

**THE LONDON SCHOOL OF ECONOMICS AND POLITICAL
SCIENCE**

HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW

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**A thesis submitted to the Department of Law of the London School of
Economics and Political Science for the degree of Doctor of
Philosophy, London, October 2011.**

DECLARATION

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ABSTRACT

International events since the landmark *Pinochet* case, increased human rights advocacy, efforts at a culture of accountability, as well as the recent pro-democratic up-rising in the Arab states sustain impetus for the consideration of Head of state immunity in international law.

A naturalist view of international law is that there can be no Head of state immunity for violations of human rights. This popular view proceeds from a theoretical misunderstanding of the positivist concept of immunities resulting in its practical misapplication. However, this naturalist view must be contextualised within the subtleties of international rule-making. It is to this end that the inquiry into Head of state immunity as a concept of customary international law, emergent trends and the formation of a new rule of custom in this regard is necessitated. Thus, this thesis will inquire into the applicability, or otherwise, of Head of state immunity before certain *fora*, including national courts, international courts, and internationalised courts with view to discerning emergent trends in the practice of Head of state immunity.

Thematic in this thesis, is the argument that a provision in the constitutive instrument establishing the jurisdiction of a court which makes irrelevant the fact of official capacity as Head of state, without more, cannot remove the immunities of Heads of states under customary international law. This thesis will undertake its analysis from the perspective of the nature of the constitutive instrument establishing an international court and the extent to which states are bound by the instrument.

This thesis will conclude this inquiry by considering the extent to which the trends elicited in the substantive part of the work have changed customary international law and the extent to which there can be said to be a new international law on Head of state immunity.

TABLE OF CONTENTS

Contents

TABLE OF CASES	10
TABLE OF CONVENTIONS AND STATUTES.....	20
TABLE OF ABBREVIATIONS.....	26
INTRODUCTION	28
CHAPTER 1: THE CONCEPT OF HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW	35
1.1 INTRODUCTION.....	35
1.2 METHODOLOGY	36
1.3 EVOLUTION OF THE CONCEPT OF IMMUNITY	37
1.3.1 THE ABSOLUTE THEORY OF STATE IMMUNITY	38
1.3.2 THE RESTRICTIVE THEORY OF STATE IMMUNITY	42
1.3.3 THE ABSOLUTE THEORY OF HEAD OF STATE IMMUNITY	44
1.3.4 RESTRICTIVE THEORY OF HEAD OF STATE IMMUNITY	52
1.4 BASIS OF THE CONCEPT OF IMMUNITY IN INTERNATIONAL LAW ..	54
1.4.1 THE PRINCIPLES OF SOVEREIGNTY, SOVEREIGN EQUALITY AND THE DIGNITY OF STATES	57
1.4.2 RECIPROCITY OR COMITY	68
1.4.3 THE THEORY OF REPRESENTATION	70
1.4.4 ANALOGY WITH DIPLOMATIC IMMUNITIES.....	71
1.4.5 ANALOGY WITH STATE IMMUNITY	73
1.4.6 THE IMPERATIVE OF FUNCTIONALITY	74
1.5 CONCLUSION	75

CHAPTER 2: HEAD OF STATE IMMUNITY: A CHALLENGE TO HUMAN RIGHTS?	77
2.1 INTRODUCTION.....	77
2.2 THE IMPERATIVES OF A SYSTEM OF HUMAN RIGHTS AND A SYSTEM OF IMMUNITIES	79
2.3 THE PROBLEM SO FAR	80
2.4 FRAMEWORK FOR THE RESOLUTION OF THE IMPERATIVES OF HUMAN RIGHTS AND THE IMPERATIVES OF IMMUNITIES OF STATES AND STATE OFFICIALS.....	82
2.4.1 THE UNIVERSAL JURISDICTION APPROACH.....	83
2.4.2 THE <i>JUS COGENS</i> APPROACH.....	105
2.4.3 A HUMAN RIGHTS EXCEPTION TO STATE IMMUNITY INSTRUMENTS APPROACH	134
2.4.4 THE IMPLIED WAIVER APPROACH	142
2.5 RESOLVING HEAD OF STATE IMMUNITY AND HUMAN RIGHTS.....	148
2.6 CONCLUSION	152
CHAPTER 3: HEAD OF STATE IMMUNITY BEFORE NATIONAL COURTS .	156
3.1 INTRODUCTION.....	156
3.2 HEAD OF STATE IMMUNITY BEFORE NATIONAL COURTS OF STATE OF ORIGIN	158
3.2.1 THE IRAQI HIGH TRIBUNAL AND THE TRIAL OF SADDAM HUSSEIN.....	160
3.3 HEAD OF STATE IMMUNITY BEFORE NATIONAL COURTS OF FOREIGN STATES	173
3.3.1 THE UK AND THE <i>PINOCHET CASE</i>	173
3.3.1 <i>PINOCHET 1</i>	174
3.3.2 <i>PINOCHET 2 & 3</i>	178

3.3.3. TORTURE AS PART OF OFFICIAL FUNCTIONS OF HEADS OF STATE	181
3.4 JURISPRUDENCE OF US COURTS	189
3.4.1 <i>US v. NORIEGA</i>	190
3.4.2 <i>JIMENEZ v. ARISTEGUEITA</i>	196
3.4.3 <i>LAFONTANT v. ARISTIDE</i>	197
3.4.4 <i>PAUL v. AVRIL</i>	198
3.4.5 <i>TACHIONA v. MUGABE</i>	199
3.5 FRANCE AND THE CASE AGAINST GADDAFI	200
3.6 SENEGAL AND THE CASE AGAINST HISSÈNE HABRÉ.....	204
3.7 CONCLUSION	209
CHAPTER 4: HEAD OF STATE IMMUNITY BEFORE INTERNATIONAL COURTS ESTABLISHED IN THE WAKE OF WORLD WARS I AND II	
4.1 INTRODUCTION.....	212
4.2 POST WORLD WAR I: THE TREATY OF VERSAILLES 1919 AND THE TRIAL OF THE KAISER	214
4.3 POST WORLD WAR II: THE CHARTERS OF THE INTERNATIONAL MILITARY TRIBUNALS	224
4.4 JUDICIAL ASSISTANCE AND CO-OPERATION WITH INTERNATIONAL COURTS	234
4.4.1 JUDICIAL ASSISTANCE AND CO-OPERATION UNDER THE TREATY OF VERSAILLES	237
4.4.2 JUDICIAL ASSISTANCE AND CO-OPERATION UNDER THE CHARTERS OF THE IMTs.....	238
4.5 CONCLUSION	241
CHAPTER 5: HEAD OF STATE IMMUNITY BEFORE INTERNATIONAL COURTS ESTABLISHED BY THE UNITED NATIONS SECURITY COUNCIL.....	

5.1 INTRODUCTION.....	243
5.2 THE ICTY AND THE ICTR IN PERSPECTIVE	245
5.3 THE SECURITY COUNCIL AND THE ESTABLISHMENT OF JUDICIAL BODIES.....	247
5.3.1 THE ESTABLISHMENT OF SUBSIDIARY ORGANS UNDER THE UN CHARTER.....	253
5.3.2 JUDICIAL REVIEW OF SECURITY COUNCIL DECISIONS AND OTHER MATTERS ARISING IN THE TADIC CASE.....	260
5.4 HEAD OF STATE IMMUNITY BEFORE THE ICTY AND THE ICTR	271
5.5 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE ICTY AND THE ICTR	277
5.6 CONCLUSION	281
CHAPTER 6: HEAD OF STATE IMMUNITY BEFORE THE INTERNATIONAL CRIMINAL COURT	283
6.1 INTRODUCTION.....	283
6.2 THE ICC IN PERSPECTIVE	285
6.3 HEAD OF STATE IMMUNITY BEFORE THE ICC.....	288
6.4 THE ROAD TO SECURITY COUNCIL RESOLUTIONS 1593 AND 1970..	293
6.5 LEGAL BASIS OF ICC JURISDICTION OVER THE DARFUR AND LIBYA SITUATIONS AND THE NON-APPLICABILITY OF HEAD OF STATE IMMUNITY OF AL-BASHIR AND GADDAFI	297
6.6 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE ICC: RESOLVING ARTICLE 98 OF THE ROME STATUTE WITH RESOLUTIONS 1593 AND 1970	314
6.6.1 THE EFFECT OF THE INCLUSION OF THE CHARGE OF GENOCIDE AGAINST AL-BASHIR.....	335
6.7 CONCLUSION	340

CHAPTER 7: HEAD OF STATE IMMUNITY BEFORE INTERNATIONALISED COURTS	343
7.1 INTRODUCTION.....	343
7.2 THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA	345
7.2.1 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE ECCC	349
7.3 THE SPECIAL COURT FOR SIERRA LEONE	349
7.3.1 HEAD OF STATE IMMUNITY BEFORE THE SPECIAL COURT FOR SIERRA LEONE: <i>PROSECUTOR V. CHARLES TAYLOR</i>	351
7.3.2 STATUS OF THE SCSL AND THE IMMUNITY OF CHARLES TAYLOR	354
7.3.3 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE SCSL .	364
7.4 THE SPECIAL TRIBUNAL FOR LEBANON	368
7.4.1 THE NATURE OF THE STL	370
7.4.2 HEAD OF STATE IMMUNITY BEFORE THE STL.....	376
7.4.3 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE STL....	378
7.5 CONCLUSION	380
CONCLUSION: WHITHER A NEW INTERNATIONAL LAW ON HEAD OF STATE IMMUNITY?.....	382
BIBLIOGRAPHY	393

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Taking of Hostages Act 1982 (United Kingdom)

Torture Victims Protection Act 1991 (United States)

TABLE OF ABBREVIATIONS

AC	Appeal Cases
AJIL	American Journal of International Law
All E.R.	All England Reports
ASIL	American Society of International Law
ATCA	Alien Tort Claims Act
BYIL	British Yearbook of International Law
C.T.S.	Consolidated Treaty Series
CUP	Cambridge University Press
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ETS	European Treaty Series
EWCA	England and Wales Court of Appeal
FCA	Federal Court of Australia
FSIA	Foreign Sovereigns Immunity Act
HCA	High Court of Australia
HLC	House of Lords Cases
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHT	Iraqi High Tribunal
ILM	International Legal Materials
ILR	International Law Reports
JICJ	Journal of International Criminal Justice

MLR	Modern Law Review
OASTS	Organisation of American States Treaty Series
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
QB	Queen's Bench Division Law Reports
RdC	Recueil des Cours
SCSL	Special Court for Sierra Leone
SIA	State Immunity Act
STL	Special Tribunal for Lebanon
UN	United Nations
UNGA	United Nations General Assembly
UNRIAA	United Nations Report of International Arbitral Awards
UNTS	United Nations Treaty Series
UK	United Kingdom
UKHL	United Kingdom House of Lords
US	United States
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WLR	Weekly Law Reports
YILC	Yearbook of the International Law Commission

INTRODUCTION

The development of international human rights and international criminal law as distinct areas within the broad framework of public international law has impelled the discourse on Head of state immunity in international law. Conventional obligations undertaken by states, at least since the 1980s, have implicated the question whether state officials are entitled to immunity in the face of these conventional obligations. This was highlighted by the case against Pinochet Ugarte before the United Kingdom House of Lords; a case which propelled Head of state immunity into the limelight of judicial and academic discourse and has resulted in an increase in proceedings against Heads of state. The novel practice of the United Nations Security Council of using international criminal proceedings under their peace and security mandate by the creation of *ad hoc* international criminal tribunals, in the 1990s, and the referral of situations in Darfur and Libya to the International Criminal Court as well as the current pro-democratic uprising in the Arab states have sustained the impetus of this research.

The analysis of Head of state immunity in this thesis will be contextualized within the normative developments of international human rights and international criminal law, specifically as concerns war crimes, crimes against humanity and genocide. Thus, proceedings against Heads of states for crimes outside this normative context are not central to the thesis and will only be featured in the introductory chapters which set

out the theoretical foundations and challenges of the concept of Head of state immunity.

This thesis inquires into the extent and scope of Head of state immunity in international law, whether there are emergent trends in this regard and the extent to which these trends affect existing customary international law on Head of state immunity. This thesis will contextualize this inquiry within the different contemporary categories of courts before which Head of state immunity may be implicated, i.e. national, international and internationalized courts. In the main, this inquiry would employ customary international law as well as the theory that the applicability or otherwise of Head of state immunity before an international court is dependent on the extent to which states are bound by the constitutive instrument establishing the court.

This thesis particularly draws from, as well as builds upon, the important works of Arthur Watts, Hazel Fox, Dapo Akande, Andre Bianchi and Rosanne Van Alebeek. Fox generally comments on the law of state immunity, i.e. the nature, general concepts and sources of the law of state immunity as well as the exceptions to state immunity and distinction between immunity from adjudication and immunity from execution. Fox also specifically looks at the immunity of Heads of state and state officials albeit from a very general perspective. Writing more specifically with regard to Heads of state, Watts's work is a general treatise on the legal position of Heads of state and Heads of government in international law and sets out customary international law on Head of state immunity as well as its theoretical foundation. Akande highlights the

overly simplistic approach of arguments that immunity is not available before international tribunals in the absence of a consideration of the nature of the constitutive instrument establishing an international tribunal and whether states are bound by such instrument. However, the works of these commentators are not specifically with regard to normative developments of international human rights and international criminal law.

The works of Bianchi and Van Alebeek are more within the normative framework of this thesis. Bianchi work highlights the need for courts to interpret legal rules on immunity in line with the principles and goals of international law, i.e. *lex ferenda*, because international law cannot grant immunity from acts which it criminalises. Van Alebeek inquires into whether the established rules of immunity of states and state officials are still extant in view of recent and progressive developments in international human rights and international criminal law. Van Alebeek, while aware that courts of law can only apply the law as it is, argues that such application of the law should take into consideration *lex ferenda* (policy arguments) so as to ensure remedy for individuals for violations of human rights norms.

This thesis builds upon the general works of Watts and Fox through the application of the general principles to a specific normative framework. It advances Akande's constitutive instrument theory through a critical analysis of the post World War II International Military Tribunals, international tribunals established by the United Nations Security Council and international courts established by treaty. The thesis

advances this theory beyond international courts to national courts seeking to exercise jurisdiction under an international instrument, for instance the Convention against Torture. Issues will be taken in this thesis with the work of Bianchi by showing that international law is not futuristic, rather it is realistic. The weaknesses of Bianchi's approach will be explored in this work with a view to a better understanding of the theoretical underpinnings of jurisdictional immunities and its proper application thereof. Although more closely related to Van Alebeek's work, this thesis varies with hers in terms of scope, for instance while she contends that absolute state immunity has never been a rule of international law, this thesis argues otherwise. Unlike Van Alebeek's work and the works of the other named commentators, this thesis critically analyses the various approaches that have been utilised in the reconciliation of immunity and human rights imperatives and expressly utilises the constitutive instrument theory in its inquiry into whether Heads of state enjoy immunity for international crimes and violations of human rights. Very importantly, unlike other policy based approaches, this thesis considers the trends elicited in its analysis and the extent to which such are illustrative of a new customary international law on Head of state immunity.

At the heart of this inquiry lies the tension between the traditional and progressive views of international law, i.e. the tension between a system of international immunities of states and state officials and a system of accountability for human rights violations. This thesis will argue that a system of international immunities and a system of international human rights are not mutually exclusive and that the value-

content of a system of immunities is such that the imperatives of both systems are capable of mutual co-existence. It will also be argued that the often touted conflict between international immunities and human rights does not exist.

This thesis is divided into three parts- the introductory chapters (1 and 2), the core chapters (3, 4, 5, 6 and 7) and the conclusion. Chapter 1 introduces the broad concept of immunity, its derivatives and the foundational basis for a system of immunities in international law. Chapter 2 contextualizes the thesis within the areas of international human rights and international criminal law and sets out the tension between immunity as a principle of classical positivist international law and naturalist law approach of international human rights and international criminal law.

Chapter 3 deals with the first category of courts before which the extent and scope of Head of state immunity will be considered, i.e. national courts. It will consider the national court of states of origin where national law immunities are involved, with a view to clearly distinguishing national law immunities and international law immunities of Heads of state. This chapter will address legality and legitimacy issues concerning national courts like the IHT as affecting Head of state immunity. At the core of this chapter, is an analysis of the cases against Saddam Hussein, Pinochet Ugarte and Hissène Habré.

Chapter 4 sets the path of inquiry of the thesis within an international context by the analysis of the scope and extent of Head of state immunity and any emergent trends

thereof before international tribunals established in the wake of the First and Second World Wars.

Chapter 5 is concerned with the international tribunals established by the Security Council at the end of the 'Cold War' in the 1990s and the cases against Milosevic before the International Criminal Tribunal for the Former Yugoslavia and Kambanda before the International Criminal Tribunal for Rwanda. It is also imperative to the analysis in this chapter that questions of legality of the establishment of international criminal tribunals by the Security Council are addressed because they implicate the jurisdiction, and immunity from jurisdiction, of such tribunals.

Chapter 6 will consider the extent and scope of Head of state immunity before the International Criminal Court and the cases against Al-Bashir and Gaddafi with a view to ascertaining any emergent trends and their impact on customary international law on Head of state immunity.

The last category of courts, i.e. the internationalised courts forms the subject of analysis in Chapter 7 and includes an analysis of the Extraordinary Chambers of the Courts of Cambodia, the Special Tribunal for Lebanon and the Special Court of Sierra Leone.

The non-applicability of Head of state immunity before international courts would be of no effect where there exists no means of securing the assistance and co-operation of

states with international courts. It is to this end, that it is imperative in this discourse that judicial assistance and co-operation with courts forms an integral part of the analysis of the various international and internationalised courts.

This thesis will argue that the reality of international law is that immunity does not necessarily mean impunity. Immunity merely means that accountability for impunity is to be diverted to appropriate *fora* before which Head of state immunity will not be applicable. These *fora* will be critically analysed in Chapters 3 to 7 with any concomitant emergent trends with a view to ascertaining whether and to what extent customary international law on Head of state immunity remain extant.

The thesis will conclude with an analysis of the emergent trends distilled from the chapters and the extent to which the trends have affected existing customary international law on Head of state immunity by the development of a new international law on Head of state immunity.

CHAPTER 1: THE CONCEPT OF HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW

1.1 INTRODUCTION

Immunities are not free-standing principles of international law. The concept of immunities should be seen in the general context of international law as an exception to the jurisdictional competence of an adjudicatory body.

The concept of Head of state immunity in international law is a relic from the past when there was no distinction between the personal sovereign and the state, seen in the statement of Louis XIV of France, “*L’état c’est moi.*”¹ However, the idea of statehood since the Treaties of Westphalia 1648 has diminished the lack of distinction between the personal sovereign and the state.² Likewise, monarchical sovereignty has been diminished by the rise of republicanism, anti-colonial nationalism and the emergence of democratic states. Yet, the immunity of Heads of states is, and remains, at the fore of international law.

It is imperative that the theoretical and practical underpinnings of the concept of immunity are considered at the beginning of this thesis so as to lay the foundation of the thesis and inform the content of the thesis, as a whole. This chapter, therefore,

¹ Ian Sinclair, ‘The Law of Sovereign Immunity: Recent Developments’, (1980-II) 167 *RdC* 113, p.198

² Text of treaty available at http://avalon.law.yale.edu/17th_century/westphal.asp, (Last accessed 16/08/2011)

traces the evolution of the concept of Head of state immunity and sets out the theoretical framework of the thesis. Head of state immunity being a derivative of state immunity, there is considerable reliance on state immunity in setting out the theoretical framework of the thesis.

1.2 METHODOLOGY

This thesis is an inquiry into the concept of Head of state immunity as rule of customary international law, emergent trends and the formation of a new rule of custom in this regard. In the determination of whether a rule of international law is custom, there must be state practice of the generality of states supporting the rule accompanied by the subjective belief of the obligatory nature of the practice (*opinio juris sive necessitatis*).³

The methodology adopted in this thesis to determine whether there is a new customary international law on Head of state immunity is case law specific, i.e. it employs mainly case law in the ascertainment of the practice of states with regard to Head of state immunity. The decision to adopt such methodology is borne out of the fact that the content of Head of state immunity has mostly been analysed and defined by case law; a fact largely due to the procedural nature of the concept of jurisdictional immunities. This is without prejudice to the work of the International Law Commission (ILC) of which the topic of the immunity of state officials from foreign criminal jurisdiction is

³ *North Sea Continental Shelf* case, (1969) *ICJ Reports* 3, Paragraph 77; *Continental Shelf (Libyan Arab Jamahiriyya/Malta)* (1985) *ICJ Reports* 13, Paragraph 27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* (1986) *ICJ Reports* 14, Paragraphs 183 and 207

included in its long-term programme of work. Indeed, recourse is had in the thesis to Reports of the Special Rapporteur of the ILC on the immunity of state officials from foreign criminal jurisdiction as well as various national, regional and international instruments on state immunity.

1.3 EVOLUTION OF THE CONCEPT OF IMMUNITY

Historically, immunity is traceable to the period when monarchical governments reigned and sovereignty was personal to the monarch who was regarded as *legibus solutus*.⁴ The early notions of immunity vested this privilege in the personal sovereign who ascribed to himself a personal absoluteness which was justified on the ground that the King was superior in all respects to the citizens, other authorities and even on a claim of divinity.⁵ The influence of Christianity in this period ascribed to the monarch right of rulership from God, the ultimate sovereign. What was to be called the divine right of Kings, as the temporal representatives of God, became the foundation of the political absoluteness of monarchs. It was the lack of distinction between the entities of the personal sovereign and that of the state that led to the absoluteness of the personal sovereign, which gave rise to the notion of absolute immunity for states and Heads of states.⁶

⁴ Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', (1951) 28 *BYIL* 220, p.232

⁵ F.H.Hinsley, *Sovereignty*, 2nd edition, (Cambridge: University Press, 1986) p.16, p.38

⁶ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edition, (London: Routledge, 1997), p. 119; Mark A. Summers, 'Immunity or Impunity?: The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties To The Statute of The International Criminal Court', (2005-2006) 31 *Brooklyn Journal of International Law* 463, p.466

In the course of international activities and international relations of states it became imperative to extend the privileges and immunities of the sovereign to its diplomatic representatives i.e. ambassadors, as well as warships. By the middle of the eighteenth century, there was a clear practice recognizing the immunity of diplomats.⁷

However, the Treaty of Westphalia 1648 marked the beginning of the era of the sovereign nation state as a modern state. Monarchical structures of state government gave way to democratic structures leading to a great decline in monarchies towards the end of the eighteenth century and the beginning of the nineteenth century as epitomized by the French Revolution of 1789 to 1799. This period fully established the idea of a modern state and its existence as a separate entity leading to the immunity of the state as distinct from that of the personal sovereign.⁸

1.3.1 THE ABSOLUTE THEORY OF STATE IMMUNITY

1.3.1.1 CIVIL CASES

State immunity was necessitated by the pervasive competence of a state, in the exercise of its sovereign powers and capacities. It was, therefore, tantamount to

⁷ Emmerich De Vattel, *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Sovereigns*, (Translation from French) (Dublin: Luke White, 1792); Eileen Denza, *Diplomatic Law: Commentary on The Vienna Convention on Diplomatic Relations*, 2nd edition (Oxford: Clarendon Press, 1998) p.1

⁸ See Yitiha Simbeye, *Immunity and International Criminal Law* (Aldershot: Ashgate Publishing, 2004), p.93

judicial impropriety for a state to exercise jurisdiction over the acts of another state carried out in the exercise of its sovereign powers.

The customary legal endorsement of the absolute nature of state immunity is ascribed to *The Schooner Exchange v. McFaddon and others*.⁹ This case concerned the ownership of a vessel, which was an armed national vessel within US territorial waters alleged to have been violently taken by persons acting under the decrees and orders of Emperor Napoleon of France. The defendants sought the attachment of the vessel and its restoration to them as the rightful owners. The Court found the jurisdiction of a state within its own territory to be necessarily absolute and exclusive, and that exceptions to the power of a state within its own territory must derive from the consent of the state itself. In holding that the vessel was exempt from the jurisdiction of the court, the court relied on an implied consent of states to exemption from their jurisdictions where the sovereignty of other states was implicated.

While the *Schooner Exchange* case may have expressed the absolute jurisdiction of states within their territories, the absolute nature of the immunity of states is established through state practice as illustrated by the *Parlement Belge*,¹⁰ the *Porto Alexandre*,¹¹ and the *Cristina*.¹² The *Parlement Belge* involved a collision between two vessels one of which, the *Parlement Belge*, was the property of the King of Belgium used as a mail packet. Proceedings in *rem* were instituted against the

⁹ 11 US 116 (1812)

¹⁰ (1880) 5 P.D. 197. For a review of other cases establishing the absolute nature of state immunity, see J.W. Garner, 'Immunities of State-Owned Ships Employed in Commerce', (1925) 6 BYIL 128

¹¹ [1920] P. 30; 1 ILR 149

¹² [1938] AC 485

Parlement Belge but the Court of Appeal held that the immunity of the vessel as the property of the sovereign was not lost by reason of it also carrying merchandize and passengers for hire. The decision in this case was relied on in the *Porto Alexandre* and in the *Cristina*, cases which involved vessels that had been requisitioned by Portugal and Spain, respectively, for public purposes but which were used for trading activities and the principle that a sovereign state could not be impleaded, directly or indirectly, before the courts of other states was upheld.¹³

These cases illustrate the practice of absolute state immunity and the adoption of a later practice of restrictive immunity of states underscores the fact of the hitherto absolute nature of state immunity. In *Littrell v. United States (No. 2)*, it was acknowledged that the prevailing view of the immunity of states was absolute in nature.¹⁴

1.3.1.2 CRIMINAL CASES

The fulcrum of the international system and a foundational principle of international law, which is pertinent to this thesis, is that no state can claim legal superiority over another. This is expressed in the Latin maxim, *par in parem non habet imperium*.¹⁵

¹³ See *The Luigi*, 230 Fed. Rep. 493

¹⁴ 100 ILR 438, p.445

¹⁵ This means that an equal has no power over an equal, see Bryan A. Garner (ed.), *Black's Law Dictionary*, 9th edition, (St. Paul: Thomson Reuters, 2009), p.1859

Criminal trials imply a vertical relationship between the party exercising jurisdiction over a criminal act and the party subject of the criminal proceedings. The purpose of criminal proceedings being to ascertain guilt and impose punishment in the form of a penalty or imprisonment on the accused, the rule with regard to the criminal liability of states is absolute immunity. Enforcement measures against a state for criminal acts by another state would be seen as acts of hostility and superiority. As such, there is an absence of conventional law removing the absolute immunity of states in criminal matters. The US Foreign Sovereigns Immunity Act 1976,¹⁶ the UK State Immunity Act 1978,¹⁷ and state immunity legislations of various jurisdictions including Canada,¹⁸ Australia,¹⁹ Pakistan²⁰, South Africa,²¹ and Singapore,²² all exclude criminal proceedings over states.

An attempt by a state to exercise criminal jurisdiction over a foreign state would undermine the *par in parem non habet imperium* principle. Moreover, the application of the criminal jurisdiction of a state over another would amount to an application of the criminal laws of a state to regulate the public acts of others.²³ Thus, leading to the extension of “the legislative jurisdiction” of one state into another.²⁴

¹⁶ (1976) 15 *I.L.M.* 1388, Section 1303(a) [Hereinafter FSIA]

¹⁷ (1978) 17 *I.L.M.* 1123, Section 16(4) [Hereinafter SIA]

¹⁸ State Immunity Act 1982, reproduced in (1982) 21 *I.L.M.* 798, Section 17

¹⁹ Foreign Sovereign Immunities Act 1985, reproduced in (1985) 25 *I.L.M.* 715, Section 3(2)

²⁰ State Immunity Ordinance 1981, reproduced in UN-Materials ST/LEG/SER.B.20, p.20, Section 17(2)(b)

²¹ Foreign States Immunity Act 1981, reproduced in UN-Materials ST/LEG/SER.B.20, p.34, Section 2(3)

²² State Immunity Act 1979, reproduced in UN-Materials ST/LEG/SER.B.20, p.28, Section 19(2)(b)

²³ Hazel Fox, *The Law of State Immunity*, (Oxford : OUP, 2002), p.505

²⁴ *Ibid*

1.3.2 THE RESTRICTIVE THEORY OF STATE IMMUNITY

The increased nature of state participation, particularly of socialist governments, in commercial and trading activities necessitated a departure from the absolute approach to state immunity.²⁵ Lord Macmillan stated in the *Cristina* case that the immunity of foreign sovereigns was a concession to the dignity, equality and independence of foreign sovereigns which the comity of nations enjoined, and that in view of the modern approach where sovereigns have “condescended to lay aside their dignity” by embarking on commercial activities it is questionable “whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances”.²⁶

The restrictive approach to the immunity of a state involves a distinction between acts carried out by a state in a public or sovereign capacity (*acta jure imperii*) and acts carried out in a commercial or trading capacity (*acta jure gestionis*).²⁷

The public (*jure imperii*) and private (*jure gestionis*) capacity distinction has been roundly criticized because the actor in question being a government, it naturally follows that all its acts would be for public purposes. According to Lauterpacht,

“...the state always acts as a public person. It cannot act otherwise. In a real sense all acts *jure gestionis* are acts *jure imperii*.”²⁸

²⁵ Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (Oxford: Clarendon Press, 1994) p.79

²⁶ *Supra* 12, p.498

²⁷ Criteria for this distinction have involved the purpose of the act, nature of the act, the context of the act; see *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379; *I Congreso del Partido* [1983] AC 244; *Holland v. Lampen-Wolfe* [2000] 1 WLR 1537; Mizushima Tomonori, ‘One Immunity Has Gone...Another: *Holland v. Lampen-Wolfe*’, (2001) 64 *MLR* 472

Though tenuous and theoretically, as well as practically, impossible this distinction is merely adopted more for convenience than actual analysis.²⁹

On 19 May 1952, a ‘new’ US policy on state immunity contained in a letter addressed by the Acting State Department Legal Adviser, Jack B. Tate to the Attorney General was announced.³⁰ Through the espousal of a commercial exception to state immunity, this policy heralded the emergence of the restrictive theory of state immunity in customary international law. This culminated in the notable cases of *The Philippine Admiral*,³¹ the *Trendtex Trading Corporation v. Central Bank of Nigeria*,³² *Alfred Dunhill of London Inc v. Republic of Cuba*,³³ and *I Congreso*,³⁴ which decided that state immunity did not avail states with respect to disputes arising out of their commercial activities.

In line with the new practice, conventions on state immunity, e.g. the European Convention on State Immunity 1972 (Basle Convention)³⁵ and the United Nations (UN) Convention on Jurisdictional Immunities of States and their Properties 2004,³⁶ as well as national legislation on state immunity, as obtainable in the US, UK, Australia,

²⁸ Lauterpacht, *supra* 4, p.224; Jürgen Bröhmer, *State Immunity and the Violation of Human Rights*, (The Hague: Martinus Nijhoff Publishers, 1997) p.19

²⁹ Lord Clyde in *Holland v. Lampen-Wolfe*, *op.cit.*, p.1579

³⁰ 26 *Dept of State Bulletin* 984 (1952)

³¹ [1977] AC 373

³² [1977] 1 *QB* 529

³³ 66 *ILR* 212

³⁴ *Supra* 27

³⁵ (1972) 11 *I.L.M.* 470.

³⁶ Adopted by the UN General Assembly in Resolution 59/38 of 16 December 2004, yet to enter into force.

Canada, South Africa, Singapore and Pakistan codify the restrictive approach to state immunity for commercial transactions.

1.3.3 THE ABSOLUTE THEORY OF HEAD OF STATE IMMUNITY

The nature of the office of the chief executive of a state as well as the title and the number of persons occupying the position depends on the constitutional set-up of a state. In Switzerland, there is no particular individual who is the Head of state.³⁷ Likewise, in the break-up of the Former Republic of Yugoslavia, the position of Head of state was occupied by more than one person in the Bosnian-Serb entity. The constitutional set-up of states may mean that the chief executives of states may include Presidents, Military heads, Prime Ministers as Heads of Governments,³⁸ the Pope as the Head of the Vatican,³⁹ and even where the chief executives holds no official title but rather is known as the 'Leader of the Revolution'.⁴⁰

As stated earlier, immunity applies as an exception to the adjudicatory or enforcement jurisdiction of states. It does not imply an absence of legal liability, but merely an absence of jurisdiction, i.e. adjudication or enforcement is circumscribed by rules on

³⁷ Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers*, (1994-III) 247 *RdC*, p.21

³⁸ *Saltany v. Reagan*, 702 *F.Supp.* 319 (1988)

³⁹ See *Guardian F. v. Archdiocese of San-Antonio*, Case No. 93-CI-11345 (Tex. Dist. Ct.1994) against Pope John Paul II cited in *Tachiona v. Mugabe*, 169 *F.Supp. 2d* 259, p.287 (S.D.N.Y. 2001); *Doe v. The Archdiocese of Galveston-Houston*, 408 *F.Supp. 2d* 272 (S.D.Tex. 2005) against Pope Benedict XI

⁴⁰ This is the case with Mouammer Gaddafi as the Head of the Great Socialist People's Libyan Arab Jamahiriya.

immunity.⁴¹ The exercise of jurisdiction by a state over another being an exercise of *imperium* which violates the principle of *par in parem non habet imperium*, it logically follows that immunity is a prerogative of a state and vests in the state. It does not belong to individuals; it is only extended to Heads of states as the representatives *par excellence* of states. As such, the immunity of a Head of state can be waived by his state.⁴²

The traditional absoluteness of the personal sovereign fuels the modern idea of Head of state immunity. The sovereign was absolutely immune from legal proceedings before his own courts since the courts acted in the name of the sovereign and on his behalf. The sovereign was also immune before the courts of foreign states.

The absolute immunity of the personal sovereign was recognized by the Privy Council in *Chung Chi Cheung v. The King*,⁴³ that neither the sovereign nor his envoy, properties including public armed ship are to be subject to legal process. This decision follows from earlier decisions in the nineteenth century in *De Haber v. Queen of Portugal*,⁴⁴ and *King of Hanover v. Duke of Brunswick*,⁴⁵ that personal sovereigns were immune from any claim brought against them in the courts of other states.

⁴¹ Lord Hewart, C.J in *Dickinson v. Del Solar; Mobile and General Insurance Co. Ltd (3rd Party)*, 5 ILR 299. See also *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* Judgment of 14 February 2002, (2002) I.C.J. Reports 3, Paragraph 60 [Hereinafter *Arrest Warrant case*]; Yoram Dinstein, 'Diplomatic Immunity from Jurisdiction *Ratione Materiae*', (1966) 15 ICLQ 76, p.81

⁴² Philippines in the case against Ferdinand Marcos, see *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir.1987) and Haiti in the case against Prosper Avril, see *Paul v. Avril*, 812 F.Supp.207 (S.D. Fla.1993)

⁴³ [1939] AC 160, p.175, per Lord Atkins

⁴⁴ (1851) 17 QB 171, p.206-207

⁴⁵ (1844) 6 Beav. 1; (1848) 2 HLC 1

Though the nature of the office as chief executive and the nature of government had changed, at least towards the end of the 18th century,⁴⁶ the idea of the absoluteness of the powers of the personal sovereign subsisted. This meant that Heads of states enjoyed absolute immunity, like personal sovereigns, and resulted in the prevailing international custom that Heads of states enjoy complete immunity even for private acts.⁴⁷ In *Ex-King Farouk of Egypt v. Christian Dior, S.A.R.L.* the French Regional Court of Appeal found that had the King been a sitting one that he would have enjoyed immunity in the action for the cost of the clothes for his wife.⁴⁸ In *Lafontant v. Aristide*,⁴⁹ proceedings were instituted against President Jean-Bertrand Aristide while in exile in the US for the political assassination of the plaintiff's husband, despite the overthrow of Aristide's government, the US recognized him as the Head of Haiti and so he was held to be immune.

In *Estate of Domingo v. Republic of Phillipines*,⁵⁰ the US courts recognised the absolute immunity of President Ferdinand Marcos, and his wife, for the political assassination of opposition leaders. In *Tachiona v. Mugabe*,⁵¹ a class action was brought by the plaintiffs for themselves and on behalf of some deceased victims alleging torture and other acts of terror against President Robert Mugabe. The Court in dismissing the action upheld Mugabe's immunity, even for private acts.

⁴⁶ By the American Revolution (1775-1783) and the French Revolution (1789-1799)

⁴⁷ Malanczuk, *supra* 6, p.119

⁴⁸ 24 *ILR* 228

⁴⁹ 844 *F. Supp.* 128 (E.D.N.Y. 1994)

⁵⁰ 808 *F.2d* 1349 (9th Cir. 1987)

⁵¹ *Supra* 39

Even for international crimes, Heads of states are absolutely immune from the courts of other states. Colonel Gaddafi, as the Libyan Head of state and other persons were tried *in absentia* by the Special Court of Assizes of Paris for the destruction of an aircraft and the murder of the 170 passengers and crew aboard.⁵² Upon appeal, the Court of Cassation in terminating the proceedings held that,

“International custom precluded Heads of state in office from being the subject of proceedings before the criminal courts of a foreign state...In the current state of international law, complicity in a terrorist attack, however serious such a crime might be, did not constitute one of the exceptions to the principle of the jurisdictional immunity of foreign Heads of state in office.”⁵³

The absolute nature of the immunity of Heads of states was clearly established in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.⁵⁴ Here, the Republic of Djibouti requested the ICJ to adjudge and declare that France, by sending witness summonses to the Head of state of Djibouti and to senior Djiboutian officials has violated its obligations under general and customary international law not to attack, and to prevent attacks on, the immunity, honour and dignity of the Djiboutian President. The Ministry of Foreign Affairs of France had stated, in relation to the summons, that “all incumbent Heads of states enjoy immunity from jurisdiction when travelling internationally” and that “this is an established principle of international law and France intends to ensure that it is respected.”⁵⁵

⁵² The *Gaddafi* case, 125 *ILR* 490

⁵³ *Ibid.*, p.493

⁵⁴ (2008) *I.C.J. Reports* 177

⁵⁵ *Ibid.*, Paragraph 31

France, while arguing that the summons was not an attack on the Djiboutian President recalled that it,

“[F]ully recognises, without restriction, the absolute nature of the immunity from jurisdiction and even more so, from enforcement that is enjoyed by foreign Heads of state.”⁵⁶

The ICJ, on its part, stated that

“A Head of state enjoys in particular “full immunity from criminal jurisdiction and inviolability” which protects him or her “against any act of authority of another state which would hinder him or her in the performance of his or her official duties.”⁵⁷

1.3.3.1 IMMUNITY *RATIONE PERSONAE*

To ensure the complete inviolability of Heads of states, the absolute immunity enjoyed by Heads of states extends to crimes committed while in office and even before the assumption of office. This principle of inviolability was imported from diplomatic law to apply to Heads of states who are representatives *par excellence* of the state.⁵⁸ This absolute immunity is also referred to as immunity *ratione personae* (personal or status immunity) and attaches to an individual by virtue of his official position.

Immunity *ratione personae* is procedural in nature because it ensures the complete inviolability of the office holder through his exemption from the jurisdiction of

⁵⁶ *Ibid.*, Paragraph 166

⁵⁷ *Ibid.*, Paragraph 170

⁵⁸ Summers, *supra* 6, p.472

states.⁵⁹ Apart from diplomats, Heads of state and Heads of government, the scope of applicability of this class of immunity has been extended to include Ministers of Foreign Affairs,⁶⁰ Defence Ministers,⁶¹ and Ministers of the Interior.⁶²

The Convention on Special Missions includes Heads of states and governments as well as Foreign Affairs Ministers and ‘other persons of high rank’ as those entitled to immunity from criminal jurisdiction and who are personally inviolable when on a special mission.⁶³ There is ambiguity as to those falling within the class of ‘high ranking’ officials of states entitling such persons to immunity *ratione personae*. The UN Convention on Jurisdictional Immunities of States only refers to the immunity *ratione personae* of Heads of states while the Commentary of the International Law Commission mentions the immunity *ratione personae* of ‘other officials’ of states.⁶⁴

Likewise, the ICJ in its decision in the *Arrest Warrant* case did not decisively determine the scope of immunity *ratione personae*, thereby leaving the question of state officials who come within the scope of applicability of personal immunity uncertain. The ICJ in stating those officials who enjoy immunity from the criminal and civil jurisdiction of other states mentioned,

⁵⁹ Antonio Cassese, ‘When May Senior State Officials be Tried for International Crimes?: Some Comments on the Congo and Belgium Case’ (2002) 13 *EJIL* 853, p.863; Antonio Cassese, *International Criminal Law*, (Oxford: University Press, 2003), p.265-267

⁶⁰ *Arrest Warrant* case, *supra* 41; *Tachiona v. Mugabe*, *supra* 39

⁶¹ Colin Warbrick, ‘Immunity and International Crimes in English Law’, (2004) 53 *ICLQ* 769, concerning the application for arrest warrant against General Shaul Mofaz, p.771

⁶² *Jones v. Kingdom of Saudi Arabia*, [2004] *EWCA Civ* 1394; [2005] 2 *WLR* 808; [2006] *UKHL* 26

⁶³ 1400 *U.N.T.S.* 231, Articles 21, 29 and 31(1)

⁶⁴ The failure of the Convention to include other officials is due to the disagreement over exactly the officials who may enjoy this type of immunity, see Paper by Professor Gerhard Hafner at Chatham House, London on 5 October 2005, Conference on State Immunity and the New UN Convention, Transcripts and Summaries of Presentations and Discussions available at <http://www.chathamhouse.org.uk/publications/papers/view/-/id/310/>, p.8, (accessed 16/08/2011)

“...certain holders of high-ranking office in a state, *such as* the Head of state, Head of government and Minister of Foreign Affairs”.⁶⁵ (Emphasis added)

It is evident from the use of the phrase ‘such as’ by the ICJ that the list is not intended to be exhaustive of state officials who come within the scope of immunity *ratione personae*. Immunity *ratione personae* has been applied to include the members of family of Heads of states as was done for Charles, The Prince of Wales as the heir apparent to the British monarchy,⁶⁶ as well as Cordero De La Madrid,⁶⁷ as wife of the President of Mexico and Imelda Marcos,⁶⁸ as wife of President of the Philippines.

If the criteria for the applicability of immunity *ratione personae* is the representative capacity of a foreign official, then the ICJ decision in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*,⁶⁹ that the Minister of Justice was representative of the Republic of Rwanda and as such her statements were binding, internationally, on Rwanda irrespective of the nature of the functions of the Minister would impact on the scope of applicability of immunity *ratione personae*. Arguably, this immunity would apply to all cabinet Ministers, including National Security Advisers and even Chiefs of Army and General Staff. This is an expansion of the traditional approach that the category of state officials who are representative of states and whose actions are internationally binding upon states are Heads of states, Heads of government and Foreign Ministers.

⁶⁵ Paragraph 51, *supra* 41, p.21

⁶⁶ *Kilroy v. Windsor*, 81 ILR 605

⁶⁷ *Kline v. Kaneko*, 141 Misc. 2d 787, 535 N.Y.S.2d 303, N.Y.Sup., 1988

⁶⁸ *Estate of Domingo v. Republic of Philippines*, *supra* 50

⁶⁹ (2006) *I.C.J. Reports* 6, Paragraphs 45-48

The ICJ in the *Arrest Warrant* case held that the circulation of an arrest warrant against the Foreign Minister of Congo by Belgium was liable to affect Congo in the conduct of its international relations.⁷⁰ This is a further expansion by the ICJ of state officials who are entitled to immunity *ratione personae* on the basis that they are engaged in the conduct of international relations. Arguably therefore, lesser state officials while abroad for official purposes, on behalf of states, promoting international relations would be entitled to immunity *ratione personae*. This argument is strengthened by the Convention on Special Missions that members of missions in the territory of foreign states enjoy inviolability and immunity from the criminal and civil jurisdiction of states.⁷¹ Likewise, the Vienna Convention on the Representatives of States in their Relations with International Organizations of a Universal Character 1975 provides for the inviolability of members of missions as well as delegates who are in the territory of host states for the conduct of business with the international organizations.⁷²

Therefore, immunity *ratione personae* may be divided into two parts- the first a more comprehensive immunity ensuring the complete inviolability of Heads of states and senior state officials like Foreign Affairs Minister when abroad irrespective of whether the purpose of the visit is official or private; and the second, less comprehensive

⁷⁰ *Supra* 41, Paragraph 71

⁷¹ *Supra* 63, Articles 29 and 31

⁷² *UN Doc. A/CONF.67/16 (14 March 1975)*, Articles 28-30 and 58-60 (This Convention is yet to enter into force). See commentary by J.G. Fennessy in (1976) 70 *AJIL* 62

immunity for lesser state officials who are charged with the conduct of international relations or are abroad on official purposes to promote international relations.

Immunity *ratione personae* applies to private acts committed either before assumption of office as well as during the subsistence of office. This is to avoid foreign states interfering with the functions of state officials under the guise of being private acts.⁷³ Since immunity *ratione personae* is effectively absolute during incumbency,⁷⁴ and given that it comes to an end at the expiration of office, a serving Head of state is exempt from the jurisdiction of the courts of states even where the commission of a crime is alleged. However, the matter may be different where the court seeking to exercise jurisdiction is an international court.⁷⁵

1.3.4 RESTRICTIVE THEORY OF HEAD OF STATE IMMUNITY

International law distinguishes between serving and former Heads of states for the purpose of applicability of immunities. The immunity of former Heads of states is applicable to official acts only, or acts performed in a sovereign capacity. Such acts are attributable to the state.⁷⁶ As such, former leaders are vulnerable to the institution of proceedings of accountability against them.⁷⁷ This is because despite the clout, privileges and prestige they may have even after office, they revert back to being “private citizens” and there is no reason not to institute proceedings against them like

⁷³ Cassese, ‘When May Senior State Officials be Tried for International Crimes?’, *supra* 59, p.862

⁷⁴ Salvatore Zappala, ‘Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Law?: The Ghaddafi Case Before the French Cour de Cassation’ (2001) 12 *EJIL* 598

⁷⁵ This will be fully considered in subsequent chapters of the thesis.

⁷⁶ Summers, *supra* 6, p.471

⁷⁷ *Jimenez v Aristeguieta*, 33 *ILR* 353

other private citizens once grounds exist for exercising jurisdiction over acts which cannot be attributed to the state.⁷⁸

1.3.4.1 IMMUNITY RATIONE MATERIAE

The immunity of former Heads of states is restricted to acts performed in an official capacity, i.e. *ratione materiae*. Persons acting *qua* officials of the state are not to be held responsible for acts done in that capacity.⁷⁹ A pre-requisite, therefore, for the applicability of this immunity is that the act in question has to be official in nature. An act is official “if it is performed by an organ of a state in his official capacity, so that it can be imputed to the state...”⁸⁰

Immunity *ratione materiae* or functional immunity is substantive in nature, i.e. it does not attach to the individual but attaches to the act in question, and so it does not come to an end when the official ceases to hold office.⁸¹ It endures as the official acts of the state and this serves to prevent the circumvention of the sovereign right of a state of freedom from interference in its internal affairs and structures.⁸²

⁷⁸ Watts, *supra* 37, p.88.

⁷⁹ Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd edition, (London: Cavendish Publishing, 2003) p. 169; Erin M. Callan, ‘In Re Mr and Mrs Doe: Witnesses Before the Grand Jury and the Head of State Immunity Doctrine’ (1989-1990) 22 *NYUJIL&P* 117, p.120

⁸⁰ Dinstein, *supra* 41, p.82

⁸¹ Paola Gaeta, ‘Official Capacity and Immunities’ in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (edited), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford: University Press, 2002) p.975;

⁸² Lord Millet in *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No.3)*, [1999] 2 *All E.R.* 97; Hereinafter *Pinochet (No. 3)*; J. Craig Barker, ‘The Future of Former Head of State Immunity after Ex Parte Pinochet’, (1999) 48 *ICLQ* 937, p.940-941

Immunity *ratione materiae* may be rationalized on the imperative of ensuring that officials effectively carry out their functions without any apprehension of the institution of legal proceedings against their person.⁸³ Since the act in question is attributable to the state, the review of such acts by foreign courts would undermine the executive powers of states as it would be tantamount to second-guessing the state in its sovereign capacity.⁸⁴ In *Chuidian v. Philippine National Bank*,⁸⁵ the court was of the view that proceedings against state officials for acts committed in an official capacity would effectively amount to proceedings against the state itself. In *Ex-King Farouk of Egypt v. Christian Dior, S.A.R.L.*⁸⁶ the court found that the purchase of designer clothes could not be part of the official functions of a Head of state.

In its applicability to individuals, immunity *ratione materiae* is more extensive than immunity *ratione personae* because it covers a longer time period and applies to a wider category of state officials.⁸⁷ However, immunity *ratione personae* is more extensive with regard to the nature of acts covered.

1.4 BASIS OF THE CONCEPT OF IMMUNITY IN INTERNATIONAL LAW

The concept of immunity does not exist in *vacuo* in international law. It is anchored on certain theoretical and practical principles rationalizing its existence. Judicial and

⁸³ Hazel Fox, 'The First *Pinochet* Case: Immunity of a Former Head of State' (1999) 48 *ICLQ* 207, p.208

⁸⁴ Ruth Wedgwood, 'International Criminal Law and Augusto Pinochet', (1999-2000) 40 *Virginia Journal of International Law* 829, p.838

⁸⁵ 912 F.2d 1095 (9th Cir. 1990)

⁸⁶ *Supra* 48

⁸⁷ Cassese, *supra* 59, p.863

academic opinion are in agreement as to the basis of the concept of immunity in international law.

In what has become a *locus classicus*, Marshall C.J. in *The Schooner Exchange v. McFaddon and others* stated thus,

“The world being composed of distinct sovereigns, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers... One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him... This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”⁸⁸

In his Hague Academy Lectures, Sucharitkul stated the basis of immunity of states to include the principles of sovereignty, sovereign equality and the dignity of states, the

⁸⁸ *Supra* 9, p.137

principle of reciprocity and comity of nations, the theory of representation, the analogy with diplomatic immunities and state immunity.⁸⁹

Sir Arthur Watts, while commenting on the specific subject of Head of state immunity states as follows,

“The basis for the special treatment accorded to Heads of states is variously ascribed, *inter alia*, to the dignity which is a recognised quality of states as international persons..., the respect due to them as representatives of sovereign states..., the equality and independence of sovereigns and sovereign states and the principle of *par in parem non habet imperium*; the incompetence of municipal law in an essentially international relationship; the practical need to ensure the free exercise by him of his functions as the highest organ of the state; the requirements of satisfactory international intercourse;...and the dictates of international comity and courtesy...”⁹⁰

The justifications advanced by Marshall C.J and Sucharitkul for state immunity and those of Watts for Head of state immunity overlap; a fact which is attributable to the common origin of both concepts and the fact of Head of state immunity as an integral component of state immunity. These justifications will now be contextualised within the framework of this thesis.

⁸⁹ Sompong Sucharitkul, ‘Immunities of Foreign States before National Authorities’ (1976-I) 149 *RdC* 87, p.115-121.

⁹⁰ *Supra* 37, p.36, note 34 citing Robert Jennings and Arthur Watts (edited), *Oppenheim’s International Law*, 9th edition, Volume 1: Peace, (London: Longman, 1992), p.1034. See also Charles Pierson, ‘Pinochet and the End of Immunity: England’s House of Lords Holds That a Former Head of State is Not Immune for Torture’, (2000) 14 *Temple International and Comparative Law Journal* 263.

1.4.1 THE PRINCIPLES OF SOVEREIGNTY, SOVEREIGN EQUALITY AND THE DIGNITY OF STATES

Immunity in international law is anchored on the foundations of the international order which are the sovereignty and sovereign equality of states; and is expressed in the maxim '*par in parem non habet imperium*'. Thus, a sovereign cannot exercise jurisdiction over another without its consent.

It is essential that the principles of sovereignty, sovereign equality and the dignity of states are addressed individually, rather than collectively, so as to fully understand each principle and its rationalisation of a system of immunities, particularly Head of state immunity.

1.4.1.1 SOVEREIGNTY

The concept of sovereignty presents itself as an enormous body of work, vast in scope and far-reaching in its ramifications. This thesis is not, and does not aspire to be about, the concept of sovereignty. The thesis is necessarily limited only to how the concept of sovereignty justifies a system of immunities.

Historically, the Treaties of Westphalia of 1648 are the precursors of the modern autonomous state as we know it. Westphalia in ending the traditional papal rights over

monarchs recognized the secular rights of monarchs and left a legacy that has led to modern conceptions of the state as free from external control.⁹¹

Sovereignty may be approached as a matter of competence whereby sovereignty is purely an articulation of “the way that political power is or should be exercised”.⁹² This approach is responsible for the tendency in expressing the powers of the state as absolute and this is evident in the early notions on sovereignty.⁹³ As such, sovereignty defines the powers of a state to pursue and effect its ideals through its own authorities and under its own laws as well as the exclusive control of a state over affairs within its territory.⁹⁴

From the perspective of international law, sovereignty is analysed from its external dimensions as the quality of a state as being independent and enjoying non-interference in the conduct of its affairs. From this dimension, the sovereignty of a state is relative vis-à-vis other states.

Characteristically, sovereignty as a fundamental attribute of the power of a state necessitates the independence of this competence from external control. The internal

⁹¹ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, (Cambridge: University, 2004) p.30

⁹² Joseph A. Camilleri, “Rethinking Sovereignty in a Shrinking, Fragmented World” in R.B.J Walker, and Saul H. Mendlovitz, *Contending Sovereignities: Redefining Political Community*, (Boulder: Lynne Rienner, 1990), p.13

⁹³ The French Jurist, Jean Bodin, in his theory of the state first sought to justify the ultimate and plenary nature of the power of the King based on the concept of sovereignty in his classical work, ‘Six Livres de la République’ (The Six Books of the Republic) cited in Djura Ninčić, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*, (The Hague: Martinus Nijhoff, 1970) p.3; Hinsley, *supra* 5, p.1

⁹⁴ This reasoning is also evident in the definition of a sovereign state by Vattel, *supra* 6, Book I Chapter I, paragraph 4 that “every nation that governs itself, under what formsoever, without dependence on any foreign power, is a sovereign state. Its rights are naturally the same as those of any other state.”, p.66

and the external dimensions of sovereignty are not mutually exclusive; the external dimensions are predicated upon the internal dimensions, which have implications for, as well as give impetus to the external dimensions.

States are bound together by certain commonalities in furtherance of which they may come together to establish a pluralistic international system to regulate and enforce their commonalities. Such a pluralistic system would be founded upon the aggregated sovereignties of the constituent states; the establishment of the system being an expression of sovereignty in itself. The concept of sovereignty would underlie the nature of the relationship, on the one hand, between states within the system and on the other hand, the relationship between states and the international system.⁹⁵ Likewise, the competence of international institutions would be defined by sovereignty as the basis for the applicability of international norms.⁹⁶ This is buttressed by the consensual nature of international law,⁹⁷ i.e. the operation and applicability of international rules as well as the acceptance of the international jurisdictional competence are premised on the consent of states.

The internal dimensions of sovereignty dictate that a state is competent to act and its actions cannot be subject to review. As such, states and Heads of states should be immune from proceedings seeking to review the competence of states to act. The external dimensions of sovereignty necessitate immunity to ensure non-interference in

⁹⁵ Bröhmer, *supra* 29, p.12

⁹⁶ Benedict Kingsbury, 'Sovereignty and Inequality', (1998) 9 *EJIL* 601

⁹⁷ As highlighted by the *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, (*Italy v. France, UK and US*), Judgment of 15 June 1954, (1954) *I.C.J. Reports* 19

the acts of states. In addition, the competence of international institutions seeking to exercise jurisdiction over states and their Heads is determined by the consent of states.

1.4.1.2 SOVEREIGN EQUALITY

Sovereign equality is an ‘essential element’ of sovereignty.⁹⁸ While sovereignty sets out the basis of the relationship between states as well as their relationship with the international order, sovereign equality characterizes the nature of the relationship between states.

The idea of the equality of states in international law proceeds from the equality of men. Vattel’s states that,

“Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature- Nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less sovereign than the most powerful kingdom.”⁹⁹

Juridical equality before the law with respect to access to and application of the law applies to all men, both great and small. However, is this notion of equality applicable to states?

⁹⁸ Ninčić, *supra* 93, p.4

⁹⁹ Vattel, *supra* 7, Paragraph 18, p.9, Book II, Chapter II, Paragraph 36, p.234. For Vattel, equality is a natural right.

It may be disingenuous to draw parallels or analogies between human beings and states but it would be more disingenuous to disregard the human content of statehood and indeed, in the functioning of states. States are made up of men who in ensuring continuity of existence, interests and beliefs pursue certain ideologies. That states are made up of humans is a fact that is very readily accepted where the commission of a crime under the auspices of the state is in issue. There should be consistency in the recognition of the human content of states.

The international system being an aggregation of states, international rules and norms are not to be perceived outside their human content. Individuals are the objects of international law and increasingly, but by no means without controversy, also subjects of international law.

The equality contemplated in this section is legal in nature and not factual. Aptly put by Oppenheim,

“Whatever inequality may exist between states as regards their size, power, degree of civilisation, wealth and other qualities, they are nevertheless equals as international persons”.¹⁰⁰

Legal equality of states is concerned with sovereign rights of states, political independence and territorial integrity of states, and equality before the international legal regime. Whereas, factual equality is concerned with the differentials in state power and its relativity in international law as well as the ability of states to influence

¹⁰⁰ Lassa Oppenheim, *International Law*, Vol.1, (3rd edition) (London: Longmans, 1920) p. 15 cited in Simpson, *supra* 91, p.27

international politics and rule-making. Therefore, for the purposes of this work, a state like Nauru is no less a state than the US or the UK.

The principles relating to sovereignty and sovereign equality have nothing to do with how powerful a state is. Granted that the index of power has no place in determining state sovereignty, this index is a powerful tool in the manipulation of sovereignty. While all states may have the capacity to participate in international organizations and agreements because they enjoy legal equality, not all of them will have the same negotiating or bargaining power. Therefore, while sovereignty empowers access into a sphere of activity, it does not control the specifics or vagaries of the modality of the conduct of activity or the result. By attainment of age of franchise, all men have an equal right to vote. However, in the actual exercise of the right some men will be able to affect and influence the process more than others by virtue of power, perhaps financial or political.

The equality of states does not necessarily translate into equality in rights and duties. The reality is that not all states have equal rights and duties in international law.¹⁰¹ However, all states possess equal capacity for rights and duties.¹⁰² The essence of equality therefore is “the absence of formal superiority and subordination in the legal relations between states”.¹⁰³

¹⁰¹ For instance, the rights and duties of non-coastal states may not be same with the rights and duties of coastal states.

¹⁰² Hans Kelsen, ‘The Principle of Sovereign Equality of States as a Basis for International Organisation’, (1944) 53 *Yale Law Journal* 207, p.209

¹⁰³ Simpson, *supra* 91, p.28

The international order, under the Charter of the UN, is structured upon the principle of sovereign equality.¹⁰⁴ The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States re-affirms the basic importance of sovereign equality as a means of achieving the purposes of the UN.¹⁰⁵ International legal opinion,¹⁰⁶ treaty law¹⁰⁷ and judicial pronouncements¹⁰⁸ lend support to the importance of the principle in the foundation of the international order. The principle has even been argued to fall within the category of *jus cogens*.¹⁰⁹

Sovereign equality impels the freedom of international association of states and their freedom to engage in international relations. The principle also underlies many rights and duties accruing to states in international law, customary or conventional such as the right to territorial integrity and jurisdictional competence.¹¹⁰ As a result therefore, rules governing inter-state relations are due to the respect of the sovereign equality of states.

The jurisdictional competence of states emanates from their sovereignty. This competence is not absolute but is relative and circumscribed by the sovereign equality

¹⁰⁴ 1 *U.N.T.S.* XVI, Articles 2(1) and 78

¹⁰⁵ UNGA Resolution 2625 (XXV)

¹⁰⁶ Ian Brownlie, *Principles of Public International Law*, 7th edition, (Oxford: OUP, 2008), p.287; Jennings and Watts, *supra* 89, p.339

¹⁰⁷ Convention on Consular Relations 1963, 596 *U.N.T.S.* 1 and Convention on Special Missions 1969, *supra* 63

¹⁰⁸ *Prosecutor v Tadic* (Jurisdiction) (Appeals Chamber), 105 *ILR* p.479, paragraph 55

¹⁰⁹ Martin Dixon, *Textbook on International Law*, Sixth edition (Oxford: OUP, 2007) p.40, 77. Article 53 of the Vienna Convention on the Law of Treaties, 1155 *U.N.T.S.* 331, provides thus,

“...a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

¹¹⁰ Dixon, *ibid.*, p.29

of other states, as expressed in the *par in parem non habet imperium* principle. To avoid the exercise of *imperium* between sovereign equals, states and Heads of states are immune from the jurisdictions of foreign states.

As the substantive basis for the immunities of states and Heads of states in international law,¹¹¹ the concept of sovereignty and its concomitant principle of sovereign equality therefore imply that immunity would apply to all Heads of states irrespective of their personal, political or social shortcomings. It would apply,

“...to all sovereigns no matter how nefarious, undemocratic or uncivilised they might be. The doctrine of sovereign immunity ensured that all sovereigns would be treated equally in deference to their position and regardless of the substantive politics they pursued in their own countries”.¹¹²

Lauterpacht, in his objection to the principles of equality and independence rationalizing immunity of states, is doubtful whether these principles form part of classical international law.¹¹³ He argues that based on the early scholarship in international law reliance on these principles is absent from the works of Grotius, criticized by Bynkershoek and admitted by Vattel only with regard to the personal sovereign.¹¹⁴ Lauterpacht further argues that rather than basing exemption from jurisdiction on sovereignty and sovereign equality, on the contrary, such exemption is a refutation of sovereignty and sovereign equality.¹¹⁵

¹¹¹ Sucharitkul, *supra* 89, p.117

¹¹² Simpson, *supra* 91, p.87

¹¹³ Lauterpacht, *supra* 4, p.228

¹¹⁴ *Ibid.*, see also Sinclair, *supra* 1, p.121

¹¹⁵ *Ibid.*, p.229

International law and its rule-making process are dynamic. It would only serve to stifle the development of the law if only principles that enjoy support in classical international law can be the only principles obtainable in contemporary international law. Unlike the immunity of personal sovereigns and diplomats, the immunity of states and Heads of states do not enjoy longevity of history. However, the immunity of states and Heads of states having developed from the immunity of personal sovereigns, the independence and equality of states recognized by Vattel as founding the immunity of personal sovereigns must be the source of the immunity of states, state officials and state property. Furthermore, the absence of these principles from the works of early scholars or their criticism does not remove them from general international law.

While it is acknowledged that international legal history has witnessed the fragmentation of sovereignty as seen in the economic and social spheres of states, this is not the case with the political sphere as concerns states' conception of their statehood, of which the immunity of states and state officials is an integral part.

Bianchi in objecting to the reliance on sovereignty of states as a justification for immunities asserts that,

“...much depends on what one takes sovereignty to mean. If sovereignty is regarded as a normative concept, the content of which is determined by international law rules, then it is hard to accept that conduct which runs counter to the very foundation of the system can be shielded from scrutiny by the rules of the same legal system. Furthermore, to prove that a judgment issued by a municipal court can be prejudicial to the independence

of a foreign state would require demonstration that the exercise of jurisdiction jeopardises one of those states' functions that international law characterises as sovereign and to which it accords protection".¹¹⁶

This view conceptualizes sovereignty only from its external dimension without regard to its internal dimensions. As an organic whole, the content of sovereignty is determined internally and externally, i.e. from a national as well as an international perspective. Bianchi's criticism, therefore, is limited by his definition of sovereignty.

1.4.1.3 THE DIGNITY OF STATES

The idea of the dignity of states as articulated in *Chisholm v. Georgia* means that a state is not to degrade its sovereignty by submitting itself to the jurisdiction of another state.¹¹⁷ This theory postulates that the dignity of states is impugned by subjecting states and Heads of states to the "coercive process of judicial tribunals".¹¹⁸ Based on this theory, the exercise of jurisdiction by a state over another state or Heads of state, contrary to the principle of sovereign equality will be an exercise of *imperium* which would compromise the dignity of the state over which jurisdiction is exercised. This notion of dignity of states was relied upon in *The Schooner Exchange*,¹¹⁹ *The Parlement Belge*,¹²⁰ and in *The Cristina*,¹²¹ in the determination of state immunity.

¹¹⁶ Andrea Bianchi, 'Serious Violations of Human Rights and Foreign States' Accountability before Municipal Courts', in Lal Chand Vohrah, Fausto Pocar, *et al* (edited), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, (The Hague: Kluwer Law International, 2003), p.154

¹¹⁷ 2 *Dall.* 419, 425 *US* 1793

¹¹⁸ *In re Ayers*, 123 *US* 443, p.505 cited in Evan H. Caminker, 'Judicial Solicitude for State Dignity', (2001) 574 *Annals of American Academy of Political and Social Science* 81, p.83, note7

¹¹⁹ *Supra* 9

¹²⁰ *Supra* 10

Reliance on the dignity of states as justification for a system of immunities of states and Heads of states becomes problematic when faced with the restrictive theory of state immunity. After all, the exercise of jurisdiction by a state over the commercial activities of another state implicates the dignity of the trading state. However, the dignity of a state pales where what is in issue is a commercial transaction; whereas with respect to proceedings against Heads of states the dignity of states is called into serious question, especially where there is an element of criminality and in view of the possible outcome of criminal proceedings.

Lauterpacht argued that the reliance on the notion of the dignity of states is antiquated and that it would accord more with the dignity of a state to submit itself to the jurisdiction of another state than to assert immunity.¹²² Lauterpacht's idealism is not in consonance with reality. States vigilantly guard against matters that diminish their status or infringe their dignity and resist submission to the jurisdiction of another state. The established practice of states rendering apology to other states for acts which compromise the dignity of states underscores this point.

Bianchi argues that it is wrong to ascribe psychological feelings to states, which are abstract entities.¹²³ However as argued earlier, states are made up of individuals and while this fact is readily recognized when a crime has been committed under the guise

¹²¹ *Supra* 12

¹²² Lauterpacht, *supra* 4, p.230-231; Bianchi, *supra* 116, p.153

¹²³ Andrea Bianchi, 'Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights' in Benedetto Conforti and Francesco Francioni., (edited) *Enforcing International Human Rights in Domestic Courts*, (The Hague: Martinus Nijhoff, 1997), p.409-410

of the state, it is submitted that the wrong is not in ascribing human feelings to states but in the selective recognition of the human content of states. Like a state would be overjoyed to win the World Cup so would it be embarrassed if not allowed to conduct its affairs and international relations in a manner befitting of its sovereign status or if its principal officer were subjected to criminal proceedings in another state.

1.4.2 RECIPROCITY OR COMITY

An application of the principle of reciprocity or comity would mean that a state refrains from exercising jurisdiction over another state by respecting the immunities of foreign states and Heads of states in order that those states would accord it same respect. This principle was relied upon in *The Parlement Belge*,¹²⁴ and *Rahimtoola v. Nizam of Hyderabad*.¹²⁵

The principle of reciprocity or comity is a dominant feature in US literature and court jurisprudence.¹²⁶ Thus in *Ex parte Peru*,¹²⁷ and in *Republic of Mexico v. Hoffman*,¹²⁸ it was decided that courts should hesitate to act where to do so would amount to political embarrassment of the executive arm of government in its conduct of international

¹²⁴ *Supra* 10

¹²⁵ *Supra* 27

¹²⁶ *The Schooner Exchange*, *supra* 8; Shobha Varughese George, 'Head of State Immunity in the United States Courts: Still Confused After All These Years', (1995-1996) 64 *Fordham Law Review* 1051, p.1061; Charles E. Hickey, 'The Dictator, Drugs and Diplomacy by Indictment: Head of State Immunity in United States v. Noriega', (1988-1989) 4 *Connecticut Journal of International Law* 729, p.731

¹²⁷ 318 *US* 588

¹²⁸ 324 *US* 30

relations. Likewise *In re Grand Jury Proceedings, Doe*,¹²⁹ and in *Aristide v. Lafontant*,¹³⁰ the courts rationalised the immunities of Heads of states on the mutual respect and comity among nations. This approach to Head of state immunity is to be seen against the background of the peculiarity of the US constitutional set-up where the doctrine of separation of powers is deeply entrenched in the process of government and suggestions of immunity are made by the State Department to the judiciary.¹³¹

Caplan argues that basing the immunity of states and their officials based on practical courtesy is more in tune with the dictates of reality because it gives pride of place to the adjudicatory jurisdiction of other states.¹³² He maintains that this approach is better for an international culture of accountability, otherwise states and their officials would evade the jurisdiction of states whereas the practical courtesy model enables states to withdraw the immunity.¹³³

Immunities facilitate international relations and the conduct of international relations being solely within the competence of states it accords with reason that immunities belong to states, and can only be waived by the state whose immunities are implicated. It is therefore wrong to assume that the immunity of state A can be withdrawn by state B without the consent of state A.

¹²⁹ 817 F.2d 1110

¹³⁰ *Supra* 49

¹³¹ Sucharitkul, *supra* 89, p.120

¹³² Caplan, Lee Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory' (2003) 97 *AJIL* 741, p.754-755

¹³³ *Ibid.*

The problem with the approach expressed by Caplan, is that it makes the immunity of a Head of state dependent on the state of origin as well as the state seeking to assert jurisdiction. This approach is faced with the difficulty of where the Head of state A is involved in legal proceedings in state B and state A asserts the immunity of its official but state B refuses to grant the immunity. A further problem with this model is that in the event that the courts of state B are free to criminally indict and proceed against Heads of states C and D, officials of state B would be similarly indicted and proceeded against in the courts of states C and D. This would entrench a tit-for-tat approach in the adjudicatory process leading to its de-legitimisation and would adversely affect international relations.

The basis of reciprocity as a rationale for the existence of immunity is limited by the fact that the applicability of international rules is not based on reciprocal gestures.¹³⁴ Nevertheless, reciprocity and international courtesy are practical reasons which rationalise a system of immunities of states and state officials. They do not, and cannot, substantively justify a system of immunities of states and Heads of states.¹³⁵

1.4.3 THE THEORY OF REPRESENTATION

The extent of the representative capacity of an official implicates the immunity the official may enjoy *ratione personae* or *ratione materiae*. Immunity is accorded to a Head of state due to the “special status” as the occupier of a “state’s highest office”

¹³⁴ Lauterpacht, *supra* 4, p.228

¹³⁵ Sucharitkul, *supra* 89, p.119

possessing *ius repraesentationis omnimodae*, a general competence to act for the state; and the actions which are attributable to the state.¹³⁶

This theory of representation explains why immunities are extended to state officials but it does not justify the existence of the immunities. The limitation of this theory as a foundational basis for the immunities of state officials is illustrated where a state does not recognise a particular official as the representative of another state.¹³⁷

1.4.4 ANALOGY WITH DIPLOMATIC IMMUNITIES

The immunity of diplomatic agents was established by a well-developed practice and was justified on the grounds of ensuring mutual respect and efficiency in the conduct of international relations as well as guaranteeing states that their diplomats in different jurisdictions would be accorded the same courtesy. Customary international law grants to diplomats personal inviolability (immunity *ratione personae*) and to former diplomats a qualified immunity, *ratione materiae*, with respect to their official acts.¹³⁸ These rules of customary international law were later codified by the Vienna Convention on Diplomatic Relations 1961.¹³⁹

¹³⁶ Watts, *supra* 37, pp.31-32; 53.

¹³⁷ *US v. Noriega*, (1990) 746 *F.Supp.* 1506

¹³⁸ Vattel, *supra* 6, Book IV, Chapter VII, p.680; The 'Printed Personal Instructions to the Diplomatic Agents of the United States' as far back as 1885 provided that, "a diplomatic representative possesses immunity from the criminal and civil jurisdiction of the country of his sojourn, and cannot be sued, arrested or punished by the law of that country", cited in Herbert T. Leyland, 'Limitations on the Doctrine of Diplomatic Immunity', (1921) 10 *Kentucky Law Journal* 25

¹³⁹ 500 *U.N.T.S.* 95. See also Convention on Special Missions, *supra* 63, Article 43

Diplomatic immunity is founded upon the representative nature of diplomats. As such, the representative nature of official capacity as Head of state is the basis for this analogy. Heads of states are the “representatives *par excellence*” of their states and their representative capacities are more extensive than those of diplomats.¹⁴⁰ Therefore, practical prudence dictated the extension of diplomatic immunities to Heads of states.

Likewise, the absence of an international legal instrument articulating the principles of Head of state immunity, unlike diplomatic immunity, necessitated the application of principles of diplomatic immunity to Heads of states. For instance, Section 20 of the SIA provides for the application of diplomatic immunities to Heads of states. The Convention on Special Missions also extends the applicability of diplomatic privileges and immunities within the Convention to Heads of states when heading special missions.¹⁴¹

While the influence of diplomatic law on the development of the concept of Head of state immunity is considerable, the basis of Head of state immunity cannot be founded upon diplomatic immunity. This is because diplomatic immunity, like Head of state immunity, is an aspect of the wider concept of immunity of states which is based on sovereignty and sovereign equality.

¹⁴⁰ Watts, *supra* 37, p.22

¹⁴¹ *Supra* 63, Article 21

1.4.5 ANALOGY WITH STATE IMMUNITY

Head of state immunity must be conceptualised against the backdrop of state immunity because the latter elucidates the substance of the former.¹⁴² This is so when one considers that the principal idea behind the immunity *ratione personae* and immunity *ratione materiae* of Heads of states is that the authority and decision-making processes of states are not to be circumvented by exercising jurisdiction over state officials under the pretence of adjudicating the acts of the officials.

Reliance on an analogy with state immunity to rationalise Head of state immunity is given impetus by the historical fact of a lack of distinction between the person of the sovereign and the state making the acts of one, acts of the other. As sovereign entitlements of states, immunity is extended to state officials who act in a sovereign or representative capacity, for instance Heads of states and diplomats.¹⁴³

An analogy with state immunity, *per se*, cannot suffice as the foundational basis for Head of state immunity, rather the analogy provides a complementary basis, to the concept of sovereignty and sovereign equality, for the concept of Head of state immunity in international law.

¹⁴² Kerry Creque O'Neill, 'A New Customary Law of Head of State Immunity?: Hirohito and Pinochet', (2002) 38 *Stanford Journal of International Law* 291

¹⁴³ Various state immunity instruments have extended the applicability of certain provisions to Heads of states, see Section 14(1)(a), Part 1 of SIA, *supra* 17; Article 3(2) of UN Convention on Jurisdictional Immunities, *supra* 36. The FSIA is silent as to its applicability to Heads of states.

1.4.6 THE IMPERATIVE OF FUNCTIONALITY

At the core of this theory is the functioning of government. The efficiency of government will be better secured where Heads of states are not inundated with legal proceedings which, undoubtedly, will adversely impact on their abilities to function efficiently.¹⁴⁴

The imperative of functionality of government is essential for the rights and duties of a state arising under international law as well as to facilitate cordial international relations between states. To properly carry out their functions, especially in a globalised world, the nature and purpose of the office of Head of state involves international travel. Therefore, the fact that a state allows a foreign state to function within its territory or allows foreign state officials to visit its territory is indicative of “an implied obligation not to derogate from a grant”.¹⁴⁵ Otherwise, it would be entrapment.

The nature of the functions of Heads of states necessitates that there should be no interference in, or impediments to, the functions. The practical logic behind this theory is highlighted by a situation where state A is free to exercise jurisdiction over the policies of state B which are unpopular in state A.

¹⁴⁴ This is the primary view of the ICJ in the *Arrest Warrant* case, *supra* 41. In fact, following the enactment of the Belgian Law of 1993 on universal jurisdiction, there was a proliferation of cases against Heads of states including George Bush of US, Ariel Sharon of Israel, Fidel Castro of Cuba, Yassir Arafat of the Palestinian Authority, Hissène Habré of Chad, former President Augusto Pinochet of Chile, see Ellen L. Lutz, ‘Prosecutions of Heads of State in Europe’, in Ellen L. Lutz and Caitlin Reiger, edited, *Prosecuting Heads of State*, (Cambridge: CUP, 2009), p.25, pp.36-37

¹⁴⁵ Jordan, CJ of the New South Wales Supreme Court, in *Wright v. Cantrell* (1943) 44 New South Wales State Reports (SRNSW) 45 cited in I.A. Shearer, *Starke’s International Law*, 11th edition, (London: Butterworths, 1994) p.192, note 14

However, the imperative of functionality does not suffice as a foundational basis for Head of state immunity. Rather, it merely complements the concept of sovereignty and the principle of sovereign equality as the basis for the existence of a system of immunities of states and Heads of states.

1.5 CONCLUSION

The concept of immunity in international law is a dynamic one which has undergone changes as to its scope resulting in a restriction of the traditional absoluteness of the concept. This chapter has considered the evolutionary developments in the immunities of states and Heads of states as well as the nature and scope of applicability of Head of state immunity, bearing in mind the problem of development within boundaries that are far from defined; a problem illustrated by the lack of certainty as to the scope of immunity *ratione personae*.

It is argued in this chapter that sovereignty is the foundation of the pluralistic international order in which states exist, and that the viability of this pluralistic order is ensured by the principle of sovereign equality. As the *fons et origo* of the international order, all international rules draw from sovereignty and it is to this extent that the basis of the concepts of immunities of states and Heads of states is to be found in the concept of sovereignty and the principle of sovereign equality.

As sovereign equals, there is a competing assertion of sovereignty of a state seeking to assert jurisdiction and that of the state asserting immunity from the jurisdiction. It is in the resolution of these competing assertions that the subsidiary foundations of immunity, seen in the principles of reciprocity, comity of nations, dignity of states and the imperative of functionality, come into play to support sovereignty and sovereign equality as the foundational basis of Head of state immunity.

With the increasing development of an international regime of human rights and a culture of accountability, Head of state immunity has come under serious criticism for entrenching a culture of impunity. The question whether Head of state immunity is a challenge to human rights and entrenches impunity will be considered in the next chapter.

CHAPTER 2: HEAD OF STATE IMMUNITY: A CHALLENGE TO HUMAN RIGHTS?

2.1 INTRODUCTION

The notion of the immunity of states and Heads of states originated in classical positivist international law at a time when states were recognized as the only subjects of the international law and the direct protection of the individual had not yet materialized into the realm of international law. Traditionally, states were the protectors and enforcers of the individual rights of citizens and so could espouse international claims on behalf of their citizenry. With the development of human rights as a separate branch of international law, the evolution of international law has witnessed an individual-oriented approach and has gradually eroded the traditional state-oriented approach.

While the essence of immunity is the exemption of the adjudicatory and enforcement jurisdiction of states, human rights expanded the adjudicatory and enforcement jurisdiction of states thereby resulting in a ‘seeming’ doctrinal conflict between the two systems.

More prevalent in the interface between the systems of immunities and human rights has been the challenge of the immunities of states for violations of human rights.¹ While the focus of this thesis is Head of state immunity, it is important to consider state immunity challenges to human rights. This is because despite a sustained practice of recognizing the state immunity for human rights violations, there seems to be an emerging change in judicial attitudes as evidenced in the bare minority decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom*,² the decision of the UK Court of Appeals in *Jones v. Saudi Arabia*,³ and the Italian Court of Cassation in *Ferrini v. The Federal Republic of Germany*.⁴

This chapter will analyse the imperatives of the two systems involved in this discourse, on the one hand a system of human rights and on the other hand, a system of immunities. It will also critically analyse the various theoretical approaches that have been resorted to in the reconciliation of the seeming conflicting imperatives of the systems. Invariably, the analysis in the chapter will inform the issue of whether, and to what extent, there is a new customary international law on Head of state immunity.

¹ As against Head of state immunity. This is attributable to the prevailing notions about the inviolability of the person of Heads of states. See *Arrest Warrant* case, (2002) *I.C.J. Reports* 3; *Gaddafi* case, 125 *ILR* 490

² (2002) 34 *EHRR* 273

³ 2004] *EWCA Civ* 1394; [2005] 2 *WLR* 808; [2006] *UKHL* 26; the Court held that while states may be entitled to immunity, state officials were not immune from its proceedings.

⁴ Originally in (2004) 87 *Rivista di Diritto Internazionale* 539; (Cass. Mar. 11, 2004) in 128 *ILR* 658; Andrea Bianchi, 'Ferrini v. Federal Republic of Germany', (2005) 99 *AJIL* 242

2.2 THE IMPERATIVES OF A SYSTEM OF HUMAN RIGHTS AND A SYSTEM OF IMMUNITIES

It is inherent in the dignity of humanity that human beings possess certain rights and freedoms. Human rights and freedoms are accepted societal values which “all human beings should be able to claim “as of right” of the society in which they live”.⁵ The protection of human rights is one of the fundamental objectives, and greatest achievements, of the international order.⁶ A system of human rights is fundamental for humanity, national and international peace and stability. The scope of violations of human rights is of great magnitude when committed by persons, like Heads of states and other state officials who have the machinery of state power available at their disposal. These violations, particularly when they are part of the policy of a state, impact greatly on the international system as gross flouting of universally accepted norms with implications for international peace and security.

Immunities have been established, in the previous chapter, to be a core principle of public international law and its theoretical foundations structure the international order making it a highly respected and conservatively guarded concept. The concept of immunity cannot to be detached from its functions, including the facilitation of international diplomacy and relations.

⁵ Bruno Simma, *et al*(edited), *The Charter of the United Nations: A Commentary*, 2nd edition, Vol. II, (Oxford: University Press, 2002) p. 921 quoting Louis Henkin, ‘Human Rights’, *EPIL II*, p.886

⁶ See Preamble of the UN Charter, 1 *U.N.T.S.* XVI

2.3 THE PROBLEM SO FAR

Generally, international human rights instruments are applicable to states and seek to ensure that state officials and agents respect the stipulated standards.⁷ However, human rights encounter an “enforcement crises” where immunities are involved.⁸ This is because while human rights enhance the jurisdiction of states, immunities are an exemption from the jurisdiction a state may ordinarily possess. The necessary consequence of immunity, by the exemption of a state or its official from the jurisdiction of a court, is the challenge to the enforcement of human rights standards. As such, immunity is perceived as inhibiting the development of a system of human rights capable of meeting international standards of accountability.⁹

At the heart of this chapter are two seemingly conflicting perspectives. Firstly, the classical positivist view which recognizes that states are the only subjects of international law and that the duties and rights enunciated in the human rights instruments devolve on states. As such, international rules are to be interpreted against the backdrop of the position of the individual in traditional international law, as incapable of acquiring direct rights in international law.¹⁰ Based on this classical view of international law, the immunities of states and state officials are to be respected always.

⁷ Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd edition, (London: Cavendish Publishing, 2003), p.14

⁸ M. Cherif Bassiouni, ‘The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights’, (1982-1983) 9 *Yale Journal of World Public Order* 193

⁹ *Campione v. Peti-Nitrogenmuvek NV and Hungarian Republic*, 65 *ILR* 287 p.302

¹⁰ Jürgen Bröhmer, *State Immunity and the Violation of Human Rights*, (The Hague: Martinus Nijhoff Publishers, 1997), p.8

Secondly, there is the progressive human rights perspective of international law that there is no rule stipulating that only states can acquire direct rights and duties in international law. As such, nothing stops individuals and organisations from assuming direct rights in international law. Moreover, the trend in international law has been to recognize the increasing importance of non-state actors in international activities.¹¹ With the emerging trend in international law seeking to entrench a culture of accountability, it has been argued that the enforcement of the rights of individuals is to prevail even where immunities are involved.¹²

It has been argued that the developments in the law regarding the immunities of states, i.e. from absolute to restrictive, was largely contributed to by the increasing significance and recognition of the individual in international law, though it may have only been the economic interests of individuals or at least of 'the international business man'.¹³ Following from this, it would seem that the civil interests of individuals should also be given the same value as their economic interests, hence translating into a more progressive restriction of immunities of states beyond their commercial activities. States, after all, exist for its citizenry and the duty of states includes the protection of individuals and safeguarding their fundamental freedoms. However, as stated in Chapter 1, the fragmentation of sovereignty in the economic sphere of states has not been achieved in the political sphere.

¹¹ Hersch Lauterpacht, *International Law and Human Rights*, (London: Stevens and Sons Ltd, 1950) p.4

¹² Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', (1951) 28 *BYIL* 220, p.235

¹³ Bröhmer, *supra* 10, p.143

Like the concept of immunities, the existence of a system of human rights is founded upon the sovereignty of states. Indeed developments in the area of human rights are given impetus by the very idea of sovereignty. It becomes apposite to consider whether there is an actual conflict between the imperatives of a system of human rights and a system of immunities, and in the event of a conflict, how the values are to be reconciled.¹⁴

2.4 FRAMEWORK FOR THE RESOLUTION OF THE IMPERATIVES OF HUMAN RIGHTS AND THE IMPERATIVES OF IMMUNITIES OF STATES AND STATE OFFICIALS

The imperatives of a system for the protection of human rights cannot be understated. Likewise the importance of the immunities to which states and their officials are entitled cannot be whimsically disregarded. In seeking to reconcile the seemingly conflicting interests of both systems, the concepts of universal jurisdiction and *jus cogens* as they impact on immunities will be considered. In addition, international and national instruments on state immunity (with possible exceptions thereof) as well as the theory of implied waiver of immunity will also form part of the analysis.

¹⁴ Dan Sarooshi, 'Sovereignty, Economic Autonomy, the United States, and the International Trading System: Representations of a Relationship', (2004) 15 *EJIL* 651, p.653

2.4.1 THE UNIVERSAL JURISDICTION APPROACH

Certain fundamental rights cannot be adequately secured by a few states or through a “framework of bilateral relations” alone.¹⁵ To ensure effective protection and enforcement of these rights a mechanism that would involve the generality of the world community is sought to be achieved through the idea of universality of interest in the protection of human rights.

There is no agreed definition of universal jurisdiction in general international law.¹⁶ However, this does not preclude any definition which embodies the essence of the principle as the ability to exercise jurisdiction irrespective of territoriality or nationality.¹⁷ According to Randall,

“This principle provides every state with jurisdiction over a limited category of offences generally recognized as of universal concern, regardless of the *situs* of the offence and the nationalities of the offender and the offended”.¹⁸

¹⁵ C. Schulte, ‘The Enforcement of Obligations *Erga Omnes* before the International Court of Justice, Procedural Law and the East Timor Judgment’ in Kalliopi Koufa (edited) *Thesaurus Acroasium, Vol. XXVIII, Might and Right in International Relations* (Athens: Sakkoulas Publications, 1999) p.534.

¹⁶ Dissenting Opinion of Judge *ad hoc*, Van den Wyngaert in *Arrest Warrant* case, *supra* 1, Paragraph 44; see also Claus Kreß, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit international*’, (2006) 4 *JICJ* 561, p.563; Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General (Ex.CL/411 (XIII)) during the 13th Ordinary Session of the Executive Council of the African Union, 24-28 June 2008 (This Report is based on a collaborative work between Dr Chaloka Beyani and the author of the thesis in 2008)

¹⁷ Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, (2004) 2 *JICJ* 735, p. 745

¹⁸ Kenneth C. Randall, ‘Universal Jurisdiction Under International Law’, (1988) 66 *Texas Law Review* 785, p.788

For Brown, the concept of universal jurisdiction is based on functionality in view of the decentralised nature of the international system; a feature that makes it difficult for the system to enforce its fundamental laws.¹⁹

The Princeton Principles on Universal Jurisdiction provide that universal jurisdiction pertains broadly to the power of states to punish certain crimes irrespective of the place committed and by whom committed (i.e. in the absence of other grounds for the exercise of jurisdiction).²⁰ This ‘universal’ right of states to institute legal proceedings regarding gross violations of *jus cogens* norms entailing obligations of this character has been likened to the Roman Law principle of *actio popularis* which gave every member of the public the right to legal action in defence of public interest, whether or not one was affected.²¹

Universal jurisdiction is not without controversy and this extends to its history as well as its applicability. While some commentators contend that the principle is novel,²² earlier indications of the principle go back to the international crime of piracy. Articles 19 and 105 of the Geneva Convention on the High Seas 1958 and the UN Convention on the Law of the Sea 1982 respectively, provide that,

¹⁹ Bartram S. Brown, ‘The Evolving Concept of Universal Jurisdiction’, (2001) 35 *New England Law Review* 383, p.384

²⁰ Principle 1, Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction, (New Jersey: Program in Law and Public Affairs, 2001) p.28. It is acknowledged that these Principles are of limited authority and only provide a useful guide.

²¹ Oscar Schachter, *International Law in Theory and Practice*, (Dordrecht: Martinus Nijhoff Publishers, 1991), p.209; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, [1962] *I.C.J. Reports* 319, p.343; see also the Dissenting Opinion of President Winiarski, *ibid*, p. 449, p.452; Egon Schwelb, ‘The *Actio Popularis* and International Law’, (1972) 2 *Israeli Yearbook on Human Rights* 46

²² Henry A. Kissinger, ‘Pitfalls of Universal Jurisdiction’, *Foreign Affairs*, July/August 2001

“On the high seas, or in any other place outside the jurisdiction of any state, *every* state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”²³

The fact that pirates were regarded as stateless persons coupled with the fact that acts of piracy were committed on the high seas outside the territorial jurisdiction of states would have meant that pirates were completely outside the ambit of the law. To avoid a situation whereby states would not have had the right to exercise jurisdiction over pirates, a means of asserting some sort of universal jurisdiction over piracy was necessitated.²⁴

It is commonly assumed that certain international crimes like slavery, slave trade, genocide, war crimes, crimes against humanity and torture attract universal jurisdiction because of the ‘moral heinousness’ of these crimes.²⁵ However, ‘moral heinousness’ is not to be equated with universal jurisdiction.²⁶ Universal jurisdiction over piracy was due to its peculiar nature and not any notion of heinousness; and so the appropriateness of relying on piracy to establish universal jurisdiction over international crimes based on the notion of heinousness is doubtful and without proper foundation.²⁷

²³ 1958 Convention, 450 *U.N.T.S.* 82; 1982 Convention, 1833 *U.N.T.S.* 397

²⁴ Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’, (2004) 45 *Harvard International Law Journal* 183

²⁵ See the views of Yves Beigbeder, *International Justice against Impunity: Progress and New Challenges*, (The Netherlands: Martinus Nijhoff, 2005) p.48-53; Randall, *supra* 18, p.788-789. See also *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980); 77 *ILR* 169, describing a torturer as “hostis humanis generis- an enemy of all mankind”.

²⁶ Kontorovich, *op.cit*

²⁷ *Ibid*

The issue of whether there exists universal jurisdiction over a crime is dependent on the subtleties of international rule-making, i.e. the extent to which universal jurisdiction is accepted as an international rule. Furthermore, the fact that universal jurisdiction may exist with regard to a crime does not render the immunities of states and Heads of state inapplicable. The ICJ summed up the matter by asserting as follows,

“It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on states obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law... These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.”²⁸

Randall contends that recognition of universal jurisdiction over slavery and slave trading can be traced to the Geneva Convention on the High Seas, the UN Convention on the Law of the Sea, the 1926 Convention to Suppress the Slave Trade and Slavery and its Protocol in 1953 and Supplementary Convention in 1956.²⁹

²⁸ *Arrest Warrant* case, *supra* 1, Paragraph 59

²⁹ *Supra* 18, p.798

However, there is nothing in the text of these provisions conferring states with universal jurisdiction, indeed most of the provisions direct their obligations to state parties; obligations which are merely contractual.³⁰ Indeed, Kontorovich argues that,

“At most, international treaties on slave trading created “delegated jurisdiction” whereby several nations conveyed to one another the right to exercise some of their jurisdictional powers with respect to a particular offence, effectively making each state an agent of the others. Since such arrangements rest on state consent and the traditional jurisdiction of each state party to the agreements, they in no way...can be considered as examples of universal jurisdiction”.³¹

Conceding that the international instruments on slavery do not explicitly confer universal jurisdiction, Randall further argues that universal jurisdiction over slavery and slave trading exists in customary international law. He relies on Sørensen who argues that customary international law as seen in the extensive efforts to abolish slavery, even in the absence of explicit provisions in international instruments on slavery providing for universal jurisdiction, sustains universal jurisdiction over these crimes.³²

It is doubtful if customary law sustains the view of Randall or Sørensen because there is no evidence of general practice of universal jurisdiction over slavery and slave trade which states have accepted as law.

³⁰ Conventions on the Seas, *supra* 23; The Convention to Suppress the Slave Trade and Slavery (Slave Trade Convention), 60 *L.N.T.S.* 254; The Protocol to the Slave Trade Convention, 182 *U.N.T.S.* 51; and the Supplementary Convention to the Slave Trade Convention 266 *U.N.T.S.* 3

³¹ *Supra* 24, p.193

³² Randall, *supra* 18, p.791; Max Sørensen (edited) *Manual of Public International Law*, (New York: St. Martin's Press, 1968) 365; See also M. Cherif Bassiouni, 'Theories of Jurisdiction and Their Application in Extradition Law and Practice', (1974-1975) 5 *California Western International Law Journal* 1, p.54

The trial of Adolf Eichmann in 1961 by Israel is commonly perceived as establishing universal jurisdiction over crimes against humanity and war crimes.³³ Charges were brought in Israel against Eichmann, under the Nazis and Nazi Collaborators (Punishment) Law 1950.³⁴ Although a retroactive legislation, the 1950 Law provided the basis for exercise of jurisdiction against Eichmann.³⁵

It is an accepted principle of international law that states may assert jurisdiction over both nationals and non-national who violate their laws. The decision of the Permanent Court of International Justice in the *Lotus* case,³⁶ that unless expressly prohibited by international law, states may extend the application of their laws to persons outside their jurisdiction support this argument. In addition, Israel being the “sole sovereign representative of the Jewish people, as well as nation where many of the victims (of the Holocaust) took refuge”, there was already a jurisdictional link between Israel and Eichmann for his ‘crimes against the Jewish people’.³⁷ Eichmann’s actions violated Israeli law; therefore there was a valid basis of Israeli territorial jurisdiction over him.

The *Eichmann* case does not support universal jurisdiction over crimes against humanity or war crimes. There was already in existence a valid basis on which Israel

³³ *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 *ILR* 5 (Hereinafter *Eichmann* case)

36 *ILR* 5; See text of Judgement of Supreme Court at p.277

³⁴ Reprinted in UN Yearbook on Human Rights for 1950 (1952) 163

³⁵ L.C. Green, ‘The Eichmann Case’, (1960) 23 *MLR* 507, p.512-515

³⁶ *Series A*, No. 27, pp.18-19

³⁷ Kontorovich, *supra* 24, p.197. The non-existence of the state of Israel by the time of the Holocaust is a weakness of reliance on nationality to found jurisdiction over Eichmann, see Green, *supra* 35, p.514

exercised jurisdiction over Adolf Eichmann, and so the added ground of universal jurisdiction was merely superfluous.

In 1993 Belgium enacted the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law.³⁸ By this legislation Belgium arrogated to itself universal jurisdiction over persons accused of crimes against humanity. An investigating Magistrate in Belgium, on 11 April 2000, issued an international arrest warrant through *Interpol* against the Minister of Foreign Affairs of the Democratic Republic of Congo alleging crimes against humanity and war crimes. The Congo instituted proceedings before the ICJ contending that Belgium had, by issuing and circulating the arrest warrant, violated the sovereignty and sovereign equality of the Congo as well as violated the diplomatic immunity of its senior state official.³⁹ The Court came to its decision on grounds other than universal jurisdiction and found that Belgium had failed in its international obligation to the Congo by not respecting the sovereignty of the Congo and the immunity *ratione personae* of its Foreign Minister.

Also, in September 2005, a Belgian judge issued an arrest warrant against the former President of Chad, Hissène Habré. Habré was subsequently arrested by Senegalese officials but the request for his extradition to Belgium was refused by Senegal.⁴⁰

³⁸ See Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (as amended in 1999) (1993) 38 *I.L.M.* 918; (as amended in 2003) (2003) 42 *I.L.M.* 749

³⁹ *Arrest Warrant* case, *supra* 1

⁴⁰ 125 *ILR* 569

Senegal referred the matter to the African Union (AU) which mandated Senegal to ensure the prosecution and trial of Habré in Senegal.⁴¹

In February 2009, Belgium instituted proceedings against Senegal before the ICJ claiming that Senegal is in breach of its international obligations under the Convention against Torture by failing to prosecute or extradite Habré.⁴²

Again, any reliance on the *Arrest warrant* and *Habré* cases as authority for the existence of universal jurisdiction is limited. Due to political pressure from the US, the controversial universal jurisdiction legislation of Belgium has been amended.⁴³ This amendment was done in the aftermath of the ICJ decision in the *Arrest Warrant* and is in line with the Rome Statute of the International Criminal Court.⁴⁴ Although the ICJ refrained from deciding on the issue of universal jurisdiction in the *Arrest Warrant* case, the decisions of the majority of the judges do not accept that universal jurisdiction forms part of general international law, except as applicable to the international crime of piracy.⁴⁵

Furthermore, unlike the Congo in the *Arrest Warrant* case, Senegal is a party to the Convention against Torture 1984. The Convention provides in Article 5(2) that parties

⁴¹ Assembly/AU/Dec.127 (VII), July 2006

⁴² See *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, (2009) *I.C.J. Reports* 139; yet to be decided on its merit.

⁴³ Sean D. Murphy, 'US Reaction to Belgian Universal Jurisdiction Law', (2003) 97 *AJIL* 984, p.986. The amended law in providing against the applicability of official positions is conditional upon the limits established under international law (Article 4 of 2003 Amendment)

⁴⁴ See Articles 27 and 98 of the Rome Statute, 2187 *U.N.T.S.* 90, considered in Chapter 6 of this thesis.

⁴⁵ See Separate Opinion of President Guillaume, Joint Separate Opinions of Judges Higgins, Buerghenthal, and Kooijmans, *supra* 1

are to ensure that they assert jurisdiction over persons accused of torture found within their territories or to extradite such persons. Therefore, the basis of jurisdiction by Belgium cannot be ‘pure’ universality as it had earlier sought in the *Arrest warrant* case, but rather ‘treaty-based’ universality.

Universal jurisdiction has also been argued to have extended to certain crimes “so serious and on such a scale that they can justly be regarded as an attack on the international legal order...” and treaties codifying these crimes stipulate that states within whose territory persons guilty of such crimes are found are under a duty to prosecute or extradite (*aut dedere, aut judicare*) such persons.⁴⁶ Rather for the sake of convenience than as a term of art, this category of crimes has been wrongly referred to as embodying ‘treaty-based universal jurisdiction’ and they include genocide, war crimes and torture.⁴⁷ The idea of treaty-based universal jurisdiction seems a misnomer in view of the fact that it is custodial and relates to contractual obligations limited only to parties to the agreement.

With regard to treaty-based universal jurisdiction, resort is to be had to the language of the specific treaties. Contrary to the opinion expressed by Bassiouni,⁴⁸ the Convention on the Prevention and Punishment of the Crime of Genocide 1948 does not impose an

⁴⁶ Per Lord Millet, *Pinochet (No. 3)*, [1999] 2 All E.R. 97, p.177. See M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, (The Netherlands: Martinus Nijhoff Publishers, 1995)

⁴⁷ Bruce Broomhall, ‘Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law’, (2000-2001) 35 *New England Law Review* 399

⁴⁸ M. Cherif Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’, (1996) 59 *Law and Contemporary Problems* 9, p.15

obligation to prosecute or extradite on parties.⁴⁹ Rather the Convention provides that trials are to be by,

“a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”⁵⁰

The Convention also provides that,

“Genocide ...shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”⁵¹

The interpretation of these provisions can only result in one of two outcomes. Firstly, proceedings for genocide may be brought by states which are obligated to exercise jurisdiction where there is a territorial jurisdictional link, or secondly, proceedings may be brought before a competent international criminal court. Where genocide has been committed and extradition is sought, parties to the Convention cannot qualify the genocide as a political offence for which there can be no extradition. Rather extradition is granted in accordance with municipal laws because extradition is dependent on the existence of a treaty or agreement in the absence of which there is no obligation to extradite.⁵² If anything, the provisions of the Genocide Convention leave no doubt that the Convention does not embody universal jurisdiction and neither does it confer same upon parties. In fact, the drafting history of the Genocide Convention supports this view because an earlier proposal providing that parties could punish

⁴⁹ 78 U.N.T.S. 277

⁵⁰ *Ibid.*, Article VI

⁵¹ *Ibid.*, Article VII

⁵² Anthony Aust, *Handbook of International Law*, (Cambridge: CUP, 2005), p.264

offenders within any territory under their jurisdiction irrespective of his nationality or place of commission of crime was rejected.⁵³

International instruments regarding war crimes and torture are more explicit in their provisions regarding the issue of treaty-based universal jurisdiction. Articles 49, 50, 129 and 146 of the first,⁵⁴ second,⁵⁵ third,⁵⁶ and fourth,⁵⁷ Geneva Conventions 1949 respectively, provide that,

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed...grave breaches and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”

The extent to which it may be said that there is universal jurisdiction over war crimes is limited by the fact that the obligations stipulated in the Geneva Conventions are contractual agreements which are binding only upon parties. Higgins, Kooijmans and Buergenthal, in their Joint Separate Opinion in the *Arrest Warrant* Case, opine that the fact that the provisions of the Geneva Conventions did not anticipate any territorial or nationality jurisdictional links may be suggestive of a “true universal principle”.⁵⁸ However, in doubting whether the Geneva Conventions were reflective of universal

⁵³ Luc Reydams, ‘The Rise and Fall of Universal Jurisdiction’, in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law*, (Oxford: Routledge, 2011) p.337, p.343-344

⁵⁴ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 *U.N.T.S.* 31

⁵⁵ Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 *U.N.T.S.* 85

⁵⁶ Convention relative to the Treatment of Prisoners of War, 75 *U.N.T.S.* 135

⁵⁷ Convention relative to the Protection of Civilian Persons in Time of War, 75 *U.N.T.S.* 287

⁵⁸ *Supra* 1, Paragraph 31-32

jurisdiction, the judges cited the “authoritative” Pictet Commentary on the Geneva Conventions that the obligation upon parties to search for offenders is with regard to offenders present within their territory.⁵⁹

By Articles 49, 50, 129 and 146 of the first, second, third and fourth Geneva Conventions, respectively, jurisdiction may be exercised by a party based on territoriality where persons accused of war crimes are found within its territory or it may surrender accused persons to another party which has made out a *prima facie* case. It is submitted that a High Contracting Party concerned who has made out a *prima facie* case is one that has some sort of jurisdictional link with an accused person. This, coupled with the fact that there is a dearth of case law on the matter, shows that reliance on the provisions of the Geneva Conventions as establishing universal jurisdiction for war crimes is misguided.

Article 5 of the Convention against Torture and other Cruel, Inhuman or Degrading Punishment 1984,⁶⁰ obligates parties to establish jurisdiction over acts of torture committed within their jurisdictions or by their nationals or against their nationals. Article 7 of the Convention against Torture provides that a party in whose territory an accused person is found shall extradite him or submit the matter to its competent authorities for prosecution. Article 5 establishes jurisdictional links between parties and persons alleged to have committed torture.

⁵⁹ *Ibid.*

⁶⁰ 1465 U.N.T.S. 85

States not party to the Geneva Convention and the Convention against Torture may not exercise jurisdiction under the Conventions. This is because of the *pacta tertiis nec nocent nec prosunt* principle codified in Article 34 of the Vienna Convention on the Law of Treaties 1969, i.e. a treaty cannot create rights or obligations for third parties without their consent.⁶¹ While the substance of the Conventions, i.e. the prohibition against war crimes and torture, are reflective of customary international law thereby binding states not parties to the Conventions, it would be wrong to assume that all the rules contained in the Conventions are reflective of customary international law. Arguably, the provisions on the exercise of jurisdiction by parties, which are rules of procedure, are not reflective of customary international law because by their nature, as procedural rather than substantive rules, they are incapable of becoming custom.

Essentially therefore, obligations of *aut dedere, aut judicare* under the Geneva Conventions and the Convention against Torture apply to the parties on an *inter partes* basis. The conventional obligation of *aut dedere, aut judicare* differs from universal jurisdiction. Universal jurisdiction, by its very nature, extends to all states and does not just operate *inter partes*, unlike the *aut dedere* conventional obligation, which is essentially territorial jurisdiction for extraterritorial acts.⁶²

The treaty provisions discussed above are merely declaratory of obligation of parties. There is no *established* practice of the exercise of universal jurisdiction by states over war crimes and torture. Indeed, the decision of the House of Lords in *Pinochet (No. 3)*

⁶¹ 1155 U.N.T.S. 331; [Hereinafter VCLT]

⁶² *Supra* 1, Joint Separate Opinion, Paragraph 42. See Broomhall's description of *aut dedere, aut judicare* as treaty-based universal jurisdiction, *supra* 47

was based on the Convention against Torture which Chile and the UK had ratified, Section 134 of the Criminal Justice Act and the requirement of double criminality in English law rather than on universal jurisdiction.⁶³

The existence of universal jurisdiction for human rights violations is doubtful.⁶⁴ Judges Higgins, *et al*, upon considerations of the various national legislations and case-law in the UK,⁶⁵ Australia,⁶⁶ Austria,⁶⁷ France,⁶⁸ Germany,⁶⁹ Netherlands,⁷⁰ and US,⁷¹ observed that though there may have been efforts to adjudicate over extra-territorial crimes, especially war crimes, there has been no clear instance of assertion of

⁶³ *Supra* 46; on the contrary, Lord Millett in *Pinochet (No.3)*, *ibid.*, p.177 argues that there is universal jurisdiction over international crimes where the acts involved violate *jus cogens* norms and where the seriousness and scale of such attacks are such that they are an attack on the international legal order. However, this view does not enjoy the support of the other judges of the House of Lords and cannot be supported for the reasons mentioned above.

⁶⁴ See Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, (Oxford: OUP, 2008), p.221 where she argues that “mandatory universal jurisdiction is for now still only of a conventional nature.”

⁶⁵ *Ibid.*

⁶⁶ *Nulyarimma v. Thompson* [1999] FCA 1192 and *Polyukhovich v. Commonwealth of Australia* [1991] HCA 32.

⁶⁷ The Austrian Supreme Court (in *Dusko Cvjetkovic*) asserted jurisdiction over genocide on the grounds of lack of a functioning legal system in the state where the genocide was committed as well as the lack of an international criminal court in existence to exercise jurisdiction over the matter; Axel Marschik, ‘*The Politics of Prosecution: European National Approaches to War Crimes*’, in Timothy McCormack & Gerry Simpson (eds) *The Law of War Crimes: National and International Approaches*, (The Hague: Kluwer Law International, 1997), p.79-81

⁶⁸ *In re Javor*, 1996 Bull. Crim., No. 132, p. 379; Case note by Brigitte Stern, ‘*In re Javor*. 1996 Bull. Crim., No.132, at 379, *In re Munyeshyaka*. 1998 Bull. Crim. No.2, at 3’, (1999) 93 AJIL 525. See also *Gaddafi* case, 125 ILR 490

⁶⁹ The Higher Regional Court of Bavaria has asserted universal jurisdiction over genocide where the accused was found in Germany; see *supra* 1, Joint Separate Opinion, Paragraph 22

⁷⁰ Pita Schimmelpennick van der Oije and Steven Freeland, ‘Universal Jurisdiction in the Netherlands- The Right Approach but the Wrong Case?: Bouterse and the ‘December Murders’’, 2001 *Australian Journal of Human Rights* 20

⁷¹ Though relying more on passive personality, the US has shown an inclination towards universal jurisdiction in response to terrorism, see *US v. Yunis*, 681 F.Supp 896 and *US v. Bin Laden*, 92 F. Supp (2d) 189 (2000).

universal jurisdiction where there has been no other jurisdictional link, with the exception of Belgium, as evident in the instance before the Court.⁷²

Moreover, as the 1993 Law of Belgium currently stands, it excludes prosecution of Heads of states, Heads of governments, Ministers of Foreign Affairs and other persons enjoying international immunities during the period of incumbency.⁷³

For Judge *ad hoc* Van den Wyngaert, in her Dissenting Opinion in the *Arrest Warrant* Case, international law not only permits but also encourages universal jurisdiction for war crimes and crimes against humanity.⁷⁴ This purported idea of universal jurisdiction for war crimes and crimes against humanity has also been argued to extend to Heads of states.⁷⁵ However, this is doubtful because there is no evidence of established state practice of universal jurisdiction over international crimes. President Guillaume, in the *Arrest Warrant* case, found support with Lord Slynn of Hadley in *Pinochet (No.2)* that there is no universality of jurisdiction with regard to international crimes and he further asserted that only piracy is subject, truly, to universal jurisdiction in international law.⁷⁶

⁷² *Supra* 1, Joint Separate Opinion, Paragraph 44-45

⁷³ In the case against Ariel Sharon of Israel, the Belgian Court of Cassation held that though the Belgian legislation on universal jurisdiction of 1993 provides against the official status of an accused person, the legislation if interpreted as setting aside immunities would be in contravention of customary international law on immunity; see *H.S.A., et al v. S.A., et al*, (Decision Related to the Indictment of Ariel Sharon, Amos Yaron & others), (2003) 42 *I.L.M.* 596, p.600

⁷⁴ *Supra* 1, Dissenting Opinion, Paragraphs 59 and 67

⁷⁵ Andrea Bianchi, 'Serious Violations of Human Rights and Foreign States' Accountability before Municipal Courts', in Lal Chand Vohrah, Fausto Pocar, *et al* (edited), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, (The Hague: Kluwer Law International, 2003), p.173

⁷⁶ *Supra* 1, Separate Opinion of President Guillame, Paragraph 12

Perhaps more than any other state, Spain has been in the forefront of claims of universal jurisdiction. Under Article 23 (4) of the Ley Orgánica del Poder Judicial (Judicial Power Organization Act), Spain has jurisdiction over crimes committed by Spanish or foreign citizens outside Spain, including genocide, terrorism and other crimes in international treaties that Spain is party to.⁷⁷ In the *Spanish Guatemalan Genocide* case, complaints for gross human rights violations were lodged, before the *Audencia Nacional*, against several Guatemalan officials, including former Heads of state Gral Efraín Ríos Montt, Oscar Humberto Mejías Victores and Fernando Romeo Lucas García for acts of terrorism, genocide and torture against the Guatemalan Mayan indigenous people and their supporters. The investigating judge accepted the complaint.

Upon appeal, the Spanish Supreme Court held by a very slim majority (8:7), in 2003, that Spanish national interests (a jurisdictional link) had to be affected and solely with regard to the crime of torture for Spanish courts to exercise jurisdiction in the matter.⁷⁸ The Court found that the exercise of territorial and international criminal jurisdiction under Article 6 of the Genocide Convention 1948 was not exclusive and that any other criminal jurisdiction exercisable is subsidiary to the provision of Article VI.⁷⁹ The Majority in noting that the Genocide Convention does not provide for universal

⁷⁷ Ley Orgánica 6/1985, B.O.E. 1985, 157; See Luis Benavides, 'Introductory Note to the Supreme Court of Spain: Judgment on the Guatemalan Genocide Case', (2003) 42 *I.L.M.* 683

⁷⁸ Decision of the Spanish Supreme Court Concerning the Guatemalan Genocide (2003) 42 *I.L.M.* 686

⁷⁹ *Ibid*, p.695-698

jurisdiction argued that neither was universal jurisdiction prohibited by the Convention.⁸⁰

To the extent that universal jurisdiction over the crime of genocide under general international law cannot be said to exist under treaty law (a fact which even the Spanish Supreme Court did not deny) or customary international law, it would be wrong to read it, however impliedly, into the Genocide Convention. To hold otherwise amounts to judicial law-making in international law and is not recognised as a source of international under Article 38 of the Statute of the ICJ.⁸¹

The more cautious approach of the Majority of the Spanish Supreme Court is preferable to that of the Minority. This is because the Majority, at least, took into consideration the ICJ decision in the *Arrest Warrant* case.⁸²

Article VIII of the Genocide Convention provides that a party may call upon the competent organs of the UN to take such action under its Charter as may be appropriate for the prevention and suppression of the genocidal acts. This, in no way, provides for the exercise of universal jurisdiction by states. Therefore, it was wrong of the Majority to argue that Article VIII rendered the jurisdiction of Spanish courts effective.⁸³ Furthermore, the misinterpretation of the House of Lords decision in *Pinochet (No.3)* by the Minority judges to the effect that under international law,

⁸⁰ *Ibid*, p.697

⁸¹ 59 *Stat.* 1055

⁸² Naomi Roht-Arriaza, 'Guatemalan Genocide Case: Judgment No. STC 237/2005', (2006) 100 *AJIL* 207, p.209.

⁸³ *Supra* 78, p.696

crimes of *jus cogens*, including genocide, are punishable by any state flaws the judgment. The *Pinochet* decision, as earlier stated, was based on the Convention against Torture, which the UK and Chile were party to and had contractually agreed to the exercise of jurisdiction under the Convention. The effect of the designation of a norm as *jus cogens*, does not mean that it can confer a court with jurisdiction which it does not have under international law.

Upon further appeal, in 2005, the Spanish Constitutional Court rejected the subsidiarity requirement of the Supreme Court and upturned the decision of the Supreme Court holding that Spain could investigate crimes of genocide, torture, murder and illegal imprisonment committed in Guatemala between 1978 and 1986 and that the principle of universal jurisdiction was not dependent on the existence, or otherwise, of national interests.⁸⁴ The Constitutional Court was of the view that,

“The Convention’s silence on alternative jurisdictions beyond territorial and international tribunals cannot be read as an implicit limitation. Rather, Article VI of the Convention simply establishes the minimal obligations on states. The obligations to avoid impunity found in customary international law are incompatible with such a limited reading of the Convention and would, perversely, place more stringent limits on the actions of state parties to the Convention than those that applied to non-parties, which could rely on a universal jurisdiction founded in customary international law.”⁸⁵

To the extent that the Constitutional Court adopted the position of the Minority of the Spanish Supreme Court, it is difficult to agree with the Court, for the reasons given

⁸⁴ Judgment No. STC 237/2005 (Tribunal Constitucional September 26, 2005), translated in Roht-Arriaza, *op.cit*

⁸⁵ *Ibid*, p.210

above. The Court's argument, that the fact that the Genocide Convention makes no mention of jurisdictions other than territorial or international tribunals does not mean an 'implicit limitation' on jurisdiction, is flawed. After all, neither does the silence mean an 'implicit' authorization of other jurisdiction under Article VI of the Convention. While the sentiment behind the decision to check impunity is laudable, it is a misinterpretation of the law to assume that not exercising universal jurisdiction under said Article VI would be incompatible with the obligations of states under customary international law. Although customary international law, like treaty law, prohibits the crime of genocide, customary international law does not impose an obligation on states to exercise universal jurisdiction for genocide. To this end, the issue of limits under the Convention for parties and non-parties goes to no issue.

Asserting universal jurisdiction, Spain convicted and sentenced an Argentine naval officer, Adolfo Scilingo to 640 years imprisonment for crimes of humanity.⁸⁶ The action of Spain is not reflective of international law, *lex lata*; the practice of Spain is indicative, perhaps, of where international law might be headed.

Having considered both treaty and customary international law on the matter, it is submitted that there is no valid authority for the claim that universal jurisdiction can be exercised where Heads of states violate human rights.⁸⁷

⁸⁶ Scilingo, No.16/2005 (Audencia Nacional (Penal Chamber, 3d section) 19 April 2005) cited in Roht-Arriaza, *ibid.*, p.213. See Alicia Gil Gil, 'The Flaws of the Scilingo Judgment', (2005) 3 *JICJ* 1082-1091

⁸⁷ See Bianchi, *supra* 75, for a contrary view.

2.4.1.1 THE PROBLEM WITH UNIVERSAL JURISDICTION

On the face of it, universal jurisdiction may seem as the panacea for the horrors of international crimes by ensuring that the human rights violators are brought to justice. However, the potential for abuse of universal jurisdiction is not to be taken for granted and there are practical problems with its acceptance. These include firstly, the consequence of judicial chaos that would arise due to a proliferation of litigation.⁸⁸

Secondly, there is also the adverse impact on legal fact-finding by national courts, especially in view of the fact that the courts of the states seeking to exercise universal jurisdiction would not have any direct link with the crime in issue. The litigation process is an expensive one and the increased costs for individual litigants as well as taxpayers must also be considered.

Thirdly, there is the problem of securing the presence of witnesses from outside the jurisdiction of the state asserting universal jurisdiction so as to ensure a fair trial. Fourthly, the fact that states would use universal jurisdiction as an excuse to pursue citizens of other countries that they do not share the same ideals (socio-political, cultural, economic or religious) would have serious implications for the fairness of the trial of accused persons. Securing protection of rights of victims of international crimes is not to be achieved at the expense of the fundamental rights of accused persons. It would be an absurd, and indeed a dangerous, system of international

⁸⁸ For a contrary view, see Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong', (2008) 18 *EJIL* 955, p.956-957. However, the increased litigation against Heads of states evident in the aftermath of the Belgian law on universal jurisdiction supports the view in this thesis.

accountability that required this. Indeed this would be tantamount to importing the logical fallacy that ‘two wrongs make a right’ into international law.

Inevitably, these concerns will adversely affect the legitimacy of any decision based on universal jurisdiction. The establishment of a culture of accountability cannot be founded upon illegitimate decisions and processes. It is, in part, due to these reasons of practicality that universal jurisdiction is not supported.

Fifthly, if it is accepted that universal jurisdiction may be exercised over Heads of states and state officials, in accordance with Belgium’s initial purport, this can result in the harassment of officials. This would, no doubt, adversely impact on the effective performance of the official functions of such persons. This harassment and interference could have international repercussions by embarrassing a state in its conduct of foreign relations which could in turn cause tensions between states. There is the further consequence of the ultimate impact on international peace and security, the maintenance of which is the primary reason for the establishment of the present international order.⁸⁹

Sixthly, there is the added problem of forum-shopping where victims of international crimes as well as activists would seek to bring complaints against certain state officials hoping that a state will be able to institute criminal proceedings against these officials.

⁸⁹ See Preamble of the UN Charter

Additionally, because it is inherent in the idea of universality that there are few or no limits, the scope for abuse of universal jurisdiction would be virtually limitless. States would capitalise on the concept to further their political agendas.⁹⁰ Interestingly, the two countries that have asserted universal jurisdiction over international crimes, namely Belgium and Spain asserted jurisdiction over nationals of their former colonial territories, i.e. Belgium over the Democratic Republic of Congo and Rwanda; and Spain over Argentina. Belgium dropped charges against US officials in the wake of the amendment of its 1993 Law in 2003 but preserved the cases involving Chad and Rwanda.⁹¹ The claims by Belgium and Spain seem imperialist and suggest a re-assertion of colonial powers by Belgium and Spain. Likewise, the power and economic differential between developed and developing states as well as the fact that the assertions of this ground for jurisdiction have emanated from developed states over, predominantly, nationals of developing states is a mockery of the de-colonization process. This strengthens the legal argument about the extensive potential of the universal jurisdiction for abuse.

The concept of universal jurisdiction is an inadequate tool for the reconciliation of the interests of a system of human rights and a system of immunities. This is because even if accepted that universal jurisdiction is an established ground for the exercise of jurisdiction like territoriality or nationality and that universal jurisdiction is free from

⁹⁰ A weakness in this line of argument, like any based on the likelihood of abuse, is that the likelihood of abuse of a concept cannot negate the existence of the concept. However, see M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', (2001-2002) 42 *Virginia Journal of International Law* 81, p.82

⁹¹ The case against George Bush of US involved immunity *ratione personae* while that of Chad was immunity *ratione materiae*; however the issue is one of universal jurisdiction and not the type of immunity that could be claimed in the cases.

problems, the concept of immunity operates to exclude the jurisdiction that a state would ordinarily possess. Irrespective of its type, i.e. territoriality or nationality or universality, “jurisdiction does not imply an absence of immunity, while absence of immunity does not imply jurisdiction”.⁹²

2.4.2 THE *JUS COGENS* APPROACH

The concept of *jus cogens* is reflected in the Law of Treaties as an internationally accepted norm which cannot be derogated from and which can only be modified by a subsequent norm of the same character.⁹³ Sir Gerald Fitzmaurice describes *jus cogens* as absolute obligations “which operate in an imperative manner in virtually all circumstances...The obligation is, for each state, an absolute obligation of law not dependent on its observance by others.”⁹⁴

The class of norms that fall within *jus cogens* is not without controversy. However, the concept of *jus cogens* is accepted as applying to the use of force, the law of state responsibility, the principle of non-discrimination based on racial grounds, the principle of self-determination, grave violations of human rights amounting to

⁹² *Arrest Warrant Case, supra* 1, Paragraph 59

⁹³ 1155 *U.N.T.S.* 331, Article 53. See also the Article 53 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, (1986) 25 *I.L.M.* 543.

⁹⁴ ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’, (1957-II) 92 *RdC*, p.125

international crimes, namely slave trade, genocide, crimes against humanity and torture.⁹⁵

The inclusion of the prohibition against torture, crimes against humanity, war crimes and genocide into the spectrum of *jus cogens* as peremptory norms of international law is an attempt to infuse some sort of normative hierarchy into the field of public international law. As such, the category of rules within *jus cogens* have a ‘higher normativity’ and are different from other international legal rules.⁹⁶

A consequence of the designation of a norm as *jus cogens* is evident in the nature of the obligations that would arise from it. It is pertinent to consider whether the obligations inherent in a norm are to be limited, *inter partes*, to only the parties to an agreement?

It is a general rule of international law, and contained in the Law of Treaties, that an agreement or a treaty cannot create obligations or give rights to third parties without

⁹⁵ Ian Brownlie, *Principles of Public International Law*, 7th edition, (Oxford: OUP, 2008), p.511; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US) (1986) *I.C.J. Reports* 392; Gennady M. Danilenko, ‘International *Jus Cogens*: Issues of Law Making’, (1991) 2 *EJIL* 42; *Prosecutor v. Furundzija*, Case No. IT-95-17/I-T, (1999) 38 *I.L.M.* 317; Antonio Cassese, *Human Rights in a Changing World*, (Great Britain: Polity Press, 1990), p.79; M. Cherif Bassiouni, ‘The Need for International Accountability’ in Bassiouni (edited), *International Criminal Law*, 2nd edition, Volume III: Enforcement, (New York: Transnational Publishers, 1999) p.10; Louis Henkin, *The Age of Rights*, (New York: Columbia University Press, 1990) p.18; Richard B. Lillich, ‘Global Protection of Human Rights’ in Theodor Meron (edited), *Human Rights in International Law and Policy Issues*, (Oxford: Clarendon Press, 1984), p.127

⁹⁶ Oscar Schachter, ‘Entangled Treaty and Custom’, in Yoram Dinstein, (edited), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, (The Netherlands: Martinus Nijhoff Publishers, 1989), p.717, p.734

their consent.⁹⁷ Only the parties to whom an international obligation is due may bring a claim or institute proceedings with regard to breaches of the obligation.⁹⁸

However, the consequence of the designation of a *jus cogens* status to a norm of international law is two-fold. Firstly, the norms become universal in character and secondly, the norms become binding on states even in the absence of any conventional obligation.⁹⁹ This is because the practice of confining obligations to only the parties to an agreement goes against the very essence of the peremptory nature of the norm, the essence of which is the protection of the *ordre public*, i.e. the fundamental values of the international order.¹⁰⁰ The international order is not limited to one state or a few states but comprises of the generality of states and the obligations arising from a *jus cogens* designation are to be extended to all states.

The issue of the pervasiveness of certain obligations arose before the ICJ in the *Barcelona Traction Light and Power Co. Ltd* case (Belgium v. Spain), where the Court stated that,

“an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising *vis-à-vis* another state...By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal

⁹⁷ *Pacta tertiū nec nocent nec prosunt* principle

⁹⁸ Advisory Opinion of the ICJ in the *Reparations for Injuries Suffered in the Service of the United Nations*, (1949) *I.C.J. Reports* 174; Nina H.B. Jørgensen, *The Responsibility of State for International Crimes*, (Oxford: University Press, 2000) p.93

⁹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 11 July 1996- Preliminary Objections, (1996) *I.C.J. Reports* 4, Paragraph 31

¹⁰⁰ Joint Dissenting Opinion, *Al-Adsani v. UK*, *supra* 2, Paragraphs O-III2-3

interest in their protection; they are obligations *erga omnes*.”¹⁰¹

It is a necessary consequence of the designation of a norm as *jus cogens* that it implies pervasive obligations *erga omnes*.¹⁰² As a result, it has been argued in some quarters, notably by Bassiouni, that human rights which have attained *jus cogens* have attendant *obligatio erga omnes* and therefore prevail over other rules of international law, whether customary or treaty because by virtue of their peremptory nature they are higher norms.¹⁰³ Therefore, legal obligations arising from the *jus cogens* nature of a norm and the *erga omnes* nature of these legal obligations must include the non-recognition of immunities of states and Heads of states. For Bassiouni, there are implications of universal jurisdiction arising as a result and this jurisdiction is mandatory because the implications are “those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law”.¹⁰⁴

On the face of the matter, the concepts of *jus cogens*, *obligatio erga omnes* and universal jurisdiction seem similar. However it would be wrong to treat the concepts

¹⁰¹ (1970) *I.C.J. Reports* 3, Paragraph 33; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, (2004) *I.C.J. Reports* 136, Paragraphs 155 and 159. See also André de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the implementation and Enforcement of the International Responsibility of State*, (The Hague: Kluwer Law International, 1996); Bassiouni, *supra* 242; Giorgio Gaja, ‘Obligations *Erga Omnes*, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts’ in Joseph Weiler, Antonio Cassese and Marina Spinedi (eds.), *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, (Berlin: Walter de Gruyter, 1989) p.151

¹⁰² *Prosecutor v. Furundzija*, *supra* 95. See also *A v. Secretary of State for the Home Department (No.2)*, [2005] 2 A.C. 68

¹⁰³ Bassiouni, *supra* 95, p.11-13; Bassiouni, *supra* 48, p.17. On *obligatio erga omnes*, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Oxford: Clarendon Press, 1989) p.192

¹⁰⁴ M. Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, (1996) 59 *Law and Contemporary Problems*, p.65-66; Bartram S. Brown, ‘The Evolving Concept of Universal Jurisdiction’, (2000-2001) 35 *New England Law Review* 383, p.391

as necessitating the same consequence.¹⁰⁵ Theoretically, it may be attractive to argue that there are inherent obligations which are *erga omnes* in *jus cogens* norms and that the violations of the norms incur universal jurisdiction of all states to protect the norms and enforce the obligations. Attractive as the argument may seem, it is circular and lacks conviction when tested out in practice.

The concepts of *jus cogens* and *obligatio erga omnes* face definitional problems. Though there is no requirement for precise definition of legal concepts, there is the problem that the meaning to be attached to *obligatio erga omnes* is not clear. Indeed, the prohibition against torture is *jus cogens* and obligations arising under the Convention against Torture are *erga omnes*. However such obligations have been held not to include the duty on state parties to give civil remedies to victims under Article 14 of the Convention where torture is alleged.¹⁰⁶ Parties to the Convention may have consented to an obligation of *aut dedere, aut judicare*, however the enforcement of this obligation is not without its problems. A state party may lack the political will to exercise jurisdiction over a matter and also lack the legal bases to extradite because for extradition to take place, there usually has to be an extradition treaty in existence between the parties involved.

Article 5 of the Convention against Torture provides for the exercise of jurisdiction by states, but its provisions cannot be taken to imply a duty to exercise jurisdiction. This

¹⁰⁵ Bassiouni contends, *supra* 95, p.11-14, that the consequence of *jus cogens* implies universal jurisdiction over the crime irrespective of where and by whom committed while the consequence of the attendant *erga omnes* obligation is to place states under a duty not to grant impunity to violators

¹⁰⁶ *Bouzari v. Islamic Republic of Iran*, (Ontario Superior Court of Justice Decision of 1 May 2002) 124 *ILR* 427; (Ontario Court of Appeal Decision of 30 June 2004, dismissing the appeal) 128 *ILR* 586; *Jones v. Saudi Arabia*, *supra* 3

position which finds favour with state practice is contrary to the position of the Committee against Torture which was established under Article 17 of the Convention against Torture. The position of the Committee is that states are to adopt necessary measures to fulfil the obligations under the Convention including granting civil remedies to victims.¹⁰⁷ In the case of *Suleymane Guengueng et al*, which involved torture victims bringing a claim against Senegal with regard to Hissène Habrè, the complainants claimed that Senegal was in breach of its obligations under Articles 5 and 7 of the Convention against Torture and also claimed for compensation by virtue of Article 14 of the Convention.¹⁰⁸ The Committee decided that Senegal had breached its obligations under Articles 5 and 7 of the Convention.

A factor that diminishes the effect of the position of the Committee against Torture especially with regard to its decision against Senegal is the fact that the Committee is a political body that was established to monitor implementation of the Convention and not an adjudicatory body. Its findings and decisions can only have political and not legal implications. Moreover, the powers of the Committee are merely exhortatory, as the Convention against Torture in Article 19 provides for the powers of the Committee to include making comments and reports. More importantly, there are decisions of courts, namely *Bouzari v. Iran*,¹⁰⁹ and *Jones v. Saudi Arabia*,¹¹⁰ supporting the view that Article 14 of the Convention against Torture does not impose an obligation on

¹⁰⁷ See the Conclusion and Recommendation of the Committee Against Torture: Canada 07/07/2005 during its 34th Session, 2-20 May 2005 (CAT/C/CR/34/CAN), Paragraph 3.12

¹⁰⁸ Decisions of the Committee Against Torture under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 36th Session, 1-19 May 2006, Communication No. 181/2001: Senegal. 19/05/2006 (CAT/C/36/D/181/2001)

¹⁰⁹ *Supra* 106

¹¹⁰ *Supra* 3

parties to grant a civil remedy. Lord Bingham of Cornhill in his judgment in *Jones v. Saudi Arabia* doubted the authoritativeness of the Committee and stated with regard to the recommendation of the Committee concerning Canada in 2005 that,

“whatever its [the Committee] value in influencing the trend of international thinking, the legal authority of this recommendation is slight”.¹¹¹

Having said this, the decision of the Committee under its individual complaint mechanism (Article 22 of the Convention), a mechanism that was accepted by Senegal, is not to be considered to be irrelevant. It would seem that the decision is indicative of a new trend of accountability to ensure that parties to the Convention against Torture do not grant safe havens to accused persons, including Heads of states.

Coming back to the issue of the purported relatedness of the *jus cogens*, *obligatio erga omnes* and universal jurisdiction, the process of assumption of jurisdiction over violations of norms of *jus cogens* is not a mechanical one that triggers universal jurisdiction, as was the view of the Minority of the Spanish Supreme Court in the *Guatemalan Genocide* case.¹¹² The fact that treaties which seek to protect *jus cogens* norms through the proscription of certain acts do not provide for ‘true’ universal jurisdiction by state parties as well as states not party to the treaties makes the issue of universal jurisdiction even more debatable.¹¹³ The *erga omnes* nature of the obligations of human rights of *jus cogens* status only extends to the recognition and

¹¹¹ *Ibid.*, Paragraph 23

¹¹² *Supra* 78

¹¹³ Hazel Fox, *The Law of State Immunity*, (Oxford : OUP, 2002), p.526; Hazel Fox, *The Law of State Immunity*, 2nd edition, (Oxford : OUP, 2008), p.157

respect of such a norm. It does not extend to the extraterritorial enforcement of such a norm in the absence of any jurisdictional basis.

Moreover, the *erga omnes* nature of a norm is separate from the issue of jurisdiction. This position is supported by the ICJ decision in the *East Timor* case (*Portugal v. Australia*) that,

“...the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a state when its judgment would imply an evaluation of the lawfulness of the conduct of another state which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.”¹¹⁴

The issue of universal jurisdiction has been sufficiently dealt with in the previous section, suffice it to say that there is lack of judicial authority as well as the benefit of state practice to support claims regarding universal jurisdiction over human rights. Therefore regarding the concepts of *jus cogens*, *obligatio erga omnes* and universal jurisdiction, there is a variance between the theoretical statements of commentators and what states do in practice; a practice evident in the jurisprudence of courts.

¹¹⁴ (1995) *I.C.J. Reports* 90, Paragraph 29. The Court re-affirmed itself in *Armed Activities in the Territory of the Congo (New Application:2002) (The Democratic Republic of Congo v. Rwanda)*, Judgment of 3 February 2006 (Jurisdiction and Admissibility), (2006) *I.C.J. Reports* 6, Paragraph 64

2.4.2.1 THE TRUMPING ARGUMENT

The trumping argument is principally developed by legal scholars and there are various expressions of the argument. More articulately expressed is the contention of Bassiouni that by the designation of *jus cogens* status to certain human rights, such rights are to prevail over other norms of international law and obligations arising from the rights as peremptory norms include the non-recognition of immunities including those of Heads of states and the duty not to grant impunity to violators.¹¹⁵ Essentially the thrust of the argument is that certain human rights considerations are to prevail over, i.e. ‘trump’ immunities because the rights form part of *jus cogens* while the immunities are merely part of customary international law.

The trumping argument has formed the basis of the decisions of some national courts. In *Ferrini v. Federal Republic of Germany* the plaintiff brought a civil action in tort against Germany for his capture from Italy and subsequent deportation and forced labour in Germany during World War II.¹¹⁶ The court of first instance held that it had no jurisdiction because of the immunity of states for acts done *jure imperii*.¹¹⁷ This decision was affirmed by the Court of Appeal. Upon further appeal, the *Corte di Cassazione* (Court of Cassation) considered that,

¹¹⁵ Bassiouni, *supra* 95, p.11-14; *supra* 104, p.63. See also the Dissenting Opinion of Judge Al-Khasawneh in the *Arrest Warrant* case, *supra* 1, Paragraph 7; Katherine R. Thomas and Joan Small, ‘Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture’ (2003) 50 *Netherlands International Law Review* 1, p.4

¹¹⁶ *Supra* 4; Pasquale de Sena and Francesca de Vittor, ‘State Immunity and Human Rights: the Italian Supreme Court Decision on the *Ferrini* Case’ (2005) 16 *EJIL* 89

¹¹⁷ *Tribunale di Arezzo*, Decision No. 1403/98 of 3 November 2000 (unpublished), cited in de Sena and de Vittor, *ibid.*, p.93

“the crucial issue was whether the foreign state was entitled to immunity when its conduct, due to its “extreme gravity”, amounted under customary international law to an international crime, defined as a violation of international law that jeopardizes “universal values that transcend the interests of individual national communities”.¹¹⁸

The crimes involved in the *Ferrini* case were deportation and forced labour. The Court recognized that these crimes as laid down in the 1907 Hague Regulations are part of customary international law.¹¹⁹ However, it is difficult to agree with the reasoning of the Court because the fact that the prohibition of an act in violation of human rights is part of customary international law is not enough to elevate the prohibition to *jus cogens*. It is not, in anyway, accepted that the prohibition of deportation and forced labour are *jus cogens* norms. There is no accepted category of acts amounting to *jus cogens* and this is part of the problem with the reliance on the normative hierarchy argument.¹²⁰ Bianchi, a leading scholar of the ‘trumping’ school of thought concedes the weakness of the reasoning that deportation and forced labour are international crimes within the realm of *jus cogens*.¹²¹ As such, the view of the Court that international crimes attract universal jurisdiction is misplaced.¹²²

In December 2008, Germany instituted proceedings against Italy before the ICJ, following the *Ferrini* decision.¹²³ Germany alleges that as a result of its judicial

¹¹⁸ Bianchi, *supra* 4, p.243

¹¹⁹ *Ibid.*

¹²⁰ Caplan, Lee Caplan, ‘State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory’ (2003) 97 *AJIL* 741, p.772.

¹²¹ *Op.cit.*, p.245

¹²² See *Arrest Warrant* case, *supra* 1, Joint Separate Opinion of Higgins *et al*; Bianchi, *supra* 4, p.244

¹²³ ICJ Press Release No- 2008/44 of 23 December 2008

practice, Italy has failed in its international obligation to respect the immunities of Germany and that the international responsibility of Italy is engaged.¹²⁴

In an earlier decision, the Court of first instance of Leivadia in *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre case)* found that the acts of the Nazi which were in violation of Article 46 of the Hague Regulations, regarding the right to family honour, life, property and religious convictions which are peremptory international norms, could not be acts *jure imperii*.¹²⁵ Though the Court categorized the rights to family honour, life, property and religious convictions as *jus cogens* norms, the decision to award default judgment against Germany was however based on waiver of immunity.¹²⁶ Germany later petitioned the Greek Supreme Court (Areois Pagos) which affirmed the lower court on the *jus cogens* nature of the rights in issue and the tacit waiver of immunity.¹²⁷

The assertion of the Greek courts that the rights to family honour, life, property and religious convictions are of a peremptory nature is not persuasive. Not only does such

¹²⁴ *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter Claim Order of 6 July 2010. The case is yet to be decided on its merits.

¹²⁵ Originally in (2001) 49 *Nomiko Vima* 212; (2003) 42 *I.L.M.* 1030; see case note by Ilias Bantekas, 'Prefecture of Voiotia v. Federal Republic of Germany Case No. 137/1997', (1998) 92 *AJIL* 765, p.766; Maria Gavouneli and Ilias Bantekas, 'Prefecture of Voiotia v. Federal Republic of Germany, Case No.11/2000, Areois Pagos (Hellenic Supreme Court), 4 May 2000', (2001) 95 *AJIL* 198; The case was later brought before the German Federal Court of Justice because execution of the decision against the assets of the Federal Republic of Germany in Greece was not possible under local law. The Court held that the Greek court did not have jurisdiction because despite the move to restrict the applicability of immunity when peremptory norms of international law are violated, the prevalence of opinion is to the effect that such had not gained ground in international law. See Sabine Pittrof, 'Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the *Distomo* Case', (2004) 5 *German Law Journal* 15, p.18.

¹²⁶ Bantekas, *ibid.* The implied waiver approach will be dealt with later in the chapter.

¹²⁷ Gavouneli and Bantekas, *op.cit.*, p.200

an assertion lack any supporting evidence but shows the inherent ridiculousness of the trumping argument if taken to extreme lengths. The problem of limit of categorization of what may amount to a peremptory norm arises. Does it include socio-economic rights?

The *Ferrini* and *Prefecture of Voiotia* stand out in having held that norms of *jus cogens* prevail over the immunity of states, though for different reasons. As will be seen later in the chapter, the general practice of states has been to uphold the immunities of states and state officials, including Heads of states, even where norms of *jus cogens* have been violated. However, the cases upholding immunity have approached the different imperatives of a system of human rights and a system of immunities from the perspective of whether there is a tort exception to immunity legislations.¹²⁸

2.4.2.2 THE PROBLEM WITH THE TRUMPING ARGUMENT

The concept of sovereignty in international law is not devoid of value. As the foundation and framework of the international system, sovereignty essentially founds all international law concepts, principles and regimes; all of which must be approached as having inherent values and interests which they protect. While a system of human rights is founded on the sovereignty of states and exists to protect the values it seeks to promote; likewise parity of reasoning dictates that a system of immunities of states and state officials exists to protect the values inherent within that system. A

¹²⁸ The tort exception to state immunity legislations approach will be considered later in the chapter.

flaw in the ‘normative hierarchy theory’ approach of the trumping argument is that it pays little or no detail to the nature and functionality of immunities and treats the system of immunities as value-free.¹²⁹

Other problems of the trumping argument go the issues of the scope of the concept of *jus cogens* and the effect of violations of *jus cogens* norms. Firstly, the scope of the concept of *jus cogens* is for the most part uncertain and undefined. Brownlie argues that the issue of the category of norms falling under the *jus cogens* is more settled than the content of *jus cogens*, *per se*.¹³⁰ Though more prevalently applied to human rights, the concept of *jus cogens* is not restricted to only human rights. Its origin in the Law of Treaties contradicts such a claim. While certain norms of international law, like the prohibition against the use of force, are not doubted as being part of *jus cogens*, reference may be made to the system of human rights to discern which rights may be categorized as *jus cogens*, and this includes the prohibition against slavery, genocide and torture.

Apart from the prohibition against slavery, genocide and torture the issue of rights which may be categorised as *jus cogens* is not settled. The Supreme Court of Greece in the *Prefecture* case included the provisions of Article 46 of the Hague Regulations on rights to family honour, the lives of persons, private property and religious convictions and practice as peremptory norms of international law. Likewise, the scope of *jus cogens* has been argued to extend to other fundamental principles of

¹²⁹ Caplan, *supra* 120, p.744

¹³⁰ Brownlie, *supra* 95, p. 512

international law, even the principles of *pacta sunt servanda* and freedom of the seas.¹³¹

The apparent lack of certainty as to the scope of *jus cogens* may be attributable to the decentralized nature of the international system. However it is the potential of this uncertainty to invalidate the essence of *jus cogens*, by creating difficulty whereby within the normative hierarchy, there exists another hierarchy among peremptory norms, that contributes in undermining the trumping argument. This will be illustrated by the argument of a commentator that immunity being a fundamental principle of international law is a norm of *jus cogens* and as such is to prevail over human rights of a peremptory nature because the recognition of immunities in international law predates that of human rights.¹³² The commentator further argues his case based on the implicit wording of Article 53 VCLT which will have the effect that any human rights treaty which conflicts with the existing *jus cogens* rule on immunities will be void.¹³³

Apart from the usefulness of the argument above in highlighting the problems inherent in the uncertainty as to the scope of *jus cogens*, it is very difficult to agree with Black-Branch. This is not just because it is doubted whether the importation of this normative hierarchy is obtainable within the realm of general international law of a procedural nature. For a rule to gain the status of *jus cogens*, such a rule must be of norm-creating character, i.e. it must be substantive in nature. Immunities are not

¹³¹ Caplan, *op.cit.*, p.772; and A. Mark Weisburd, 'The Emptiness of the Concept of *Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina', (1995-1996) 17 *MJIL* 1, p.21

¹³² Jonathan Black-Branch, 'Sovereign Immunity under International Law: The Case of Pinochet' in Diana Woodhouse, (ed.), *The Pinochet Case* (Oxford: Hart Publishing, 2000) p.101

¹³³ *Ibid.*

substantive in nature but procedural because though not a defence in itself, they operate as a bar to the exercise of jurisdiction. They, therefore, cannot be part of *jus cogens*, rules which do not permit derogation from its principles. It is implicit from the definition of *jus cogens* as norms from which there can be no derogation that immunities are excluded because of the right of states to waive immunity.¹³⁴ Furthermore, no legal authority exists for the contention that immunities is of peremptory status.

The second issue regarding the problem of the trumping argument is the issue of the effect of a designation of a norm as *jus cogens*. It is accepted that obligations *erga omnes* are concomitant of the designation of a norm as *jus cogens*, meaning that states are obligated to recognize such norms as being peremptory. States are also under an obligation not to violate such norms. Having said this however, it is important to bear in mind that the issues of recognition of a norm as a peremptory one and the jurisdiction to enforce the norm are separate. The recognition of the substantive prohibition of an act which is a norm of *jus cogens* involves obligations not to violate the norm. However, states are not obligated to secure the enforcement of a violation of a norm of *jus cogens*.¹³⁵

In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ in reiterating its earlier statement in the

¹³⁴ Andrew Clapham, 'National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice' in Mark Lattimer and Philippe Sands, edited, *Justice for Crimes against Humanity*, (Portland, Oregon: Hart Publishing, 2003), p.320-321, note 59

¹³⁵ Fox, *supra* 113, p.525

Barcelona Traction case on the effect of *erga omnes* obligations stated that as a result of the *erga omnes* nature of the right of self-determination that states are under an obligation not to recognize the illegal construction of the wall and are also obligated not to assist in maintaining the situation occasioned by the construction.¹³⁶ The Opinion of the Court only recognizes the construction of the wall as illegal and a duty on states not to further the illegality of the act. There is no obligation on states to enforce the self-determination of the Palestinians.

As earlier stated, the ICJ in the *East Timor* case while recognizing the *erga omnes* character of the right of peoples to self-determination found the *erga omnes* character of a norm to be a separate issue from the rule of consent to jurisdiction.¹³⁷

Thirdly, the consequence for the violation of *jus cogens* is codified only with regard to the law of treaties.¹³⁸ Articles 53 and 64 VCLT provide respectively that “a treaty is void if at the time of its conclusion, it conflicts with a peremptory norm of general international law” and “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”. It may be attractive to argue that had the intention been to attach consequences to the violation of human rights which have attained the status of *jus cogens*, the codification of the effects of *jus cogens* would have been extended beyond the Law of Treaties into relevant human rights instruments. However, when faced with the fact that codification is not exhaustive of international rule-making, this argument

¹³⁶ *Supra* 101, Paragraph 155-160

¹³⁷ *Supra* 114

¹³⁸ Bianchi, *supra* 75, p.171

loses its strength. Moreover, the peremptory nature of the prohibition against genocide and torture, which do not contain any provision to that effect in their codifying instruments, have been recognized.

In essence, while states may be under obligation to respect certain rights as pertaining to *jus cogens*, this does not mean that they are under an obligation to enforce the respect of those rights, especially by exercising jurisdiction in circumstances which they are ordinarily not entitled to. Indeed in *Bouzari and Others v. The Islamic Republic of Iran*, the Canadian Superior Court of Justice, per Swinton, J, considered and agreed with the expert opinion of Professor Greenwood who disagreed with the contention that the effect of the prohibition of torture as a norm of *jus cogens* includes an obligation on states to provide a civil remedy against a foreign state for acts of torture even where such acts have not occurred within the territory of the state before whom the matter is brought.¹³⁹

If the contention is accepted that the effect of the designation of a norm as *jus cogens* includes a duty on states to provide civil remedies for the violation of such norms by asserting jurisdiction in disregard of immunities, such reasoning therefore could imply that the national legislations of various states like the US, UK and Canada on state immunity as well as international instruments like the European Convention on State Immunity and the UN Convention on the Jurisdictional Immunities of States and their Property would be in breach of *jus cogens*. This is because these legislations do not provide for an exception to immunities on grounds of violation *jus cogens* norms.

¹³⁹ *Supra* 106, Paragraph 62 and Paragraphs 73-83, respectively

Had the argument been accepted in *Bouzari v. Iran*, that states are under an obligation to provide a civil remedy where there has been a violation of the *jus cogens* norm prohibiting torture, it would be tantamount to subverting the structure of the international system by giving rise to judicial law-making in international law (by amending international instruments on international immunities) and in national law (by amending national legislations of foreign states on immunity) which is a violation of the sovereignty of states and interference in the domestic affairs of states.

While recognizing the problem that the trumping argument faces regarding the effect of violation of a *jus cogens* norm, Tomuschat has argued that although inherent in the peremptory nature of *jus cogens* rights that there are consequences for violation of the human rights involved, however the extent of the consequences outside the Law of Treaties is doubtful because,

“if a given rule is characterized as pertaining to the body of *jus cogens*, no more is said than that the international community attaches great importance to compliance with this rule”.¹⁴⁰

This view is rather extreme and a better view would be one that accepts the extension of the concept of *jus cogens* together with its effects outside the Law of Treaties into general international law, but recognizes that for *jus cogens* to override other norms, the norms involved must have the same character as the peremptory norms and a substantive conflict between the norms must exist. Articles 53 and 64 VCLT make it

¹⁴⁰ Christian Tomuschat, *Human Rights: Between Idealism and Realism*, (Oxford: OUP, 2003), p.315-316

clear that their provisions apply to “norms having the same character”, and so this would mean that to prevail over immunities the *jus cogens* nature of the right will extend beyond its substantive nature into a procedural nature or contain “procedural guarantees” to ensure its enforcement.¹⁴¹ Or in the converse, immunities would extend beyond being a procedural rule into a substantive defence. Either way, this does not form part of international law.

Fourthly, for a rule of international law to be in conflict with a norm of *jus cogens* a real conflict between the rule and the *jus cogens* norm must be shown to exist, and not just assumed. The most important question to be asked, therefore, is whether human rights of *jus cogens* status really conflict with immunities. This is perhaps the biggest problem the trumping argument faces. Having stated earlier that the issues of the recognition of a norm of *jus cogens* and the enforcement of the norm remain separate and that only substantive norms can be *jus cogens*, it is important to also mention that the issue of immunity and liability are different. Immunity does not mean absence of liability but only absence of jurisdiction. As the ICJ in the *Arrest Warrant* case noted, immunity does not mean impunity.¹⁴²

The lack of a substantive character of immunity deprives it of the ability to attain *jus cogens* status. Therefore, the character of rights which are *jus cogens* and the character of immunities are separate.

¹⁴¹ Bröhmer, *supra* 10, p.195

¹⁴² *Supra* 1, Paragraph 60

The issue of conflict between human rights of *jus cogens* status and immunities was considered at length by the House of Lords in the case of *Jones v. Saudi Arabia*.¹⁴³ Mr Jones in a civil action made claims against Ministry of the Interior of The Kingdom of Saudi Arabia and against one of the officials of the Kingdom alleging acts of torture while in official custody. A second claim by three others was made alleging they were victims of the systemic torture by Saudi officials. Saudi Arabia in February 2003 applied to have the service of the claim to it by Jones set aside on the grounds that Saudi Arabia, its servants and agents are entitled to immunity under Section 1 of the SIA 1978, and that the Court had no jurisdiction to entertain the claim. At first instance, the application of Saudi Arabia was allowed and the service of claims on Saudi Arabia was set aside, this was in view of the ECHR decision in *Al-Adsani v. UK*,¹⁴⁴ while permission to serve the official was refused.

Upon appeal to the Court of Appeals by Jones, the Court was faced with the issues of the immunity of Saudi Arabia in respect of the claim of Jones and the immunity of Saudi officials in respect of the claims made against the officials.¹⁴⁵ The Court of Appeal held that Saudi Arabia was entitled to immunity and dismissed the claim against it in line with the decision of the ECHR in *Al-Adsani*. Bizarrely however, the Court held that the state officials were not entitled to immunity,¹⁴⁶ contrary to the earlier position of the UK courts in *Propend Finance Property Ltd v. Sing*.¹⁴⁷

¹⁴³ *Supra* 3

¹⁴⁴ *Supra* 2

¹⁴⁵ [2004] EWCA Civ 1394, Paragraph 9

¹⁴⁶ *Ibid.*, Paragraph 31

¹⁴⁷ 111 ILR 611

Upon further appeal, the House of Lords stated that,

“To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires state to assume civil jurisdiction over other states in cases in which torture is alleged.”¹⁴⁸

The Law Lords in deciding that both Saudi Arabia and its officials were immune essentially decided that there was no conflict between *jus cogens* and immunities of state and state officials, including Heads of states. The House of Lords were also critical of the reasoning of the Minority Decision in *Al-Adsani* for simply assuming that a conflict existed between the immunities and torture as a norm of *jus cogens*.

According to Lord Hoffman,

“The *jus cogens* is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom (Saudi Arabia), is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture.”¹⁴⁹

The case of *Jones v. Saudi Arabia* having established that there is no conflict between *jus cogens* and immunities of states in civil matters, the matter then turns to the immunities of state officials in criminal matters. The ICJ in its decision in the *Arrest Warrant Case* emphasized the different natures of immunity and individual criminal responsibility. According to the Court,

“Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature,

¹⁴⁸ Judgment of Lord Hoffman, *supra* 3, Paragraph 45

¹⁴⁹ *Ibid.*, Paragraph 44

criminal responsibility is a question of substantive law.”¹⁵⁰

The effect is that where immunity applies the courts of a state simply have no jurisdiction over the matter. As argued earlier, the designation of a norm as *jus cogens* under international law, or its breach thereof cannot confer a jurisdiction which courts lack in the first place.¹⁵¹

The fundamentals of both *jus cogens* and immunities are conceptually misplaced and result in practical misapplication. Claims regarding the conflict between *jus cogens* and immunities lack substance and are chimeral. According to Fox,

“State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a *jus cogens* mandate can bite.”¹⁵²

The trumping argument has also been rejected by the Canadian Superior Court of Justice in *Bouzari v. Islamic Republic of Iran*.¹⁵³ The case involved an action against Iran for acts including torture against the plaintiff who in the alternative relied on the argument that torture being a norm of *jus cogens* prevailed over other rules of international law including the immunity to which Iran was entitled. The court found

¹⁵⁰ *Supra* 1, Paragraph 60

¹⁵¹ See *Case Concerning Armed activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (2006) *I.C.J. Reports* 6, Paragraph 64; see also *Jones v. Saudi Arabia*, *supra* 3, per Lord Bingham, Paragraph 24

¹⁵² Fox, *supra* 113, p.525, 2nd edition, p.151; see *Jones v. Saudi Arabia*, *ibid.*, Judgments of Lords Bingham and Hoffman, Paragraphs 24 and 44, respectively

¹⁵³ *Supra* 106

no evidence in state practice to the effect that state immunity does not apply where a norm of *jus cogens* has been violated and held that though torture was a norm of *jus cogens*, this did not require states to disregard the immunities of states.

In *Al-Adsani v. The Government of Kuwait*, action was brought against Kuwait for torture before the UK courts which found that Kuwait was entitled to immunity.¹⁵⁴ Upon refusal of leave to appeal by the House of Lords,¹⁵⁵ the appellant petitioned the ECHR under Article 6(1) of the European Convention on Human Rights alleging a restriction of his right of access to court as provided for under the Convention.¹⁵⁶ The ECHR upheld the decision of the UK.¹⁵⁷ The trumping argument was raised before the ECHR and this argument was crucial in dividing the Judges, however the Majority of the Court rejected this argument.¹⁵⁸

As stated earlier, the trumping argument is a product of commentators. The preponderance of state practice does not support the trumping argument and so this fundamentally undermines the credibility of the argument. Though the policy rationale

¹⁵⁴ 103 ILR 420

¹⁵⁵ 107 ILR 536

¹⁵⁶ *E.T.S.* No. 5; 213 *U.N.T.S.* 221. See also the cases of *Fogarty v. UK*, (2001) 34 *EHRR* 302 and *McElhinney v. Ireland*, (2001) 34 *EHRR* 322 on the issue of state immunity and access to court under the European Convention on Human Rights. These cases fall outside the normative framework of this thesis and will not be considered.

¹⁵⁷ *Supra* 2

¹⁵⁸ “Reply of the Applicant to the Further Observations of the Government of the United Kingdom dated 28 July 2000”, 27 October 2000, supplied by the Archives Section of the ECHR, Strasbourg, cited in Ed Bates, ‘The *Al-Adsani* Case, State Immunity and the International Legal Prohibition on Torture’, (2003) 3 *Human Rights Law Review* 193, p. 202. Criticism of this decision has included that it did not consider the nature of the acts of torture and its link with the sovereign powers of a state whether it constitutes *acta jure imperii*; see Alexander Orakhelashvili, ‘State Immunity in National and International Law: Three Recent Cases before the European Court of Human Rights’, (2002) 15 *Leiden Journal of International Law* 703, p.712. It is erroneous to import this distinction between *jure imperii* and *jure gestionis* into the realm of human rights, afterall “the state always acts as a public person. It cannot act otherwise. In a real sense all acts *jure gestionis* are acts *jure imperii*”, see Lauterpacht, *supra* 12, p.224.

behind the argument is commendable, it perhaps may be reflective of what the law should be, *de lege ferenda*. It is to this end that decisions of the Minority in *Al-Adsani v. United Kingdom* and the Italian Court in *Ferrini v. Germany* could point to the direction of changing judicial attitudes regarding immunities where violations of human rights of peremptory status are alleged, however the trumping argument cannot be said to be reflective of the current state of international law, *de lege lata*.

The prohibition against torture exists at both treaty level as well as customary level. While not all states may be party to the Convention against Torture, it is not in issue that all states, even those who engage in the practice of torture, renounce the act.¹⁵⁹ The recognition of the immunities where there has been violation of *jus cogens* norms like torture does not negate the prohibition of torture as a norm of international law, and a peremptory one at that. If a state upholds immunities where torture has been committed this does mean that the state permits torture contrary to the Convention.¹⁶⁰

The fifth issue goes to the heart of the problem with *jus cogens* and the normative hierarchy theory. While the content and scope of the concept of *jus cogens* may seem problematic, the concept is better approached not as one of hierarchical normativity, but one of validity.¹⁶¹ International rule-making processes are not always universal in scope. For instance, a treaty is only binding *inter partes* and cannot create obligations or rights for third parties without their consent. Again, customary international law

¹⁵⁹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (Oxford: Clarendon Press, 1994), p.22

¹⁶⁰ *Bouzari v. Iran*, *supra* 106, Paragraph 51 per Swinton J; *Jones v. Saudi Arabia*, *supra* 3, per Lord Hoffman, Paragraph 44.

¹⁶¹ See Higgins, *op.cit.*, p.21-22, where she argues that the normative quality of *jus cogens* is not due to any hierarchical normativity but rather because of the regard of “world community as a whole”.

permits a state which has persistently objected to the formation of a rule of custom, from its inception, to contract itself out of the application of the rule.¹⁶²

The approach taken to torture where immunities are in issue by proponents of the trumping argument and normative hierarchy theory adds unnecessary complications to an already complicated area of law. *Jus cogens* as a concept of validity, rather than normative hierarchy is such that states cannot contract themselves out of the applicability of the rules either by not being party to a treaty or objecting to a custom from its inception. The implication of treating *jus cogens* as a concept of validity is that it becomes the benchmark by which the content of international rules is measured. This would mean that any rule of international law, conventional or customary which violates a rule of *jus cogens* would be invalid. This approach accords better with the provision of Article 53 of the VCLT to the effect that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law.

States, by supporting or upholding immunities, have not violated the prohibition of torture as a norm of *jus cogens*, neither have they contracted themselves out of the prohibition of torture under the Convention or customary international law. As earlier stated, immunities being procedural in nature cannot change the substantive nature of the prohibition against torture.

¹⁶² *Anglo-Norwegian Fisheries Case (UK v. Norway)*, (1951) *I.C.J. Reports* 116; Malcolm Shaw, *International Law*, 6th edition (Cambridge: CUP, 2008), p.90

The general practice of upholding the immunity of states where norms of *jus cogens* have been violated, as seen most notably in the *Al-Adsani* decision, *Bouzari v. Iran* and *Jones v. Saudi Arabia* has contributed to the increased practice seeking the individual accountability of senior state officials, especially Heads of states.¹⁶³ Hence, in *Tachiona v. Mugabe*,¹⁶⁴ the submission of the *amicus curiae* was that fundamental human rights which enjoy *jus cogens* status imposing obligations *erga omnes* supersede the sovereignty of states and disentitle their representatives from relying on immunity because it is “an essential characteristic” of *jus cogens* norms that international legal obligations prevail over domestic law.¹⁶⁵ However, the Court upheld the immunity of Robert Mugabe as Head of state of Zimbabwe.

There are complications inherent in the nature of *jus cogens* and the trumping argument, complications which undermine the trumping argument as a solution to the problem of the iniquities of a system of immunities. Finally, if the trumping argument is accepted it would involve the unilateral restriction of the rights, privileges and entitlements of states without their consent and this would have the effect of fundamentally changing the basis of the international system.¹⁶⁶

¹⁶³ Gavouneli and Bantekas, *supra* 125, p.202

¹⁶⁴ 169 *F.Supp. 2d* 259

¹⁶⁵ Brief of *Amicus Curiae* submitted by INTERIGHTS in support of the Plaintiffs’ Appeal before the US Court of Appeals for the second circuit, 5 November 2003, p.4, available at <http://www.interights.org/doc/ZIM%20AMICUS2.doc>, (Last accessed 01/06/07)

¹⁶⁶ Fox, *supra* 113, p.540

2.4.2.3 DISTINCTION BETWEEN CIVIL IMMUNITIES AND CRIMINAL IMMUNITIES

In a bid to end impunity of state officials, a distinction has been made regarding the immunities of state and that of state officials, including Heads of states, by distinguishing the nature of the legal proceedings involved. Since states can exercise civil jurisdiction over foreign states, albeit limited, but cannot exercise criminal jurisdiction over foreign states as it can over individuals, it becomes attractive to accept that in criminal proceedings norms of *jus cogens* could override immunities, but not in civil proceedings.

This seems to be the view taken by the ECHR in *Al-Adsani v. UK*.¹⁶⁷ Likewise in the Court of Appeal decision of the UK in *Jones v. Saudi Arabia*, the Court was of the view that Saudi Arabia enjoyed immunity while its officials did not.¹⁶⁸ Further to these, the *Pinochet* case centred on individual criminal responsibility, rather than civil liability; and the UN Convention on Jurisdictional Immunities of State and Their Property is understood to exclude criminal proceedings from its ambit.¹⁶⁹ The combined effect of these would seem to mean that immunity would be available in civil proceedings against states and state officials but not in criminal proceedings

¹⁶⁷ *Supra* 2, Joint Dissenting Opinion of Judge Rozakis, *et al*, Paragraph O-III4; See Paragraphs 34 and 66 of the Majority decision

¹⁶⁸ *Supra* 145

¹⁶⁹ See General Assembly Report of the *Ad Hoc* Committee on the Jurisdictional Immunities of State and Their Property Official Records, Fifty-Ninth Session, Supplement No. 22 UN Doc A/59/22 (2004) ; Lorna McGregor, 'State Immunity and *Jus Cogens*', (2006) 55 *ICLQ* 437, at 444

against state officials. This, it has been argued, would ensure that nothing gets in the way of the duty of states to prosecute certain international crimes.¹⁷⁰

Attempts to distinguish between civil and criminal proceedings, especially where *jus cogens* and immunities are involved, have been criticized as being at variance with the requirements of international law with regard to reparation and state responsibility.¹⁷¹ Arguably, it would seem to be a rather formalistic approach to immunities that regarded the recognition of immunities of states and their officials in civil proceedings but not the immunity of the same officials in criminal proceedings. After all, “the availability of immunity has always been determined on the basis of the nature or purpose of the underlying act rather than the type of proceeding involved”.¹⁷² Likewise, whatever the effect of *jus cogens* may be, the effect is not determined by the nature of the proceedings but “the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule”.¹⁷³

On the one hand, the liability of states and the liability of state officials in criminal proceedings are distinct. It is an accepted principle of international law that individual criminal responsibility attaches to the acts of state officials which violate human rights norms. However, the horizontal structuring of the international order is such that does not permit criminal liability for the acts of states.¹⁷⁴

¹⁷⁰ McGregor, *ibid.*, p.444 citing Fox, *supra* 113, p.222 citing Mr Reuter and Mr Ushakov, *Yearbook of the International Law Commission* (1986) Vol. 1, 1943rd Meeting (7 May 1986), Paragraph 30

¹⁷¹ McGregor, *ibid.*

¹⁷² *Ibid*; See Dissenting Opinion of Judge Loucaides in *Al-Adsani v. UK*, *supra* 2

¹⁷³ *Al-Adsani v. UK*, *ibid.*, Joint Dissenting Opinion of Judges Rozakis, *et al*, Paragraph 4

¹⁷⁴ *Jones v. Saudi Arabia*, [2006] UKHL 26, Paragraph 31

On the other hand, a civil action against state officials for violations of *jus cogens* would implicate states especially where the officials claim that they were acting in the exercise of their official functions. Thus, the liability of states and the liability of state officials in civil proceedings would invariably be the same because payment for damages or compensation would be from state funds. However, with regards to criminal proceedings, there is a clear difference in the liability of the state and the individual criminal liability of state officials. To this end, a good argument is to be made for the distinction between civil and criminal proceedings where the immunities of states and their officials are implicated. The distinction would apply only to those state officials who enjoy immunity *ratione materiae* rather than those enjoying immunity *ratione persone*, for whom immunity would be absolute.

In *Pinochet (No.3)*, Lord Hutton was of the view that though Chile was internationally responsible for the acts of torture with which Pinochet was accused, that Chile could claim state immunity if sued for damages in respect of the acts of torture in the UK and that there is no inconsistency with Pinochet's entitlement to claim immunity if sued in civil proceedings for damages and his lack of entitlement to claim immunity in criminal proceedings instituted against him in a personal capacity for torture.¹⁷⁵ Article 4 of the ILC Draft Code of Crimes against the Peace and Security of Mankind, which recognises that its provision for the responsibility of individuals is without prejudice to state responsibility under international law, supports this view.¹⁷⁶

¹⁷⁵ *Supra* 63, p.167. See also the decisions of Lord Millett (p.180) and Lord Phillips (p.181-182)

¹⁷⁶ (1996) Volume II *YILC*

2.4.3 A HUMAN RIGHTS EXCEPTION TO STATE IMMUNITY INSTRUMENTS APPROACH

States like the US, UK, Singapore, Canada, Australia, South Africa and Pakistan have enacted legislations on state immunity incorporating the restrictive approach to the immunities of states, found in a number of international treaties like the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States and their Property.¹⁷⁷ These instruments, both international and national, provide for certain exceptions to the immunity of states including commercial transactions, actions in respect of torts, employment etc.

The thrust of the human rights exception approach is that human rights violations are included in the various exceptions in the instruments on immunities of states. In the event that such an exception does not exist, then in addition to the accepted exceptions, that human rights violations are to be read into the instruments as exceptional circumstances where the immunities of states will be disregarded.

The US Alien Tort Claims Act (ATCA) led to increased litigation in the US courts against foreign governments and their agencies.¹⁷⁸ In *Filartiga v. Pena Irala*,¹⁷⁹ the Court of Appeals held illegal the acts of torture which violated the prohibition on torture, a norm of customary international law.

¹⁷⁷ See Chapter 1 of thesis

¹⁷⁸ 28 U.S.C. 1350

¹⁷⁹ *Supra* 25

The *Filartiga* case led to several suits against foreign states until the US Supreme Court put paid to the matter in a later decision in *Amerada Hess Shipping Corporation v. Argentine Republic* stating that only the Foreign Sovereigns Immunity Act (FSIA) could provide the basis for assumption of jurisdiction over foreign states.¹⁸⁰ The provisions of the FSIA are clear, and save for the limited exception of where rights in property are taken in violation of international law, violations of human rights do not come under the express provisions of the Act. As stated by the Supreme Court in *Amerada Hess*,

“immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA’s exceptions”.¹⁸¹

In a bid to exercise jurisdiction against a foreign state where human rights violations are alleged, attempts have been made by some US courts to constructively interpret the exceptions in the FSIA to include human rights. Thus, in *Von Dardel v. Union of Soviet Socialist Republics*,¹⁸² the District court in asserting jurisdiction found that the Union of Soviet Socialist Republics (USSR) in holding a Swedish diplomat in *incommunicado* detention for over 35 years had violated international law on diplomatic immunity. The court in relying on the international agreements exception of the FSIA as well as an implied waiver of its immunity by the acts of the USSR was of the view that the USSR was not entitled to immunity.

¹⁸⁰ 488 US 428 (1988); 81 ILR 658. Importantly, see *Tel-Oren v. Libyan Arab Republic* 726 F.2d 774 (DC Cir. 1984); 470 US 1003 (1985); 77 ILR 193 also brought under the ATCA which was held not to apply to torture by non-state actors; Meron, *supra* 95, p.122-126.

¹⁸¹ *Ibid.*, p.436

¹⁸² 623 F. Supp 246 (DDC 1985); 77 ILR 258

However, there was no appeal of this decision of the District court and the extent of the authoritativeness of this decision is doubtful since there are later decisions by the Supreme Court which do not support this decision. Though not overruled expressly, it has been made redundant by the later decision of the US Supreme Court in *Amerada Hess* providing for the FSIA as the sole grounds for bringing a case against a foreign sovereign.¹⁸³

Likewise in *Nelson v. Saudi Arabia* involving an action against the government of Saudi Arabia and the King Faisal Hospital for acts of torture suffered at the hands of the government, the US Court of Appeal reversed the decision of the District Court that the acts involved did not qualify under the commercial acts exception of the FSIA and held that the torture suffered by the appellant resulted from his recruitment and hiring and so qualified as commercial activity within the meaning of the FSIA.¹⁸⁴ Upon further appeal, the Supreme Court reversed the Court of Appeal decision and upheld its earlier position that the FSIA was the sole basis for jurisdiction by US courts over a foreign sovereign.¹⁸⁵

In *Siderman de Blake v. The Republic of Argentina* it was held that though the prohibition of torture was *jus cogens* and any state violating the prohibition was in violation of *jus cogens*, the FSIA, however, does not contain an exception on such grounds and so does not confer courts with jurisdiction.¹⁸⁶

¹⁸³ *Op.cit*

¹⁸⁴ 923 F.2d 1528 (11th Cir.1991); 88 ILR 189; 100 ILR 545

¹⁸⁵ *Ibid.*

¹⁸⁶ 103 ILR 454, p.470-475

Despite the fact that the *Amerada Hess* case did not involve human rights violations but rather the destruction of property, the decision is clear and the strictness of its application even in the face of gross human rights violations illustrates the point that the FSIA does not admit a human rights exception to its provisions. A case that best drives home this point is the case of *Hugo Princz v. Federal Republic of Germany*.¹⁸⁷ The facts of the case involve Mr Princz as a teenager who with his family were American citizens of Jewish faith. They were subjected to slave labour in Germany's war industry and the plaintiff also suffered death of his parents and sister in concentration camps and further had to endure watching his brothers starve to death, all during the Holocaust. However, just before the end of the war, Mr Princz was rescued by American soldiers and despite his unsuccessful efforts seeking payment *ex gratia* from Germany for compensation for his sufferings, he instituted action in 1992.

The District Court in an impassioned decision held that the FSIA did not apply, despite acknowledging the decision of the Supreme Court in *Amerada Hess* and sought to distinguish the peculiar circumstances of the case before it as well as the fact that Nazi Germany being a 'rogue nation' was estopped from relying on US law to its advantage.¹⁸⁸ The Court of Appeal reversed this decision and held that Germany was entitled to immunity because the position of the law as stipulated in *Amerada Hess* is clear and therefore actions against foreign states must therefore come within the permissible provisions of the FSIA.

¹⁸⁷ 813 F. Supp 22 (D.D.C. 1992); 26 F.3d 1166 (D.C. Cir. 1994); 103 ILR 594

¹⁸⁸ See Mathias Reimann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v. Federal Republic of Germany*', (1994-1995) 16 *Michigan Journal of International Law* 403

However, the US in 1996 enacted the Anti-terrorism and Effective Death Penalty Act (AEDPA) 1996 which provides that foreign states indicated by the State Department as sponsors of terrorism or involved in terrorism would be liable for acts of torture, hostage-taking and other serious violations of human rights.¹⁸⁹ This resulted in the decision in *Flatow v. The Islamic Republic of Iran*, where jurisdiction was assumed over Iran and some of its officials, including a former Head of state, for supporting a terrorist attack in Israel which led to the death of an American citizen.¹⁹⁰

The AEDPA was passed in response to what the US felt was growing terrorism and to curb this phenomenon as well as provide remedies for its citizens in the event of being victims to acts of terror. The Act seemingly has the effect of amending the FSIA by providing a further exception to the FSIA for terrorist acts and human rights. The issues whether the effect of the AEDPA is a human rights exception to the FSIA and whether Congress has overridden the earlier judicial position that did not admit such a human rights exception to the FSIA are to be considered.

Unfortunately, however optimistic the AEDPA may seem, the Act restrictively provides against a state which must be designated as a sponsor of terrorism and the claimant must be a US citizen. In addition, the statutory exceptions in the FSIA must apply for the property of the foreign state not to enjoy immunity from attachment or

¹⁸⁹ Bianchi, *supra* 75, p.158

¹⁹⁰ 999 F. Supp. 1 (D.D.C. 1998)

execution where judgment has been obtained.¹⁹¹ As such, the decision in *Amerada Hess* is the prevailing practice of the US.

The UK SIA does not expressly include a human rights exception to the immunities of states. This issue arose in the case of *Al-Adsani v. Kuwait* which involved the plaintiff, a dual national of both UK and Kuwait.¹⁹² The plaintiff alleged he was abducted and tortured while in Kuwait at the behest of the Sheikh. Upon return to Britain, he brought action against the Kuwaiti government and the Sheikh. Both the High Court and Court of Appeal held that the government of Kuwait was entitled to immunity and that the SIA did not contain an exception to the immunity of foreign states in cases of torture. The ECHR upheld the decision of the UK courts that Kuwait was entitled to immunity, which it found was not a restriction of the applicant's right to access to court under the European Convention on Human Rights.

While unlike the FSIA, the SIA includes Heads of states in its definition of foreign states for the purposes of the Act, however like the FSIA, the provisions of the SIA are clear with regard to permissible exceptions under the Act. The position under the SIA was stated by Lord Bingham in his decision in *Jones v. Saudi Arabia*, as follows,

“I think that certain conclusions... are inescapable:
...that none of these claims falls within any of the
exceptions specified in the 1978 Act... *On a
straightforward application of the 1978 Act, it would
follow that the Kingdom's claim to immunity for itself*

¹⁹¹ *Al-Adsani v. UK*, *supra* 2, Paragraph 64. This is because immunity from jurisdiction and immunity from enforcement are two separate issues.

¹⁹² 100 *ILR* 465; *supra* 154, 155 and 2. See case note by Susan Marks, ‘Torture and the Jurisdictional Immunity of Foreign State’ (1997) 56 *Cambridge Law Journal* 8. The Convention against Torture of 1984 and this is given effect in English Law by Section 134 of the Criminal Justice Act 1988

and its servants or agents should succeed, since this is not one of those exceptional cases, specified in Part 1 of the 1978 Act, in which a state is not immune, and therefore the general rule of immunity prevails. It is not suggested that the Act is in any relevant respect ambiguous or obscure: it is, as Ward LJ observed in *Al-Adsani v Government of Kuwait*..., "as plain as plain can be". In the ordinary way, the duty of the English court is therefore to apply the plain terms of the domestic statute."¹⁹³ (Emphasis added)

Similarly, in *Bouzari v. Iran*, it was held that the Canadian SIA 1985 does not allow a human rights exception.¹⁹⁴ The first plaintiff, a citizen of Iran instituted action against the country alleging, among other claims, assault and torture. The contention of the plaintiffs was that the case fell within the exceptions in the Canadian SIA, and in the alternative they argued that a further exception be read into the Act to permit actions against torture and that in the event Iran was entitled to immunity that the SIA was unconstitutional for being in violation of the Canadian Charter of Rights and Freedoms. The Court found that,

“The language of the State Immunity Act was clear and the Court could not, therefore, read into it a further exception to immunity even if the Act was inconsistent with international law... The fact that the State Immunity Act meant that Iran was immune from the jurisdiction of the Canadian courts in the present case did not mean that the Act was unconstitutional. The ill-treatment of the first plaintiff had no point of contact with Canada and involved acts for which Canada was not responsible. The Charter of Rights and Freedoms did not require Canada to afford the plaintiffs a remedy in the Canadian courts.”¹⁹⁵

¹⁹³ *Supra* 3, Paragraph 13

¹⁹⁴ *Supra* 106

¹⁹⁵ *Ibid.*, Paragraphs 4(b) and 18-42; Paragraphs 5 and 74-88

It is on the strength of the jurisprudence of the courts in the instances considered above that it is submitted that the national legislations of the US, UK and Canada do not contain exceptions to the immunities of states where human rights violations are alleged, even those of *jus cogens* status. Similarly, the courts of these jurisdictions have resisted efforts to extend the provisions of the legislations by reading into them a further exception to accommodate human rights, or *jus cogens* claims. The refusal to extend these legislations, which will have the effect of amending the legislations, is not surprising as such an act would amount to judicial law-making.

Finally, it is important to note that both the European Convention on State Immunity and the UN Convention on the Jurisdictional Immunities of States and their Property do not contain a human rights exception. There have been calls on states not to ratify the UN Convention in its present form without a human rights protocol.¹⁹⁶ However the feasibility of such an action is doubtful, this is because the UN Convention has taken the better part of twenty-two years to come into existence.¹⁹⁷ Though not yet in force because it is yet to get the required ratification by states, the likelihood of the UN Convention becoming operational would be much slimmer if there is a human rights protocol because immunity of states is integral to states' conceptions of their sovereignty. Though state sovereignty has yielded to pressure in other areas of international law, for instance international trade and commerce, the reality evident in

¹⁹⁶ McGregor, *supra* 169, p.445, Christopher Keith Hall, 'UN Convention on State Immunity: The Need for a Human Rights Protocol', (2006) 55 *ICLQ* 441

¹⁹⁷ Hazel Fox, 'In Defence of State Immunity: Why the UN Convention on State Immunity is Important', (2006) 55 *ICLQ* 399

the practice of state is that states are unwilling to compromise their sovereignty where human rights violations are alleged.

2.4.4 THE IMPLIED WAIVER APPROACH

The implied waiver approach in reconciling the conflicting interests of a system of human rights and a system of immunities postulates that in view of the *jus cogens* nature and the concomitant *obligatio erga omnes* of certain fundamental rights, a state must be deemed to have waived its immunity either where it is a party to a human rights agreement or where it engages in gross violations of peremptory norms of international law.¹⁹⁸ Though this approach recognizes the peremptory nature of certain human rights and the existence of state immunity legislations, it does not rely on the trumping argument or on a human rights exception to the legislations. Rather the approach relies on a waiver by a state of its immunities, however impliedly from the act of the state.¹⁹⁹

In *Lois Frolova v. USSR*, the US Court of Appeals rejected the argument of implied waiver of immunity against the USSR in a claim against the USSR by the American wife of a Soviet citizen for mental stress and loss of consortium as result of the refusal of the USSR to permit his emigration.²⁰⁰ The plaintiff in relying on Section 1604 of

¹⁹⁸ Andrea Bianchi, 'Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights' in Benedetto Conforti and Francesco Francioni., (edited) *Enforcing International Human Rights in Domestic Courts*, (The Hague: Martinus Nijhoff, 1997), p.423; Bröhmer, *supra* 10, p.191

¹⁹⁹ Adam C. Belsky, *etal*, 'Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law', (1989) 77 *California Law Review* 365

²⁰⁰ 761 F 2d 370 (1985)

the FSIA which provides that the immunity of foreign state shall be subject to ‘existing international agreement’, argued that the USSR was a party to the UN Charter and the Helsinki Accords and so had impliedly waived its immunity. The Court of Appeal rejected this argument and held that more “convincing evidence” was required for a waiver.²⁰¹

The issue also arose in the US in *Von Dardel v. USSR*.²⁰² The District court in asserting jurisdiction found that the USSR had violated international law on diplomatic immunity. The court in relying on the international agreements exception under the FSIA, as well as an implied waiver of its immunity by the acts of the USSR, was of the view that the fact that both the US and USSR were parties to the 1961 Vienna Convention on Diplomatic Relations²⁰³ and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1973,²⁰⁴ and that the signing of these and other human rights treaties implied a waiver by the USSR of its immunity. It also held that the FSIA did not extend immunity to clear violations of international law.

However, the limits of this decision as judicial authority have been canvassed earlier. Suffice it to say that the U.S. Supreme Court has decided differently in *Nelson v. Saudi Arabia*,²⁰⁵ and in *Amerada Hess*.²⁰⁶

²⁰¹ *Ibid*, p.378; see case note by Monroe Leigh, ‘*Frolova v. USSR*’, (1985) 79 *AJIL* 1057

²⁰² *Supra* 182

²⁰³ 500 *U.N.T.S.* 95

²⁰⁴ 1035 *U.N.T.S.* 167

²⁰⁵ *Supra* 184

²⁰⁶ *Supra* 180

Similarly, in *Hugo Princz v. Federal Republic of Germany*, the District Court decision that Germany had waived its immunity under the FSIA by violating norms of *jus cogens* was dismissed by the Court of Appeals.²⁰⁷ The Court of Appeal held that the violation, by Nazi Germany, of *jus cogens* norms could not be an implied waiver of the immunity of Germany as recognized by the FSIA.

Also, in *Siderman de Blake v. Argentina*, the Court rejected the argument that violations of norms of *jus cogens* is an indication that immunities of states may be waived.²⁰⁸

The decision of the Supreme Court of Greece in *The Distomo Massacre* case was rationalized on the basis that by engaging in acts which are in violation of *jus cogens* a state is deemed to have waived its immunity.²⁰⁹ However, the authority of this decision has been undermined by certain incidents. Despite its finding that Germany was not entitled to immunity from jurisdiction, the Areios Pagos later upheld that Germany was entitled to immunity from execution.²¹⁰ Likewise the Federal Court of Justice of Germany has held that the acts involved, though illegal, being sovereign acts of Germany, the Greek Courts did not have jurisdiction over the matter and so it did not recognize the judgment of the Greek Courts.²¹¹ Additionally, in *Kalogeropoulou et*

²⁰⁷ *Supra* 187

²⁰⁸ *Supra* 186; see also Reimann, *supra* 188, p.414

²⁰⁹ *Supra* 125

²¹⁰ Decision of the Greek Supreme Court No. 36/2002 (2003) cited in McGregor, *supra* 169, p.440, note 27; see also August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', (2006) 17 *EJIL* 803

²¹¹ *Distomo Bundesgerichtshof* (BGH), decision of 26 June 2003, III ZR 245/98, published in (2003) *NJW* 3488, cited in McGregor, *ibid*

al v. Greece and Germany before the ECHR,²¹² the applicants contended that the immunity of Germany from execution as upheld by Greece was an infringement of their right under Article 6 of the European Convention on Human Rights, however the Court relied on its earlier decision in *Al-Adsani* in finding that Article 6 was not violated, thus rejecting the contention of the applicants.

With regard to human rights treaties and their state parties, it has been argued that the introduction of the implied waiver argument serves to ensure that the substantive effect of these international human rights agreements is maintained because the concept of immunities may work to render such agreements redundant.²¹³ This argument has been taken further by Bianchi who argues that the human rights provisions of the UN Charter and the Universal Declaration on Human Rights are evidence of the implicit waiver by states of their immunity at least with regard to matters where human rights concerns are in issue.²¹⁴ This argument is marred by the non self-executing nature of the human rights provisions in the UN Charter and the exhortatory nature of the Universal Declaration. Furthermore, the conclusion of treaties and other international agreements which create obligations on states cannot be taken to mean a relinquishment of state sovereignty, which for the purposes of the implied waiver approach, would mean lack of consent of a state to waive its immunity.²¹⁵

²¹² No. 59021/00, Admissibility Decision of December 2002; see also Kerstin Bartsch and Björn Elberling, 'Jus Cogens v. State Immunity, Round Two: the Decision of the European Court of Human Rights in the *Kalogeropoulou et al v. Greece and Germany* Decision', (2003) 4 *German Law Journal* 477

²¹³ *Von Dardel v. USSR*, *supra* 182

²¹⁴ Bianchi, *supra* 198, p.423

²¹⁵ *S.S. "Wimbledon"*, (1923), P.C.I.J., *Series A*, No.1

It has been held in *I Congreso del Partido*,²¹⁶ and *Kuwait Airways Corporation v. Iraqi Airways (No.1)*,²¹⁷ that it is not a requirement of international law that where a foreign state is accused of violating international law that the state would be disentitled from the immunities which it would ordinarily be entitled to under international law.

The implied waiver approach is given impetus by the recognition in both national and international instruments on state immunity as well as customary international law that states may waive their immunities. Brownlie in acknowledging that in the UK, a waiver of immunity is to be “unequivocal”, asserts that a waiver of immunity by a state cannot be implied from the nature of the activity.²¹⁸ Violation of norms of *jus cogens* by a state does not determine whether a state has waived its immunity.

In *Pinochet (No.3)*, Lord Goff upheld Chile’s argument that any waiver of immunity must be express.²¹⁹ Lord Goff relied upon the opinion of Jennings and Watts, that,

“A state, although in principle is entitled to immunity, may waive its immunity. It may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of a particular dispute which has already arisen, or by consent given in advance in a contract or an international agreement ... A state may also be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking

²¹⁶ [1983] AC 244

²¹⁷ [1995] 1 WLR 1147

²¹⁸ Brownlie, *supra* 95, p.335

²¹⁹ *Supra* 63, p.123-124

any steps in the proceedings relating to the merits of the case.”²²⁰

He concluded that the only examples given by Jennings and Watts of implied waiver of immunity are with regard only to submission to jurisdiction, instituting or intervening in proceedings or by taking steps in proceedings.²²¹ It is instructive that waiver of immunity was not implied from the nature of the activity of a state.

Although the US provides in Section 1605(a)(1) of the FSIA that a state may waive its immunity explicitly or by implication, the Court of Appeal in *Princz v. Germany*, per Judge Ginsburg, opines that “an implied waiver depends upon the foreign government having at some point indicated its amenability to suit”.²²²

However, the recognition of the possibility of a waiver cannot give rise to an exception to the immunity of states. This is because the waiver that was envisaged both in codified form (national and international instruments) and at customary international law is one that is based on the consent of states. By the consensual nature of international law, the reliance on “...waiver where there is no indication of any actual will to forego protection” would be tantamount to a fundamental change of the structure of the international order.²²³

²²⁰ Oppenheim’s International Law (9th edition), (London: Longman, 1992), p. 351-355

²²¹ *Op.cit.*

²²² *Supra* 187, p.1174

²²³ Reimann, *supra* 188, p.409

2.5 RESOLVING HEAD OF STATE IMMUNITY AND HUMAN RIGHTS

The approaches considered in this chapter have been primarily concerned with the immunities of states. However as stated in Chapter 1, immunity is an entitlement of states which extends to its officials, including Heads of states. In addition, most jurisdictions recognize the immunity of states to include Heads of states and certain senior state officials.²²⁴

Tomuschat argues that,

“... individuals who engage in criminal activities should, as a rule, not be able to benefit from the functional position which they occupy within the structure of governance of the state on whose behalf they are acting. To hold them accountable may also operate as a useful deterrent from abusing posts of responsibility”.²²⁵

The idea that Heads of states are to be subject to criminal proceedings for accountability in instances where states would be immune cannot be accepted. Firstly, a disagreement with regard to Heads of states being subject to proceedings of accountability is not to be taken as a hard and fast rule, it must be contextualised against the constitutive instrument establishing the jurisdiction of a court and the extent to which states are bound by the instrument.

²²⁴ Sections 1 and 3 of the UN Convention on Jurisdictional Immunities, UNGA Resolution 59/38 (16 December 2004); Section 14 SIA 1978, (1978) 17 *I.L.M.* 1123; *Gaddafi Case*, *supra* 68; *Arrest Warrant Case*, *supra* 1; *Re Mofaz* 128 *ILR* 709; *Re Bo Xilai* 128 *ILR* 713

²²⁵ Tomuschat, *supra* 140, p.317

Secondly, while one agrees that there must be a distinction in the assessment of immunity of states and immunity of Heads of states this is only with regard to the nature of the liability, immunity being a matter that goes only to jurisdiction and not to the existence of liability. Therefore the fact that criminal liability attaches to a person does not mean that the person can be proceeded against, these are two different things. A Head of state who is implicated in violations of human rights is still a Head of state and continues to represent his state and people. If the reverse were the case, it would be difficult to justify the incumbency of Robert Mugabe of Zimbabwe, as well as Augusto Pinochet, Charles Taylor and Mouammar Gaddafi at the periods they were Heads of Chile, Liberia and Libya respectively.

Bianchi argues that,

“The close interrelationship between state immunity and Head of state immunity, given their common rationale of ensuring respect for the sovereignty of other states, does not allow one to reach conflicting conclusions about their scope of application. If individuals are accountable for crimes of international law, states also must be accountable in civil proceedings for analogous violations of human rights. Furthermore, should states continue to be held immune, plaintiffs would sue their agents, thus circumventing the jurisdictional bar of immunity”.²²⁶

Bianchi’s argument that states, like individuals, should be accountable for violations of human rights follows from a wrong premise. The nature of liabilities involved is separate. The existence of criminal liability does not automatically translate into civil liability and an analysis of contemporary jurisprudence of courts in international law

²²⁶ Bianchi, ‘Individual Accountability for Crimes against Humanity: Reckoning with the Past, Thinking of the Future’, (1999) 19 *School of Advanced International Studies Review* 97, p.112

shows that states are entitled to immunity in civil proceedings for violations of human rights.

It is therefore in view of the extensive jurisprudence on the matter that it can be stated that the argument that immunities are to be denied where violations of human rights of *jus cogens* status are alleged, according to Gavouneli and Bantekas, “has been put passionately, but not authoritatively.”²²⁷ Indeed, the ILC Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction reported that “... it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law.”²²⁸

While human rights should be adequately secured on the other hand, the process of governance and state functioning should not be readily compromised. A balance must be struck between the rights and expectations of individuals and the rights and expectations of the states and state officials.

Despite criticisms that the ICJ decision in the *Arrest Warrant* case will lead to impunity it is maintained, alongside the Court, that immunity does not mean impunity.²²⁹ Immunity does not mean absence of liability; rather it means that the enforcement of the liability against those to whom the immunity attaches could be limited in time or depending on the forum seeking to enforce this liability.

²²⁷ Gavouneli and Bantekas, *supra* 125, p.203

²²⁸ Roman Kolodkin, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *UN Doc.A/CN.4/631*, 10 June 2010, Paragraph 90

²²⁹ *Supra* 1, Paragraph 60

Approaching immunities from the perspective of liability complicates issues in the discourse on reconciling human rights imperatives and immunities. The matter is better dealt with where immunities are approached from the perspective of the adjudicatory competence of the courts of a state over actions of other states and state officials.²³⁰ In proceedings for enforcement of human rights, where immunities are implicated, the issue should not be about the moral reprehensibility of recognising immunities, rather it should be that the matter be directed to the proper forum where immunities can be appropriately addressed.²³¹

The often projected dilemma between Head of state immunity and human rights is more chimeral than real. This is because immunity does not negate the substantive provisions of international norms “but merely diverts any breach of it to a different method of settlement”.²³² According to Fox, reliance on immunities

“...immunity has served and is capable of serving valid purposes. Used restrictively, wisely, and in the interests of the general community, it has the utility, in my view, as a legitimate aid to the rule of law. It is a legal device for the allocation of authority and jurisdiction; procedurally it serves as a sorting mechanism for the appropriate method of settlement; and substantively it preserves certain public values, and privileges the general cause as determined by democratic government over the private interest.”²³³

²³⁰ Hazel Fox, ‘Some Aspects of Immunity from Criminal Jurisdiction of the State and its Officials: The Blaškić Case’, in Lal Chand Vohrah, *et al* (edited), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, (The Hague: Kluwer Law International, 2003), p.301. See also *Arrest Warrant case, op.cit.*, Paragraph 61

²³¹ Bianchi, *supra* 198, p.406

²³² Fox, *supra* 113, p.525

²³³ *Ibid.*, p.xxxiv

Likewise, Judges Higgins, *et al*, state that,

“...The law of privileges and immunities, however, retains its importance since immunities are granted to high state officials to guarantee the proper functioning of the network of mutual inter-state relations, which is of paramount importance for a well-ordered and harmonious international system”.²³⁴

2.6 CONCLUSION

The aged battle between positivist and naturalist views of international law lies at the heart of this chapter. The chapter has considered the approaches that have been resorted to in an effort to resolve the competing interests of a system of immunities and a system of human rights as well as the inadequacies of the approaches.

The chapter has also established that the international order being value-oriented, its principles are to be seen in that regard, even if the principles are dictated by political considerations. Human rights and immunities are core principles of a complex legal order; an order which is capable of accommodating these principles and their values.

Traditional perceptions of sovereignty have been gradually eroded in the fields of economic and commercial activities, employment relations, contracts, trusts and intellectual property.²³⁵ This has not been the case with regard to the immunities where violations of human rights are concerned. It is in recognition of the moral

²³⁴ *Supra* 1, Paragraph 75

²³⁵ Bianchi, *supra* 75, p.152

concerns that some courts have tried to circumvent the immunity hurdle by giving preference to human rights. However, such decisions have mostly been reversed on appeal. It is clear that perhaps states are not ready to accept such a progressive interpretation of their immunities.

International law is not static. It is dynamic. It could be that the move from absolute immunity to restrictive immunity for states in their commercial affairs as well as contemporary efforts to read human rights exceptions to immunity may be indicative of future modification of the scope of immunities. It may be that the international law is gradually evolving towards the non-application of immunities for human rights violations. However, international law is not yet there. Infact, the ILC Special Rapporteur on Immunity of States from Foreign Criminal Jurisdiction acknowledged that exceptions to immunity for state officials still remained in the realm of progressive developments.²³⁶

That a concept in international law is controversial and creates difficult situations is not enough to do away with it. Indeed, the fact that a concept is subject to abuse should not be the sole basis for challenging the existence of a concept nor should the fact of vulnerability to abuse be enough to make a concept redundant. For instance, the right of self-defence is one of the most abused concepts in international law but this

²³⁶ *Supra* 228, Paragraphs 90-93

cannot be said to be a justification for challenging its existence which is established under customary international law and treaty law.²³⁷

The use of the term ‘conflict’ in this chapter does not mean that there is a substantive conflict between human rights and immunities. The term is used loosely and employed only for the sake of analysis. Neither does the fact that immunities necessitate the exemption of the jurisdiction of a court for human rights violations where states and state officials are concerned mean that there is a substantive conflict between human rights and immunities. The concept of immunity does not take away the substantive jurisdiction of a court over human rights violations where such jurisdiction has been competently conferred by an instrument. The concept of immunity merely excludes states and state officials from jurisdiction. The concept does not negate the jurisdiction of a court over human rights violations but only makes it inapplicable in certain instances- instances which form the content of the rest of the thesis.

Finally, in the determination of emergent trends regarding immunities of Heads of states, this chapter has shown the inclination of judges, domestic and international, to disregard immunities of states for human rights violations. While this inclination is yet to materialise into state practice, it is indicative perhaps of the direction of international law in this regard and the possibility of restriction of immunities of states for human rights violations. The question is whether the trend is also indicative of an emergent trend regarding Head of state immunity and the extent to which such trend

²³⁷ UN Charter, Article 51; Christopher Greenwood, ‘Humanitarian Intervention: The Case of Kosovo’, (2002) *Finnish Yearbook of International Law* 170

affects existing customary international law on the matter. The rest of the thesis will be dedicated to answering this question.

CHAPTER 3: HEAD OF STATE IMMUNITY BEFORE NATIONAL COURTS

3.1 INTRODUCTION

The most prominent feature of the international order is its decentralized nature, with no central and compulsory law-making or adjudicatory organ. Thus, the adjudicatory mechanisms of the ICJ and the more recent ICC are limited with regard to Head of state immunity. While the mechanism of the ICC and its limits will be considered in Chapter 6; the limits of the ICJ are more straightforward. The ICJ has no criminal jurisdiction and by the express provision of Article 34 of its Statute, only states can be parties to proceedings before the Court.¹ Therefore, the issue of legal proceedings against Heads of states does not arise before the ICJ. However, decisions of the Court are useful in the analysis of Head of state immunity and emergent trends in that regard.

Due to a lack of central and compulsory international adjudicatory body, the national courts of states have become very important not just in domestic proceedings but also in international proceedings. Indeed, the ICJ in the *Arrest Warrant* case recognized this role of national courts while enumerating the circumstances under which the immunities of state officials, including Heads of states, may not operate as a bar to criminal proceedings against such persons. The Court enumerated the circumstances

¹ 59 *Stat.* 1055. However, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, criminal responsibility was indirectly in issue before the ICJ, (2007) *I.C.J. Reports* 1

under which the immunities of state officials may not bar criminal proceedings to include:²

- a) before the courts of their countries under their domestic law;
- b) before foreign courts where the state has waived the immunity;
- c) before courts of another state after expiration of office and “provided that it has jurisdiction under international law” in respect of acts done in a private capacity;
- d) before certain international criminal courts.

While the previous chapter involved a general consideration of immunities, the primary focus of this chapter (like subsequent ones) will be immunities of Heads of states. This chapter will analyse the jurisprudence of national courts with a view to ascertaining whether there is an emergent trend on Head of state immunity and the extent to which such trend affects existing customary international law on the subject.³

The jurisprudence of national courts will be considered firstly, from the perspective of states of origin of Heads of state and the trial of Saddam Hussein before the Iraqi High Tribunal will form subject of the analysis. Secondly, national courts of foreign states will be considered in this chapter and the UK House of Lords decision in the *Pinochet* case as well as decisions from the US, France and Senegal.

Questions of legality of an adjudicatory body necessarily implicate the validity of jurisdiction of over a Head of state. As such, this chapter will consider events leading

² (2002) *ICJ Reports* 3, Paragraph 61.

³ As stated earlier in the introduction, this thesis will employ an analysis of customary international law and the constitutive instrument theory in its determination of emergent trends and its impact on Head of state immunity.

up to the establishment of the Iraqi High Tribunal (IHT), whether the Coalition Provisional Authority (CPA) could establish the Tribunal and the legitimacy of invasion of Iraq in 2003 and the post-occupation legitimacy of the CPA in determining whether the IHT could exercise jurisdiction over Saddam Hussein and the extent to which the decision of the Tribunal is indicative of an emergent trend affecting customary international law on Head of state immunity.

3.2 HEAD OF STATE IMMUNITY BEFORE NATIONAL COURTS OF STATE OF ORIGIN

The immunities of states are extended to Heads of states to ensure effectiveness, efficiency and independence in the conduct of official duties by not subjecting Heads of states to legal proceedings while in office. However, immunities of Heads of states vary according to the regime under consideration. The issue of immunities of Heads of states in international law applies before foreign jurisdictions while the issue of immunities of Heads of state before courts of their state of origin is dependent on municipal law, i.e. constitutional provisions to that effect.⁴ Therefore, while Heads of states are entitled to immunity under international law, not all Heads of states will be entitled to immunity within their states. For instance the Constitution of the Federal Republic of Nigeria provides for the immunity of its President from domestic legal

⁴ Some constitutions provide for absolute immunity, some provide for limited immunity and while some are silent on the matter.

proceedings while the UK has no such provision.⁵ Indeed, a sitting UK Prime Minister was subjected to questioning and investigation over the issue of cash-for-peerages.⁶

In the exercise of its legislative sovereignty a state may provide for, or against, the immunity of its own Head of state in proceedings before its own courts. As such, a Head of state would be disentitled from relying on the sovereign attribute of the state to the disadvantage of the state and to his personal advantage. For instance, in a case not concerning international immunities, former President of Peru, Alberto Fujimori was charged with human rights violations before the Peruvian courts.⁷ Also Saddam Hussein was charged with crimes against humanity and was tried before the Iraqi High Tribunal, convicted and sentenced to death by hanging.

International immunities are not involved in proceedings before national courts of states of origin. International immunities (the focus of this thesis) are implicated where a foreign state or court asserts jurisdiction over a Head of state of another state contrary to the principle of sovereign equality, i.e. *par in parem non habet imperium*. While the case against Fujimori in Peru did not involve international immunities, the

⁵ Section 308. See also the Constitutions of Pakistan (Article 248), Guyana (Article 182), Belgium (Article 88), and Sri Lanka (Article 35). Some states like the US and Singapore (Article 22k of the Constitution) grant a limited immunity to their Heads of states, see *Clinton v. Jones*, 520 US 681; *US v. Nixon*, 418 US 683; and *Nixon v. Fitzgerald*, 457 US 731. In the UK, the Crown Proceedings Act considerably diminished this immunity; however proceedings against the sovereign in her personal capacity are inadmissible. The Iraqi Constitution of 2005 does not provide for immunity of Head of state.

⁶ News available at http://news.bbc.co.uk/2/hi/uk_news/politics/6179911.stm, (Last accessed 07/04/2011)

⁷ See Ronald Gamarra, 'A Leader Takes Flight: The Indictment of Alberto Fujimori', in Ellen Lutz and Caitlin reiger (eds.), *Prosecuting Heads of State* (Cambridge:CUP, 2009) 95-109

case against Saddam Hussein is not so clear because of events leading to the establishment of the IHT.

3.2.1 THE IRAQI HIGH TRIBUNAL AND THE TRIAL OF SADDAM HUSSEIN

For a proper legal analysis of the trial of Saddam Hussein before the IHT, the factual background leading up to the establishment of the Court as well as the nature of the court will be considered.

3.2.1.1 FACTUAL BACKGROUND

In 1990, Iraq invaded and purportedly annexed Kuwait. While acting under Chapter VII of the UN Charter, the Security Council in Resolution 660 condemned the invasion by Iraq and requested its withdrawal from Kuwait.⁸ Subsequently, and also acting under its Chapter VII mandate, the Council in Resolution 678 authorized states to ‘*use all necessary means*’ to uphold and implement relevant Resolutions and to restore international peace and security in the concerned area.⁹ In 1991, a coalition of forces intervened on behalf of the Security Council to repel Iraq.

In 2003, a coalition of states including, most notably, the US and the UK embarked on a military action in Iraq alleging that Iraq was in material breach of Resolution 687 and Resolution 1441 imposing terms of the ceasefire including disarmament

⁸ S/RES/660 (1990)

⁹ S/RES/678 (1990); see also Christopher Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq’, (2003) 4 *San Diego International Law Journal* 7, p.26

requirements by Iraq and calling upon Iraq to comply with disarmament obligations, respectively.¹⁰ Upon the invasion of Iraq by the coalition relying on the revival of the mandate to use force against Iraq based on a combined effect of Resolutions 678, 687 and 1441, the CPA was established upon the occupation of Iraq to administer the country.¹¹ The CPA established an Iraqi Governing Council under its authority and an interim constitution was put in place for Iraq.

The CPA delegated to the Iraqi Governing Council, in CPA Order Number 48, the authority to create a special tribunal in Iraq.¹² The Governing Council established the Iraqi Special Tribunal, and adopted the Statute of the Court. The establishment of the Special Tribunal became effective on 10 December 2003 upon signing of Order 48 by the CPA Administrator.¹³ However, on 11 August 2005, the Iraqi Transitional Assembly, as part of the Transitional Government, revised the Statute of the Special Tribunal and the name of the Special Tribunal changed to the Iraqi High Tribunal (IHT). Due to a legislative procedural defect, i.e. failure to refer the draft legislation to the State Consultative Council for review, the law was re-enacted with amendments as Law No.10 of 2005 in September 2005.¹⁴

¹⁰ S/RES/687 (1991) and S/RES/1441 (2002)

¹¹ Unlike the authorisation to use force against Iraq in 1991, the authorisation to use force against Iraq in 2003 is entrenched in considerable controversy that undermines its legitimacy, see Vaughan Lowe, 'The Iraq Crisis: What Now?', (2003) 52 *ICLQ* 859-871

¹² Section 1(1) of Order No. 48, available at http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf, (Last accessed 16/08/2011)

¹³ See Statute of the Tribunal annexed to Order No. 48. See generally M. Cherif Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal', (2005) 38 *Cornell International Law Journal* 327

¹⁴ Human Rights Watch, 'Judging Dujail: The First Trial before the Iraqi High Tribunal', November 2006, *HRW Report* Vol. 18, No.9 (E); IHT Statute, Official Gazette of the Republic of Iraq, 18 October 2005

The trial chamber of the IHT, in its judgment of 5 November 2006, stated that the Governing Council which had established a temporary Constitution, among other things, emphasized the establishment of a Special Iraqi Court of Law.¹⁵ An interim government was elected on 3 May 2005 and the Security Council in Resolution 1546 acknowledged the interim government as the “independent, sovereign government of Iraq”.¹⁶ Further to this, Law No.10 of 2005 which re-affirmed the Court was passed by a government which enjoyed legitimacy, as it was elected by 78% of the Iraqi citizenry, the said Law having involved the citizenry in a national referendum.¹⁷

3.2.1.2 THE TRIAL OF SADDAM HUSSEIN BEFORE THE IHT

In what has come to be known as the ‘*Dujail* trial’, which was the first case investigated and tried by the Court, former President Saddam Hussein as well as other senior Iraqi officials were indicted for crimes against humanity and tried.¹⁸ Saddam Hussein was convicted and sentenced to death.¹⁹

The involvement of the CPA in the establishment of the IHT has implicated the legality of the IHT. As such, it is imperative for the validity of the jurisdiction and proceedings of the IHT that questions about the legality of the Court are resolved. If

¹⁵ ‘Unofficial’ English translation of the decision provided by the Frederick K. Cox International Law Centre at the Case Western Reserve University School of Law, available at <http://law.case.edu/saddamtrial/dujail/opinion.asp>, (accessed 16/08/2011) [Hereinafter *Dujail Judgment*]

¹⁶ *Ibid.*, p.30; S/RES/1546 (2004)

¹⁷ *Dujail Judgment, ibid*

¹⁸ *Supra* 14, p.2

¹⁹ Michael P. Scharf and Michael A. Newton, ‘The Iraqi High Tribunal’s Dujail Trial Opinion’, (December 2006) *ASIL Insights*, Vol.10, Issue 34

the CPA lacked the powers to establish the IHT then the implications would be that the IHT was invalidly established and as such had no jurisdiction over Saddam Hussein. It would also mean that the IHT would not be an Iraqi court but the court of foreign states, thereby involving the international immunities of Saddam Hussein.

3.2.1.3 LEGALITY OF THE IHT

It must be stated at the onset that the issues concerning the fairness of the proceedings against Saddam Hussein or his punishment do not affect the question of his immunity before the IHT.²⁰ This is because immunity is separate from the conduct of the trial and the merits of the case. Major criticisms of the Court and its proceedings have been directed at the legitimacy of the invasion of Iraq by the Coalition and the post-occupation legitimacy of the CPA.²¹ Bassiouni argues that,

“No norm or precedent exists in international law for an occupying power, the legitimacy of which is in doubt, to establish an exceptional national criminal tribunal.”²²

As a general proposition, the issue of the legality of an invasion must remain separate from the occupation arising from the invasion. The illegality, or otherwise, of the

²⁰ For problems of procedural fairness in the IHT, see ICTJ, Briefing Paper: Creation and First Trials of the Supreme Iraqi Criminal Tribunal, October 2005, available at <http://ictj.org/sites/default/files/ICTJ-Iraq-Creation-Tribunal-2005-English.pdf>, and ICTJ, Briefing Paper, ‘Dujail: Trial and Error?’, November 2006, available at <http://ictj.org/sites/default/files/ICTJ-Iraq-Dujail-Trial-English-2006.pdf>; HRW, *supra* 393, p.7. See also Geoffrey Robertson, ‘Ending Impunity: How International Criminal Law Can Put Tyrants on Trial’, (2005) 38 *Cornell International Law Journal* 649, p.669; Michael Scharf, ‘Is it International Enough?: A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice’, (2004) 2 *JICJ* 330, p.331-332

²¹ The ICTY has also dealt with a challenge to its jurisdiction on grounds of illegitimacy in the establishment of the Tribunal, see *Prosecutor v. Tadic*, Case No. IT-94-1-AR 72, Appeals Chamber Decision on Jurisdiction, 2 October 1995, (1996) 35 *I.L.M.* 32

²² Bassiouni, *supra* 13, p.134, 359-362. See also Articles 54 and 64 of the Fourth Geneva Convention, 75 *U.N.T.S.* 287

invasion of Iraq in 2003 has no legal implication for the conduct of the occupation by the CPA or the validity of the establishment of the IHT. The conduct of a military occupation arising from an invasion, contrary to the rules of *jus ad bellum*, cannot be invalidated by the illegality of the invasion even when the occupying power observes the laws of military occupation as provided in the Hague Regulations of 1907,²³ and the Fourth Geneva Convention of 1949.²⁴ If this were the case, parity of reasoning would then suggest that a lawful use of force against a state would serve to legalize the actions of the occupying forces even where such actions are in violation of the Hague Convention. Such a restrictive argument can only turn the law completely upside down. The laws of military occupation as laid down in The Hague Regulations and Fourth Geneva Convention are applicable to any belligerent occupation, irrespective of the lawfulness, or otherwise, of the use of force.²⁵

A controversial issue arising with regard to the establishment of the IHT and its jurisdiction over Saddam Hussein is the extent of the powers of an occupier to change the criminal or penal laws of the occupied territory and whether an occupying power may change laws as well as make laws that last beyond the period of occupation. The Geneva Conventions and Hague Regulations collectively do not permit an occupying power to change the existing legal system, change the penal legislation of the occupied

²³ Hague Convention (No. IV) Respecting the Laws and Customs of War on Land (and Annexed Regulations) 1907, 205 C.T.S. 277

²⁴ *Op.cit.*

²⁵ Christopher Greenwood, 'The Administration of Occupied Territory in International Law', in Emma Playfair, (ed.), *International Law and the Administration of Occupied Territories*, (Oxford: Clarendon Press, 1992), 241, p.243. This is supported by *US vs. List*, 15 Ann. Dig. 632, p.637, cited and quoted *ibid* where the Tribunal held that,

"International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant..."

territory, issue new penal provisions, or to change the tribunals of the occupied territory, or prosecute inhabitants for acts committed before the occupation.

The core of the duties of an occupying power is articulated in Article 43 of the Hague Regulations annexed to the Hague Convention IV Respecting the Laws and Customs of War on Land 1907 as follows,

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”²⁶

This provision is reflective of customary international law;²⁷ and is essential in the determination of the authority of the occupying power with regard to the establishment of the IHT. While providing the duty to respect the laws of the land, it is implicit from a textual reading of the provision that not all laws must be obeyed, thereby recognizing the right of the occupying power to disregard certain laws in existence in the occupied territory.²⁸ Article 43 permits the occupying power to deviate from the laws in force, in the interests of the occupying power.²⁹

²⁶ Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd edition, (Oxford: OUP, 2000), p.80. The French text of the Regulations is the only binding text and there is a variance between the English and French versions of Article 43, the French version employs the phrase “l’ordre et la vie publics” (i.e. public order and life), see Yoram Dinstein, ‘The Israeli Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations’, (1995) 25 *Israel Yearbook on Human Rights* 1, p.2-3

²⁷ Eyal Benvenisti, *The International Law of Occupation*, (Princeton: Princeton University Press, 1993), p.8

²⁸ *Ibid.*, p.9

²⁹ See *L v. N* (Olive Oil Case), 15 *ILR* 563, where it was held that an occupying power may in the face of “absolute prevention” lawfully modify the legislation of the occupied territory.

The second point is that under Article 43 an occupying power has a duty to take *all* measures in his power to restore public order and civil life. There is nothing in the Hague Regulations and Geneva Conventions preventing an occupying power from establishing adjudicatory bodies like the IHT. Indeed Article 67 of Geneva Conventions IV makes mention of “properly constituted, non-political military courts” sitting in the occupied territory; and this provision does not exclude other types of courts and tribunals.

An occupying power is required, under Article 43, to restore and to ensure, as far as possible, public order and safety. The situation in Iraq before the invasion in 2003 and the situation of chaos and anarchy after the invasion highlight the duty to restore and ensure public order and safety. The establishment of the IHT is a means of restoring and ensuring public order and safety. A textual reading of the provision in Article 43 supports this interpretation, because though vague, the use of the phrase “as far as possible” gives a wide margin of discretion to the power in the observance of this duty. In the case of Iraq, it is immaterial that there was no public order and safety prior to the invasion and occupation in 2003, to be restored. Moreover, such a restrictive interpretation of the duty under Article 43 would be against the spirit of the provision and would serve to ignore the latter part of the phrase, which imposes a duty to *ensure* public order and safety.³⁰

³⁰ *A Teachers' Housing Cooperative Society vs. The Military Commander of the Judea and Samaria Region, et al*, HC 393/82; See Edmund H. Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations', (1944-1945) 54 *Yale Law Journal* 393, p.398 where he states that, "While the occupant can restore public order and civil life only when they have been disrupted, he may legislate to ensure them in the absence of any disturbance."

In *The Christian Society for the Holy Places vs. Minister of Defence, et al* it was held that a military order of an occupying power could only be implemented on the establishment of a new arbitration body.³¹ An arbitration body is without a doubt, an adjudicatory body and this case, at least, establishes that an occupying power would be within its authority and duties under Article 43 of the Hague Regulations if it establishes an adjudicatory body. The type of adjudicatory body that would be established would be immaterial.

Similarly, during the occupation of Germany by the Allied Forces after World War II, Control Council Law No. 10 was promulgated for the punishment of persons guilty of war crimes, crimes against peace and crimes against humanity, Article III, sub-section 2 of which provided for the establishment of courts or tribunals.³²

Although an occupying power is to respect and not tamper with the organization of courts and other adjudicatory bodies in the occupied territory, the occupying power may, however, in certain circumstances establish special tribunals. These circumstances include:³³

- a) Where the citizens of the occupied territory have committed offences against the occupying power or members of its armed forces or in violation of the regulations of the occupying power;
- b) Where there is a breakdown of the local courts for the administration of justice;

³¹ HC 337/71; Emma Playfair, 'Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank, in Playfair, (edited), *supra* 25, p.206, p.208

³² Official Gazette Control Council for Germany (No.3), 1946

³³ Schwenk, *supra* 30, p.405

- c) Where the members of the armed forces of the occupying power are to be dealt with;
- d) Where the political system and courts of the occupied territory constitute a threat to the security of the occupant's army.

From the foregoing, especially in view of the collapse of the Iraqi judiciary, the constitution and the political system of Iraq which were threats to public order and safety as well as the military interests of the Coalition Forces, the CPA could validly have established the IHT.

With regard to the issue raised concerning the legislative authority of an occupying power to make new laws or to change the penal law of the occupied territory, again, the provision of Article 43 of the Hague Regulations provides the answer. Article 43 provides that the occupying power is to respect, unless absolutely prevented, the laws in force in the occupied territory. A literal reading of the provision is to the effect that the restriction on an occupying power from making new law or changing the existing law is not absolute. There is judicial as well as academic support for this view.³⁴

Furthermore, Article 64 of the Geneva Convention IV, like the Hague Regulations, recognizes that the duty of the occupying power to respect the laws of the occupied territory exists subject to the military and security needs of the occupying power.³⁵

However, Article 64 goes further to make such duty subject to the Geneva

³⁴ See *Tabib, et al vs. Minister of Defence*, HC 202/81, quoted in Playfair, *supra* 31, p.213, and Eyal Benvenisti, *Supra* 27, p.12

³⁵ *Supra* 22

Convention, i.e. the duty may be disregarded if it prevents the application of the Convention.³⁶

Therefore, the existing penal laws of an occupied territory are to be respected by the occupying power except due to necessity arising out of either the interests of public order and safety of the occupied territory or military interests of the occupying power in the occupied territory.³⁷ Saddam Hussein had entrenched Ba'athism, tyranny and fear in Iraq. This together with the overall situation in Iraq as well as the necessities of the interest of public order and safety and the military interests of the Coalition Forces justified changes in the laws of Iraq (like the Allied Powers changed racially discriminatory laws in Nazi Germany during its occupation of Germany after World War II). Since the duties of an occupying power are extensive, the legislative powers of an occupying power within the provisions of The Hague Regulations and Geneva Convention IV must be extensive so as to accommodate these duties.³⁸

In view of the above, the merits of the arguments against the legality of the IHT being established under the authority of the CPA are doubtful. Perhaps, the only issue that could have been validly raised concerns the legitimacy and functioning of the IHT that was established under the CPA after the CPA had ended its occupation of Iraq. However, these arguments have essentially been overtaken by events because the

³⁶ Benvenisti, *op.cit.*, p.101; Bassiouni, *supra* 13, p.359-362. Regarding the issue whether 'non-penal' legislation come within the scope of Article 64(2), Benvenisti who argues that although the word 'penal' is not used, taking into consideration the context of the Convention, a better interpretation of Article 64 is that it requires "respect for the existing *penal* laws, but permitting modifications (under certain circumstances) in *all* types of laws", *ibid*, p.102

³⁷ Schwenk, *supra* 30, p.406

³⁸ Greenwood, *supra* 25, p.247

current source of legitimacy of the IHT arose from the legislative acts of the Iraqi Transitional Assembly in September 2005.

3.2.1.4 HEAD OF STATE IMMUNITY BEFORE THE IHT

In the *Dujail Trial* case, the IHT rejected Head of state immunity raised on behalf of Saddam Hussein for two reasons.³⁹ Firstly, since the alleged acts involved were crimes against humanity, Saddam could not rely on immunity. Secondly, the IHT was of the view that with the overthrow of the old regime and the establishment of a new government in Iraq, and by referring the case to the IHT for trial, the new government had waived any immunity to which Saddam was entitled.

The IHT further relied on the Nuremberg precedent by arguing that the Charter of the International Military Tribunal provided against immunities and official capacities.⁴⁰ The IHT also relied on Article 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia, which provides against immunities and official capacities for international crimes, including crimes against humanity.⁴¹ In justifying its stance, the IHT stated that official capacity cannot be an exemption from punishment or the commutation of punishment. It also held that the fact that the commission of crimes by state officials was a matter reasonably within Saddam Hussein's knowledge and for

³⁹ *Supra* 15

⁴⁰ *Ibid*

⁴¹ *Ibid*, p.31-34

which he did not take the necessary steps to prevent could not exempt him from criminal liability.⁴²

The IHT's argument that the issue of immunity does not arise where the acts in issue are crimes against humanity is unfounded in customary and conventional international law. As established in the previous chapter, there is no clear-cut instance of state practice where it was held that immunities do not apply with regard to crimes against humanity. By its specificity, instruments like the Charter of the International Military Tribunal at Nuremberg, the Statutes of the International Criminal Tribunals for Yugoslavia and Rwanda as well as Rome Statute on the International Criminal Court removing immunities of Heads of states for crimes against humanity are limited to the courts established by the instruments.⁴³

In view of the legislative acts of the Iraqi Transitional Assembly, the *Dujail Trial* and the question of the immunity of Saddam Hussein did not occur in the jurisdiction of a foreign state. As stated earlier, the issue of Head of state immunity before the courts of states of origin is dependent on municipal law. As such, the IHT would have considered the provisions of the new constitution of Iraq.⁴⁴ Although the old constitution provided for absolute immunity for the Head of state, the new constitution

⁴² *Ibid*, p.33

⁴³ The Preambles of the Statutes of the ICTY and ICTR provide that the Tribunals shall function in accordance with the provisions of their respective Statutes. ICTY Statute reprinted in (1993) 32 *I.L.M.* 1192; ICTR Statute reprinted in (1994) 33 *I.L.M.* 1602

⁴⁴ The new constitution of Iraq was adopted in October 2005 following a referendum. Text of the 2005 Constitution available at http://www.uniraq.org/documents/iraqi_constitution.pdf, (Last accessed 16/08/2011)

makes no provision for immunity of the Head of state.⁴⁵ Also, the facts that Saddam Hussein was no longer an incumbent Head of state and the acts committed were acts committed in a personal capacity as well as the fact that the new government set up under the new constitution had referred the case to the IHT for trial were decisive of the matter. The absolute immunity under the old constitution was no longer in existence, even if Saddam Hussein was entitled to immunity under the new constitution the immunity was effectively removed by the new government.

Although the decision of the IHT was right in recognising that Saddam was not entitled to immunity before it as a national court of Iraq, the reasons relied on by the IHT in support of its decision are flawed and only serve to further complicate an already complex area of law.

The theoretical misunderstanding of the immunities of Heads of states is highlighted by the IHT's reliance on the Charter of the Nuremberg Tribunal and the Statutes of the Yugoslavian and Rwandan Tribunals. The Nuremberg, Yugoslavian and Rwandan Tribunals are international courts, which the IHT is not, despite its appliance of principles of international law and reliance on international assistance. This theoretical misunderstanding is also evident in the IHT's opinion that official capacity cannot be an exemption from criminal liability or the commutation of punishment. Immunity, whether under international law or national law, is not a substantive defence and cannot negate criminal liability, it merely goes to jurisdiction. The inclusion of obedience to superior orders and responsibility of superiors in the determination of

⁴⁵ Article 240 of 1970 Iraqi Constitution, see *Dujail Judgment*, *supra* 15, p.31.

whether Saddam was entitled to immunity further illustrates the misunderstanding of the IHT.⁴⁶

3.3 HEAD OF STATE IMMUNITY BEFORE NATIONAL COURTS OF FOREIGN STATES

International immunities arise before foreign jurisdictions where the sovereignty and sovereign equality of states are implicated. The question of international immunities of Heads of states before national courts of foreign states is determined by customary international law. The ICJ's enumeration of the national courts of foreign states where immunity has been waived and national courts of foreign states after expiration of office in respect of private acts where jurisdiction exists under international law will be considered against the backdrop of the relevant case law. The courts of the UK, US, France and Senegal provide the necessary material for this analysis.

3.3.1 THE UK AND THE *PINOCHET CASE*

The *Pinochet* case launched Head of state immunity into the limelight of academic and judicial discourse. Proceedings were instituted against Augustus Pinochet Ugarte in the Spanish national court alleging genocide, murder, torture and hostage-taking between 1973 and 1990, during Pinochet's tenure as the President of Chile. While on a medical check-up to the UK in 1998, after expiration of Pinochet's incumbency, an extradition request was issued from Spain to the UK so that Pinochet could stand trial

⁴⁶ Instead of treating them separately, the Court confused both issues, *ibid.*, p.32

in Spain. Proceedings for determination of whether Pinochet was entitled to immunity from arrest and extradition were instituted and Pinochet claimed immunity from any criminal process including extradition.⁴⁷ He argued that he was entitled to state immunity under Section 1 of the UK SIA and personal immunity as a Head of state under Section 20 of the Act.⁴⁸

The Divisional Court upheld Pinochet's claim and held that as a former Head of state, Pinochet was entitled to immunity even for international crimes committed in the course of his official functions as Head of state.⁴⁹ An appeal before the House of Lords was lodged by the Commissioner of Police and the Government of Spain and this led to an interesting chain of decisions from the Law Lords.

3.3.1.1 PINOCHET 1

The Lords held that,

“A claim to immunity by a Head of state or a former Head of state applied only to acts performed by him in the exercise of his functions as Head of state. Although that referred to any of his functions as a Head of state and not just those acts which had an international character, acts of torture and hostage-taking could not be regarded in any circumstances as a function of a Head of state. It was a principle of international law, as shown by the Conventions against the Taking of Hostages and Torture, that hostage-taking and torture were not acceptable conduct on the part of anyone, including a Head of state. It followed that since the acts of torture

⁴⁷ *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 1)*, [1998] 4 All ER 897.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p.898

and hostage-taking with which the applicant was charged were offences under United Kingdom statute law, in respect of which the United Kingdom had taken extra-territorial jurisdiction, the applicant could not claim immunity from the criminal processes, including extradition, of the United Kingdom”.⁵⁰

The Law Lords rightly stated that torture is an internationally unacceptable act, even for Heads of states. However, there is a variance between what is unacceptable and the legal definition of torture under the Convention against Torture.⁵¹ Article 1 of the Convention provides that for an act of torture to fall within the remit of the Convention that it must have been committed under an official capacity.⁵²

Lord Slynn dismissed the appeal and in his dissenting opinion argued that despite the clear indication of a movement towards the recognition of certain crimes with respect to which head of state immunity would be inapplicable before international tribunals, that,

“It does not seem... that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction. Nor is there any *jus cogens* in respect of such breaches of international law which require that a claim of state or head of state immunity, itself a well-established principle of international law, should be overridden.”⁵³

⁵⁰ *Ibid*

⁵¹ The next section of this chapter shall deal with the argument that torture cannot be part of the official functions of a Head of state because this argument also came up in *Pinochet 3*.

⁵² 1465 *U.N.T.S* 85, stating,

“For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

⁵³ *Supra* 47, p.913

Further to this, Lord Slynn interpreted the Convention against Torture to exclude Heads (or former Heads) of state from the term ‘public officials’ under the Convention, either because states did not wish to provide for the prosecution of Heads (or former Heads) of state or because they were not able to agree that a plea in bar to the proceedings based on immunity should be removed.⁵⁴ His Lordship attributes this omission to political and diplomatic difficulties but maintains that if states wanted to exclude immunity of former Heads of states, specifically as regards certain crimes or generally, then they must do so in clear terms and not relegate the matter to national courts.⁵⁵

While also dissenting from the majority Lord Lloyd argued that in view of the “special international tribunals” that had been established over the years with jurisdiction over genocide, crimes against humanity and torture, such crimes when committed by Heads of states cannot be tried in the national courts of foreign states because, “if they could, there would be little need for the international tribunal”.⁵⁶ Going further, he enumerated instances, similar to that of the ICJ in the *Arrest Warrant* case, in which jurisdiction may be exercised over Heads of states including national courts of own state, courts of foreign states where immunity has been waived by own state, the ICC or a “specially constituted international court”.⁵⁷

⁵⁴ *Ibid.*, p.918

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, p.930

⁵⁷ *Ibid*

Lord Lloyd's argument is somewhat sociological and lacks legal conviction. The existence of international tribunals does not remove the valid jurisdiction of national courts. The implication of Lord Lloyd's decision would have meant that Pinochet was outside the law because no proceedings were being brought against Pinochet in Chile and Chile had not waived immunity; rather Chile asserted immunity. Further, the ICC was yet to be established by the time of the decision and in any case the temporal framework of the acts alleged fell outside the jurisdiction of the Court, and no "specially constituted international court" like the Yugoslavian and Rwandan Tribunals had been established to exercise jurisdiction over the alleged acts.

The Lords, by a majority decision, upheld the appeal and effectively reversed the decision of the Divisional Court. The decision allowing the appeal on the ground that there could be no immunity in international law for crimes under international law and that Pinochet was not entitled to immunity because torture is not part of the official functions of a Head of state was wrong.⁵⁸ Heads of states or former Heads of states cannot be reasonably excluded from the provision of the Convention against Torture. This is because a Head of state is the chief representative of a state, a 'public official' *par excellence* and more importantly, the *travaux preparatoire* of the Convention does not support such a restrictive interpretation of the term 'public official'.⁵⁹

The Convention against Torture must be distinguished from the Nuremberg Charter, the Statutes of the Yugoslavian and Rwandan Tribunals as well as the ICC which are

⁵⁸ *Ibid*, see decisions of Lord Nicholls of Birkenhead and Lord Steyn at p.939 and p.945, respectively

⁵⁹ *Pinochet* (No.3), [1999] 2 *All E.R.* 97, p.164

the constitutive instruments of the Nuremberg Tribunal, ICTY, ICTR and the ICC. The Convention proscribes the act of torture while the constitutive instruments of the ICTY, ICTR and ICC establish special courts with jurisdiction over certain international crimes including torture and expressly provide against immunities of Heads of states before the special courts.

While this thesis agrees that Pinochet was not entitled to Head of state immunity in this case, it was not for the reasons advanced in *Pinochet 1*. It was not until *Pinochet 3* that the matter was properly analysed and decided.

3.3.1.2 PINOCHET 2 & 3

After the decision of the House of Lords in *Pinochet 1*, the defence discovered that Lord Hoffmann, one of the presiding judges during the appeal, was involved as an unpaid director and chairman of Amnesty International Charity Limited, and Amnesty International had been granted leave to intervene in the appeal. Pinochet applied to have the decision set aside because of Lord Hoffmann's involvement with the charity organisation on grounds of bias.⁶⁰ As such the decision in *Pinochet 1* was overturned in *Pinochet 2*.

⁶⁰ See [1999] 1 All E.R. 577; Evadne Grant, 'Pinochet 2: The Questions of Jurisdiction and Bias', in Diana Woodhouse, (ed.), *The Pinochet Case* (Oxford: Hart Publishing, 2000), p.41-61; Christine M Chinkin, 'Regina v. Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (No.3)', (1999) 93 *AJIL* 703

In *Pinochet 3*,⁶¹ a reconstituted House of Lords on rehearing the appeal allowed the appeal in part and reversed, in part, the decision of the Divisional Court. The Lords held that by virtue of Section 20 of the SIA and Article 39(2) of the Vienna Convention on Diplomatic Relations (made effective in the UK by the Diplomatic Privileges Act 1964) that a former Head of state had immunity from the criminal proceedings in the UK for acts done in his official capacity as Head of state. The Lords went on to hold that the coming into effect of the Convention against Torture which provides for an obligation of *aut dedere, aut judicare* on state parties nullified immunity *ratione materiae* for acts of torture.⁶²

The Lords were of the opinion that the application of the express terms of the Convention against Torture was such that the state parties could not uphold the immunity *ratione materiae* of public officials including former Heads of state. To do otherwise would be inconsistent with obligations of the parties under the Convention.⁶³

Lords Millett and Phillips of Matravers were of the opinion that prior to the Convention torture was an international crime for which there was no immunity in customary international law. While the Lords are correct in stating that the prohibition against torture existed under customary international law prior to the Convention, there is no supporting state practice or *opinio juris* to corroborate the opinion that

⁶¹ *Op.cit.*

⁶² *Ibid*, p.98

⁶³ *Ibid.*, Lord Saville of Newidgate, p.168-169, and Lord Hope, p. 146-151

there was no immunity under customary international law for acts of torture by Heads of states.⁶⁴

The immunities of Heads of states and the prohibition against torture are rules of custom and for the customary rule of immunity not to apply to the customary rule against torture there must be shown to be a later custom to the contrary or that a new rule is to be found in conventional or treaty law. Where a conventional rule departs from a pre-existing customary rule, the conventional rule will take precedence over the customary rule because it is later in time and also because of the express provision to that effect. However, the conventional rule is necessarily restricted to contracting parties.

The prohibition against torture under customary international law did not override the existing customary rule of immunity *ratione materiae*. Rather this was achieved under the regime of Convention against Torture. Spain, UK and Chile were parties to the Convention and so were bound by the Convention under which the UK court exercised jurisdiction. In essence, the UK courts were national courts before which there could be no immunity of Heads of state because the courts were vested with jurisdiction under international law over acts of torture.

⁶⁴ See *ibid.*, p.114 where Lord Browne-Wilkinson doubts that the existence of torture prior to the Convention could justify the conclusion that there could be no immunity *ratione materiae* for torture.

3.3.2 TORTURE AS PART OF OFFICIAL FUNCTIONS OF HEADS OF STATE

Heads of states are entitled to absolute immunity *ratione personae* by Section 20 of the UK SIA. However upon vacation of office, Heads of states have a continuing but limited immunity *ratione materiae* with respect to acts done in the exercise of functions in that capacity. This statement of the principle in customary international law is not problematic and indeed is reflected in the opinions of all the judges, both at the Divisional Court and House of Lords.

However, in their various decisions Lords Nicholls and Steyn obfuscated matters by arguing that certain crimes like torture, which are egregious violations of international law, are so heinous that they could not be regarded as part of the functions of Heads of states. Lord Steyn argued that certain acts like torture fall outside the scope of functions of a Head of state;⁶⁵ and Lord Nicholls of Birkenhead argued that while international law provides the test for judging the legality of the functions of Heads of states that torture could not be regarded as a function of Heads of states.⁶⁶ This line of reasoning is found in Lord Browne-Wilkinson's decision in *Pinochet 3*; however he restricted this reasoning with regards to its applicability after the Convention against Torture.⁶⁷

⁶⁵ *Supra* 47, p.945

⁶⁶ *Ibid.*, p.939

⁶⁷ *Supra* 59, p.114-115

It is difficult to take the view that the functions of Heads of states exclude the commission of crimes without proper analysis. The issue must be given the close analysis that it merits. The issue of whether acts of torture were committed in an official capacity and the issue of whether there can be immunity for the acts of torture must be considered independently of each other. This is because two separate aspects of international law are involved namely, the law of responsibility and the law of immunity.

In the performance of the functions of Heads of states, illegal acts may be committed and the official nature of the functions of Heads of states cannot be removed simply because of the criminal nature of the act involved.⁶⁸ The issue is best approached from the perspective of whether a criminal act, either under domestic or international law, was committed in the course of the performance of lawful official functions as Head of state. Adopting a “critical test”, which was considerably relied on in *Pinochet 3*,⁶⁹ Watts stated that,

“A Head of state clearly can commit a crime in his personal capacity; but it seems equally clear that he can, in the course of his public functions as Head of state, engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the conduct was engaged in under colour of or in ostensible exercise of the Head of state’s public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of

⁶⁸ *Ibid.*, p.126 with Lord Goff of Chieveley stating thus,

“The functions of, for example, a head of state are governmental functions, as opposed to private acts; and the fact that the head of state performs an act, other than a private act, which is criminal does not deprive it of its governmental character. This is as true of a serious crime, such as murder or torture, as it is of a lesser crime.”

⁶⁹ See *ibid.*, Judgments of Lord Goff, p.119 and Lord Hope, p.146

other states *whether or not* it was wrongful or illegal under the law of his own state.”⁷⁰

It is not enough to say that it cannot be part of the functions of a Head of state to commit a crime. The Law Lords should have embarked upon a closer analysis of the issue. After all, actions which are criminal under local law can still have been done officially and therefore give rise to immunity *ratione materiae*.

It is a general principle of law that immunity may arise, *ratione materiae*, for criminal acts which were done in the course of performance of official functions. This proposition is supported by the principle enunciated in *I Congreso del Partido*,⁷¹ and *Kuwait Airways Corporation v. Iraqi Airways (No.1)*,⁷² that the violation of norms of domestic or international law does not remove the immunities to which a state is entitled. The fact that a state official has acted *ultra vires* does not justify the qualification of the act in issue as not an official act. According to Lord Goff in *Pinochet 3*,

“...the mere fact that the conduct is criminal does not of itself exclude the immunity, otherwise there would be little point in the immunity from criminal process; and this is so even where the crime is of a serious character.”⁷³

Lord Lloyd had argued that the difficulty in seeing the acts of torture with which Pinochet was charged as part of his official functions as Head of state is resolved by

⁷⁰ ‘The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers’, (1994-III) 247 *RdC*, p.56-57

⁷¹ [1983] *AC* 244

⁷² [1995] 1 *WLR* 1147

⁷³ *Supra* 59, Judgment of Lord Goff, p.119

the substitution of the word “official” with “governmental” thereby clarifying the distinction between official and private acts.⁷⁴ Following from this reasoning, if the acts of torture were in the interests of the government and the state they would not qualify as the private acts of the individual. For instance, the example given by Lord Steyn of a Head of state who kills his gardener out of rage or who tortures people for his own personal gratification clearly falls outside the scope of official or governmental acts.⁷⁵

However, the substitution of words is superfluous because for an act to qualify as ‘official’ or ‘governmental’ it would have to have been done on behalf of the state. In *Ex-King Farouk of Egypt v. Christian Dior*, it was held that the purchase of clothes for the wife of the King were clearly private acts for which there could be no immunity *ratione materiae*.⁷⁶

The reasoning that torture as a norm of *jus cogens* is such a heinous act that it cannot be part of the official functions of Heads of states for which there can be no immunity *ratione materiae* is fraught with difficulty, the implications of which are manifold. Firstly, this reasoning is reflective of the normative hierarchy theory and this has been earlier argued to be a flawed theory which fosters obscurity, rather than clarity, of issues. Secondly, the reasoning is contrary to the definition of torture under Article 1 of the Convention against Torture. This is because for an act to qualify as torture under the Convention, the act has to be committed by a public official or person acting

⁷⁴ *Supra* 47, Judgment of Lord Lloyd, p.928

⁷⁵ *Ibid.*, Judgment of Lord Steyn, p.945

⁷⁶ 24 *ILR* 228

in an official capacity. Acts committed by private individuals or in a private capacity cannot be legally described as torture under the Convention. The practical effect of this would mean that the acts alleged against Pinochet would fall outside the scope of the Convention against Torture, an instrument which gave basis to the case.

There is the further problem of the stand-off between the principles of individual criminal responsibility and state responsibility which this reasoning engenders. If torture is argued to be removed from the domain of official acts this would have serious implications for the law of state responsibility and, as such, would fly in the face of international legal developments. Developments post World War II established the state responsibility of Germany and Japan for acts of their officials. The law of state responsibility forms a considerable and important part of the international legal order under the auspices of the UN, its organs and agencies including the ICJ and the ILC.⁷⁷

By holding that torture was not part of the official functions of Pinochet, as President of Chile, this meant that there would be no basis for finding that Chile was in breach of its international obligations under the Convention. In other words, there would be no question of imputability of the acts of Pinochet to Chile. Acts of torture implicate both individuals (state officials) and states. States being abstract entities, the question of imputability is important for the engagement of the responsibility of states. In the *Massey* claim, between US and Mexico, the Claims Commissioner opined that,

⁷⁷ See the *Rainbow Warrior* Case, 74 *ILR* 241 and the ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001, reproduced in UNGA Res 56/83 (12 December 2001). See also Eileen Denza, 'Ex parte Pinochet: Lacuna or Leap', (1999) 48 *ICLQ* 949, p.952-956

“I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of [persons in state service], whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants”.⁷⁸

Similarly, in the *Caire* claim, a case which arose before the Franco-Mexican Claims Commission in 1929 and involved the successful claim by France against Mexico for the arrest, torture and death of its national by Mexican officials, the President of the Commission stated that,

“...The state also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official organ has acted within the limits of his competency or has exceeded those limits...”⁷⁹

In this case, it was also decided by the Commission that,

“...In order to justify the admission of objective responsibility of the state for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorised officials or organs, or that, they should have used powers or measures appropriate to their official character...”⁸⁰

Fourthly, the argument that acts tainted with illegality cannot be considered to be part of the official functions of state officials was presented in *Hatch v. Baez* and was rejected.⁸¹ Lord Lloyd stated that, in *Hatch v. Baez*,

⁷⁸ (1927) *U.N.R.I.A.A.* iv. See also Roman Kolodkin, Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction, *UN Doc.A/CN.4/646*, 24 May 2011, Paragraphs 58-60

⁷⁹ (1929) *U.N.R.I.A.A.* v. 516, p.529-531

⁸⁰ *Ibid.* There are cases in support of this position; see *Youmans* case, (1926) *U.N.R.I.A.A.* iv. 110; *Union Bridge Company* case, (1924) *U.N.R.I.A.A.* vi. 138

⁸¹ (1876) 7 *Hun.* 596; cited by Lord Lloyd in *Pinochet 1*, *supra* 47, p.926

“The plaintiff contended (just as the appellants have contended in the present appeal) that the acts of the defendant must be regarded as having been committed in his private capacity...But the court rejected the plaintiff's argument. Gilbert J. said...: "The wrongs and injuries of which the plaintiff complains were inflicted upon him by the Government of St. Domingo...They consist of acts done by the defendant in his official capacity of President of that Republic. The sole question is, whether he is amenable to the jurisdiction of the courts of this state for those acts." The court concluded [that] "the fact that the defendant has ceased to be President of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them..."⁸²

Fifthly, the reasoning is besieged by the problem of boundaries.⁸³ According to Lord Bingham of Cornhill, C.J,

“A former Head of state is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions. One cannot therefore hold that any deviation from good democratic practice is outside the pale of immunity. If the former sovereign is immune from process in respect of some crimes, where does one draw the line?”⁸⁴

It was argued that the nature of torture was such that an exception must be made to the customary international rule on Head of state immunity and also that being a crime against international law that it would be illogical for international law to outlaw a conduct and also grant immunity from prosecution for the outlawed conduct.⁸⁵ The requirements for the formation of a rule of customary international law are state practice and *opinio juris*, therefore for an exception to a customary rule to arise, the

⁸² *Ibid.*, p.926-927

⁸³ See Judgment of Lord Goff, *supra* 59, p.125-126; and also Judgment of Lord Steyn, *Pinochet I*, *supra* 47, p.945

⁸⁴ Quoted by Lord Goff, *ibid*

⁸⁵ See *Pinochet I*, *op.cit.*, Lord Nicholls, p.940-942

same requirements for the formation of a customary rule are necessary. From an examination of state practice in Chapter 2, it can be stated that no such rule of exception has become law.

The argument that international law cannot outlaw a conduct like torture and at the same time grant immunity from prosecution is misplaced. This is because immunity is a jurisdictional and procedural matter and does not go to the substance of the act; and the House of Lords in a later decision in *Jones v. Saudi Arabia* made this clear.⁸⁶ Likewise the ICJ in the *Arrest Warrant* case stated that immunity from jurisdiction and individual criminal responsibility are separate issues.⁸⁷

Moreover, the Convention against Torture expressly provides that state parties, who have ratified the Convention, are under an obligation under the Convention to exercise jurisdiction over torture.⁸⁸ This obligation under the Convention prevails over the customary rule of immunities (*ratione materiae*). Since Spain, UK and Chile are parties to the Convention against Torture, Pinochet was not entitled to immunity before UK courts for acts of torture. The Pinochet case falls neatly into the categorisation of the ICJ in the *Arrest Warrant* case of instances where immunities of senior state officials would be inapplicable, i.e. the UK courts were national courts vested with jurisdiction under international law.

⁸⁶ *Ibid.*, Judgment of Lord Hoffmann, Paragraph 45

⁸⁷ *Supra* 2, Paragraph 60

⁸⁸ *Supra* 52, Articles 5 and 7

Despite the ambiguous and variegated nature of the decision of the House of Lords in the *Pinochet* case, the reasoning of the judges represent a paradigm shift in international law on Head of state immunity. The extent to which the *Pinochet* case is illustrative of an emergent international rule on Head of state immunity is limited to the contractual obligations of the state parties to the Convention against Torture.

3.4 JURISPRUDENCE OF US COURTS

The jurisprudence of US courts affirms the general rule that Heads of states are generally immune from its jurisdiction. In *Saltany v. Reagan*,⁸⁹ and in *Kilroy v. Windsor*,⁹⁰ the courts held, respectively, that Margaret Thatcher as the UK Prime Minister and Prince Charles as The Prince of Wales and heir apparent to the British throne were entitled to Head of state immunity in proceedings alleging violations of international law and human rights.

The courts have also recognised a limited immunity *ratione materiae* for former Heads of states and that Head of state immunity is an attribute of sovereignty of a state which may be waived by the state. This was decided in *In re Grand Jury Proceedings*,⁹¹ against Ferdinand and Imelda Marcos, former President of Philippines and his wife, for failure to comply with federal grand jury subpoenas and in *Paul v.*

⁸⁹ 702 F.Supp. 319

⁹⁰ 81 ILR 605

⁹¹ 817 F.2d 1108

Avril,⁹² for alleged violations of international law against Prosper Avril, as former military ruler of Haiti.

Although, the cases subject of the study of jurisprudence from the US are mostly civil cases and fall outside the normative framework of the other case studies in the thesis, i.e. crimes against humanity, war crimes and genocide, these US cases will be considered because dominant in US jurisprudence is the practice of filing suggestions of immunity, by the State Department, for Heads of states recognised by the US executive. This has led to an inconsistent application of Head of state immunity before the US courts and is aptly illustrated by *US v. Noriega*,⁹³ *Jimenez v. Aristeguieta*,⁹⁴ *Lafontant v. Aristide*,⁹⁵ *Paul v. Avril*,⁹⁶ and *Tachiona v. Mugabe*.⁹⁷

3.4.1 US v. NORIEGA

On 14 February 1988, an indictment was issued by a federal grand jury in Florida, US against General Manuel Antonio Noriega of Panama for alleged participation in a cocaine racketeering scheme which involved smuggling cocaine into and out of the US.⁹⁸

⁹² 812 *F.Supp.*207; see also *Marcos and Marcos v. Federal Department of Police*, 102 *ILR* 198

⁹³ 746 *F.Supp.* 1506

⁹⁴ 311 *F.2d* 547

⁹⁵ 844 *F.Supp.* 128

⁹⁶ *Supra* 92

⁹⁷ 169 *F.Supp. 2d* 259

⁹⁸ *Supra* 93; see also Susan B.V. Ellington, 'US v. Noriega as a Reason for an International Criminal Court (Comments)', (1992-1993) 11 *Dickinson Journal of International Law* 451

On 15 December 1989, Noriega declared Panama to be at war with the US which, on 20 December 1989, sent in troops into Panama to “safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize Noriega to face federal drug charges in the US”.⁹⁹ Noriega sought refuge in the Papal Nunciature and later surrendered himself.

Noriega contended that he was entitled to Head of state immunity. His claim to immunity was denied by the District Court which stated that for Noriega to claim Head of state immunity that he must be recognised as Head of state of Panama either under Panama’s Constitution or by the US.¹⁰⁰ The Court went further to state that in the provision for an executive arm of government that the Constitution of Panama, in Title VI, Article 170, included only a President and Ministers of state. Since Noriega was never elected as President under the presidential elections of 7 May 1989, an election which, in fact, Noriega had cancelled and the recognition of Eric Delvalle by the US rather than Noriega as the leader of Panama, disentitled Noriega from asserting Head of state immunity. The Court also stated that the decision of the US executive to recognise Delvalle was binding on the judiciary and that this had been authoritatively decided in *Republic of Panama v. Air Panama*.¹⁰¹

The Court erred in its reasoning and decision in this case. This is evident from the acknowledgment by the Court that Head of state immunity is grounded in customary

⁹⁹ *Ibid.*, p.1511

¹⁰⁰ *Ibid.*, p.1519

¹⁰¹ 745 F. Supp 669

international law.¹⁰² The theoretical underpinnings of Head of state immunity, as set out in Chapter 1, establish that it is rooted in customary international law and there is an obligation on states under customary international law to respect the sovereignty of foreign states and the immunity of Heads of foreign states.

International immunities are sovereign rights of states and the District Court was wrong in treating the immunity of Heads of states as a privilege which was at the discretion of the US to accord by arguing that,

“more importantly, the United States government has never accorded Noriega Head of State status...It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or allow an immunity on new grounds which the government has not seen fit to recognize.”¹⁰³

Assumption of leadership of a country either through constitutional or extra-constitutional means is not decisive of entitlement to Head of state immunity. Though they usually co-exist, *de jure* leadership and *de facto* leadership remain separate matters and this case is illustrative of the point. Eric Delvalle as the winner of the 1989 presidential elections in Panama was the *de jure* leader; whereas Noriega was the *de facto* leader. Noriega was the Commander-in-Chief of the Panamanian Defence Forces was in control of the government of Panama having nullified the presidential elections, and functioned to all intents and purposes as the Head of state of Panama. Noriega's non-recognition by the US as the leader of Panama did not change the fact of his leadership of Panama. The District Court even acknowledged the fact that Noriega

¹⁰² *Op.cit*

¹⁰³ *Ibid*, pp.1519-1520

was the Commander-in-Chief of the armed forces of Panama¹⁰⁴ and the *de facto* ruler of Panama.¹⁰⁵ The position of the District Court is also undermined by the fact that the US was the only country that recognised Delvalle as the President of Panama.¹⁰⁶

This thesis has argued in Chapter 1 that the international order is a horizontally structured pluralistic order where there is legal equality between all sovereigns and states. No state can ascribe to itself the power to disentitle another state of its rights or seek to whittle down the obligations of another state in international law. States and state structures vary from democratic governments to military governments to monarchies and totalitarian governments. A state having a democratic government cannot deprive a state having a military government of its entitlements under international law. Indeed to do so would amount international lawlessness. Robert Mugabe and the Republic of Zimbabwe likewise General Pinochet and the Republic of Chile are no more or less entitled to rights and obligations under international law than Barack Obama and the US or Nicholas Sarkozy and the Republic of France. Therefore it would amount to the acceptance of moral high-handedness in international relations to agree with the District Court that,

“ accepting as true statements of counsel regarding Defendant's position of power, to hold that immunity from prosecution must be granted “regardless of his source of power or nature of rule” would allow illegitimate dictators the benefit of their unscrupulous and possibly brutal seizures of power. No authority

¹⁰⁴ *Ibid*

¹⁰⁵ *Ibid*

¹⁰⁶ Ellington, *supra* 98, p.457

exists for such a novel extension of head of state immunity, and the court declines to create one here.”¹⁰⁷

Furthermore, it is accepted as a principle of international law that an act of illegality cannot remove a valid entitlement or right. This principle is well established in the *I Congreso del Partido* and *Kuwait Airways* case.¹⁰⁸ Noriega had declared Panama to be at war with the US and as the Head of state of Panama and the Commander-in-Chief of its armed forces he was under an obligation in international law to respect the laws of war as articulated in the Geneva Conventions. A system of duties is correlative of a system of rights; and international law, as a system, cannot seek to impose duties while removing rights. It would be an inconsistent application of international law that acknowledged the obligations of Heads of states under the Geneva Conventions while disregarding valid entitlements of Heads of state under customary international law for drug trafficking offences.

The Court in reasoning that Noriega did not come under the “acceptable definition” of a Head of state under customary international law relied upon the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. According to the Court,¹⁰⁹

“The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons ... defines “internationally protected person” as “(a) a Head of state, *including* any member of a collegial body performing the functions of a Head of state under the constitution of the state concerned, a Head of

¹⁰⁷ *Op.cit.*, p.1521. The assertion of the court would have meant that Heads of states like Joseph Stalin would not have been entitled to Head of state immunity.

¹⁰⁸ *Supra* 71, 72

¹⁰⁹ *Supra* 93, p.1520

government or a Minister of foreign affairs ...” Noriega has not shown that he was either the ceremonial or official head of government, and he does not otherwise fulfil the definition.” (Emphasis added)

The Court took a narrow interpretation of the provision of the Convention and from a textual reading of the provision it is clear that the Convention does not envisage only *de jure* Heads of states. The Convention expressly uses the word “including”, therefore showing that it was not a limiting and excluding provision. As such, *de facto* Heads of states would come under the provision of the Convention. Moreover, when it is considered that a suggestion of immunity was filed for Prince Charles in the US and was sustained in the courts, in his purely ceremonial capacity as the Prince of Wales and heir to the British monarchy, the non-recognition of Noriega as Head of state of Panama and the decision to refuse him immunity on that ground leaves much to be desired.

The Court also reasoned that Head of state immunity would not apply to private acts and criminal acts in violation of US laws; and that criminal activities like trafficking in narcotics could not be considered as official or governmental acts.¹¹⁰ The fact that Noriega, as a former Head of state, was entitled to immunity *ratione materiae* was decisive of the matter. Immunity *ratione materiae* being applicable only to official acts or acts carried out in the exercise of official functions means that narcotics trafficking, which are private acts, fall outside the scope of acts for which immunity may be claimed.

¹¹⁰ *Ibid.*, p.1519. The Court of Appeals affirmed the decision of the District Court and held that Noriega was properly denied immunity as Head of state for the narcotics offences, 117 F.3d 1206.

3.4.2 JIMENEZ v. ARISTEGUEITA

In *Jimenez v. Aristeguieta*, the appellant was alleged to have leveraged his status as the dictatorial Head of state of Venezuela to commit crimes motivated by financial gain.¹¹¹ Marco Perez Jimenez was a former President of the Republic of Venezuela and a request for his extradition from US was filed by Manuel Aristeguieta as Consul General of Venezuela in the US courts. Jimenez petitioned the courts for the relief of *habeas corpus* which was denied by the courts. Jimenez had contended that as a dictator he was sovereign and so the acts alleged were the sovereign acts of Venezuela, and like the concept of immunities in international law, the act of state doctrine excluded the Court from exercising jurisdiction over the matter.¹¹²

The Court correctly reasoned that as a former Head of state the immunity Jimenez was entitled to was limited *ratione materiae* to official acts and not private acts and that the crimes committed for financial gain were clearly private acts for which there could be no immunity. In coming to this decision the Court relied, among others, on the Supreme Court decision in *Underhill v. Hernandez* where the Supreme Court held that “a military commander representing a *de facto* government” was entitled to immunity, albeit *ratione materiae*.¹¹³ This buttresses the point that extra-constitutional means or illegality in the assumption of power cannot remove rights and duties as well as obligations and entitlements under international law.

¹¹¹ *Supra* 94, p.558

¹¹² *Ibid*, p.557

¹¹³ 168 US 250; see *Jimenez v. Aristeguieta*, *ibid*, p.558

3.4.3 LAFONTANT v. ARISTIDE

In *Lafontant v. Aristide*,¹¹⁴ the US courts recognised that the immunity of a serving Head of state is absolute. In January 1991, Dr. Roger Lafontant, among other persons, had attempted an unsuccessful *coup d'etat* to prevent Haitian president-elect, Jean-Bertrand Aristide, from taking office. Lafontant was arrested and sentenced to life imprisonment in July 1991. It was alleged that Aristide ordered the execution of Lafontant, while he was in custody. Thereafter, Aristide was exiled from Haiti to US in the aftermath of a successful military coup in September 1991.¹¹⁵

The US government insisted on its recognition of Aristide as the lawful Head of state of the Haitian Republic while not recognising the factual military government in place in Haiti. The widow of Lafontant instituted proceedings against Aristide for extra-judicial killing of her husband and relied on the US Torture Victims Protection Act (TVPA). The defendant claimed that he was entitled to Head of state immunity but the plaintiff argued that Aristide was no longer President and so not entitled to an absolute immunity.

The Court held that the immunity of a Head of state recognised by US is absolute.¹¹⁶ The Court was of the opinion that Aristide, as the recognised Head of state of Haiti, was entitled to immunity *ratione personae* and the immunity is based on the equality

¹¹⁴ *Supra* 95, p.132

¹¹⁵ *Ibid*, pp.129-130

¹¹⁶ *Ibid*

of states and the principles of respect and comity among states.¹¹⁷

It is pragmatically difficult to agree with the decision of the Court. Clearly Aristide had ceased to be, at least, the *de facto* ruler of Haiti which was actually being headed by a new government which Parliament had ratified. Further to this, Aristide's continued and prolonged absence from Haiti was such that it could not be doubted that he was not in control of Haiti. In view of these, it would be an absurd interpretation of law that would ascribe to Aristide the entitlements of a serving Head of state while denying those in *de facto* control of these entitlements. Furthermore, the Court stated that immunity was based on sovereign equality as well as respect and comity among nations yet in *US v. Noriega* the court in that case rejected that immunity as it arose in that case was based on sovereign equality, respect and comity among nations.¹¹⁸

3.4.4 PAUL v. AVRIL

In *Paul v. Avril*, the Court held that the immunity to which Prosper Avril was entitled as a former military ruler had been waived by Haiti.¹¹⁹ This decision is inconsistent with the reasoning of US courts which have been inclined to denying recognition and Head of state immunity to unconstitutional military governments. If the reasoning of US courts in the various cases is taken to a logical end it would mean that Avril was not entitled to Head of state immunity, therefore the Republic of Haiti would not have waived an immunity which was not available in the first place.

¹¹⁷ *Ibid*, pp. 131-140

¹¹⁸ *Supra* 93

¹¹⁹ *Supra* 92, p.1519

3.4.5 TACHIONA v. MUGABE

In *Tachiona v. Mugabe*,¹²⁰ a class action was brought by members and supporters of the opposition to President Robert Mugabe's party and government against the President and the Foreign Minister of Zimbabwe under the ATCA, TVPA and international human rights law. The plaintiffs alleged that the defendants had "planned and executed a campaign of violence designed to intimidate and suppress its burgeoning but peaceful political opposition" and this campaign involved acts of murder, torture, terrorism, rape, beatings and destruction of property.¹²¹ However, the US government filed a suggestion of immunity asserting that President Mugabe and his Foreign Minister were entitled to Head of state immunity. Also it was stated that the fact that Mugabe and his Minister were present in US in a representative capacity for the Government of Zimbabwe to the Millennium Summit of the UN entitled them to diplomatic immunity under the Convention on Privileges and Immunities of the UN,¹²² and the Vienna Convention on Diplomatic Relations.¹²³ The Court accepted the suggestion of immunity.

The jurisprudence of the US courts shows an inconsistency in the way the rules of international law regarding the immunities of Heads of states are applied. The application of Head of state immunity is used as a political tool for favouring foreign governments. This assertion is buttressed by the analysis of the cases in this section, with the exception of Robert Mugabe whose immunity could not be disregarded

¹²⁰ *Supra* 97

¹²¹ *Ibid.*, p.265

¹²² 1 *U.N.T.S.* 15

¹²³ 500 *U.N.T.S.* 95

because, however reprehensible a Head of state Mugabe is considered to be, his government and source of authority are constitutional.

3.5 FRANCE AND THE CASE AGAINST GADDAFI

The jurisprudence from the French courts is of important consideration in the discourse. Following the explosion of an UTA Airlines carrier in 1989 involving the death of all passengers and crew on board (which included several persons of French nationality), criminal investigation into the explosion implicated six Libyan nationals alleged to be members of the Libyan Secret Police. These implicated persons were tried in absentia by the Special Court of Assizes of Paris and were convicted and sentenced to life imprisonment.

Association *SOS-Attentats*, an organisation supporting victims of terrorism, as well as relatives of victims of the explosion applied for criminal proceedings against Mouammar Gaddafi, the Libyan Head of state, before the courts of France.¹²⁴ The *Ministère Public* appealed against the decision of the examining magistrate to open a criminal inquiry arguing that Gaddafi was immune from the proceedings as Head of state. The Court of Appeal dismissed the appeal and held that although Head of state immunity was a rule of customary international law, that under the Rome Statute of the ICC, state parties were under a duty to exercise jurisdiction over international crimes even where Heads of states were involved. The Court relied on the cases

¹²⁴ 125 *ILR* 490, p.491-498

against Pinochet and Noriega as evidence of practice that Heads of states were not entitled to immunity for international crimes.¹²⁵

Further appeal was lodged to the Court of Cassation and it was argued by the Advocate General before the Court of Cassation that the fact that France had ratified the Rome Statute did not mean that it was required to exercise criminal jurisdictions over international crimes in all circumstances; that it was necessary to distinguish between the possibility of exercising jurisdiction and the duty to exercise jurisdiction.¹²⁶

The decision of the Appeal Court had no basis in international law. The Appeal Court erred in its interpretation of the Rome Statute. The provisions of the Statute are with respect only to the crimes mentioned in the Statute, i.e. genocide, crimes against humanity, war crimes and aggression.¹²⁷ The crime of terrorism falls outside the remit of the Statute and the Court was wrong to have included the crime of terrorism into the clear and express provisions of the Statute.

It is a general principle that a treaty is binding only upon the contracting parties and that a treaty cannot create rights or obligations for third parties without the consent of such parties. This customary international law principle as contained in the maxim

¹²⁵ *Ibid.*, p.492

¹²⁶ *Ibid.*, p.502

¹²⁷ 2187 *U.N.T.S.* 90, Article 5(1)

pacta tertiis nec nocent nec prosunt is codified in Article 34 VCLT.¹²⁸ Libya not being party to the Rome Statute is not bound by the Statute.¹²⁹ To argue otherwise would strike at the very core of the international system.

There is evidence in support of the customary international law status of Article 34 VCLT. Sir Robert Jennings and Sir Arthur Watts relying on the commentary to the draft of the Convention by the ILC state that,

“‘there appears to be almost universal agreement’ upon such a general rule, which is based not only on a general concept of the law of contract but also on the sovereignty and independence of states.”¹³⁰

This position is further supported by case law, some of which precede the Convention, including the *Island of Palmas* arbitration,¹³¹ *Certain German Interests in Polish Upper Silesia case*,¹³² the *Free Zones of Upper Savoy and the District of Gex case*,¹³³ the *Territorial Jurisdiction of the River Oder Commission case*,¹³⁴ the *Status of Eastern Carelia case*,¹³⁵ the *Aerial Incident of 27 July 1955 case*,¹³⁶ and the *North Sea Continental Shelf Cases*.¹³⁷

¹²⁸ 1155 U.N.T.S. 331. Although by the time of the decision France had not yet ratified the Convention, France was nevertheless bound by the provision because it is reflective of the customary international law.

¹²⁹ *Ibid.*, Article 35 provides that an obligation arises for a third state from a treaty if the parties to the treaty intend so and the third state expressly accepts that obligation in writing.

¹³⁰ *Oppenheim's International Law*, 9th edition, (London: Longman, 1992), p.1260 citing the Text of the Draft Articles on the Law of Treaties with Commentaries 1966 by the ILC, *Yearbook of the ILC* (1966), Volume II, p.226. See also Anthony Aust, *Modern Treaty Law and Practice*, 2nd edition, (Cambridge: CUP, 2007), pp.256-258

¹³¹ (1928) *Reports of International Arbitral Awards*, Volume II, p. 831

¹³² P.C.I.J. (1926), *Series A*, No.7, pp.27-29

¹³³ P.C.I.J. (1932), *Series A/B*, No.46, p.141

¹³⁴ P.C.I.J. (1929), *Series A*, No.23, pp.19-22

¹³⁵ P.C.I.J. (1923), *Series B*, No.5, pp.27-28

¹³⁶ (1959) *I.C.J. Reports* 127

¹³⁷ (1969) *I.C.J. Reports* 3

The Appeal Court in the Gaddafi case reached its decision without consideration of the fact that Pinochet and Noriega were no longer in power by the time of proceedings against them.¹³⁸ The decisions in the *Pinochet* and *Noriega* cases were not based on any general practice recognising the non-applicability of Head of state immunity for international crimes. The *Pinochet* decision was based on the technicalities of the Convention against torture while the *Noriega* decision was based on the non-recognition of Noriega by the US government.

The specificity of the cases against Pinochet, Noriega and Milosevic were such that the French Court of Cassation was aware of the limited extent to which these cases could be relied upon. As such, the Court in allowing the appeal and terminating the proceedings against Gaddafi held that,

“International custom precludes Heads of states in office from being the subject of proceedings before the criminal courts of a foreign state, in the absence of specific provisions to the contrary binding on the parties concerned. In the current state of international law, complicity in a terrorist attack, however serious such a crime might be, did not constitute one of the exceptions to the principle of the jurisdictional immunity of foreign Heads of states in office.”¹³⁹

¹³⁸ *Supra* 124

¹³⁹ *Ibid.*, p.509

3.6 SENEGAL AND THE CASE AGAINST HISSÈNE HABRÉ

After Hissène Habré was deposed as the President of the Republic of Chad in 1990 and while in exile in Senegal, an indictment was issued against him in February 2000 based on allegations of acts of torture committed in Chad and he was placed under house arrest in Senegal. Habré appealed against the indictment on the ground that the courts in Senegal had no jurisdiction over the alleged acts since the acts had been committed against foreigners abroad.¹⁴⁰

The Court of Appeal in Dakar quashed the indictment on the basis of want of jurisdiction. The Court of Appeal held that there was no provision in Senegalese law for the punishment of crimes of humanity and that although the Criminal Code of Senegal had been amended in line with the Convention against Torture that it did not suffice to found jurisdiction in the matter as the procedural laws of Senegal under the Code of Criminal Procedure had to be amended in line with the substantive law so as to provide for universal jurisdiction for the acts of torture.¹⁴¹

The complainants appealed to the Court of Cassation against the decision but the appeal was dismissed. The Court of Cassation held that Article 5(2) of the Convention against Torture required parties to take necessary measures to establish jurisdiction over acts of torture and that the enforcement of the Convention required parties to take legislative measures. Therefore, the presence of the accused person in Senegal was not

¹⁴⁰ 125 *ILR* 569

¹⁴¹ *Ibid.*

enough to base the exercise of jurisdiction in the absence of any domestic procedural legislation empowering Senegal to exercise jurisdiction.¹⁴²

Not satisfied with the decision of the Senegalese courts, the torture victims from Chad lodged a communication against Senegal with the Committee against Torture. It was alleged by the complainants that Senegal was in breach of its obligations under Articles 5 and 7 of the Convention against Torture and the Committee decided in the favour of the complainants agreeing that Senegal had breached its obligations under the Convention.¹⁴³

Another group of victims, including three Belgian nationals, alleging torture by Habré in Chad brought action against him in Belgium.¹⁴⁴ The Government of Chad was prepared to waive any immunity that Habré could have relied on in the case before the Belgian courts and communicated this to Belgium.¹⁴⁵ In September 2005, a Belgian court issued an international arrest warrant against Habré and sought his extradition from Senegal. Despite Habré's re-arrest in November 2005, the Indicting Chamber of the Court of Appeals in Dakar decided that it had no jurisdiction regarding an extradition request against a former Head of state. The Senegalese President referred the matter to the AU.

¹⁴² *Ibid.*

¹⁴³ See *Suleymane Guengueng et al.*, Decisions of the Committee Against Torture, 36th Session, 1-19 May 2006, Communication No. 181/2001: Senegal. 19/05/2006 (CAT/C/36/D/181/2001); see also Chapter 2 of thesis.

¹⁴⁴ Despite the repeal in 2003 of Belgium's universal jurisdiction law of 1993, Belgium decided that the case against Habré would continue on the basis of Belgian nationality of the victims.

¹⁴⁵ Human Rights Watch, 'The Trial of Hissène Habré: Time is Running Out for the Victims', (January 2007) *HRW Report*, Number 2, p.7, 20

The AU in January 2006 established a Committee of Eminent African Jurists to consider the aspects and implications of the case against Habré and option for his trial.¹⁴⁶ The Committee concluded that Habré was not entitled to immunity and decided on an ‘African option’ as the solution.¹⁴⁷ Under this option, Senegal, Chad or any AU member could exercise jurisdiction over the accused person or an *ad hoc* tribunal could be established in any member state to try the accused. Based on the recommendations of the Committee of Eminent African Jurists, the AU decided that the matter fell within the competence of the Union and mandated Senegal to prosecute and ensure the trial of Habré.¹⁴⁸

While the issue of Head of state immunity did not arise in the arguments canvassed by Habré against his indictment before the Senegalese courts, it does not mean that Head of state immunity has no place in the Habré case. Indeed, the Committee of Jurists appointed by the AU considered the issue and was of the opinion that Habré could not rely on Head of state immunity.¹⁴⁹ Importantly, Chad indicated its amenability to waiving the immunity in proceedings in Belgium and this amenability could be interpreted to extend to possibly any other criminal proceedings outside Belgium.

¹⁴⁶ Assembly/AU/Dec.103 (VI), available at http://www.africa-union.org/root/au/Documents/Decisions/hog/AU6th_ord_KHARTOUM_Jan2006.pdf, (Last accessed 16/08/2011)

¹⁴⁷ Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, available at http://www.hrw.org/justice/habre/CEJA_Report0506.pdf, (Last accessed 16/08/2011)

¹⁴⁸ Assembly/AU/Dec.127 (VII), available at http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/Decisions_and_Declarations/Assembly-AU-Dec.pdf, (Last accessed 16/08/2011)

¹⁴⁹ *Op.cit*, p.3

Senegal became a party to the Convention against Torture upon its entering into effect in June 1987 while Chad became a party in June 1995; and the acts of torture alleged against Habré occurred in the period of his rule as Head of state of Chad until 1990. The fact that Chad became party to the Convention in 1995 after Habré had vacated office does not mean that the application of the Convention would be tantamount to the application of the law *ex post facto*.¹⁵⁰ The application of the prohibition against torture under the Convention and the non-applicability of immunities for acts of torture are not to be muddled together. It could not have been intended that immunity *ratione materiae* of former Heads of state parties to the Convention would survive the coming into effect of the Convention. However, for states not party to the Convention, while the prohibition against torture under the Convention applies to them as a rule of customary international law, there is no rule of customary international law removing immunity *ratione materiae*.

The fact that Chad was not a party to the Convention against Torture until 1995 does not affect the prohibition against torture. This date does not affect the substantive prohibition against torture under the Convention as well as under customary international law. It merely refers to the effective period when the concerned states became in agreement with each other as to the inapplicability of immunity *ratione materiae* for acts of torture. Thus, the effective date of the agreement that immunity would not be applicable to acts of torture, as agreed between Senegal and Chad, is June 1995. This would have raised a possible difficulty in any proceedings to be

¹⁵⁰ Frederic L. Kirgis, 'The Indictment in Senegal of the Former Chad Head of State', (February 2000) *ASIL Insights*

commenced against Habré because it would have meant that he would be immune from the courts of Senegal. However, this difficulty becomes a non-issue because of the position of the Government of Chad that it will waive any immunity to which Habré may otherwise have been entitled.

Unfortunately, despite the bold moves of the AU no timetable for the commencement of the trial of Habré has been set out. Senegal alleges budget constraints as impeding trial of Habré.¹⁵¹ In February 2009, Belgium instituted proceedings against Senegal before the ICJ claiming that Senegal is in breach of its international obligations by failing to prosecute or extradite Habré.¹⁵²

In the absence of a substantive decision by a competent court on the Habré case, further analysis would be purely speculative. It is also important to state that the decision of the Committee against Torture was against Senegal and its obligations under the Convention against Torture; it had nothing to do with the individual criminal liability of Habré.¹⁵³ However, in view of the explicit intention of Chad to waive immunity in proceedings in a foreign state against Habré, Senegal's hesitation to initiate criminal proceedings against Habré is questionable.

¹⁵¹ ICJ Press Release No. 2009/13 of 19 February 2009. Following the trial in absentia of Habré for attempting to overthrow the government, his conviction and sentence to death by a court in Chad, Senegal has suspended his repatriation to Chad, see <http://www.bbc.co.uk/news/world-africa-14101258>, (Last accessed 16/08/2011).

¹⁵² *Ibid.*

¹⁵³ See Chapter 2 of thesis

3.7 CONCLUSION

The immunities of Heads of states have been considered in this chapter from the dimensions of national courts of the state of origin of Heads of state and national courts of foreign states with a view to ascertaining any emergent trend.

The jurisprudence of the courts of various jurisdictions establish customary international law of absolute immunity *ratione personae* for serving Heads of state and limited immunity *ratione materiae* for former Heads of state as well as waiver of immunity by the state of origin of the person entitled to the immunity.

The qualification of Head of state immunity, by the US, based on recognition of governments, as shown in this chapter, has no place in international law. International immunities are sovereign entitlements of states and not mere privileges which are accorded by another state. The inconsistent decisions of the US courts based on the suggestions of immunity by the State Department are more indicative of ‘great power’¹⁵⁴ prerogatives than of any emergent trend regarding international immunities of Heads of state.

Contrary to the opinion of some of judges in the *Pinochet* case, the illegality of torture under the regime of customary international law does not remove the immunity of a Head of state. However, the illegality of torture under the regime of the Convention against Torture could remove Head of state immunity *ratione materiae*.

¹⁵⁴Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, (Cambridge: University, 2004)

Despite its variegated nature, the final decision of the House of Lords in the *Pinochet* case is reflective of an emergent trend on Head of state immunity where acts of torture are alleged to have been committed. However, this trend is limited by the contractual nature of obligations under the Convention against Torture which are binding upon Spain, Chile and the UK.

The inapplicability of immunity *ratione materiae* to the *Pinochet* case was not as a result that torture not being part of official functions of Heads of state. The commission of acts of torture in an official capacity and the applicability of immunity *ratione materiae* are separate considerations.

A discernible trend from this chapter is evident in the implication of the international responsibility of states before the ICJ for breach of international obligations to disregard immunities of Heads of states for acts of torture. However, this trend is limited by the express application of the Convention against Torture where the states involved in the proceedings are parties to the Convention and as such are bound by the obligations arising under the Convention.

While a substantive prosecution of Habré is yet to commence, it is clear that the decision of the AU mandating Senegal to try the matter as well as the position of the Government of Chad on waiver of any jurisdictional immunity involved lend support

to the position that former Heads of state are not entitled to jurisdictional immunities, *ratione materiae*, for acts of torture.

Moving on from national courts, the next chapter will introduce the discourse of Head of state immunity before international courts.

CHAPTER 4: HEAD OF STATE IMMUNITY BEFORE INTERNATIONAL COURTS ESTABLISHED IN THE WAKE OF WORLD WARS I AND II

4.1 INTRODUCTION

The ICJ, in the *Arrest Warrant* case, included ‘certain international courts’ in its enumeration of the instances where immunities may not avail senior state officials, including Heads of states.¹ The enumeration of the ICJ of the circumstances where Head of state immunity will not be applicable is not self-explanatory. The international nature of a court is not enough to disentitle a Head of state from immunity available under customary international law. States cannot, by their aggregation, achieve what they lack the individual capacity to do, i.e. remove a right which a third state possesses without the consent of the third state. It becomes imperative to consider what makes an international court come within the envisagement of the ICJ in the *Arrest Warrant case*, i.e. what makes an international court ‘certain’ as contemplated by the ICJ?

The question of Heads of state immunity before international courts is to be construed against the backdrop of the nature of the constitutive instrument establishing an

¹ (2002) *I.C.J.Reports* 3, paragraph 60

international court and whether states are bound by the instrument, i.e. the constitutive instrument theory.²

The different international courts and their constitutive instruments must be analysed in the determination of emergent trends on Head of state immunity. The analysis is imperative especially when it is considered that international courts, despite their seeming proliferation since the end of the Cold War, have been characterised by *ad hocism*.

International criminal accountability has not always featured in the international legal system. Efforts at international criminal accountability by the international community have largely been dependent on the era in the development of international criminal law and the necessary political will of the international community during the era. The proper place to start the analysis involved in the consideration of international courts or tribunals and efforts at international criminal accountability is after the First World War (WWI) and subsequently the efforts after the Second World War (WW II).

This chapter will begin the analysis of international courts and their constitutive instruments by considering international courts established after WWI and WWII and the extent to which the post world wars efforts at accountability indicate a paradigm shift in international law. This chapter will employ the constitutive instrument theory

² Dapo Akande, International Law Immunities and the International Criminal Court', (2004) 98 *AJIL* 407, p.417-418; The Appeals Chamber of the ICTY in *Prosecutor v. Blaskic*, was of the view that though immunity applied to proceedings before national courts, it also has been respected and taken into account in international proceedings, 106 *ILR* 609, paragraph 41

in its analysis of the applicability of Head of state immunity in the type of international courts featured in this chapter.

Furthermore, because a central feature of the international system is the absence of machinery for enforcement, including the enforcement of judicial orders and requests, it is important that any analysis of international courts also considers judicial assistance and co-operation with the international courts. The non-applicability of Head of state immunity before an international court can only be achieved where there is an obligation on states to co-operate with and assist an international court. Thus, this chapter will generally consider the underlying principles of judicial assistance and co-operation with international courts before proceeding to the obligations of states regarding judicial assistance and co-operation under the Treaty of Versailles and the Charters of the International Military Tribunals established after World War II.

4.2 POST WORLD WAR I: THE TREATY OF VERSAILLES 1919 AND THE TRIAL OF THE KAISER

Historically, the idea of establishing international courts to try serious violations of international law arose for the first time after WWI. After WWI, an armistice agreement was concluded between the Allied and Associated Powers and Germany on 11 November 1918 resulting in cessation of hostilities. Kaiser Wilhelm II abdicated

and fled to the Netherlands where he was granted asylum.³ After its initial protest over the harshness of the terms of the Treaty, Germany finally accepted the terms of the Treaty of Versailles on 28 June 1919, formally bringing to an end WWI.⁴

Prior to the Treaty of Versailles, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties was established to inquire into and report on, *inter alia*, the degree of responsibility for offences attaching to particular members of enemy forces however highly placed and the constitution and procedure of a tribunal appropriate for the trial of these offences.⁵

In its report presented to the Preliminary Peace Conference on 29 March 1919, the Commission proposed the establishment of a “high tribunal” which would have jurisdiction over charges against enemy authorities irrespective of their position or rank, including as Heads of states.⁶ The proposed composition of the high tribunal, the law to be applied by the tribunal and its supremacy over national courts show that the tribunal envisaged by the Commission was to be international in nature. This conclusion is supported by the recommendation of the Commission that the high tribunal be “provided by the treaty of peace.”⁷

According to the Commission,

³ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (New Jersey: Princeton University Press, 2002), p.64

⁴ 225 C.T.S. 188; H.E. Goemans, *War and Punishment: The Causes of War Termination and the First World War*, (New Jersey: Princeton University Press, 2000), p. 309.

⁵ ‘Report Presented to the Preliminary Peace Conference on March 29, 1919,’ (1920) 14 *AJIL* 95, p.116

⁶ *Ibid.*, p.121-122

⁷ *Ibid.*, p.123 and p.129 where the Commission talks about the creation of “a high tribunal with an international character” for the “trial of persons exercising sovereign rights”.

“...in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of Heads of states.”⁸

Upon considering arguments on immunity and inviolability of Heads of states the Commission stated,

“But this privilege, where it is recognised, is one of practical expedience in municipal law, and is not fundamental. However, even if in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.”⁹

Immunity does not only exist in municipal law; its place in international law is well established. The theoretical underpinning of the concept of immunity is fundamental to the international system. Therefore, the Commission was wrong to have considered immunity one-dimensionally, i.e. from the perspective of municipal law only. The Commission envisaged that Heads of states would bear individual criminal liability for violations of the laws and customs of war as well as laws of humanity in proceedings before the proposed high tribunal.

However, the question of the applicability or otherwise of immunities of Heads of enemy states for the crimes committed during the war was not determined by whether immunity was merely a municipal law principle which was not fundamental from an international perspective. The immunity which would have been implicated before

⁸ *Ibid.*, p.116

⁹ *Ibid.*

proposed tribunal is international immunities and not national immunities. The immunities of Heads of enemy states were determined by the nature of the proposed tribunal and whether states (including enemy states) were bound by the constitutive instrument establishing the tribunal.

Since the tribunal was proposed to be established by an international agreement (treaty of peace), the applicability or otherwise of Head of state immunity was determined by the very nature of the treaty of peace. Being a contractual agreement, the enemy states would have been deemed to have consented to the restriction of their sovereign rights, including the non-applicability of Head of state immunity before the tribunal. This position is supported by the statement of the Commission that,

“We have later in our Report proposed the establishment of a high tribunal composed of judges drawn from many nations, and included the possibility of the trial before that tribunal of former Heads of states with the consent of that state itself secured by articles in the treaty of peace.”¹⁰

The inclusion, or otherwise, of a provision for consent of the enemy state in the treaty of peace does not change the legal consequence of the signing of a peace treaty by an enemy state which provides against the sovereign rights of the enemy state. There is no further need to secure the consent of the enemy state by articles in the treaty; it would be merely superfluous. The consent of the state is implicit in the signing of the treaty.

¹⁰ *Ibid.*, p.116

More than any other country represented at the Commission, the representatives of the US opposed the creation of an international tribunal having criminal jurisdiction arguing that “there is no precedent, precept, practice or procedure” for this.¹¹ They also objected to the proposed tribunal because of its inclusion of Heads of enemy states to be tried and punished for violations of the laws and customs of war and of the laws of humanity.¹²

The objections of the US were based on its view that the Commission exceeded its mandate in extending individual criminal liability to violations of laws of humanity and that the Commission wrongly had sought to subject Heads of states to a tribunal which had no jurisdiction over them at the time of commission of the alleged offences.¹³ The US had maintained that a Head of state exercising sovereign rights is responsible only to those who have “confided those rights to him by consent expressed or implied.”¹⁴

The views of the US rightly represented the position of the law in 1919. However, their objection to the creation of the tribunal was devoid of the dynamism of international rule-making. It is a rule of customary international law that states could come together to create rights and obligations for themselves. The only restriction on

¹¹ *Ibid.*, p.142

¹² *Ibid.*, p.144

¹³ *Ibid.*, p.144

¹⁴ *Ibid.*, p.148

this rule is that states could not create rights and obligations for third parties without their consent.¹⁵

The Treaty of Versailles heralded a new era in international criminal responsibility of Heads of states. Of particular importance are Articles 227 and 228 of the Treaty of Versailles. Article 227 provides that,

“The Allied and Associated Powers publicly arraign Wilhelm II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan...The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.”¹⁶

Article 228 further provides that,

“The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or

¹⁵ VCLT, Article 34

¹⁶ *Supra* 4

employment which they held under the German authorities.”¹⁷

It is clear from the Treaty of Versailles that the Allied and Associated Powers intended to set up a tribunal to try the German Head of state for violations against international morality, the sanctity of treaties and the laws and customs of war. The tribunal envisaged under the Treaty was such that the international immunities of Heads of states would have no bearing in proceedings before the tribunal.

Despite providing for the trial of Kaiser Wilhelm II by the tribunal of the Allied and Associated Powers, no proceedings of accountability were brought against the Kaiser. Bass, while commenting on the politics of war trials, mentions that there was a preference in some quarters for the summary execution of the Kaiser as against dealing with him through legal and normative standards.¹⁸ The inability to muster the necessary political will to execute Article 227 of the Treaty as well as the refusal by the Netherlands to surrender the Kaiser to the Allied Powers coupled with the fact that in 1919 there were no existing legal normative framework, outside the provisions of the Hague Conventions of 1899 and 1907 dealing with war crimes,¹⁹ to judge the acts of the Kaiser meant that Kaiser Wilhelm II was not tried for his acts.

Despite the provision of the Hague Conventions, the Kaiser was not to be tried for the commission of any war crimes, but rather he was to be tried for “a supreme offence

¹⁷ *Ibid.*

¹⁸ *Supra* 3, pp.12-13; 58-105

¹⁹ Hague Convention on the Laws and Customs of War on Land 1899 (Hague II), 187 *C.T.S.* 429; Hague Convention on the Laws and Customs of War on Land (Hague IV) 1907, 205 *C.T.S.* 277

against international morality and the sanctity of treaties”. It is important to recognise that the only possible acts of the Kaiser which the tribunal proposed by the Allied and Associated Powers under the Treaty could have asserted jurisdiction over were acts in violation of the laws and customs of war as existing under the Hague Conventions.²⁰

No tribunal was established under the Treaty of Versailles due to a waning in political will on the part of the Allied and Associated Powers which was essentially brought about by the opposition of the US to the prospect of a war crimes trial.²¹ Germany proposed to try the lists of persons accused of violations of the laws and customs of war by the Allies before the German Supreme Court at Leipzig and this was accepted by the Allies in February 1920.²² The Leipzig trials which followed were anticlimactic because of disappearance of some suspects, acquittal of many accused persons, and the paltry punishment meted to convicted persons.²³ In a cynical commentary about the efforts after WWI and the proposal for the trial of the Kaiser, Telford Taylor opines that the efforts could be summed up in the following words, “the mountain laboured and brought forth a mouse.”²⁴

However, Article 227 of the Treaty of Versailles represented a paradigm shift in international law because prior to 1919, there had been no efforts to set up tribunals for the trial of Heads of states for war crimes. In fact, a policy of exile of Heads of

²⁰ Even the Hague Conventions did not prohibit states from resorting to war; see Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, (London: Bloomsbury Publishing, 1993), p.11.

²¹ *Ibid.*, pp.14-16

²² Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, (New York: Transnational Publishers, 1998), p.2

²³ *Supra* 3, pp.80-81, 89-92

²⁴ *Supra* 20, p.18

states rather than trial for war crimes was preferred prior to 1919.²⁵ In modern times, it has become customary to hold war crimes trials either through domestic courts or by establishing international court or tribunals. The trend which began with Article 227 of the Treaty of Versailles, but which it did not quite achieve, has been made manifest by the later trials of Heads of states, as will be seen in later parts of the chapter and subsequent chapters.

The terms of the Treaty of Versailles have been criticized for its harshness.²⁶ However harsh or imposed the terms of the Treaty of Versailles may be, it is in effect a contractual agreement between Germany and the Allied and Associated Powers. Therefore, the provision for the trial of the Kaiser which invariably implies the non-application of the immunity of the Kaiser is an agreement between the parties to the Treaty. Having said this, the extent to which the Treaty of Versailles is indicative of a trend of non-applicability of Head of state immunity before international courts is limited to the nature of the Treaty as a contractual agreement. This is especially so when it is considered that the Heads of state of other countries other than Germany would not have been liable to trial in the tribunal proposed under the Treaty.

Another peace treaty (Treaty of Sèvres) was signed in 1920, after WWI, between the Allied Powers and the Ottoman Empire.²⁷ The Treaty of Sèvres provided for proceedings of accountability against persons from the Ottoman Empire (Turkey)

²⁵ *Op.cit.*, pp.37-53

²⁶ F.S. Marston, *The Peace Conference of 1919: Organisation and Procedure*, (London: OUP, 1944), p.192

²⁷ [1920] *U.K.T.S.* 11

accused of the violations of the laws and customs of war after World War I. Article 226 of the Treaty of Sèvres stated that Turkey recognised the right of the Allied Powers to try and punish persons responsible for the genocidal acts in Armenia. Further to this, Article 230 of the Treaty of Sèvres provided that,

“The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.

The Allied Powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such tribunal.

In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognise such tribunal.”

Articles 226 and 230 of the Treaty of Sèvres did not expressly include the Turkish Head of state. However, it is arguable that the inclusion of the Head of state is implied in the provisions. Turkey had recognised the right of the Allied Powers to try and punish those responsible for the acts and had undertaken to surrender those persons to the Allied Powers. However, the Treaty of Sèvres was not ratified by the Ottoman Parliament and as a result the Treaty did not come into force.

A later treaty was signed at Lausanne in 1923 between the Allies and the Ottoman Empire.²⁸ The Treaty of Lausanne was ratified and it established the peace between

²⁸ Treaty of Lausanne between Principal Allied and Associated Powers and Turkey, 28 *L.N.T.S.* 11. Before signing the Treaty of Lausanne, there were efforts at the trial of certain Turkish officials at the

the warring parties. The Treaty of Sèvres did not survive the Treaty of Lausanne, which superseded the earlier treaty. The Treaty of Lausanne did not contain equivalent provisions to Article 226 and 230 of the Treaty of Sèvres. To secure the ratification of the Treaty of Lausanne by Turkey, the Allied Powers offered an amnesty for all offences committed by the Turkish between 1914 and 1922 under the Declaration of Amnesty.²⁹

Despite the agitations for the trial of senior state officials in 1919 and the commendable efforts seen in the wake of WWI, it was not until the end of another world war almost a quarter of a century later that the aspirations and ideals of the post WWI era would materialise.

4.3 POST WORLD WAR II: THE CHARTERS OF THE INTERNATIONAL MILITARY TRIBUNALS

It was against the backdrop of the statement of the Allied Powers that the cessation of hostilities against the Axis powers was to be on the basis of an unconditional surrender that Germany and Japan surrendered to the Allied Powers in May and August 1945,

national level in Turkey under the pressure from the British Forces. However, this was without success because of the political problems it brought about in Turkey. See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, (Cambridge: CUP, 2005), p.33

²⁹ Text available at http://untreaty.un.org/U.N.T.S./60001_120000/14/39/00027947.pdf, (Last accessed 15/04/08); see M. Cherif Bassiouni, *Crimes against Humanity in International Law, Second Revised edition*, (The Hague: Kluwer Law International, 1999), p.68.

respectively, bringing an end to WWII.³⁰ An agreement (London Agreement) was reached on 8 August 1945 which provided for the prosecution and punishment of major war criminals in the European battle theatre of WWII.³¹ The Agreement envisaged the establishment of an international military tribunal to fulfil its objectives as well as those of the Moscow Joint Four-Nation Declaration. To this end, the International Military Tribunal (IMT) at Nuremberg was established.³²

The Allied Powers, in a Declaration at Potsdam in July 1945 were determined to prosecute the Japanese for war crimes.³³ Japan signed the Instrument of Surrender on 2 September 1945 whereby it undertook to carry out the provisions of the Potsdam Declaration and the orders of the Supreme Commander of the Allied Powers.³⁴ The Supreme Commander for the Allied Powers in the Pacific set out a Charter for the establishment of the IMT for the Far East (IMTFE) on 19 January 1946.³⁵

Article 7 of the Charter of the IMT at Nuremberg provides that,

“The official position of defendants, whether Heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.”³⁶

³⁰ Joint Four-Nation Declaration during the Moscow Conference, (1943) reprinted in Guénaél Mettraux (edited), *Perspectives on the Nuremberg Trial*, (Oxford: OUP, 2008), p.730, Appendix 2

³¹ 82 *U.N.T.S.* 279

³² Charter of the IMT, reprinted in Mettraux, *op.cit.*, p.736, Appendix 4; See *In re Goering and Others*, 13 *ILR* 203

³³ Reproduced in Neil Boister and Robert Cryer (edited), *Documents on the Tokyo War Crimes Tribunal: Charter, Indictment and Judgments*, (Oxford: OUP, 2008), p.1

³⁴ *Ibid.*, p.3

³⁵ *Ibid.*, p.7; see Special Proclamation- Establishment of an International Military Tribunal for the Far East, 19 January 1946, *ibid.*, p.5; *In re Hirohita and Others*, 15 *ILR* 356

³⁶ *Supra* 32

Article 6 of the Charter of the IMTFE provided that,

“Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”³⁷

The Allies having emerged victorious called the shots and determined how to deal with their enemies as well as how the course of international legal history was to be made.³⁸ The fact that the IMTs were to try only citizens of the defeated countries has been one of the biggest criticisms and weaknesses of the trials at Nuremberg and Tokyo.³⁹

Having stated earlier that the source of the non-applicability of Head of state immunity under the Treaty of Versailles emanated from the contractual nature of the Treaty, it is important to consider the source of the non-applicability of Head of state immunity under the Charters of the Nuremberg IMT and the IMTFE.

The non-applicability of Head of state immunity before the Nuremberg IMT and IMTFE under their Charters (Articles 7 and 6, respectively) arose from the consent of Germany and Japan. Whereas the consent of Japan is express in the Instrument of

³⁷ *Supra* 35, p.7

³⁸ According to King, Nuremberg “was the product of a particular context in which the Allies held all the cards.” See Henry T. King, Jr., ‘The Judgments and Legacy of Nuremberg’, (1997) 22 *Yale Journal of International Law* 213, p.220

³⁹ The trials have been widely regarded as ‘show trials’ and the justice meted out by the Judges of the Tribunals criticised as “victor’s justice”, Antonio Cassese, *International Law*, (Oxford: OUP, 2001), p. 266

Surrender signed by Japan,⁴⁰ the consent of Germany is implicit in the unconditional surrender of Germany and the fact of occupation by the Allies. Any misgivings about the jurisdiction of the IMT over the German Head of state is diminished by the fact that the Allied Powers had warned that German officers and Nazi party members responsible for atrocities committed would be judged and punished.⁴¹ By surrendering unconditionally, Germany implicitly consented to the possibility of judging and punishing its state officials, including Head of state, by the IMT. In its judgment, the Nuremberg IMT stated that the Charter of the Tribunal being the source of its authority was,

“...the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world.”⁴²

Fox also opines that,

“...with respect to the International Military Tribunal at Nuremberg, the consent of Germany would seem to dispense with the need for such a plea, for the Tribunal was established by the occupying powers exercising territorial jurisdiction, as the German Reich (as the former territorial state) had unconditionally surrendered.”⁴³

⁴⁰ Neil Boister, ‘The Tokyo Trial’ in William Schabas and Nadia Bernaz (edited), *Routledge Handbook of International Criminal Law*, (Oxford: Routledge, 2011), pp.17,18

⁴¹ See Inter-Allied Declaration of 13 January 1942 reprinted in Inter-Allied Information Committee, *Punishment for War Crimes: The Inter-Allied Declaration Signed at St. James’s Palace London on 13 January 1942: and Relative Documents*, (London: HMSO, 1942); Moscow Declaration, available at <http://avalon.law.yale.edu/wwii/moscow.asp> (Last accessed 16/08/2011)

⁴² Goering, *supra* 32, p.207

⁴³ Hazel Fox, *The Law of State Immunity*, (Oxford : OUP, 2002), pp.431-432; Henry T. King, Jr., ‘Without Nuremberg – What?’, (2007) 6 *Washington University Global Studies Law Review* 653

In the judgment of the Nuremberg IMT, the Tribunal relied on Articles 227 and 228 of the Treaty of Versailles as precedents for the trial of German senior state officials including the Head of state irrespective of their international immunities.⁴⁴ The Tribunal also mentioned that The Allied Powers had a right which was recognised under Article 228 of the Treaty of Versailles to prosecute persons accused of committing war crimes. While this may not be a right that existed under customary international law at the time, it was a right that was provided for and existed under conventional law as evident in the Treaty.

It was submitted on behalf of the defendants before the Nuremberg Tribunal that the actions of individuals fell outside the remit of international law which concerns itself only with the actions of sovereign states.⁴⁵ It was further argued that where the alleged acts are committed on behalf of the state (acts of state), that the individuals that performed the acts are not personally responsible since they were protected by the sovereignty of the state for which they acted. The Tribunal rejected this submission, pronouncing that,

“Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced...The principle in international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in *appropriate* proceedings...He who violates the laws of war cannot

⁴⁴ Judgment of the IMT for the Trial of German Major War Criminals, reprinted in (1947) 41 *AJIL* 172; *Goering, op.cit.*

⁴⁵ *Goering, ibid.*, p.221

obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law.”⁴⁶ (Emphasis added)

The above judgment shows an awareness that Head of state immunity is inapplicable only in *appropriate* proceedings. For proceedings to be *appropriate*, they must be before the national courts of states of origin or states whereby the source of the obligation to derogate from immunity is conventional law and is binding on the parties involved in the proceedings.⁴⁷ Also proceedings are *appropriate* if before international courts whose constitutive instrument effectively removes Head of state immunity and is binding on the parties involved.

In *Re Hirohita and Others*, the IMTFE expressed its “unqualified adherence” to the opinions of the Nuremberg IMT because their Charters are essentially identical.⁴⁸ The IMTFE held that,

“There are no special rules that limit the responsibility for aggressive war, no matter how high or low the rank or status of the person promoting or taking part in it...”⁴⁹

Despite holding so, the Emperor of Japan did not face proceedings of accountability. The Prosecutor of the IMTFE had excluded the Emperor from the indictment of war criminals in Japan because of the political choice of the Allied Powers.⁵⁰

⁴⁶ *Ibid.*, citing the case of *Ex Parte Quirin*, (1942) 317 US 1

⁴⁷ See *Pinochet (No.3)*, [1999] 2 All E.R. 97

⁴⁸ *Supra* 35, p.363

⁴⁹ *Ibid.*, p.373

⁵⁰ *Ibid.*, pp.373-374, where the Tribunal stated that,

It is interesting that the Charter of the IMTFE is the only instrument that recognises the possibility of considering official positions, including as Head of states, in the mitigation of punishment if it was so required in the interests of justice.⁵¹ While political consideration of the Allied Powers in Far East may have been the reason for the consideration of official positions, including as Head of states, in the assessment of punishment, it is submitted that to discountenance official position in the determination of the jurisdiction of an international court only to countenance official position in the assessment of punishment is flawed. This is because this approach runs counter to logic and is tantamount to the employment of different standards for the assessment of official conduct.

It is an accepted principle in international law that immunity is a procedural matter which goes to the jurisdiction of a court and not to the substantive case and that immunity has nothing to do with criminal responsibility.⁵² Therefore to rely on official position, including as Head of state, in the assessment of punishment (which reflects the extent of criminal liability attaching to an act) runs counter to legal wisdom. This view is supported by the ILC in its Commentary to Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind to the effect that,

“The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of

“...the Prosecution also made it clear that the Emperor would not be indicted...His immunity was, no doubt, decided upon in the best interests of all the Allied Powers.”

⁵¹ *Supra* 35, Article 6; and ILC Commentary to Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind 1996, (1996) Volume II *YILC* 15

⁵² *Arrest Warrant* case, *supra* 1, and *Jones v. Saudi Arabia*, [2006] *UKHL* 26

any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequence of this responsibility.”⁵³

The non-applicability of Head of state immunity at Nuremberg and in Tokyo was ground-breaking because it heralded a departure from the customary international rule. Also unlike previous provisions in the Treaty of Versailles in 1919, the trials at Nuremberg and Tokyo successfully implemented the provision in the respective Charters of the IMTs. However, to acknowledge the ground-breaking nature of the trials and to argue that the trials established generally that Heads of states could not rely on immunities in international proceedings involve separate issues.

The relativity, determined by the Charters of the Tribunals, of the non-applicability of Head of state immunity to the trials at Nuremberg and Tokyo should be borne in mind. Where an international court is established under an agreement, a provision for non-applicability of Head of state immunity before such international court can only be a term of the agreement which is binding upon the parties to the agreement.

The contractual nature of agreements has been argued in the earlier section of this chapter to be a limitation to which Article 227 of the Treaty of Versailles is indicative of a new international law on Head of state immunity. However, where there is a supra-national organisation in a vertically structured international order, as will be

⁵³ *Op.cit.*, paragraph 6, p.27

fully analysed in the next chapter, the non-applicability of the Head of state immunity extends beyond contractual law and the consent of parties.

The Control Council of the Allied Powers, which was the principal legislative authority for Germany, on 20 December 1945, enacted Control Council Law No. 10 for the ‘Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity’ and provision was made for the establishment of national tribunals in Germany under the provisions of the Law.⁵⁴ Article II, Section 4(a) of Control Council Law No. 10 provides, *in pari materiae* with Article 7 of the Charter of the Nuremberg IMT, against immunities of Heads of states or other Government official in proceedings arising before the tribunal established under Law No. 10.⁵⁵

The trials held by the tribunals established under Control Council Law No. 10 were peculiar. They differed from the trials by the IMT at Nuremberg in the sense that they were not trials held by an international tribunal. They also differed from trials held by national courts sitting over officials of foreign states, as was the case in the Pinochet trials in the UK. With the end of the WWII and the occupation of Germany by the Allied Powers, the Allied Control Council had taken over as the supreme legislative authority of Germany and as such established the tribunals under German national law (as made by the Control Council).

⁵⁴ Official Gazette Control Council for Germany (No.3), 1946. See also *In re Ohlendorf and Others* (Einsatzgruppen Trial) before the US Military Tribunal at Nuremberg, 15 *ILR* 656, p.657; see also *In re List and Others* (Hostages Trial), 15 *ILR* 632.

⁵⁵ See also *In re Von Leeb and Others* (German High Command Trial), 15 *ILR* 376, p.395.

The source of the authority of the tribunals established under Law No. 10 regarding the non-applicability of immunities of Heads of states and senior German state officials before the tribunals established under the Law is two-fold. Firstly, there is the consent of Germany as contained in the unconditional surrender of Germany to the Allied Powers, which is essentially the same source of authority for the IMT. Secondly, there is the Law of military occupation as contained in Article 43 of the Hague Convention, as discussed in Chapter 3 of this thesis.

The principles of international law emanating from the Nuremberg IMT and the IMTFE are decidedly to the effect that Head of state immunity does not apply in proceedings before the IMTs *only*. Unfortunately, Hitler committed suicide before he could be brought before the Tribunal but it is clear from the prevailing sentiments at the time that had Hitler been alive he would have been made to face the Tribunal at Nuremberg for his acts. Although Emperor Hirohita was not indicted, two former Prime Ministers namely Tojo Hideki and Hirota Koki were indicted in the proceedings for crimes against the peace and were found guilty of conspiracy to wage aggressive war and were hanged.⁵⁶

In the aftermath of the trials by the IMTs after WWII, the UN General Assembly unanimously affirmed the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.⁵⁷ Principle III of

⁵⁶ B.V.A Röling and Antonio Cassese, *The Tokyo Trial and Beyond*, (Cambridge: Polity Press, 1993), pp.3-4

⁵⁷ UNGA Resolution 95(I), 11 December 1946

Principles of International Law Recognised in the Charter of The Nuremberg Tribunal and in the Judgment of the Tribunal states that,

“The fact that an author of an act which constitutes a crime under international criminal law has acted in his capacity as Head of state or government does not release him from his responsibility under international law.”⁵⁸

As such, a trend of irrelevance of the official status of accused persons, even as Heads of states to criminal responsibility was initiated. This trend is established in the Genocide Convention 1948,⁵⁹ the International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind,⁶⁰ the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973,⁶¹ the Statutes of the ICTY and ICTR,⁶² and also the Rome Statute of the ICC.⁶³

4.4 JUDICIAL ASSISTANCE AND CO-OPERATION WITH INTERNATIONAL COURTS

In national courts, the process of investigation of crimes, which includes gathering and giving of evidence, power to compel witnesses and evidence, arrest as well as enforce decisions and orders of the courts is not as problematic as in international courts. This is because international courts lack the enforcement machinery and capabilities of

⁵⁸ (1950) Volume II *YILC* 191

⁵⁹ 78 *U.N.T.S.* 277, Article 4

⁶⁰ (1996) Volume II *YILC*, Article 7

⁶¹ Article III, UNGA Resolution 3068 (XXVIII), 30 November 1973, text reprinted in (1974) 13 *I.L.M.* 50

⁶² ICTY Statute reprinted in (1993) 32 *I.L.M.* 1192; ICTR Statute reprinted in (1994) 33 *I.L.M.* 1602

⁶³ 2187 *U.N.T.S.* 90, Article 27

states. The non-applicability of Head of state immunity before international courts would be of no effect where there are no means of securing the assistance and co-operation of states.

Furthermore, not all aspects of criminal proceedings can be conducted within the territory and jurisdiction of a state. In view of this, to facilitate criminal proceedings states enter into multilateral and bilateral agreements on international judicial assistance and co-operation. On the regional level, there are various multilateral instruments facilitating judicial co-operation like the Council of Europe (European Convention on Extradition 1957,⁶⁴ and European Convention on Mutual Assistance in Criminal Matters 1959),⁶⁵ the Commonwealth (Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth 1986)⁶⁶ and the Organisation of American States (Inter-American Convention on Extradition 1991 and the Inter-American Mutual Assistance in Criminal Matters 1992).⁶⁷

There are no equivalent agreements between states and international courts and neither is there in existence a rule of customary international law providing for judicial assistance and co-operation between states and international courts. The fact that international courts lack the machinery for the enforcement of warrants, orders and decisions as well as the vital importance of judicial assistance and co-operation in any

⁶⁴ *E.T.S.* No. 24. Additional Protocols I and II to the Convention are available in *E.T.S.* No. 86 and No. 98, respectively.

⁶⁵ *E.T.S.* No. 30, 472 *U.N.T.S.* 185

⁶⁶ *Commonwealth Law Bulletin*, 1990, p.1043

⁶⁷ *O.A.S.T.S.* No. 75

proceedings especially international proceedings make it imperative that the constitutive instruments of international courts make provision to this effect.⁶⁸

To avoid incapacitation of international courts as well as to ensure effective discharge of their objectives and functioning, it is important that states co-operate with and assist these courts.⁶⁹ The absence of international enforcement machinery makes international courts dependent on the co-operation and assistance of states.⁷⁰

There are essentially two approaches to co-operation and judicial assistance.⁷¹ Firstly, there is the horizontal approach to co-operation whereby courts operate within a pluralistic international order made up of equal sovereigns. This approach follows the traditional means of judicial co-operation between states as evidenced in contractual agreements on extradition and mutual assistance. As such, the basis of the obligation of co-operation and assistance would be the contractual agreement entered into as an expression of state sovereignty. Secondly, the vertical approach envisages an international court to operate on a supranational level as an agency, permanent or *ad hoc*, of a supranational entity which in itself transcends state sovereignty. Such a supranational entity would be, for instance, the UN organisation and the source of

⁶⁸ See Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *EJIL* 144, p.164

⁶⁹ Christopher Murray and Lorna Harris, *Mutual Assistance in Criminal Matters*, (London: Sweet and Maxwell, 2000), p.2

⁷⁰ Michael Wladimiroff, 'Co-operation on Criminal Matters: A Defence Lawyer's Perspective', in Rodrigo Yepes-Enriquez and Lisa Tabassi (edited), *Treaty Enforcement and International Co-Operation in Criminal Matters: with Special Reference to the Chemical Weapons Convention*, (The Hague: T.M.C. Asser, 2002) 242, p.245. See generally Clive Nicholls, Clare Montgomery and Julian B. Knowles, *The Law of Extradition and Mutual Assistance: International Criminal Law: Practice and Procedure*, (London: Cameron May Publishers, 2002).

⁷¹ *Prosecutor v. Blaškić*, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of 18 July 1997, paragraphs 47 and 54

obligation of co-operation and assistance would emanate from the constitutive instrument of the supranational organisation.

The nature of co-operation and judicial assistance between states and international courts is dependent on the constitutive instrument of the court.⁷² Where the obligation emanates from a contractual agreement, failure to co-operate could be treated as a breach of contract with the attendant consequences inherent in general contractual law. While, under the vertical theory of co-operation, the consequences of failure of a state to co-operate would depend on the supra-national organisation.

4.4.1 JUDICIAL ASSISTANCE AND CO-OPERATION UNDER THE TREATY OF VERSAILLES

The Treaty of Versailles was between the Allied and Associated Powers and Germany and as a result the duty to render judicial assistance and co-operation to the tribunal on the part of states and the right to request judicial assistance and co-operation from states on the part of the tribunal is to be resolved by the Law of Treaties. By Articles 34 and 35 of the VCLT, a treaty cannot create obligations or rights for third states without their consent and obligations for third states under a treaty may only arise where third states expressly accept such obligations in writing.⁷³

⁷² Cassese, *supra* 68, p. 164 – 165 cited in Bert Swart, 'International Co-operation and Judicial Assistance: General Problems', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (edited), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford: University Press, 2002), p.1590

⁷³ 1155 U.N.T.S. 331

The obligation to co-operate with and provide assistance to the tribunal proposed under the Treaty of Versailles redounded on Germany as well as the states forming the Allied and Associated Powers including France, the British empire, Russia, the US, etc because as parties to the Treaty they were bound by it. Article 228 of the Treaty expressly mentions the obligation on the part of Germany to co-operate with the Tribunal and render assistance as needed by the Tribunal. States not party to the Treaty of Versailles are not under an obligation to co-operate with or assist the tribunal in its functioning, and as such there could be no legal consequences for failure of third states to co-operate with the tribunal. Indeed, the Netherlands' refusal to hand over the Kaiser to the Allied and Associated Powers for trial is illustrative of the point.

4.4.2 JUDICIAL ASSISTANCE AND CO-OPERATION UNDER THE CHARTERS OF THE IMTs

Unlike the Treaty of Versailles where there was a contractual agreement between the Allies and the defeated power, which provided for the establishment of an international court and the obligation of co-operation with the court, there was no such contractual agreement after WWII. It is implicit in the surrender of Germany and explicit in that of Japan that they consented to the establishment of the Nuremberg IMT and the IMTFE, respectively, and the concomitant obligation to render judicial assistance and co-operation to the IMTs.⁷⁴

⁷⁴ See *Goering, supra* 32; and *Fox, supra* 43

With regard to the states which were part of the Allied Powers, the London Agreement was reached between the Allied Powers whereby it was agreed that the parties to the Agreement would take the necessary steps to assist the IMT in the investigative and trial processes.⁷⁵ As for states which were not part of the Allied Powers and the London Agreement, they were not obligated to render judicial assistance and co-operation to the IMT.

However, the recital to the London Agreement mentions that the Allied Powers in the conclusion of the Agreement were to act not just on behalf of themselves but also to act “in the interests of all the United Nations and by their representatives duly authorized thereto”.⁷⁶ Article 5 of the Agreement also provided for members of the UN who wished to adhere to the Agreement by giving notice through diplomatic channels of such adherence.⁷⁷ Therefore, states which were not part of the Allied Powers but which had authorised the Allied Powers to conclude the Agreement in their interests or had adhered to the London Agreement (pursuant to Article 5) had an obligation to render judicial assistance and co-operation to the Nuremberg IMT.

The Allied Control Council Law No. 10 provided for the establishment of parallel tribunals within the jurisdictions of the various Allied occupying powers. It was envisaged that the jurisdiction of a tribunal established pursuant to the Law, for

⁷⁵ *Supra* 31, Article 3

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

instance the US Military Tribunal at Nuremberg, was to operate aside from the IMT.⁷⁸ Article I of Law No. 10 made the London Agreement of 8 August 1945 an integral part of Law No. 10 and provided that adherence envisaged under Article 5 of the Agreement shall not entitle the adhering state to participation or interference in the operation of Law No. 10. Further to this, Article III of Law No. 10 provides extensively for the obligations of Zone Commanders in their respective Zones, and these obligations necessarily include judicial assistance and co-operation to the tribunals established under Law No. 10.⁷⁹ In view of these provisions, the obligation of states to render judicial assistance and co-operation to the Control Council Law No. 10 established tribunals essentially was the same as their obligation towards the Nuremberg IMT.

The obligation of states towards the IMTFE is somewhat different. While it has been argued that Japan, like Germany was under an obligation to assist and co-operate with the Tribunal, it is important to recall that the IMTFE was established by General Douglas MacArthur, the Supreme Commander of the Allied Powers. However, the Governments of Great Britain, the US and the USSR which constituted the Allied Powers were all involved in the Potsdam Declaration of July 1945,⁸⁰ and the Moscow Conference of Foreign Ministers of December 1945 (establishing the Far Eastern Commission and the Allied Council of Japan)⁸¹ which gave impetus to the establishment of the IMTFE. As such, the Allied Powers were under an obligation to

⁷⁸ Control Council Law No. 10, Article III (2), *supra* 54

⁷⁹ *Ibid.*

⁸⁰ *Supra* 33

⁸¹ Text of Moscow Conference available at http://avalon.law.yale.edu/20th_century/decade19.asp (Last accessed 16/08/2011)

assist and co-operate with the Tribunal. There is no similar provision to Article 5 of the London Agreement and states which are not part of the Allied Powers are not under any obligation, under contractual law or customary international law, to judicially assist and co-operate with the IMTFE.

4.5 CONCLUSION

The post World Wars era presents a mixed bag of discernible trends and precedents. The principles enunciated at Nuremberg and Tokyo on individual criminal responsibility have been enshrined in international legal instruments and have been upheld by case law of national courts. The trials after the World Wars show the viability of war crimes trials in international proceedings for accountability. Likewise, the trial at Tokyo, arguably, is precedent for the view that while Head of state immunity may not absolve accused persons from responsibility for international crimes, the fact of official position as Head of state may be taken into consideration in the mitigation of punishment. The legal wisdom of this reasoning is doubted because it only serves to further complicate an already complex area of law. However, legal wisdom and political wisdom do not necessarily occupy the same conceptual space.

This chapter has shown that the constitutive instruments of the Tribunals, i.e. the Treaty of Versailles and the Charters of the IMTs, are the basis for the non-applicability of Head of state immunity as well as the obligation of co-operation and judicial assistance with the tribunals envisaged under the instruments.

This chapter has also shown that it was for political and practical reasons that the Heads of states in the post World Wars era were not brought to trial before the international courts established and not because of immunity (the Netherlands refused to surrender Kaiser Wilhelm, the Allied Powers decided to exclude Emperor Hirohito from the indictment of accused persons before the IMT in the Far East and Hitler committed suicide).

However, the non-applicability of Head of state immunity under the Treaty of Versailles and the Charters of the IMTs is limited to the tribunals envisaged under these instruments. While these practices attest to a new international law on Head of state immunity, it is necessarily limited to the tribunals envisaged under the Treaty of Versailles and the Charters of the IMTs.

**CHAPTER 5: HEAD OF STATE IMMUNITY BEFORE
INTERNATIONAL COURTS ESTABLISHED BY THE UNITED
NATIONS SECURITY COUNCIL**

5.1 INTRODUCTION

Prior to the establishment of the ICC in 1998, there was a marked absence of any international criminal adjudicatory mechanism and the UN Security Council, in the exercise of its powers with respect to international peace and security, resorted to the establishment of *ad hoc* international criminal tribunals to address violations of international humanitarian law.

Despite the laudable efforts in the wake of the WWII to entrench international criminal accountability of Heads of states, there was a waning in international criminal jurisprudence in this regard. Between the years after the IMTs and the establishment of the *ad hoc* tribunals in the early to mid-1990s, no international criminal tribunals were established. The fact of the non-establishment of international criminal tribunals before the 1990s cannot be attributed to an absence of violations of international humanitarian law and human rights. Rather this was as a result of the Cold War and the resulting deadlock within the Security Council.

The establishment of *ad hoc* international criminal tribunals by the Security Council in 1993 and 1994 has re-vivified the idea of entrenching a culture of accountability of

state officials, including Heads of states, for international crimes. So far, the Security Council has established only two international criminal tribunals and any analysis of the tribunals, as well as jurisprudence arising from both tribunals, apply *mutatis mutandis* to each other.

This chapter will analyse the *ad hoc* international criminal tribunals established by the Security Council to ascertain the extent to which the practice and jurisprudence of these tribunals are indicative of a new trend on Head of state immunity. Following the thematic structure of this thesis, the analysis will be against the backdrop of the constitutive instrument theory. The analysis in this chapter will not be complete without a consideration of the obligation of states to co-operate with and assist the *ad hoc* tribunals.

As stated in Chapter 3, questions of legality of an adjudicatory body seeking to exercise jurisdiction over Heads of states necessarily implicate Head of state immunity. The analysis in this chapter necessitates the consideration of whether a political body can validly establish subsidiary organs which can exercise judicial functions as well as the issue of whether there are limits to the powers of the Security Council. If the Security Council lacks the power to establish judicial tribunals, this would mean that the judicial tribunals were invalidly established and could not validly exercise jurisdiction over Heads of states.

5.2 THE ICTY AND THE ICTR IN PERSPECTIVE

Both the ICTY and the ICTR were established by the Security Council following the outbreak of ethnic hostilities. In May 1993, the Council passed Resolution 827 formally establishing the ICTY to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Council upon the restoration of peace.¹ In the following year, the Council passed Resolution 955,² wherein it decided, after receiving the request of the Government of Rwanda, to establish an international tribunal to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for similar acts, between 1 January 1994 and 31 December 1994.

The Council in making its decision to establish these Tribunals acted under Chapter VII of the UN Charter after it had made a determination, under Article 39 of the Charter, that the situations in the Balkans and in Rwanda constituted a threat to international peace and security.

The establishment of the ICTY and the ICTR as *ad hoc* tribunals, in the absence of a permanent international criminal court at the time, was given impetus by the end of the Cold War and the end of the deadlock in the Security Council which led to increased

¹ S/RES/827 (1993), Paragraph 2

² S/RES/955 (1994)

accord and action by the Council in a way that was novel to the Council and to the international community.³

The decision of the Security Council to establish the *ad hoc* tribunals in the Former Yugoslavia and in Rwanda was controversial. Lacking judicial powers, it was perceived that the Council did not have the power under the UN Charter to establish a judicial body. This controversy came up before the Trial Chamber of the ICTY in *Prosecutor v. Dusko Tadic*.⁴

In the *Tadic* case, the Defence filed a preliminary motion objecting to the trial on the basis that the ICTY lacked jurisdiction to conduct the trial.⁵ The Defence challenged the jurisdiction of the Tribunal on the ground that the Security Council could not establish a judicial body and had acted beyond its powers under the Charter by establishing the ICTY and adopting its Statute. It was also argued that the Tribunal was not established by law and could not try the accused. It is imperative to the discourse in this thesis that these jurisdictional challenges to the ICTY are considered because they are fundamental to the existence, jurisdiction and legitimacy of both the ICTY and the ICTR and as such impact on the issue of Head of state immunity before

³ Interestingly, in over forty-five years following the establishment of the UN, the Security Council had not, prior to the ICTY and the ICTR, established an international criminal tribunal for the prosecution of persons for serious violations of international humanitarian law. This was by no means due to a shortage of conflicts in the period preceding the ICTY and the ICTR. In fact, the period in question (1945-1990) had witnessed its share of bloodbaths and conflicts in Indonesia, Algeria, Korea, Sudan, Vietnam, Democratic Republic of Congo, Nigeria, Angola, Iran-Iraq, Nicaragua, Somalia etc. The non-establishment of international criminal tribunals in these regions did not mean that these conflicts were conducted in line with established norms of international humanitarian law. Neither can it be said that these conflicts were less important than the conflict in the Balkans and in Rwanda.

⁴ IT-94-1, 105 *ILR* 419

⁵ *Ibid*

the Tribunals and the wider question of whether there is a new international law on Head of state immunity.

5.3 THE SECURITY COUNCIL AND THE ESTABLISHMENT OF JUDICIAL BODIES

To ensure the functioning of the UN organisation, certain principal organs were formed including the Security Council, General Assembly and ICJ.⁶ These organs carry out various functions, and have been erroneously and crudely likened to the executive, legislative and judicial arms of government found within national government structures.⁷

The UN Charter includes the maintenance of international peace and security among the purposes of the organisation.⁸ The mandate to fulfil this primary purpose is conferred on the Security Council by UN members.⁹ The Security Council enjoys very broad powers under the Charter and its discretion in the fulfilment of its obligation with respect to the maintenance of international peace and security is equally very broad. The extensive nature of the power and discretion of the Council can be deduced from Article 39 of the Charter which empowers the Council to make a determination that there has occurred a threat to or breach of the peace or an act of aggression and

⁶ UN Charter, 59 *Stat.* 1031, Article 7

⁷ Keith Harper, 'Does the United Nations Security Council have the Competence to Act as Court and Legislature?', (1994) 27 *New York University Journal of International Law and Politics* 103, p.107

⁸ *Op.cit.*, Article 1

⁹ *Ibid.*, Article 24

also empowers the Council to decide the measures to take to maintain or restore international peace and security.¹⁰

Despite its description as an “institutional chameleon”,¹¹ the Council is a political body and as such it must be considered whether a political body can validly establish subsidiary organs which can exercise judicial functions.

Harper argues that determinations of a threat to or breach of the peace or act of aggression are “political questions” involving “political realities” as against normative legal issues.¹² As such, the Council is well posed as a political body to deal with matters in the realm of politics. This thesis shall not concern itself with the validity or propriety of the Security Council making legal determinations, rather the important issue that comes up for consideration within the scope of the thesis is whether the Council can validly establish judicial bodies which can apply normative legal rules in the determination of the matters arising before the bodies.

The determination of an existence of a state of affairs under Article 39 of the UN Charter involves political considerations and fall within the competence of the Security Council, as a political body. However, in the *Tadic* case, the Defence argued that it was not envisaged under the UN Charter that the Council could, while acting

¹⁰ *Ibid.*

¹¹ Harper, *supra* 7, p.106

¹² *Ibid.*, p.135

under Chapter VII, establish a judicial body and that a political organ like the Council could not validly establish an independent and impartial judicial body.¹³

The primary responsibility of the Security Council under the Charter is expressed in Article 24 to be the “maintenance of international peace and security”.¹⁴ The powers of the Council are determined by its primary responsibility. As stated earlier, the responsibility of maintaining international peace and security is extensive and the Council is equally given extensive discretion and powers to carry out this responsibility. This prompts the question whether there are limits to the powers of the Council. If there are limits to the powers of the Council and they are such that affect the legality of the establishment of the ICTY(R) then this would have consequences for Head of state immunity before these Tribunals.

It may be attractive and even somewhat tempting to argue that the Security Council enjoys unfettered powers in the fulfilment of its primary responsibility. However, this would result in an oversimplification of the matter and such a view would be expressed without the contextual benefit of the UN Charter.

The UN Charter expressly provides in Article 24(2) that in the discharge of its duties that the Council shall act in accordance with the purposes and principles of the UN.¹⁵ This, without doubt, is a limitation on the powers of the Council. While the powers of the Council may be extensive, they must be exercised within the framework of the

¹³ Paragraph 37 of Appeal Chamber Decision, *supra* 4, p.470

¹⁴ *Supra* 6

¹⁵ *Ibid.*

purposes and principles of the UN. Where the Council acts outside the purposes and principles of the UN, then the Council must be deemed to have acted *ultra vires* its powers. This begs the question- what are the purposes and principles of the UN?

The purposes of the UN include the maintenance of international peace and security, the development of friendly relations among nations and strengthening of universal peace, the achievement of international co-operation in solving international problems, and the harmonisation of actions of nations in the attainment of these ends.¹⁶ The principles of the UN include sovereign equality, good faith towards international obligations, peaceful settlement of disputes, and the refrainment from the threat or use of force in international relations.¹⁷

The identifiable purposes and principles of the UN provide substantive limits to the powers of the Council. In view of the purposes and principles of the UN, it is clear that the establishment of an *ad hoc* international criminal tribunal like the ICTY and the ICTR is not beyond the powers of the Council but rather furthers the purposes and principles of the Charter. Suffice it to re-state that the Council had made a determination that the situations in the Balkans and Rwanda were threats to international peace and security in those regions.¹⁸

The powers of the Security Council, under the Charter, are exercisable not just within the substantive boundaries of the Charter but also under general international law

¹⁶ *Ibid.*, Article 1

¹⁷ *Ibid.*, Article 2

¹⁸ S/RES/827 (1993) and S/RES/955 (1994)

including existing peremptory norms of international law (*jus cogens*) and human rights.¹⁹ For instance, the Council will be acting *ultra vires* its powers if in the fulfilment of its responsibility towards international peace and security it authorises the commission of acts of torture by state officials.²⁰ It cannot remotely be maintained that the Council, by the establishment of the ICTY(R) acted in violation of any *jus cogens* norm or human rights.

In view of the fact that the establishment of the ICTY furthers the purposes and principles of the UN as well as the fact that by the establishment of the Tribunals that the Council did not act in violation of general international law, it becomes difficult to see how the Council acted beyond its powers under the Charter, as contended by the Defence in the *Tadic* case.²¹

Having established that the Council did not act *ultra vires* its powers under the Charter by establishing an international criminal tribunal under Chapter VII of the Charter, it is necessary to consider what the Council can legally do under Chapter VII of the Charter.

Traditionally the actions of the Council under Chapter VII after it has made a determination of the existence of a threat to the peace, a breach of the peace or an act

¹⁹ Dapo Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decision of the Political Organs of the United Nations', (1997) 46 *ICLQ* 309, at pp.314-325; see also Derek W. Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', (1995) 5 *EJIL* 89, p.92-93 and Andreas Paulus, 'Article 29', in Bruno Simma, *etal* (edited), *The Charter of the United Nations: A Commentary*, 2nd edition, Vol. II, (Oxford: University Press, 2002), p.541

²⁰ The prohibition against torture is generally accepted as a *jus cogens* norm, see Chapter 2 of thesis.

²¹ *Supra* 4

of aggression, have involved either economic sanctions or non-military action,²² and military enforcement action,²³ with a view towards the maintenance or restoration of international peace and security. However the end of the Cold war brought about a more cohesive Security Council and an increasing awareness of a culture of accountability especially for international crimes. This inspired the Council to break out of its mould to utilise, in a novel way, its powers under Chapter VII of the Charter. The novel utilisation of Chapter VII powers of the Council is no more evident than in the establishment of the ICTY and the ICTR.

The departure from the traditional uses of Chapter VII powers of the Council, evident in the establishment of the ICTY and the ICTR, must be considered with a view to ascertaining whether this departure is inconsistent with Chapter VII of the Charter. This goes to answering the question put forward by the Defence in the *Tadic* case, i.e. whether the Council as political organ could validly establish a judicial body.

In the formation of the UN organisation, it was envisaged that the ICJ would be its principal judicial organ.²⁴ The jurisdiction of the ICJ does not extend to criminal matters and only states can be parties to disputes before the ICJ.²⁵ As such, the Council was not usurping the competence of the ICJ, a competence that the Court did not have in the first place. Furthermore, the absence, at the time, of a permanent

²² UN Charter, *supra* 6, Article 41

²³ *Ibid.*, Article 42

²⁴ *Ibid.*, Article 92

²⁵ Article 34 of the Statute of the ICJ, 59 *Stat.* 1055

international criminal court to address impunity was such that warranted the establishment of international tribunals on an *ad hoc* basis.

5.3.1 THE ESTABLISHMENT OF SUBSIDIARY ORGANS UNDER THE UN CHARTER

Article 29 of the Charter expressly empowers the Security Council,

“to establish *such* subsidiary organs *as it deems necessary for the performance of its functions.*”(Emphasis added)

From a textual reading of the provision of Article 29, it is clear, firstly, that the Council has the power to establish a subsidiary organ. Secondly, the subsidiary organ need not be of the same nature as the Council, i.e. a political organ, so long as the nature of the subsidiary organ is such that makes the organ necessary for the performance of the functions of the Council.

The functioning of the ICTY and the ICTR is consistent with the functions of the Council which is the maintenance or restoration of international peace and security. This is because the Tribunals are instrumental in addressing impunity, safe-guarding the rights and freedoms of individuals and, ultimately, they assist in the achievement of peace in transitional societies. The Nuremberg and Far East trials after WWII underscore the importance of prosecutions for the violations of international humanitarian law in societies transiting from war to peace.

Furthermore, Article 7(2) of the Charter contains a broad provision that “subsidiary organs as may be found necessary may be established in accordance with the present Charter.” The provision gives the enumerated organs of the UN in Article 7(1), including the Security Council, the power to establish subsidiary organs. Whereas Article 7(2) generally provides for the establishment of subsidiary organs, the authority in Article 29 is specific to the Security Council.²⁶

Sarooshi argues that by Article 29, the Council can only establish subsidiary organs to perform the functions of the Council while Article 7(2) does not import any “functional limitation” as regards the type of subsidiary organ that may be established.²⁷ Sarooshi’s view is that the authority in Article 7(2) is more extensive than that in Article 29 because of a perceived ‘functional limitation’ in Article 29. This is because while Article 29 specifically applies to the Security Council and states that the subsidiary organ to be established by the Council must be deemed to be necessary for the performance of its functions, Article 7(2) only mentions that the establishment of the organ is to be in accordance with the Charter. According to him, “subsidiary organs may be established under Article 7(2) to perform functions which the Council cannot itself perform.”²⁸

It is submitted that the words employed in the drafting of the provisions as well as the practical effect of the purport of the provisions do not support Sarooshi’s contention.

²⁶ See Article 22, *supra* 6, which is specific to the General Assembly.

²⁷ Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, (Oxford: Clarendon Press, 1999), p.92-93

²⁸ *Ibid.*

There is nothing in the wording of Article 29 that limits a subsidiary organ established by the Security Council to the particular functions of the Council. Under Article 29, the functions of the subsidiary organ are not limited to the functions of the Council so long as the functions of the subsidiary organ are necessary for the performance of the Council's own functions. It would be unnecessary for the Council to establish a subsidiary organ of the same nature as the Council. The provision empowers the Council to establish organs which exercise complementary functions to that of the Council. Any interpretation to the contrary would be incompatible with the express provisions of Article 29.²⁹ Furthermore, there is a necessity requirement by Article 7(2) in the establishment of subsidiary organs, i.e. the contemplated subsidiary organ must be one which "may be found necessary" by the principal organ. This, in effect, is a 'functional limitation' in Article 7(2).

It is difficult to accept Sarooshi's argument that the Council did not establish the ICTY(R) under the authority contained in Article 29 of the UN Charter because by establishing the Tribunals, the Council was not delegating the performance of its own functions to the Tribunals.³⁰ Moreover, the Secretary General's Report pursuant to Paragraph 2 of Resolution 808 which sets the legal basis for the establishment of the

²⁹ Paulus, *supra* 19, p.541. Paulus analyses the ICJ approach to the authority under the Charter to establish subsidiary organs, in the *Effect of the Awards of Compensation made by the UN Administrative Tribunal* case and in the *Application for Review of Judgment No.158 of the UN Administrative Tribunal*, in (1954) *I.C.J. Reports* 47 and (1973) *I.C.J. Reports* 166, respectively. He criticises what he considers to be the failure of the Court to distinguish between the provisions of Article 7(2) and Article 22 arguing that the approach does not address the issue of whether a principal organ, like the Security Council, possesses implied or express substantive competence to establish a subsidiary organ like the ICTY.

³⁰ *Supra* 27

ICTY mentions that the ICTY was established as a subsidiary organ under Article 29 of the Charter.³¹

It would also be a misinterpretation of the Charter to argue that the general authority to establish a subsidiary organ in Article 7(2) of the Charter extends to the achievement of the purposes and principles of the UN while the specific authority in Article 29 is applicable only with regard to the functions of the Security Council. Article 7(2) merely states that subsidiary organs may be established *in accordance with the Charter*. It goes without saying that the establishment by the Council of an organ under Article 29 must also be in accordance with the Charter. Any subsidiary organ established, whether under Article 7(2) or Article 29, must be towards the achievement of the purposes and principles of the Charter. The practical effect of both provisions is that Article 29 is specific only with regard to its application to the Security Council and not in any other way.

The authority to establish a subsidiary organ under Articles 7(2) and 29 are complementary and the combined effect of both provisions is that the Security Council may establish a judicial body as a subsidiary organ to enable it achieve the fulfilment of its primary responsibility and this must be done in accordance with the Charter.

The Council's primary responsibility, its functions and competence are with regard to the maintenance and restoration of international peace and security. Therefore, although the Council is a political body possessing no judicial functions, it can

³¹ U.N. Doc. S/25704, 3 May 1993, reprinted in 32 *I.L.M* 1163 (1993), Paragraph 28

establish judicial bodies like the ICTY and ICTR where it considers such Tribunals necessary for the restoration or maintenance of international peace and security.³² The ICJ in its Advisory Opinion in the *Reparation for Injuries Suffered in the Service of the UN* stated that,

“Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”³³

In the *Effect of the Awards of Compensation made by the UN Administrative Tribunal case*,³⁴ the ICJ found that in the determination of the legal power of the General Assembly to establish a tribunal competent to render judgments binding on the UN that it was necessary to consider whether the Assembly had the power to establish the tribunal under the Charter. The Court was of the opinion that it was inevitable that there would be disputes between the UN organisation and its staff as to contractual rights and duties, and as such the General Assembly had the power and the legal capacity to establish the Administrative Tribunal to settle disputes between the organisation and its staff.³⁵

The ICJ also maintained this view in its Advisory Opinion on the *Application for Review of Judgment No.158 of the UN Administrative Tribunal*.³⁶ In this case, the

³² Paulus acknowledges that the Council could establish subsidiary organs under Article 29 which could exercise functions that the Council could not exercise itself, see Paulus, *supra* 19, p.540; see also Michael Wood, ‘The Interpretation of Security Council Resolutions’, (1998) 2 *Max Planck Yearbook of UN Law* 73, p.78

³³ (1949) *I.C.J. Reports* 182

³⁴ (1954) *I.C.J. Reports* 47

³⁵ *Ibid.*, at pp.56-58, 61

³⁶ (1973) *I.C.J. Reports* 166

Court was of the opinion that the purpose of the general authority and the specific authority, under the Charter, to establish subsidiary organs is to facilitate the effective functioning as well as the achievement of the purposes of the UN. The Court stated that,

“Accordingly, to place a restrictive interpretation on the power of the General Assembly to establish subsidiary organs would run contrary to the clear intention of the Charter. Article 22, indeed, specifically leaves it to the General Assembly to appreciate the need for any particular organ, and the sole restriction placed by that Article on the General Assembly’s power to establish subsidiary organs is that they should be “necessary for the performance of its functions.”³⁷

The general authority in Article 7(2) of the Charter must, therefore, be read subject to the specific authority in Article 22 (with regard to the General Assembly) and in Article 29 (with regard to the Security Council). This view is supported by the Dissenting Opinion of Judge Hackworth in the *Effect of the Awards of Compensation made by the UN Administrative Tribunal*,³⁸ who argued that,

“The statement “in accordance with the present Charter” [under Article 7(2)] is given definite expression in Articles 22 and 29 by which the General Assembly and the Security Council, respectively, are authorised to establish subsidiary organs...It must be concluded, therefore, that when the General Assembly approved the Statute creating the Administrative Tribunal it did so in the exercise of its authority under Article 22. Nowhere else in the Charter is any such authorisation to be found. And nowhere else in the Charter can there be found any authorisation, express or implied, for the establishment by the General Assembly of any other kind of organ be it judicial, *quasi* judicial or non-judicial.”³⁹

³⁷ *Ibid.*, Paragraph 16, at pp.172-173

³⁸ *Supra* 34, p.76

³⁹ *Ibid.*, p.78

Therefore, it is submitted that in the decision to establish the ICTY and the ICTR as subsidiary organs, the Security Council acted under Article 29 of the Charter.

The source of the authority of the Council to establish a subsidiary organ like the ICTY and the ICTR is different from the substantive competence of the Council to establish the Tribunals. The powers to be given to a subsidiary organ must be such that the principal organ possesses expressly or impliedly. To this end, a principal organ can establish a subsidiary organ to perform functions which the principal organ can or cannot perform by itself, so long as the functions of the subsidiary fall within the competence of the principal organ. The source of the substantive competence, express or implied, must be found within the general competence of the Council. Bowett argues that,

“[A] Resolution which contemplates a subsidiary organ with a given function has to find its constitutional basis first and foremost in the article justifying the function- and not in an article giving general power to establish subsidiary organs.”⁴⁰

According to Sarooshi,

“The principal organ must itself possess either the express or implied powers which it seeks to delegate to its subsidiary...this does not preclude a principal organ from possessing an implied power to establish a subsidiary organ to exercise functions which it does not itself possess. In such a case, the power to establish such a subsidiary organ may even be implied from the general competence of the principal to operate in the particular area...”⁴¹

⁴⁰ Derek W. Bowett, *United Nations Forces: A Legal Study* (New York: Fredrick A. Praeger Publishers, 1964), p.178

⁴¹ *Supra* 27, p.93-94

The general competence of the Council is found in Article 24 of the UN Charter. Article 24 in outlining the functions and powers of the Council gives it primary responsibility for the maintenance of international peace and security. The substantive competence of the Council to establish the ICTY and the ICTR, as means for the restoration of international peace and security can be implied from Article 24 of the Charter. Therefore the constitutional basis for the establishment of the ICTY and the ICTR is Article 24 of the Charter.

5.3.2 JUDICIAL REVIEW OF SECURITY COUNCIL DECISIONS AND OTHER MATTERS ARISING IN THE TADIC CASE

In the *Tadic* case, the Defence argued that Chapter VII of the UN Charter does not authorise the Security Council to create a judicial body as a measure to address a threat to international peace and security and that as such, the Council had exceeded its powers.⁴² The consideration of this argument necessarily involves the review of decisions of the Council.

The Prosecutor had argued before the Trial Chamber that the ICTY lacked the authority to review its establishment by the Council and that this review necessarily involved political questions which were non-justiciable. Despite the conservative approach of the Trial Chamber that the Tribunal lacked the power to review Council

⁴² *Supra* 4

decisions,⁴³ the Trial Chamber still went on to justify the establishment of the Tribunal, which invariably was a review of the decision of the Council to establish the Tribunal.

The Appeal Chamber did not feel so constrained in the matter. The Appeal Chamber stated that it is inherent in the jurisdiction of a judicial tribunal to determine its own jurisdiction.⁴⁴

The round-about approach of the Trial Chamber was not necessary since the challenge to the jurisdiction of the ICTY involved an interpretation of the functions and powers of the Security Council under the UN Charter. The Charter is a treaty and the ICTY, as a judicial body, is competent to answer questions involving the interpretation of a legal instrument like the Charter. Although the Council is a political body which is influenced by political considerations, the decision to establish an international tribunal as a means to restore or maintain international peace and security (irrespective of whatever political considerations that might have influenced the decision) is one that involves a legal question which the Tribunal could not have rightly absolved itself from.⁴⁵ The legal question involved is centred on the interpretation of the provisions of the Charter, particularly Article 24 and Chapter VII.

⁴³ *Ibid.*, Trial Chamber Decision, paragraphs 10-13, p.430-431. See also *Legal Consequences for States for the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, (1971) *I.C.J. Reports* 16. However, the Appeal Chamber of the ICTY, in the *Tadic* case, acknowledged that the broad discretion of the Council under the Charter reduced the scope of possible review of the Council decisions, Paragraph 21 of Appeal Chamber decision, p.462

⁴⁴ *Ibid.*, Paragraph 18, p.460

⁴⁵ In the *Certain Expenses of the UN* case, (1962) *I.C.J. Reports* 151, at 155, the ICJ stated that,
“It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature

It was further contended by the Defence that the Council had been inconsistent in the creation of international tribunals because it had not taken the same steps it took with regards to the former Yugoslavia in the case of other countries where violations of international humanitarian law had occurred in the course of armed conflict.⁴⁶

The inconsistency of the Council in the creation of international criminal tribunals in other instances where violations of international humanitarian law had occurred is merely factual. It does not go to the legality of the establishment of the ICTY or its jurisdiction. The Council is a political body; its decisions and actions are determined by political considerations which make consistency and uniformity in the practice of the Council an unattainable ideal. The practical effect of the contention of the Defence can be likened to the challenge of the jurisdiction of a court by an accused person simply because criminal proceedings were not instituted against other persons who had committed the same crime as the accused.

The Defence also challenged the ability of international tribunals to promote international peace and security.⁴⁷ The question of the ability of international criminal tribunals to promote international peace and stability is one that lies within the broad discretion of the Security Council to make. Under Article 29 of the Charter, the

of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.”

⁴⁶ *Supra* 4

⁴⁷ *Ibid.*, Paragraph 23, p.435

decision of the Council to establish a subsidiary organ and the necessity of the subsidiary organ to be established are within the broad discretion of the Council.

The ICJ in the *Review of Judgment* case recognised that the object of Articles 7(2) and 22 of the Charter is to actuate the accomplishment of the purposes of the UN and its effective functioning.⁴⁸ The ICJ stated that it would be antithetical to the intention of the Charter to restrictively interpret the power of the General Assembly under Article 22.⁴⁹ This is no truer for the General Assembly than it is for the Security Council. Therefore, the power of the Council to establish the ICTY as its subsidiary organ which would contribute to ending the commission of war crimes as well as the restoration of peace in that region, should not be restrictively interpreted.

The decision by the Council to establish the Tribunal and the suitability of this decision as a means of restoring or maintaining international peace and security fall within the broad discretion of the Council. Elsewhere, the Council had stated its conviction that in the particular circumstances of the former Yugoslavia that the establishment of the ICTY would contribute to the restoration and maintenance of peace.⁵⁰ These determinations are clearly political determinations which the Council is well suited to make. The suitability of the Tribunal as a means for the restoration or maintenance of international peace and security is a ‘matter of strict political

⁴⁸ *Supra* 36

⁴⁹ *Ibid.*, paragraph 16, pp.172-173

⁵⁰ S/RES/827 (1993)

appreciation' one that is not reviewable by the Tribunal because there are no legal standards to adjudge the decision.⁵¹

More importantly, Article 39 of the Charter leaves the choice of measures in the restoration or maintenance of international peace and security, including the non-exhaustive provision of Article 41 and the provision of Article 42, open to the Council.⁵² Likewise any necessary assessment of the measures to be taken in the restoration or maintenance of international peace and security is left to the Council.

In *Prosecutor v. Joseph Kanyabashi*,⁵³ the Defence challenged the competence of the Council to establish the ICTR by contending that the conflict in Rwanda was not a threat to international peace and security. The Trial Chamber held that,

“Although bound by the provisions in Chapter VII of the UN Charter and in particular Article 39 of the Charter, the Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security. By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber.”⁵⁴

⁵¹ *Supra* 4, Trial Chamber Decision, Paragraph 24, p.435 relying on Judge Weeramantry's opinion in the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. UK)* (Order of 14 April 1992) (1992) *I.C.J. Reports* 3, p.50 [Hereinafter *Lockerbie* case]

⁵² The ICTY Appeal Chamber stated that the Council has wide discretion over the choice of means and evaluation Under Article 39 because of the “political evaluation of highly complex and dynamic situations” involved; *ibid.*, Paragraph 39, p.471

⁵³ Case No. ICTR-96-15-T, (Decision on the Defence Motion on Jurisdiction), Decision of 18 June 1997

⁵⁴ *Ibid.*, Paragraph 20. See also Paragraph 21

The fact that the conflict in Rwanda was internal did not mean that international peace and security were unaffected, especially in view of the resulting displacement of persons and the refugee situation. Moreover, the Council is not constrained in determining the existence of a threat to international peace and security by the internal or international nature of a conflict.

It was also contended by Kanyabashi that international peace and security had already been re-established by the time the Council established the ICTR and that the establishment of an *ad hoc* tribunal was never a measure contemplated by Article 41 of the Charter.⁵⁵

By Article 24 of the Charter, the decision that there is a threat to international peace and likewise the decision that international peace and security has been restored is the sole preserve of the Council. Since the Council had not made the decision that international peace and security had been restored in Rwanda but rather chose to establish the ICTR as a measure to restore peace, it would be tantamount to the usurpation of the responsibility of the Council as well as the pre-emption of a decision of the Council to decide that international peace had been restored in Rwanda when the Council had made no decision to that effect.

The contention that the establishment of an *ad hoc* tribunal was never a measure contemplated by Article 41 of the Charter is misplaced. While Article 41 does not mention the establishment of judicial bodies as part of the non-military measures, it

⁵⁵ *Ibid.*, Paragraphs 25 and 27

does not exclude the establishment of such bodies.⁵⁶ This is because the range of actions under Article 41, including complete or partial interruption of economic relations and of both transportation and communication means as well as the severance of diplomatic relations, are only illustrative of the types of non-military actions that may be employed. The list was not intended to be a closed list that is exhaustive of the actions that may be taken under Article 41 and the use of the word ‘include’ in the drafting of the provision supports this view.

5.3.2.1 ARE INTERNATIONAL TRIBUNALS ESTABLISHED BY THE SECURITY COUNCIL ESTABLISHED BY LAW?

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides that,

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.⁵⁷

This prompts the question of whether the ICTY was established by law, a question which was raised by Defence in the *Tadic* case.⁵⁸

⁵⁶ *Ibid.*, Paragraph 27

⁵⁷ 999 *U.N.T.S.* 171. The Covenant entered into force in 1976. This provision is mirrored in various other regional human rights instruments like the European Convention on Human Rights (Article 6) 213 *U.N.T.S.* 222 and the American Convention on Human Rights (Article 8) *O.A.S.T.S.*No. 36, 1144 *U.N.T.S.* 123, respectively.

⁵⁸ *Supra* 4, Paragraph 2, Trial Chamber Decision, p.428; Paragraph 41, Appeal Chamber Decision, p.471

The fact is that the ICTY was established by a Resolution of the Security Council. If the establishment of the Tribunal does not meet the requirement of Article 14 of the ICCPR then this will have grave implications for the Tribunal and the trials of Heads of state. This is because one of the limits of the Council in the exercise of its functions is that it must comply with general international law including human rights norms; and the requirement that an accused person is tried by a court that is established by law is a fundamental human right.

The ICTY Appeals Chamber was of the opinion that the internationally accepted standard that the right of an individual to have a criminal charge against him determined by a tribunal established by law applied more to national settings where there is a legislature and clear division of powers and functions between the various arms of government than in proceedings before an international court. The Chamber also considered that the ‘established by law’ requirement means that the establishing body, where not a Parliament, has the power to take binding decisions and also that establishment of the Tribunal must be in accordance with the rule of law.⁵⁹

The approach to the issue from the perspective that the ‘established by law’ requirement is applicable to national legal systems which have legislatures is misconceived. The political structure of states is such that not every national setting operates a system of government where there is a legislature with clear division of powers and functions amongst the various arms of government. Judicial tribunals established under military governments are not established by law emanating from

⁵⁹ *Ibid.*, Paragraphs 42-45, pp.472-476

legislatures. This does not mean that such tribunals are invalid for not meeting the international requirement of establishment by law.

Unlike the ICCPR, European Convention on Human Rights and the American Convention on Human Rights, the phrase ‘established by law’ is absent from the African Charter on Human and People’s Rights concerning the rights of accused persons.⁶⁰ Article 7(1) of the African Charter provides that,

“Every individual shall have the right to have his cause heard. This comprises:(d) the right to be tried within a reasonable time by an impartial court or tribunal.”⁶¹

The requirement that a tribunal deciding the criminal liability of individuals is to be established by law is better considered from the perspective of whether the tribunal is duly established. A tribunal is duly established where the establishing body possesses the authority and power necessary for its establishment. This approach does away with the tenuous distinction of the existence of legislatures at the national level and its non-existence at the international level. In essence, a judicial tribunal either at the national or international level is established by law if the formal requisites for its due establishment have been complied with by a body possessing the authority and power to establish the tribunal.

As such, in a state under democratic government the formal requisite for the establishment of a judicial tribunal would involve the acts of the legislature and executive arms of government. In a state under a military government the due

⁶⁰ OAU Doc. CAB/LEG/67/3 rev.5, reprinted in (1982) 21 *I.L.M.* 58.

⁶¹ *Ibid.*

establishment of a tribunal would proceed from an order or edict of the military government. Likewise the due establishment of an international tribunal like the ICTY would proceed from the Resolution of the Security Council which has met the procedural requirement in the voting process. While for an international court established by treaty like the ICC, the due establishment of the Court would be through the conclusion and ratification of a multilateral treaty by the contracting states.

The Secretary-General, in his Report leading up to the establishment of the ICTY, averted his mind to the fundamental nature of human rights in the functioning of the Tribunal, especially Article 14(1) of the ICCPR.⁶² The ICTY Appeals Chamber in considering whether the ICTY was established by law also mentioned the fair trial guarantees contained in the Statute of the Tribunal and the Rules of Procedure and Evidence before the Tribunal.⁶³ However, the fact of the acknowledgement of the importance of fair trial as a human right standard in the establishment of the ICTY and also the fact that the Statute of the ICTY and its Rules of Procedure and Evidence contain provisions entrenching fair trial and human rights standards does not address the important issue of whether the ICTY was established by law.⁶⁴

⁶² *Supra* 31, Paragraph 106

⁶³ *Tadic* case, *supra* 4

⁶⁴ Greenwood criticises the approach of the Appeals Chamber by arguing that the approach "...confuses the question whether the Tribunal has been established by law with the question whether it functions in accordance with law." See Christopher Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia', (1998) 2 *Max Planck Yearbook of UN Law* 97, p.104

The Appeal Chamber should have resolved the issue on the strength of the authority of the Security Council under the UN Charter to establish a judicial body as a subsidiary organ as a measure for the restoration or maintenance of international peace and security as well as the compliance of Resolution 827 with the formal requisites for passing a resolution.⁶⁵

It has been established, in this chapter, that the Council had the authority to establish the ICTY, and Resolution 827 establishing the Tribunal was adopted without a vote by general agreement of the 15 members of the Council.⁶⁶ In view of these, the ICTY met the formal requisites for its establishment from the appropriate authority and therefore was duly established.

This section has established that the Security Council can establish a judicial body, that by the establishment of the ICTY and the ICTR the Council did not act in excess of its powers; and that the fact that such a tribunal is established under a resolution of the Council does not mean that the tribunal is not validly established. Having established the foregoing, it becomes apposite to consider whether there is Head of state immunity before these tribunals which will determine the inquiry into whether there is a new international law on immunity emerging from the jurisprudence of the ICTY/ICTR.

⁶⁵ See UN Charter, *supra* 6, Article 27 on the voting procedure of the Council.

⁶⁶ See William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, (Cambridge: CUP, 2006), p.4

5.4 HEAD OF STATE IMMUNITY BEFORE THE ICTY AND THE ICTR

The Statutes of the ICTY and the ICTR provide that,

“The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment”.⁶⁷

The ICTY and ICTR Statutes must be interpreted against the backdrop of the decision of the Security Council to establish the Tribunals under Chapter VII of the Charter as a measure to restore international peace and security in the concerned regions.⁶⁸ A consideration of the implications of the decision by the Council to act under Chapter VII is imperative to ascertain the applicability or otherwise of immunities of Heads of states before the Tribunals and the obligation of states to co-operate with the Tribunals.

Chapter VII of the Charter provides that the Council may take a range of non-military and military actions under Articles 41 and 42 after it has made the necessary determination under Article 39. As stated earlier, the list of actions specified under Chapter VII is not a closed one and by Article 25, UN members are bound by the decisions of the Council, having agreed to “accept and carry out the decisions of the Security Council”.⁶⁹ This means that by the instrumentality of Article 25, UN members consent to submit their sovereign prerogatives to the decisions of the

⁶⁷ Article 7(2) of the ICTY Statute reprinted in (1993) 32 *I.L.M.* 1192; Article 6(2) of the ICTR Statute, reprinted in (1994) 33 *I.L.M.* 1602

⁶⁸ S/RES/827 (1993) and S/RES/955 (1994)

⁶⁹ *Supra* 6

Security Council taken under Chapter VII. Having so consented, members recognise that, by Article 103 of the Charter, their obligations under the Charter prevail over other international obligations.⁷⁰

By the combined effect of Articles 25 and 103 of the Charter, the obligation of states towards the Council supersedes the obligation of states under customary international law to respect the immunities of Heads of states as well as the prerogative to assert these immunities before the international tribunals established by the Council under Chapter VII.⁷¹

The ICTY indicted Slobodan Milosevic, when he was a serving President of the FRY.⁷² Unfortunately, the untimely death of Milosevic put an end to his trial. However in the preliminary motions before the Trial Chamber Milosevic had argued that the ICTY is an illegal body because the Council lacked the power to establish such a Tribunal and also contended that he was not amenable to the jurisdiction of the Tribunal because of his former status as President of the FRY.⁷³

The Trial Chamber addressed Milosevic's objections by reference to the *Tadic* case and following the decision of the Appeals Chamber in *Tadic*, the Trial Chamber

⁷⁰ *Ibid.*, Article 103 provides that,

“In the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

⁷¹ See Report of the Secretary-General, *supra* 31, paragraph 23 where it was recognised that a decision to establish the ICTY under Chapter VII would mean that “...all states would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.”

⁷² *Prosecutor v. Slobodan Milosevic et al*, Case No. IT-99-37, indictment available at www.un.org/icty

⁷³ *Prosecutor v. Milosevic* (Trial Chamber Decision on Preliminary Motions, Decision of 8 November 2001), paragraphs 26-34, available at www.un.org/icty. See also André Klip and Göran Sluiter (edited), *Annotated Leading Cases of International Criminal Tribunals, Volume VIII: The International Criminal Tribunal for the Former Yugoslavia 2001-2002*, (Antwerp-Oxford: Intersentia, 2005), pp.20-21

concluded that the establishment of the ICTY was within the powers of the Council under Chapter VII (Article 41) to restore or maintain international peace and security.⁷⁴

With regard to the issue of the former status of Milosevic as President and the question of immunities of Heads of states before the ICTY, the Trial Chamber stated that Article 7(2) of the Statute of the ICTY is reflective of customary international law and is supported by the legacy of the IMTs for Nuremberg and the Far East, various international instruments as well as the *Pinochet* case and the conviction of the former Prime Minister of Rwanda by the ICTR.⁷⁵

There is no express pronouncement by the Appeals Chamber in the *Milosevic* case on the issue of Head of state immunity. The Appeals Chamber had stated in another case that,⁷⁶

“It may be the case (it is unnecessary to decide here) that, between states, such a functional immunity exists against prosecution for those acts, but it would be incorrect to suggest that such an immunity exists in international criminal courts. The Charter of the International Military Tribunal in Nuremberg denied such an immunity to “Heads of state or responsible officials in government departments”, as does this Tribunal’s Statute.”

The cursory consideration of the issue by the Trial Chamber is fraught with assumptions rather than adequate analysis. The Trial Chamber assumed the customary law status of Article 7(2) of the ICTY Statute, a tendency that is not peculiar to the

⁷⁴ *Ibid.*, Paragraphs 5-7

⁷⁵ *Ibid.*, Paragraphs 26-33

⁷⁶ See *Prosecutor v. Radislav Krstic*, Case No IT-98-33-A, Appeal Chamber Decision of 1 July 2003, Paragraph 26

Tribunal but is common with commentators.⁷⁷ A weakness with this approach is that of generalisation without proper analysis of the issue.

Articles 7(2) and 6(2) of the Statutes of the ICTY and ICTR, respectively, provide for the criminal responsibility of Heads of states in circumstances where the immunities ordinarily available to such persons have been effectively removed. Likewise, the provisions of Article 7 of the Charter of the IMT at Nuremberg, Article 6 of the Charter of the IMT for the Far East and various international treaties including the Rome Statute of the ICC provide for the criminal responsibility of Heads of states in circumstances where there has been effective removal of immunities.⁷⁸

It is submitted that the nature of the constitutive instruments of the ICTY and ICTR, as a Chapter VII decision of the UN Security Council, as well as the combined effect of Articles 25 and 103 of the UN Charter effectively remove the Head of state immunity of UN members before the ICTY and the ICTR. The general membership of states in the UN makes Articles 7(2) and 6(2) of the Statutes of the ICTY and ICTR, respectively, binding upon all states. The conventional law contained in the provisions assume customary international law status as a result. However recognition of the customary law status of the criminal responsibility of Heads of states irrespective of their official position does not mean that Head of state immunity is inapplicable for international crimes. Recourse is had to the statement of the ICJ in the *Arrest Warrant*

⁷⁷ See for instance, Yusuf Aksar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunal to a Permanent International Criminal Court*, (London: Routledge Press, 2004), p.94

⁷⁸ For analysis of immunities before the IMTs, see Chapter 4 of thesis; for analysis of criminal liability of Heads of states under international treaties, see Chapters 2 and 3 of thesis; and for analysis of immunities before the ICC, see Chapter 6.

case that immunities may not bar criminal proceedings before *certain* international criminal courts.⁷⁹

The ability of the Security Council to remove Head of state immunity before the international tribunals established under Chapter VII is inherent in the powers of the Council under the Charter and the express provisions of Articles 25 and 103 of the Charter. Therefore, the non-applicability of Head of state immunity before the ICTY and ICTR is as a result of the constitutive instrument theory.

Reliance by the Trial Chamber on the *Pinochet* decision as a basis for its decision that Milosevic was not immune from the jurisdiction of the ICTY is diminished by the difference in the basis of jurisdiction of the Tribunal and that of the House of Lords. The jurisdiction of the Tribunal over Milosevic arose under Resolution 827 and the UN Charter while the jurisdiction of the House of Lords over Pinochet arose under the Convention against Torture and the Criminal Justice Act.⁸⁰ Moreover, the nature of the ICTY and the House of Lords differ- the former is an international court while the latter is a national court. The ICTY and the ICTR share the same jurisdictional basis, i.e. Security Council Resolution under Chapter VII, and as such the Trial Chamber's reliance on the decision of the ICTR concerning the former Prime Minister of Rwanda, Kambanda was more appropriate.

The ICTR indicted Jean Kambanda, who was the Prime Minister of the Republic of Rwanda for his involvement in the genocide and crimes against humanity which

⁷⁹ (2002) *ICJ Reports* 3, paragraph 61

⁸⁰ See Chapter 3 of thesis

occurred in Rwanda in 1994.⁸¹ Kambanda did not challenge the jurisdiction of the ICTR over him and pleaded guilty to the charges against him and was sentenced to life imprisonment.⁸² The ICTR did not consider the issue of Head of state immunity which was not raised by the Defence possibly because of the Tribunal's acceptance of the overriding powers of the Council acting to restore or maintain international peace and security.⁸³ Nevertheless, the decisions of both the Trial and Appeal Chambers of the ICTR in the *Kambanda* case support the view that Heads of states do not enjoy immunities for crimes before international courts established by the Security Council acting under Chapter VII.

The jurisprudence of the ICTY shows detailed analysis of Resolution 827 and the powers of the Council under the Charter in relation to the legitimacy of the Tribunal. One would have expected that the Chambers of the ICTY would have also applied this approach by defending the jurisdiction of the Tribunal over Milosevic from the perspective of the nature of Resolution 827, the powers of the Council under Chapter VII and the binding nature of decisions of the Council under the Charter.

⁸¹ *The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-DP; indictment available at www.un.org/ictt

⁸² Trial Chamber Judgment and Sentence of 4 September 1998 (Case No. ICTR-97-23-T), upheld by Appeal Chamber Judgment of 19 October 2000 (Case No. ICTR-97-23-A), both available at www.un.org/ictt. See also André Klip and Göran Sluiter (edited), *Annotated Leading Cases of International Criminal Tribunals, Volume VI: The International Criminal Tribunal for Rwanda 2000-2001*, (Antwerp - Oxford: Intersentia, 2003), p.659

⁸³ Being a jurisdictional issue, the Tribunal could raise the issue *suo motu*.

5.5 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE ICTY AND THE ICTR

As stated in the previous chapter, the non-existence of an enforcement mechanism to implement judicial orders of international courts necessitates the co-operation of states with international courts. The Security Council, well aware of the problem that the ICTY and the ICTR might face with regard to the implementation of its requests and orders, expressly decided under Chapter VII that,

“...all states shall co-operate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the Tribunal and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligations of states to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.”⁸⁴

In similar fashion, Articles 29 and 28 of the Statutes of the ICTY and ICTR, respectively, provide for the co-operation of states with the Tribunals in the investigation and prosecution of accused persons and states’ compliance with requests for assistance or orders issued by the Tribunals.⁸⁵

Like the issue of immunity, judicial assistance and co-operation with the ICTY and ICTR is dependent on the constitutive instrument of the Tribunals and the extent to which states are bound by the instrument.

⁸⁴ S/RES/827 (1993), Paragraph 4; S/RES/955 (1994), Paragraph 2. Resolution 955 contains an additional request that states are to keep the Secretary-General informed about the measures taken under their domestic laws to implement the provisions of the Resolution and the Statute.

⁸⁵ *Supra* 67

The obligation of states to co-operate with the ICTY and the ICTR is rooted in the Charter as well as in general international law. It has already been established earlier in this chapter that by Article 25 of the Charter that states are bound to comply with decisions of the Security Council. Furthermore by Article 103, the obligations of states under the UN Charter prevail over other conflicting international obligations. The combined effect of Articles 25 and 103 of the Charter include the obligation of states to co-operate with, as well as assist, the ICTY and ICTR especially in view of the fact that co-operation and assistance would be geared towards the restoration or maintenance of international peace and security.

Under general international law, a state may not rely on its domestic law as reason for non-compliance with an international obligation. Therefore, the fact that the domestic law of a state prohibits compliance with an international obligation or that a state has not taken the necessary measures under its domestic laws to implement its international obligations will not avail the state of non-compliance with its international obligations.⁸⁶

Despite the express stipulation by the Council that states are under an obligation to render assistance and co-operation to the ICTY and ICTR, some states have failed to comply with this obligation.⁸⁷ The matter came to the fore in *Prosecutor v. Tihomir Blaskic* (*Decision on the objection of the Republic of Croatia to the issuance of*

⁸⁶ See *Prosecutor v. Tadic* (Deferral) 101 *ILR* 1 and the decision of the President of the Tribunal in *Prosecutor v. Blaskic* (Application to vary conditions of detention), 108 *ILR* 69, Paragraphs 7-9, cited in Greenwood, *supra* 71, p.107, note 38

⁸⁷ Address of Antonio Cassese, President of the ICTY, to the UN General Assembly, 4 November 1997, see Press Release of the General Assembly GA/9345 of 4 November 1997

subpoenae duces tecum).⁸⁸ In this case, Croatia challenged the capacity of the ICTY to issue *subpoenae duces tecum* to states under Article 54 of the Rules of Procedure of the Tribunal. The Prosecution argued that the ICTY has implied and inherent powers which are necessary for the effective performance of its functions and that these powers include the power to require the production of evidence.⁸⁹ Croatia contended that compulsion is not a feature of international law and that where this is intended that the constitutive instrument of a Tribunal seeking to exercise powers of compulsion must expressly make a provision to that effect.⁹⁰

The Statute of the ICTY and Resolution 827 expressly provide that states are under an obligation to comply with requests or orders for assistance from the Tribunal. As such, the argument of Croatia lacks merit. Croatia had also contended that it was the intention of the Council that only individuals, to the exclusion of states, could be subjects of orders of the Tribunal.⁹¹ It is difficult to dispute that the Council intended that states should be subject to orders of the ICTY and a reading of the provisions of Article 29 of the Statute of the ICTY and Paragraph 4 of Resolution 827 does not support any argument to the contrary.⁹² Moreover, the Council firmly re-stated its intention that states should co-operate with the ICTY in Resolution 1031.⁹³

⁸⁸ Case No IT-95-14-T, 110 *ILR* 607. See also *Prosecutor v. Ferdinand Nahimana & 2 ors*, Case No. ICTR-99-52-T, in André Klip and Göran Sluiter (edited), *Annotated Leading Cases of International Criminal Tribunals: The ICTR 2003*, Volume XII (Antwerp-Oxford: Intersentia, 2007) p.363

⁸⁹ *Ibid.*, Paragraph 24 of Decision of Trial Chamber II, p.624

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, Paragraph 48, p.632-633

⁹² See Appeal Chamber Judgment, of 29 October 1997, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case IT-95-14-AR, 110 *ILR* 607, Paragraph 26, p.698-700. The Trial Chamber had argued that the exercise of jurisdiction over states was incidental to the functioning of the Tribunal, see Paragraph 49 of Trial Chamber II Decision of 18 July 1997, *ibid.*, p.633. The Appeal Chamber cautioned that the use of the term jurisdiction in relation to the incidental or ancillary powers of the Tribunal over states is misleading because the

States which are not members of the UN may expressly accept in writing the obligation of co-operation and assistance with the international tribunals established by the Security Council. This is in line with the general principle of treaty law as contained in Article 35 of the VCLT.⁹⁴ However, the general membership of the UN moots this point.

Another thorny issue raised in the *Blaskic* case was the inability of the ICTY to impose penalty for failure to comply as evident in the meaning of the term ‘*subpoenae*’.⁹⁵ However, the Appeal Chamber acknowledged the inability of the Tribunal to impose a penalty or sanction on states and concluded that the term only referred to the ability of the Tribunal to issue a compulsory order for the production of evidence which imposes penalty for non-compliance for individuals acting in their private capacity.⁹⁶ Therefore, while the Tribunal possesses the power to issue a binding order to states to produce documents, the Tribunal lacks the power to impose penalties on states for non-compliance. The power to impose penalties for non-

Tribunal has no jurisdiction over states although it possesses certain powers over states in relation to judicial co-operation and assistance, see Appeal Chamber Judgment, paragraph 28, *ibid.*, p.701

⁹³ S/RES/1031 (1995), Paragraph 4

⁹⁴ 1155 *U.N.T.S.* 331. Switzerland passed a law in 1995, when it was not yet a member of the UN, implementing the Statute of the ICTY, see

[http://www.icty.org/x/file/Legal%20Library/Member States Cooperation/implementation legislation switzerland 1995 en.pdf](http://www.icty.org/x/file/Legal%20Library/Member%20States%20Cooperation/implementation%20legislation/switzerland_1995_en.pdf), (Last accessed 16/08/2011). See also paragraph 26 of the Appeal Chamber Judgment in the *Blaskic* case, *op.cit.*, pp.698-700.

⁹⁵ The term ‘*subpoenae*’ exists only in the English version of Rule 54 of the Rules of Procedure and not in the French text (both texts are official); see Greenwood, *supra* 71, p.108

⁹⁶ *Supra* 92, Appeal Chamber Judgment, Paragraph 21, pp.695-696. However, the Appeal Chamber decided that the Tribunal did not have the power to issue a *subpoenae* to state officials acting in their official capacity, because of their functional immunity, *ibid.*, Paragraph 38, pp.707-708.

compliance with orders of the ICTY, and likewise the ICTR, is vested in the Security Council.⁹⁷

Finally, it is important to note that Croatia did not dispute that states have an obligation to co-operate with the ICTY; its challenge was addressed at the “coercive authority” of the ICTY over states.⁹⁸ The *Blaskic (subpoenae)* case is illustrative of an international trend whereby the Security Council may impose the obligation of judicial assistance and co-operation upon states with regard to international tribunals established by the Council. The obligation portends far-reaching implications for the trials of Heads of states, who do not enjoy immunities, before such tribunals.

5.6 CONCLUSION

The power of the Security Council has necessitated the establishment of bodies to assume judicial roles as well as governmental roles.⁹⁹ The Council is not a judicial body and so is not capable of exercising judicial or quasi-judicial functions. However, this chapter has shown that non-judicial organs of the UN like the Security Council may establish judicial bodies which are necessary for the performance of the functions of the Council. The legal authority and the substantive competence for the establishment of international tribunals by the Council have to be found in the UN Charter which sets out the functions and powers of the Council in accordance with the purposes and principles of the Charter.

⁹⁷ Greenwood, *op.cit.*, pp.108-109

⁹⁸ *Op.cit.*, Trial Chamber II Decision, Paragraph 71, p.643.

⁹⁹ The Council established bodies with administrative authority over Kosovo and East Timor.

The establishment of international tribunals by the Council presents a novel and contemporary facet in the discourse on Head of state immunity in international law. The decisions of the ICTY in the *Tadic*, *Milosevic* and *Blaskic* cases as well as the decision of the ICTR in the *Kambanda* case are evidence of a trend in the 1990s of the establishment of international criminal tribunals by the Security Council, before which the Head of state immunity would be inapplicable and to which states are bound to render assistance and co-operation.

The end of the cold war enabled the Security Council to rise to the role envisaged that the Council would play at the drafting of the UN Charter. While the establishment of the *ad hoc* international criminal tribunals, like the ICTY and the ICTR, is a discernible trend in the practice of the Security Council since the 1990s, it is arguable that the establishment of international tribunals was envisaged at the inception of the organisation in 1945. The UN Charter provides in Article 91 that the ICJ is the *principal* judicial organ of the UN, even though the ICJ was at the time, and remained for many decades after, the only judicial organ of the UN. The Charter did not mention that the ICJ was to be the *only* judicial organ of the UN. When this interpretation is made against the backdrop of the authority of the Security Council and the General Assembly to establish subsidiary organs (Articles 7, 22 and 29) and the non-exhaustive nature of the range of actions open to the Council under Article 41, then the power to establish the ICTY and the ICTR come as no surprise. Rather, the length of time it has taken the Council to take such a course of action is surprising.

CHAPTER 6: HEAD OF STATE IMMUNITY BEFORE THE INTERNATIONAL CRIMINAL COURT

6.1 INTRODUCTION

International practice shows that international criminal tribunals may be established as the belligerent right of a victor, over a vanquished, as well as by the UN Security Council.¹ Additionally, an international criminal tribunal can be established by a multilateral treaty between states, for instance the International Criminal Court (ICC). The decision to establish the ICC was taken at the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998. The product of this Conference was the Rome Statute of the ICC which is the constitutive instrument of the ICC. The Rome Statute entered into force on 1 July 2002, upon ratification by sixty states.

The establishment of the ICC represents a paradigm shift from *ad hocism* to permanence in the enforcement of norms of international humanitarian law and international criminal law through the exercise of criminal jurisdiction. Against the backdrop of the limitations of the jurisdiction of the ICTY and the ICTR,² the ICC was very much anticipated and its purpose seems almost messianic- to bring about the end of impunity through international accountability for perpetrators of grave crimes.³

¹ See Chapters 4 and 5 of thesis.

² The jurisdiction of the ICTY(R) was specific to the territories of the Former Yugoslavia and Rwanda and efforts are underway for the Tribunals to wind up operations, see S/RES/1503 (2003)

³ Rome Statute, 2187 U.N.T.S. 90, Preamble

Laudable as the purpose of the Court is, the jurisdiction of the ICC over perpetrators of grave crimes, including Heads of states, is limited.

This chapter, in contributing to the analysis in the thesis of emergent trends on Head of state immunity and whether there is a new international law on Head of state immunity, will consider the jurisdiction of the ICC and immunities of states parties as well as states not parties to the Rome Statute.

The referral of the Darfur and Libya situations by the Security Council raises very important issues which will also be considered in this chapter, particularly the jurisdiction of ICC over states not parties to the Rome Statute and whether the Council can change the position of a state regarding a treaty from non-contractual to contractual, i.e. can the Council make a state a party to a treaty, against its consent? Other important issues arising include the duty of states to co-operate with the ICC, where there has been a referral of a situation to the ICC by the Security Council acting under Chapter VII of the UN Charter as well as the effect of Chapter VII on the referral of the Darfur and Libya situations to the ICC. These issues will be analysed against the backdrop of the constitutive instrument theory, underlying the thesis as a whole.

6.2 THE ICC IN PERSPECTIVE

The Rome Statute of the ICC was adopted on 17 July 1998 by 120 states and established the ICC as a permanent international criminal institution that is complementary to national criminal jurisdictions.⁴

The jurisdiction of the Court, *ratione materiae*, extends to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.⁵ Article 11 provides that the jurisdiction of the Court, *ratione temporis*, applies only with respect to crimes committed after 1998, i.e. after the entry into force of the Statute establishing the Court. It is further provided that with regard to states becoming parties to the Statute after its entry into force, the Court may exercise jurisdiction only with respect to crimes committed after the entry into force of the Statute for that state, unless a declaration has been made under Article 12.⁶

By Article 13, the jurisdiction of the ICC may arise firstly, where there has been a referral to the Prosecutor of the Court by a state party in accordance with Article 14. Secondly, where there has been a referral to the Prosecutor by the Security Council

⁴ *Ibid.*, Article 1

⁵ *Ibid.*, Article 5

⁶ *Ibid.*, Article 12(3) provides that,

“If the acceptance of a state which is not a Party to this Statute is required under paragraph 2, that state may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting state shall co-operate with the Court, without any delay or exception, in accordance with Part 9.”

acting under Chapter VII of the UN Charter; and thirdly where the Prosecutor has initiated investigation in accordance with Article 15.

Therefore, with the entry into force of the Rome Statute, where one or more of the crimes listed in Article 5 occurs, the ICC, subject to the declaration in Article 12, may be seised of jurisdiction to try accused persons where a state party or the Security Council refers a situation to the Court or where the Prosecutor, on his own accord, initiates investigations subject to the authorization of the Pre-Trial Chamber.

There have been three (3) referrals made by states parties to the Prosecutor of the Court. Uganda,⁷ The Democratic Republic of Congo,⁸ and the Central African Republic,⁹ have referred the investigation of situations regarding crimes within the jurisdiction of the ICC committed within their territories since 1 July 2002. These referrals have implicated mostly rebel leaders and not Heads of states.

However, more prominent and somewhat more interesting, is the decision of the Security Council on 31 March 2005 and 26 February 2011 to refer the situations in Darfur and Libyan Arab Jamahiriya, respectively, to the Court. The prominence of the referral of these situations results from the involvement of the Security Council acting

⁷ Uganda was the first state party to the Rome Statute to refer a situation to the Court. It referred the situation concerning the Lord's Resistance Army to the Prosecutor of the ICC on 29 January 2004, ICC Press Releases (2004), ICC-20040129-44

⁸ On 19 April 2004, the Democratic Republic of Congo referred the situation of crimes within the jurisdiction of the ICC committed in its territory since 1 July 2002 to the Prosecutor of the Court, ICC Press Releases (2004), ICC-OTP-20040419-50

⁹ The Government of the Central African Republic, on 07 January 2005, referred the situation of crimes within the jurisdiction of the Court committed anywhere on its territory since 1 July 2002, ICC Press Releases (2005), ICC-OTP-20050107-86

under its Chapter VII powers and the implication of the immunities of incumbent Heads of states. When it is considered that Sudan and Libya are not parties to the Rome Statute, this makes their referral particularly interesting.

In addition, the Prosecutor of the ICC was granted authorisation on 31 March 2010 by the Pre-Trial Chamber to open investigation into the post-presidential election violence in Kenya in 2007. This follows from a decision by the Presidency of the Court, on 6 November 2009, assigning the situation in the Republic of Kenya to the Pre-Trial Chamber II.¹⁰

The jurisdiction *ratione temporis* of the ICC is not retrospective and takes effect from the date the Statute of the Court entered into force which was on 1 July 2002. As such, the incidents in the Balkans and in Rwanda are excluded from the jurisdiction of the ICC. Moreover, the ICTY and the ICTR had been established by the Security Council to address those situations. Furthermore, the jurisdiction of the ICC is subject to that of national systems and only comes into effect where the national courts are unwilling or unable to carry out the investigations and prosecutions.¹¹ For instance, the Cour de Cassation of the Central African Republic in April 2006 had declared that the country's national judicial system was unable to carry out the necessary investigation and prosecution of the crimes alleged to have been committed within the country's territory.¹²

¹⁰ ICC Press Releases (2009), ICC-CPI-20091106-PR473

¹¹ Rome Statute, *supra* 3, Article 17

¹² ICC Press Release, on 22 May 2007 announcing its decision to open investigation in the Central African Republic, ICC-OTP-20070522-220

6.3 HEAD OF STATE IMMUNITY BEFORE THE ICC

The Rome Statute, like previous international instruments before it including the Statutes of the IMTs and the Statutes of the ICTY and ICTR, clearly provides against the relevance of official capacity of Heads of states. Article 27(1) of the Rome Statute states that,

“This Statute shall apply to all persons without any distinction based on official capacity. In particular, official capacity as a Head of state or government, a member government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

Provisions, like Article 27(1), making the fact of official capacity of persons including Heads of states or government irrelevant to the question of criminal responsibility, without more, cannot remove the immunities of state officials under customary international law.¹³ Such provisions must be interpreted subject to the theory that the effect of the constitutive instrument establishing a Court before which the provision is applicable must be binding upon those the provision is directed at.

While the provision of Article 27(1) is not novel,¹⁴ Article 27(2) of the Statute is seemingly novel in its provision that,

¹³ This does not mean that a treaty cannot vary custom for parties, see the *North Sea Continental Shelf cases* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/ Netherlands*), 1969 *I.C.J. Reports* 3, Paragraph 25, p.24

¹⁴ See Report of the Commission on the Responsibility of the Authors of the War, (1920) 14 *AJIL* 95, pp.116-117; Charter of IMT at Nuremberg (Article 7) and Charter of IMTFE (Article 6) both reprinted in Guénaél Mettraux (edited), *Perspectives on the Nuremberg Trial*, (Oxford: OUP, 2008), p.736,

“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

The practical effect of Article 27(2) is that the jurisdiction of the ICC over an accused person is not precluded where an act was committed in an official capacity. This effect is not new because the IMTs, the ICTY and ICTR possessed jurisdiction over accused persons who had acted in their official capacities, despite the non-inclusion of similar provisions to Article 27(2) in their constitutive instruments.

Furthermore, Article 27(2) is applicable to both international and national law immunities of officials of state parties. The fact that international criminal tribunals are dependent on states for judicial co-operation and assistance in the form of arrest and surrender of accused persons makes it important that the Rome Statute includes a provision for state parties to waive the national immunities which are applicable to their officials.¹⁵

The different laws of states provide differently for the immunities that are available to officials under national laws.¹⁶ These exist and operate differently from international law immunities; national law immunities are available only at the national level and not before international courts. National immunities also apply to a different class of persons and unlike international law immunities they are not based on any theory of

Appendix 4 and p.7 respectively; Article 7(2)ICTY and Article 6(2)ICTR Statutes, reprinted in (1993) 32 *I.L.M.* 1192 and (1994) 33 *I.L.M.* 1602, respectively.

¹⁵ Dapo Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 *AJIL* 407, p.420

¹⁶ See Chapter 3 of thesis.

representative capacity but are based solely on the effectiveness of governmental officials in their duties.¹⁷ As such, state parties cannot rely on the immunities available to their officials under their peculiar national laws to evade the jurisdiction of the ICC.

This thesis is concerned with international law immunities and it is re-iterated that the question of the immunities of Heads of states for international crimes is dependent on the nature of the constitutive instrument establishing an international court and the extent to which states are bound by the instrument. By Article 34 VCLT, the Rome Statute is applicable to and binding only upon states parties; it cannot create obligations or rights for states not parties to the Statute.¹⁸ Therefore, a consideration of the immunities of Heads of states before the ICC would involve firstly, state parties and secondly, states not party to the Rome Statute.

Subject to the constitutive instrument theory, immunities are removed where it is provided that official capacity does not exclude criminal responsibility. Therefore, the effect of the substantive provisions of Article 27(1) and (2) is the removal of immunities of Heads of states and other state officials of parties to the Rome Statute. By ratifying the Rome Statute, states parties have agreed that the immunities enjoyed by their officials, including Heads of state will not bar the ICC from exercising jurisdiction over such persons. There is a good faith requirement (*pacta sunt servanda*)

¹⁷ See Chapter 1 of thesis.

¹⁸ 1155 U.N.T.S. 331

on states parties that their contractual agreement within the framework of the Rome Statute are kept.¹⁹

That the establishment of the ICC was meant to put an end to impunity is not enough to assume that Head of state immunity is not applicable before the ICC. Neither is the express inclusion by the ICJ in the *Arrest Warrant* case, of the ICC as an example of ‘certain’ international tribunals before which international immunities are not applicable enough to address the issue of the non-applicability of immunities before the ICC. The ICJ cannot confer on the ICC a jurisdiction which it does not have. Moreover, the immunities of Heads of states not party to the Rome Statute remain unaffected by the provisions of Article 27(1). The immunities of Heads of states not party to the Statute exist under, and are governed by, customary international law and as such, they enjoy absolute immunity even where international crimes are alleged to have been committed. Therefore, the ICC must be distinguished from the ICTY and ICTR as international courts before which Head of state immunity would not apply.

The Rome Statute, in recognising that the immunities of states not parties to the Statute remain unaffected by Article 27, qualifies the non-applicability of the immunities of state parties by the immunities of non-parties.²⁰ As such, Article 27 is to be read subject to Article 98(1) which provides that,

¹⁹ See VCLT, *ibid.*, The Preamble of which notes the universal recognition of the principles of free consent and of good faith and the *pacta sunt servanda* rule in treaty-making. In addition, Article 26 provides that,

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

²⁰ Hazel Fox, *The Law of State Immunity*, (Oxford : OUP, 2002), p.432

“The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the co-operation of that third state for the waiver of the immunity.”

It is against this background that the referrals by the Security Council of the situations in Darfur and Libya should be examined. In line with Article 13(b) of the Rome Statute and acting under Resolution 1593, the Council, on 31 March 2005, decided to refer the situation in Darfur, Sudan since 1 July 2002 to the Prosecutor of the Court for investigation and prosecution.²¹ Likewise, the Security Council by virtue of Article 13(b) decided in Resolution 1970 to refer the situation in Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor for investigation and prosecution.²²

Importantly, Sudan and Libya are not parties to the Rome Statute and Resolutions 1593 and 1970 have raised important issues particularly the effect of the Resolutions on the immunities of the Head of state of Sudan and Libya, respectively as well as the obligations of Sudan, Libya, parties and non-parties to the Rome Statute to co-operate with the ICC.

²¹ S/RES/1593(2005)

²² S/RES/1970 (2011)

6.4 THE ROAD TO SECURITY COUNCIL RESOLUTIONS 1593 AND 1970

DARFUR

The humanitarian crisis, the widespread human rights violations and attacks on civilians in Darfur precipitated by the protests and attacks on the Government of Sudan, in 2003, for failure to protect the black African Sudanese from attacks of the nomadic Arabs (Janjaweed militia) and the economic marginalisation of the black African Sudanese prompted the Security Council, acting under Chapter VII of the UN Charter, to pass Resolution 1556 in July 2004.²³ The Council, under Article 39 of the Charter, had determined that the situation in Darfur was a threat to international peace and security as well as stability in the Darfur region.²⁴ Resolution 1556 listed the conditions to be fulfilled by the Government of Sudan and particularly stated in operative paragraph 6 the Council's intention to consider further action under Article 41 of the UN Charter in the event of non-compliance by the Government of Sudan.

The seriousness and urgency of the humanitarian crisis in Darfur was such that the Council intended that non-compliance by the Government of Sudan with Resolution 1556 would necessitate the consideration of enforcement action under Article 41. The Council's expression of its intention of possible action under Article 41 is very important; and the referral by the Council of the Darfur situation must be considered against the backdrop that the referral in itself is an action taken under Article 41 for the maintenance of peace and security in the region. It is not a mere referral but an action

²³ S/RES/1556 (2004)

²⁴ *Ibid.*

taken to restore international peace and security in the Darfur region. As such, the issues of Head of state immunity and the obligation of states to co-operate with the ICC must be considered in the light of the Chapter VII of the UN Charter.

Following the failure of the Government of Sudan to fully meet its obligations under Resolution 1556, the Council passed Resolution 1564 on 18 September 2004.²⁵ The Council, in Resolution 1564, requested the UN Secretary-General to establish an international commission of inquiry to investigate the reports of violations of international humanitarian law and human rights law in Darfur to determine whether or not acts of genocide have occurred and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.²⁶

The Commission submitted its Report of findings to the Secretary-General on 25 January 2005.²⁷ The Commission found that the Government of Sudan and the Janjaweed militia were responsible for violations of international humanitarian law and human rights law amounting to crimes against humanity and war crimes.²⁸ The Commission strongly recommended the referral of the situation in Darfur to the ICC, and also recommended that states exercise universal jurisdiction over the perpetrators so as to “help break the cycle of impunity”.²⁹

²⁵ S/RES/1564 (2004)

²⁶ *Ibid.*, Paragraph 12

²⁷ The Report of the International Commission of Inquiry on Darfur to the UN Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf, (Last accessed 16/08/2011)

²⁸ *Ibid.*, p.3

²⁹ *Ibid.*, p.5-6. The Commission’s recommendation for the exercise of universal jurisdiction by states is misconceived especially in view of the fact that universal jurisdiction is yet to be mainstreamed into general international law as a basis for the exercise of jurisdiction.

Acting on the Report of the Commission, the Council passed Resolution 1593 on 31st March 2005.³⁰ In the Resolution, the Council acting under Chapter VII of the Charter, expressly decided to refer the situation in Darfur to the ICC. The action of Council can be seen as an atypical measure under the Council's enforcement mandate in Article 41 of the Charter, not involving the use of force.³¹

In June 2005, the Prosecutor of the ICC announced the decision to open investigation into the situation in Darfur, stating that the investigation will focus on individuals who bear the greatest criminal responsibility for the crimes committed in the Darfur region.³² In July 2008, the Prosecutor applied to the Pre-Trial Chamber of the ICC for an arrest warrant to be issued against Omar Hassan Ahmad Al-Bashir, the President of Sudan.

LIBYA

Following the pro-democratic uprising in the Arab states which started in early 2011 in Tunisia, then spread to Algeria, Egypt, Libya and Syria in early 2011, the Government of the Libyan Arab Jamahiriya embarked on a brutal campaign to quash the civilian unrest in the state. On 26 February 2011, the Security Council unanimously decided, in Resolution 1970, to refer the situation in Libya Arab

³⁰ S/RES/1593 (2005)

³¹ Benedetto Conforti, *The Law and Practice of the United Nations*, 2nd revised edition, (The Hague: Kluwer Law International, 2000), p.206

³² ICC Press Releases (2005), ICC-OTP-0606-104

Jamahiriya since 15 February 2011 to the ICC Prosecutor for investigation and possible prosecution.³³

Similar to its decision in Resolution 1593, the Council's referral of Libya to the ICC was done under Chapter VII of the UN Charter and was a measure under Article 41 of the Charter. Unlike Resolution 1593, there was no determination of a threat to international peace and security in Resolution 1970.

The non-determination of a threat to international peace and security under Article 39 of the Charter does not mean that the referral in Resolution 1970 is not an action necessary for the restoration of international peace and security. The fact that the Council, in Resolution 1970, had expressly invoked Chapter VII and stated that it was taking measures under Article 41 must mean that the determination under Article 39 is implicit in the Resolution. Moreover, the Council had expressly stated in the Preamble to Resolution 1970 that it was mindful of its primary responsibility for international peace and security. If the situation in Libya were not a threat to international peace and security, there would be no need to restore international peace and security in that region. Furthermore, there is no rule that states that the Council must expressly make the Article 39 determination before action under Charter VII. Moreover, the determination by the Council in Resolution 1973 that the situation in Libya continues to constitute a threat to international peace and security supports this view because the

³³ S/RES/1970 (2011), Operative Paragraph 4

use of the word ‘continues’ in the Resolution presupposes the existence of a threat to international peace and security.³⁴

The ICC Prosecutor decided to open investigation into the Libya situation on 3 March 2011. On 16 May 2011, the Prosecutor requested the issuance of warrants of arrest against Mouammer Gaddafi, his son Saif Al-Islam Gaddafi who is the *de facto* Prime Minister of Libya and successor to Mouammer Gaddafi, and Abdullah Al-Senussi the Libyan Head of Military Intelligence for crimes against humanity. On 27 June 2011, the Pre-Trial Chamber I granted the request and issued the warrants of arrest.

6.5 LEGAL BASIS OF ICC JURISDICTION OVER THE DARFUR AND LIBYA SITUATIONS AND THE NON-APPLICABILITY OF HEAD OF STATE IMMUNITY OF AL-BASHIR AND GADDAFI

It is stated at the onset of this section, that the recent death of Gaddafi on 20 October 2011, does not rob the arguments contained herein of their legal validity. Having been captured by the rebels in Libya, there was a possibility that the Libyan National Transitional Council would have surrendered Gaddafi to the ICC to face his trial but the unfortunate killing of Gaddafi robbed the ICC and international discourse of the opportunity of robust arguments and discussions on the issue of Head of state immunity.

³⁴ S/RES/1973 (2011)

Sudan and Libya are not parties to the Rome Statute. *A priori*, they are not bound by the Statute, i.e. Article 27 of the Rome Statute is ineffectual against Al-Bashir and Gaddafi. By Article 34 VCLT, the Rome Statute and the jurisdiction of the ICC operate with respect to parties to the Rome Statute. This would mean that the rights and obligations of Sudan and Libya under customary international law are not affected by the provisions of the Rome Statute.

The immunities of Sudan and Libya in international law are not governed by treaty law under the Rome Statute but rather exist as customary international law which recognises the absolute immunity of Heads of states (*ratione personae*) even for international crimes. As such the immunities of Sudan and Libya, which extend to Al-Bashir and Gaddafi under international law, remain.

However, the matter does not end here and the argument above has to be assessed in the light of the effect of a referral by the Security Council on the jurisdiction of the ICC. Having said that the ICC does not have jurisdiction over states not parties to its Statute does not mean that the ICC can only exercise jurisdiction over nationals of state parties.³⁵

³⁵ The predominant view from the US, which is not party to the Rome Statute is that the ICC can only exercise jurisdiction over nationals of states parties, see David J. Scheffer, 'Developments in International Law: Foreword', (1999) 93 *AJIL* 1, pp.18-20; Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', (2001) 64 *Law and Contemporary Problems* 13, pp.13-14. Thus, the US has entered into bilateral immunity agreements with states to ensure that US nationals are not subject to the jurisdiction of the ICC. See Dominic McGoldrick, 'Political and Legal Responses to the International Criminal Court', in Dominic McGoldrick, Peter Rowe and Eric Donnelly (edited), *The Permanent International Criminal Court: Legal and Policy Issues*, (Oxford: Hart Publishing, 2004) 389, pp.423-433; Dapo Akande, 'The Jurisdiction of the ICC over Nationals of Non-Parties: Legal Basis and Limits', (2003) 1 *JICJ* 618-650.

The ICC may exercise jurisdiction over nationals of states not parties to the Rome Statute where the national commits any of the crimes within the jurisdiction of the Court in the territory of a state party. Article 12(2)(a) of the Rome Statute of the ICC provides that,

“In the case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following states are parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The state on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft;
- (b) The state of which the person accused of the crime is a national.”

The above provision clearly provides, by the use of the phrase ‘*one or more*’, that the ICC may lawfully exercise jurisdiction over nationals of a state that is not party to its Statute where such persons have committed a crime within the jurisdiction of the Court on the territory of a state party or on board a vessel or aircraft registered to a state party. Article 12 does not require a state to be party to the Rome Statute or to have accepted the jurisdiction of the ICC before its national who has committed a crime within the jurisdiction of the ICC in the territory of a state party can be tried by the ICC. It is a recognized principle in law that individuals are subject to the laws (substantive and procedural criminal laws) applicable in foreign territories including those which are concomitant of treaty obligations.³⁶

³⁶ See Philippe Kirsch, The Rome Conference on the International Criminal Court: A Comment, (November/December 1998) *ASIL Newsletter* 1; See also Michael P. Scharf, ‘The ICC’s Jurisdiction over Nationals of Non-Party States: A Critique of the US Position’, (2001) 64 *Law and Contemporary Problems* 67, p.98-116; Gennady M. Danilenko, ‘ICC Statute and Third States’, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones

It is also possible for the Court to exercise jurisdiction over a national of a state not party to the Rome Statute where the Security Council refers a situation involving such a party to the ICC, in line with Article 13(b) of the Statute.³⁷ By Article 13(b) of the Statute, the Council acting under Chapter VII of the UN Charter may refer a situation to the ICC. Nothing in the wording of Article 13(b) lends itself to the interpretation that the referral of a situation must be with respect to a state party to the Rome Statute- it would be odd to interpret the provision as such.

The Security Council being seised of the situation in Darfur decided to refer the situation to the ICC, as envisaged under Article 13(b). Likewise, the Council decided to refer the situation in Libya to the ICC. Resolution 1593 provides that the Security Council,

“Determining that the situation in Sudan continues to constitute a threat to international peace and security,
Acting under Chapter VII of the Charter of the United Nations,

1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
2. Decides that the Government of Sudan and all other parties to the conflict in Sudan shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this Resolution, while recognizing that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and international organizations to co-operate fully.”

(edited), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford: University Press, 2002) 1871, 1891-1897; Jordan J. Paust, 'The Reach of ICC Jurisdiction over Non-Signatory Nationals', (2000) 33 *Vanderbilt Journal of Transnational Law* 1

³⁷ Dan Sarooshi, 'The Peace and Justice Paradox: The International Criminal Court and the United Nations Security Council', in McGoldrick, *et al*(edited), *supra* 35, p.95, at pp.96-98

In Resolution 1970 the Council stated that it was,

“*Mindful* of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations, *Acting* under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,...
4. *Decides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;
5. *Decides* that the Libyan authorities shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organizations to co-operate fully with the Court and the Prosecutor.”

The Security Council’s decision to refer the matter to the ICC was irrespective of the non-contractual status of Sudan and Libya vis-à-vis the ICC. This status was irrelevant to the decision of the Council having expressly determined, in the case of Sudan, and implicitly determined, in the case of Libya, that the situations constituted a threat to international peace and security.

The legal basis for the jurisdiction of the ICC over a matter and the legal basis of the non-applicability of immunities before the ICC are separate. After all, jurisdiction does not mean an absence of immunity.³⁸ The legal basis for the referral of the Darfur and Libya situations to the ICC, hence the jurisdiction of the ICC over the situations, is not in issue- Article 13(b) of the Rome Statute clearly provides for this possibility.

³⁸ *Arrest Warrant case*, (2002) *ICJ Reports* 3, Paragraph 59

However, what seems unclear is the actual legal basis for the non-applicability of the immunities of Al-Bashir and Gaddafi before the ICC.

On 14 July 2008, the Prosecutor of the ICC applied to the Pre-Trial Chamber requesting it to issue a warrant of arrest of Al-Bashir for his alleged involvement in the commission of crimes of genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups in Darfur from March 2003 to July 2008.³⁹ On 4 March 2009, the Pre-Trial Chamber decided to issue a warrant of arrest in respect of crimes against humanity and war crimes, rejecting the application in respect of the crime of genocide.⁴⁰ The Pre-Trial Chamber also directed the Registrar of the Court to prepare a request for co-operation seeking the arrest and surrender of Al-Bashir and to transmit it to the competent Sudanese authorities and to all states parties to the Rome Statute as well as to the Security Council members not parties to the Rome Statute.⁴¹

The ICC being conferred with jurisdiction by virtue of Resolution 1593 could, unquestionably, exercise jurisdiction over ordinary persons responsible for the international crimes in Darfur. However, the jurisdiction of the Court over Al-Bashir as the Head of state of a non-contracting party to the Rome Statute whose alleged

³⁹ “Prosecutors’ Application under Article 58”, public redacted version ICC-02/05-157-AnxA, filed on 12 September 2009.

⁴⁰ *In The Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir (“Omar Al-Bashir”)*, ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir’, Public Redacted Version, No: ICC-02/05-01/09 available at <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf>, (accessed 16/08/2011); [Hereinafter *Al-Bashir Arrest Warrant Application*]. For the warrant of arrest, see *In The Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir (“Omar Al-Bashir”)*, ‘Warrant of Arrest of Omar Hassan Ahmad Al-Bashir’, Public Document, No: ICC-02-05-01/09, available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>, (accessed 16/08/2011)

⁴¹ US, China and Russia are not parties to the Rome Statute

actions were not committed in the territory of a state party requires closer analysis. Resolution 1593 is silent on the issue of Head of state immunity. The issue of whether Al-Bashir's absolute immunity under customary international law survives Resolution 1593 is of paramount importance in this context. The levity with which the issue was treated by the Pre-Trial Chamber of the ICC in the application for the arrest warrant of Al-Bashir is regrettable.

The Pre-Trial Chamber held that the current position of Al-Bashir as Head of state of Sudan, a non-contracting party to the Rome Statute, has no effect on the jurisdiction of the ICC. The Chamber based its decision on four considerations.⁴² Firstly, the objective of the Rome Statute in ending impunity as contained in the Preamble of the Statute. Secondly, the express provisions of Article 27 of the Rome Statute. Thirdly, the applicability of other sources of international law as contained in Article 21 of the Statute, is subject to there being a lacuna in the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence before the Court and that a lacuna cannot be filled by the application of the Articles 31 and 32 of the Convention on the Law of Treaties. And fourthly, the acceptance of the Security Council by the referral of the Darfur situation that the investigation and prosecution arising as a result would be done within the framework of the Rome Statute, the Elements of Crimes and the Rules as a whole. These four considerations will be dealt with *seriatim*.

⁴²Al-Bashir Arrest Warrant Application, *op.cit*, Paragraphs 41-45

The legal effect of a preamble of a treaty is merely exhortatory. It is not legally binding, not even on the parties to a treaty.⁴³ The reliance of the Pre-Trial Chamber on the aims and objectives of the Rome Statute to end impunity as contained in the Preamble of the Statute is flawed and precipitates the unfortunate reasoning of the Chamber on the non-applicability of the Head of state immunity for Al-Bashir before the ICC.

In response to the second consideration of the Pre-Trial Chamber in its Decision, Article 27 (1) and (2) apply only with respect to parties to the Rome Statute. It cannot found the decision of the Chamber that the current position of Al-Bashir as Head of state of Sudan, a non-contracting party to the Rome Statute, has no effect on the jurisdiction of the ICC, without a consideration of the legal effect of Resolution 1593.

Thirdly, and rather oddly, the Pre-Trial Chamber seemed to imply that other sources of international law are inapplicable before the Court except where there is a lacuna in the Rome Statute, the Elements of the Crime and the Rules of the Court and such lacuna is not cured by Article 31 and 32 VCLT. This is outside the contemplation of the Statute of the Court. In fact, Article 21 of the Rome Statute expressly provides that,

- “1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law,

⁴³ Sarah Williams and Lena Sherif, ‘The Arrest Warrant for President Al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court’, (2009) 14 *Journal of Conflict and Security Law* 71, p.82

including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.”

There is nothing in the wording of the Statute which makes other sources of international law inapplicable before the Court or applicable in the conditions spelt out by the Pre-Trial Chamber. Indeed, it is an odd interpretation of the law to state that customary international law does not apply before an international court.⁴⁴ This is at variance with the generally accepted practice in international law whereby international courts have relied on other sources of international law like customary international law.⁴⁵

The Pre-Trial Chamber based its Decision on an implied acceptance by the Security Council that the investigation and prosecution arising from the referral would be done within the framework of the Rome Statute, the Elements of the Crime and the Rules of

⁴⁴ Article 38 of the Statute of the ICJ, 59 *Stat.* 1055, requires the ICJ to apply the following in its decisions:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁴⁵ For example, the ICJ relied upon customary international law in its decision in the *North Sea Continental Shelf Cases*, *supra* 13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, (1986) *I.C.J. Reports* 107.

the Court. The conduct of the investigation and prosecution against Al-Bashir by the ICC within the framework of its Statute and Rules does not effectively address the issue of Head of state immunity of Al-Bashir as President of Sudan (a non-party to the Rome Statute) and its non-applicability before the ICC. A consideration of the issue outside Resolution 1593 and its practical effect on Sudan and the immunities of Sudan officials before the ICC as well as before national authorities will be inadequate.

The Pre-Trial Chamber again failed to rise to the occasion by availing itself of the opportunity to elucidate on the issue of Head of state immunity before the ICC where there has been a referral under Article 13(b) of its Statute.⁴⁶ It was merely stated that,

“...The Chamber also notes that, consistent with its findings in the Al-Bashir case, the official position of an individual, whether he or she is a national of a state party or of a state which is not party to the Statute, has no effect on the court’s jurisdiction.”⁴⁷

It is submitted that the view of the Chamber is not supported by general international law. The nature of the ICC’s constitutive instrument as a treaty is such that is governed by the Article 34 of the Convention on Law of Treaties. As such, the jurisdiction of the ICC is only effectual against nationals of states who have given their consent to the jurisdiction of the ICC, either under the Rome Statute or some

⁴⁶ *Situation in the Libyan Arab Jamahiriya : Decision on the Prosecution’s Application Brought Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No: ICC-01/11, public redacted version, 27 June 2011, available at <http://www.icc-cpi.int/iccdocs/doc/doc1101337.pdf> (accessed 16/08/2011); [Hereinafter *Gaddafi Arrest Warrant Application*]

⁴⁷ *Ibid.*, Paragraph 9

other binding instrument.⁴⁸ In the absence of basis for consent of states, the ICC has no jurisdiction over nationals of states not party to its Statute.

Unlike Gaddafi, the official position of Al-Bashir as Head of state of Sudan was not in question. Gaddafi had adamantly rejected his official position as Head of state of Libya.⁴⁹ The Pre-Trial Chamber in the *Gaddafi Arrest Warrant Application* in finding that Gaddafi was the Head of state of Libya relied on the Decree on Revolutionary Legitimacy which states that the “legitimacy of the Leader of the Revolution stems from his being the leader of this great revolution.”⁵⁰ The Chamber stated that,

“Although Muammar Gaddafi claims not to have any position and not to be the President of Libya, he is recognised inter alia as the “ultimate authority or ruler”, “political head of the government in Libya”, or “ideological and spiritual head of the movement”.”⁵¹

Despite his claims and title to the contrary, Gaddafi was the *de facto* Head of state of Libya because he was in absolute control of the machinery of state and exercised control over the territory, media and telecommunications, military and security forces, and finances of Libya. He was the internationally recognised Libyan Head of state and had repressed opposition to himself or to his regime.⁵² He exercised absolute political and administrative control of Libya and Saif al-Islam Gaddafi and Abdullah al-Senussi who oversaw the economy and military, respectively were subject to the control of

⁴⁸ This point will be considered in detail later in this chapter.

⁴⁹ Gaddafi had stated in a speech delivered in Tripoli on 25 February 2011 that,
“I’m among the people, among the masses, even though Mu’ammarr al-Qadhafi isn’t a President, King or Head of state and he doesn’t have any constitutional or administrative powers.”

See *Gaddafi Arrest Warrant Application*, *supra* 46, Paragraph 15

⁵⁰ *Ibid.*, Paragraph 16

⁵¹ *Ibid.*, Paragraph 72

⁵² *Ibid.*, Paragraphs 19-20

Muammar Gaddafi.⁵³ In view of all these, it is difficult to come to a conclusion other than that Gaddafi was the Head of state of Libya.

It is to be re-iterated that the fact that the ICC has jurisdiction over the Darfur and Libyan situations does not of itself dispense with the immunity of Al-Bashir and Gaddafi. The question of jurisdiction of the ICC over Al-Bashir and Gaddafi, and necessarily the immunities of Al-Bashir and Gaddafi, proceeds from two bases- firstly the Rome Statute of the ICC and secondly, Resolutions 1593 and 1970.

It has been commented that the Rome Statute and Resolution 1593 do not mention the issue of immunities of Heads of states of non-parties where there has been a referral by the ICC.⁵⁴ However, Resolutions 1593 and 1970 having referred the Darfur and Libyan situations to the ICC, it would have been superfluous for the Resolutions to have included a provision against the applicability of Head of state immunity because the Rome Statute provides in Article 27(1) and (2) that the official capacity as Head of state is irrelevant to criminal responsibility and that international law or national law immunities shall not be a bar to the Court's jurisdiction. Article 27 being applicable only to states parties, it becomes pertinent to consider whether the immunity of Al-Bashir and Gaddafi is extant in proceedings before the ICC, and if not whether the Security Council can change this state of affairs or can make Sudan and Libya parties to the Rome Statute.

⁵³ *Ibid.*, Paragraphs 72, 73 and 83

⁵⁴ Williams and Sherif, *supra* 43, p.79-80. Resolution 1970 is also silent on Head of state immunity.

The argument against the non-applicability of the immunity of Al-Bashir and Gaddafi before the ICC is hinged on Resolutions 1593 and 1970 and, ultimately, Chapter VII of the UN Charter.

The Security Council had determined severally that there was threat to international peace and stability in the Darfur region and this determination paved way for its enforcement mandate; a mandate which the Council was mindful of in Resolution 1970 on the Libya situation. It has been argued earlier in this thesis that the enforcement powers of the Council under Chapter VII of the Charter is not limited to military action but includes economic and other pacifist means of restoring international peace and stability.⁵⁵

By Article 25 of the UN Charter, the effect of the decision by the Security Council to refer the Darfur and Libya situations to the ICC is that all member states of the UN are bound by the decision. Sudan and Libya, being members of the UN, are bound by the decision and as such the immunity of Al-Bashir and Gaddafi before the ICC must be deemed to have been effectively removed by the Council. The trials of Milosevic by the ICTY and Kambanda by the ICTR clearly show that the Council can circumvent the immunity of states and their officials.⁵⁶

Despite the fact that Sudan and Libya are not parties to the Rome Statute, Sudan and Libya are members of the UN, having joined the organisation in 1956 and 1955,

⁵⁵ Chapter 5 of thesis

⁵⁶ Dapo Akande, "The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?", (2008) *Oxford Transitional Justice Research Working Paper Series* pp.2-3

respectively.⁵⁷ By virtue of their membership of the UN, Sudan and Libya are bound by the UN Charter. They have accepted that the purpose of the UN is to maintain international peace and security; a purpose which involves taking effective collective measures for the prevention and removal of threats to the peace.⁵⁸ They have also accepted to fulfil, in good faith, the obligations assumed in accordance with the UN Charter.⁵⁹ Very importantly, Sudan and Libya have agreed to accept and carry out the decisions of the Security Council in accordance with the Charter. Membership of the UN is not obligatory of states; it is open to states which accept the obligations contained in the Charter.⁶⁰

It is against the backdrop of these acceptances by Sudan and Libya, the nature of Resolutions 1593 and 1970 as Chapter VII Resolutions, and Article 25 of the Charter that it is submitted that Sudan and Libya are bound by the decision of the Security Council to refer the Darfur and Libya situations to the ICC (constitutive instrument theory). Sudan and Libya are therefore bound by the jurisdiction of the ICC which operates under the constitutional framework of the Rome Statute. Article 1 of the Rome Statute of the ICC provides that “... The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”

By referring the situations to the ICC, the Security Council had accepted the Rome Statute as the constitutive and operative instrument of the Court. It was not open to the

⁵⁷ However, in 1969 Libya informed the UN that it had changed its name to the Libyan Arab Jamahiriya. See <http://www.un.org/en/members/growth.shtml>, (accessed 16/08/2011).

⁵⁸ UN Charter, 59 *Stat.* 1031, Article 1

⁵⁹ *Ibid.*, Article 2

⁶⁰ *Ibid.*, Article 4

Council to decide otherwise. The UN and indeed the Security Council recognise the sovereign capacity of states to enter into a multilateral treaty establishing a judicial body to be governed by the constitutive multilateral agreement. The Council could not have decided to refer the Darfur and Libya situations to the ICC under a different legal framework, when the Council's decision to refer the situations arose under the constitutive legal framework of the ICC (Article 13(b) of the Rome Statute). Moreover, the Council made copious reference to the Rome Statute in the Resolutions 1593 and 1970, and as such the Council had accepted that the jurisdiction of the ICC over the Darfur and Libya situations could only be exercised in line with the Rome Statute.⁶¹

Thus, Sudan and Libya are bound by the Rome Statute of the ICC as the constitutive and operative instrument of the Court, including Article 27 of the Rome Statute. This means that the immunity enjoyed by Al-Bashir and Gaddafi would be inapplicable in proceedings before the Court.

Having established that Sudan and Libya are bound by the Rome Statute, this does not mean that Sudan and Libya are parties to the Statute. To maintain such an argument

⁶¹ See Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities', (2009) 7 *JICJ* 333, p.340-341 where he argues that,

"A decision by the Security Council that the Court may act implies a decision that it act within its Statute. This implication arises unless the Security Council were to provide otherwise. And if the Security Council were to provide that the Court should act otherwise than in accordance with its Statute, it is doubtful that the Court would be competent to do so, in spite of the Security Council decision."

He further argues that the ICC is not bound by Security Council Resolutions and not being a member of the UN, the provision of Article 103 of the UN Charter is not applicable to the Court, *ibid.*, n.29

would tend towards artificiality. The extensive powers of the Security Council cannot make Sudan and Libya parties to the Rome Statute. To argue otherwise would be to subvert the foundational basis of the international order. The Council can impose certain treaty obligations upon UN members. Thus, by the combined effect of Article 25 of the UN Charter and Resolutions 1593 and 1970, Sudan and Libya are in a similar position to parties to the Rome Statute.⁶²

On 6 July 2009, the Prosecutor appealed against the decision of the Pre-Trial Chamber in the *Al-Bashir Arrest Warrant Application*. The Appeals Chamber, on 3 February 2010, unanimously reversed the decision of the Pre-Trial Chamber to the extent that the Pre-Trial Chamber erred in law when it applied a wrong standard of proof at the arrest warrant stage of the proceedings by its decision against issuing a warrant of arrest with respect to the charge of genocide against Al-Bashir.⁶³ The Appeals Chamber in remanding the case back to the Pre-Trial Chamber directed that a new decision on the issuance of the arrest warrant with respect to the crime of genocide should be reached, using the correct standard of proof.⁶⁴

⁶² Akande, *ibid.*, p.342. However, this is only with regard to the jurisdiction of the ICC and obligation to co-operate with the Court, it does not mean that other obligations of state parties, e.g. funding, redound on Sudan and Libya.

⁶³ *In The Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir ("Omar Al-Bashir")*, 'Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir', Public Document, No: ICC-02/05-01/09 OA, available at <http://www.icc-cpi.int/iccdocs/doc/doc817795.pdf>, (Last accessed 16/08/2011)

⁶⁴ The Pre-Trial Chamber had rejected the application of the Prosecutor in relation to the charge of genocide on the basis that the existence of genocidal intent was "only one of several reasonable conclusions available on the materials provided by the Prosecution." The Appeals Chamber, however, was of the view that requiring the existence of genocidal intent to be the only reasonable conclusion resulted in requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt thereof. The standard of proof applied by the Pre-Trial Chamber had the practical effect of imposing a more stringent and burdensome standard as required for the arrest warrant stage of the proceedings as stipulated under Article 58(1)(a) of the Rome Statute. See Paragraph 33 of the Judgment of the Appeals Chamber, *ibid.*

On 12 July 2010, the Pre-Trial Chamber decided to issue a warrant of arrest against Al-Bashir for charges of genocide by killing,⁶⁵ causing serious bodily or mental harm⁶⁶ and deliberately inflicting on target groups conditions of life calculated to bring about the group's physical destruction.⁶⁷ The Chamber also directed the Registrar of the Court to prepare a supplementary request for co-operation seeking the arrest and surrender of Al-Bashir for charges contained in both warrants of arrests and for transmission of the supplementary request to Sudan, all states parties and all Security Council members not states parties to the Rome Statute and those that were not members of the Council on 4 March 2009.

On 27 June 2011, the Pre-Trial Chamber found there were reasonable grounds to issue arrest warrants for Muammar Gaddafi and his co-accused for crimes against humanity and made its decision to that effect.⁶⁸ It also decided that the Registrar shall prepare a request for co-operation seeking the arrest and surrender of Gaddafi and his co-accused which shall be transmitted to the competent Libyan authorities, all states parties to the Rome Statute, all of Libya's neighbouring states, and to the Security Council members not parties to the Rome Statute.⁶⁹ The Chamber also directed the Registrar to prepare and transmit to any other state any additional request for the arrest

⁶⁵ Rome Statute, *supra* 3, Article 6(a)

⁶⁶ *Ibid.*, Article 6(b)

⁶⁷ *Ibid.*, Article 6(c)

⁶⁸ *Gaddafi Arrest Warrant Application*, *supra* 46

⁶⁹ *Ibid.*

and surrender necessary to effect the arrest and surrender of Gaddafi and his co-accused.⁷⁰

The question arises whether the decision to issue a supplementary warrant of arrest for charges of genocide against Al-Bashir has an effect of the international immunities of Al-Bashir before the Court. This will best be considered in the obligation of states to provide judicial assistance and co-operation to the ICC.

6.6 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE ICC: RESOLVING ARTICLE 98 OF THE ROME STATUTE WITH RESOLUTIONS 1593 AND 1970

There is a general obligation to co-operate with the ICC in the investigation and prosecution of crimes within the jurisdiction of the Court. This obligation is limited only to state parties of the Rome Statute.⁷¹ The Court may report failure of a state party to co-operate with the ICC to the Assembly of states or to the Security Council, where the Council referred a matter to the Court.⁷² The failure of a state party in its obligation to co-operate with the ICC can be interpreted by the Assembly of state parties to the Rome Statute as a material breach of the Rome Statute entitling the states

⁷⁰ *Ibid.*

⁷¹ Rome Statute, *supra* 3, Article 86; Claus Kreß and Kimberly Prost, 'Article 86: General Obligation to Co-operate', in Otto Triffterer (edited), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, (Oxford: Hart Publishing, 2008), p.1513-1514

⁷² Rome Statute, *ibid.*, Article 87(7). See recent Report by the Pre-Trial Chamber to the Security Council and the Assembly of State Parties of the failure of Chad and Kenya to arrest and surrender Al-Bashir who visited Chad in July 2010 and Kenya in August 2010, Press Release ICC-CPI-20100827-PR568, 27 August 2010

parties, by virtue of Article 60 VCLT, by unanimous agreement to suspend the operation of the Rome Statute in whole or in part or to terminate it in the relations between themselves and the defaulting state or as between all the parties.

However, strong policy reasons including the development of a system of accountability in international criminal law make this choice of action very unlikely. The likely consequences of the failure by a state party to co-operate with the Court would more likely be demand for compliance with the request and possibly strained relations with the Assembly of states.⁷³ Where the ICC reports failure of a state party to co-operate to the Council, it is open to the Council to decide upon a range of actions under the UN Charter to enforce its decisions.

States not parties to the Rome Statute are not obligated to co-operate with the ICC unless a basis exists for the assumption of the obligation.⁷⁴ Article 87 (5) of the Rome Statute provides that,

“a. The Court may invite any state not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such state or any other appropriate basis.

b. Where a state not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to co-operate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of states parties or, where the Security Council referred the matter to the Court, the Security Council.”

⁷³ *Ibid.*

⁷⁴ Rome Statute, *op.cit.*, Article 87

Article 87(5)(a) envisages three different situations where the ICC can request states not parties to its Statute to assist the Court. Firstly, the assistance and co-operation of non-contracting parties may be requested on a case-by-case basis where *ad hoc* arrangements exist to that effect. Secondly, a request may proceed from the Court on a general basis where such an agreement has been concluded between a non-contracting party and the Court. And finally on any other appropriate basis, which would include where the Council has referred a situation to the Court.

These situations under Paragraph 87(a) are mutually exclusive. There cannot be *ad hoc* arrangements when there is already in existence a general agreement to assist and co-operate with the Court. Likewise, in an appropriate case, for e.g. where the Council, acting under Chapter VII, has referred a situation to the ICC there will be no need for *ad hoc* arrangements or general agreements by non-contracting parties to co-operate with the Court. The obligation of a non-contracting party to co-operate with the Court, where there has been a referral by the Council, will proceed not under the Rome Statute but under some other rule of international law.⁷⁵

This interpretation of Article 87(5)(a) is strengthened by the disjunctive use of the word “or”. Had the framers of the Statute wanted the situations to be mutually inclusive they would have used the conjunctive word ‘and’, instead. Furthermore, there is support for this view of Article 87(5)(a) in Article 87(5)(b).

⁷⁵ This argument will be advanced later in the chapter.

By Article 87(5)(b), on the one hand, where there has been failure by a non-contracting party to co-operate with the Court in instances covered by the first two situations under Article 87(5)(a), i.e. where there exists an *ad hoc* arrangement or an agreement to co-operate with the Court, the Court is to inform the Assembly of states parties. On the other hand, where there has been a referral by the Security Council, failure by non-contracting parties to co-operate with the Court will necessitate a report to the Council. Therefore, by Article 87(5), the ICC expressly recognises the obligation of states not parties to its Statute to assist and co-operate with the Court where there has been a Council referral.

The practical effect of Article 87(5)(b), is unclear except in the situation where the Council is informed of the failure of a non-contracting party to the Rome Statute to co-operate with the ICC, where the jurisdiction of the ICC arose as a result of a referral by the Council. In this situation, the range of decisions and actions open to the Council are provided for under the UN Charter. Where a non-contracting party has entered into an *ad hoc* arrangement or an agreement to co-operate with the Court, failure to do so would merely necessitate information to the Assembly of states parties to the Rome Statute. The choice of actions open to the Assembly of state parties would be determined by the non-contractual status of the party vis-à-vis the ICC.

Co-operation of states parties with the ICC is predicated upon the ability of the Court to secure the co-operation of third states for the waiver of their immunity. An analysis

of the obligation to co-operate with the ICC is incomplete without an examination of Article 98 of the Rome Statute.

By Article 98 the Court may not make a request where to do so would result in state parties violating their international obligations regarding the international immunities of officials of third states. *A priori*, Sudan and Libya not being parties to the Rome Statute are third states within the meaning of Article 98.⁷⁶ Therefore, the Court is obliged not to request that states parties surrender Al-Bashir and Gaddafi since this would result in the violation of the immunities of Al-Bashir and Sudan as well as Gaddafi and Libya under customary international law.

However, the effect of the decision of the Council to refer the Darfur and Libya situations to the ICC and the obligations of Sudan and Libya under Resolutions 1593 and 1970, respectively, to co-operate fully with the Court is that Sudan and Libya are deemed to be in a similar position with parties to the Rome State and as such, there is no need for the requirement of the waiver of Sudan and Libya's immunities under Article 98.

⁷⁶ The description 'third state' as used in this provision is unclear whether it refers to another state or a non-contracting party to the Rome Statute. Although, the VCLT uses 'third state' to refer to non-contracting parties, it has been argued that this terminology is not adopted in the Rome Statute. The Rome Statute has utilised the terms 'non-contracting states' and 'states not parties', see Paola Gaeta, 'Official Capacity and Immunities' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (edited), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford: University Press, 2002), p.993-995 who relies on the principle of effectiveness (*ut res magis valeat quam pereat*) in the interpretation of the term 'third state' to mean "third states as regards the Statute" which means states not party to the Statute; Paola Gaeta, 'Does President Al-Bashir enjoy Immunity from Arrest?', (2009) 7 *JICJ* 315, p.328; See also Akande, *supra* 15, p.423-424 who argues that the term 'third state' as used in Article 98 must be interpreted as being applicable only to states not party to the Rome Statute because to argue otherwise would be to defeat the purpose of the Rome Statute and will have the practical effect of negating Article 27.

Having argued so, this does not make the attitude of the Pre-Trial Chamber, in directing requests for co-operation for the arrest and surrender of Al-Bashir and Gaddafi from states parties without considering the provisions of Article 98 of the Rome Statute and the issue of immunity of Al-Bashir and Gaddafi before national authorities, any less objectionable. The Court was seised of jurisdiction to determine if it had the jurisdiction to make a request under Article 98 without having obtained the co-operation of Sudan by the waiver of immunity, yet the Court ignored the opportunity.

The essence of Article 98 of the Statute is the recognition by the Court that despite the non-applicability of immunities of Heads of states before its proceedings that Heads of states, nonetheless, enjoy immunities vis-à-vis national authorities. The Court is under a legal obligation not to proceed with a request for arrest and surrender from state parties where such a request would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court has obtained the co-operation of the third state by a waiver of the immunity.

It has been argued that the failure by the Court to address the issue of the conflicting obligations of states parties that may arise as a result of the Court's request for arrest and surrender of Al-Bashir may be a breach by the Court of its obligations under

Article 98.⁷⁷ This argument may be extended, *pari passu*, to the request for the arrest and surrender of Gaddafi. This view seems extreme when it is considered that the practical effect of Resolutions 1593 and 1970 bringing the Darfur and Libya situations within the jurisdiction of the ICC and its constitutional framework would also mean that the immunities available to Al-Bashir and Gaddafi are effectively removed before the ICC as well as before national authorities. As such, there is no requirement for the ICC to obtain the co-operation of Sudan and Libya by the waiver of immunity under Article 98 before the ICC can proceed with a request for surrender of Al-Bashir and Gaddafi from states parties. Furthermore, there is support for the argument that there is no requirement for the ICC to obtain the co-operation of Sudan and Libya by the waiver of its immunity when the wordings of Article 98, Resolutions 1593 and 1970 are considered.

Article 98 expressly provides that,

“The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the *co-operation* of that third state for the waiver of the immunity.” (Emphasis added)

Resolution 1593 provides that,

“...the Government of Sudan and all other parties to the conflict in Sudan *shall* co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this Resolution, while recognizing that states

⁷⁷ Dapo Akande, ‘Should the ICC Appeals Chamber Have Made a Decision on Bashir’s Immunity?’, *EJIL: Talk!*, 13 February 2010, available at <http://www.ejiltalk.org/should-the-icc-appeals-chamber-have-a-made-a-decision-on-bashirs-immunity/#more-1930>, (Last accessed 16/08/2011)

not party to the Rome Statute have no obligation under the Statute, *urges* all states and concerned regional and international organizations to co-operate fully.”⁷⁸
(Emphasis added)

Likewise, Resolution 1970 provides that,

“...the Libyan authorities *shall* co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, *urges* all States and concerned regional and other international organizations to co-operate fully with the Court and the Prosecutor.”⁷⁹
(Emphasis added)

The obligations of Sudan and Libya to co-operate fully with the Court, under Resolutions 1593 and 1970, must necessarily and implicitly include the co-operation of Sudan and Libya for the waiver of immunity under Article 98. As a result, the ICC must be deemed to have obtained the co-operation of Sudan and Libya for the waiver of the immunity.

In situations like Darfur and Libya, where the Council had expressly or implicitly determined that there was a threat to international peace and security necessitating its Chapter VII enforcement powers, the Council may avail itself of pacifist and/or non-pacifist choice of action to maintain international peace and security, subject to its better discretion and judgment. The referral of the Darfur and Libya situations in Resolutions 1593 and 1970 was a means to restore international peace and security in that region. Therefore, failure of Sudan and Libya to render judicial assistance and co-

⁷⁸ Operative Paragraph 2

⁷⁹ Operative Paragraph 5

operation to the ICC would be disruptive of efforts restoring international peace and security and, very likely, a threat to international peace and security. Moreover, Sudan and Libya as UN members have contractually bound themselves to decisions of the Security Council.

For ease of analysis of obligation of judicial assistance and co-operation under Resolutions 1593 and 1970, the provision of the Resolutions shall be considered as regards state parties, the Governments of Sudan and Libya, as well as states not parties to the Rome Statute.

Firstly, the obligation of state parties to the Rome Statute to co-operate with the ICC is clearly provided for in Article 86 of the Rome Statute. It is also implicit in the Resolutions 1593 and 1970, and as such the re-statement in these Resolutions would be superfluous.

Secondly, there is the decision in Resolution 1593 that the Government of Sudan and other parties to the conflict shall co-operate fully with and provide assistance to the Court, and the decision in Resolution 1970 that the Libyan authorities shall co-operate fully with and assist the ICC. The language of the Resolutions, by the use of the word ‘shall’, makes mandatory the obligation of assistance and co-operation with the ICC by Sudan as well as parties to the conflict in Sudan and by the Libyan authorities.

Thirdly, there is the recognition by the Council that states not party to the Rome Statute have no obligation under the Statute. This recognition is in line with Article 34 VCLT. The recognition of the Council with regard to the obligation of states not party to the Rome Statute was with respect to the Rome Statute and no more.⁸⁰ Being a cardinal principle of interpretation that words are to be given their ordinary meaning, it would be wrong to rely on that recognition as a premise for arguing, *generally*, that states not party to the Rome Statute have no obligation to co-operate with the Court under Resolution 1593.⁸¹ The obligation on states not parties to the Statute lies outside the Statute.

The Council, in adopting Resolution 1593 and 1970, acted under Chapter VII in deciding to refer the Darfur and Libya situations to the ICC as a means to restore international peace and security, it would be defeatist of the very essence of Chapter VII of the Charter for states not party to the Rome Statute, who are nonetheless UN members, not to be under an obligation to co-operate fully with the Court. The ICJ, in its (*South West Africa*) Advisory Opinion, stated that it would be inconsistent to maintain that where the Security Council has acted under its powers to maintain international peace and security on behalf of all member states that those member

⁸⁰ See Göran Sluiter, 'Using the Genocide Convention to Strengthen Co-operation with the ICC in the Al-Bashir Case', (2010) 8 *JICJ* 365, p.372 where he argues that because of the Council's reference to the Statute only in its recognition that states not party to the Rome Statute have no obligation to the ICC, that it is possible to rely on the Genocide Convention as creating a duty on states to co-operate with the Court.

⁸¹ This view is also supported by the *expressio unius est exclusio alterius* rule of interpretation, i.e. the express inclusion of one thing is the exclusion of another.

states would be free to act in disregard of the action taken to maintain international peace and security.⁸²

The basis of the obligation for states not parties to the Rome Statute is not the Rome Statute but rather the UN Charter. This argument is strengthened by the fact that the referral to the ICC, as a measure necessary for the restoration of international peace and security, would be futile in the absence of an obligation of all states to co-operate with the Court. By the general membership of the UN, states not parties to the Rome Statute are nevertheless bound by Article 25 of the UN Charter. Therefore, theoretically as well as practically, the distinction that can be made between the obligations of co-operation of state parties to the Rome Statute, the Government of Sudan, the Libyan authorities and other states not party to the Rome Statute with regard to the referral of the Darfur and Libya situations to the ICC is minimal. The interpretation of the 'urging' of states not party to the Rome Statute and its legal effect must be done against the backdrop of the UN Charter, especially Article 25 and Chapter VII. In fact, no distinction can be made between the obligation of states to co-operate with the ICC where the Security Council acting under Chapter VII of the Charter has referred a matter to the Court and the obligation of states to co-operate with the ICTY and the ICTR.⁸³

⁸² [1962] *I.C.J. Reports* 319, Paragraph 112

⁸³ See Annalisa Ciampi, 'The Obligation to Co-operate', in Cassese, *et al* (edited), *supra* 76, Volume II, 1607-1638, p.1616; Bert Swart, 'Arrest and Surrender', in Cassese, *et al* (edited), *ibid.*, 1639-1703; Bert Swart and Göran Sluiter, 'The International Criminal Court and International Criminal Co-operation', in Herman A.M. Von Hebel, Johan G. Lammers and Jolien Schukking (edited), *Reflections on the International Criminal Court: Essays in Honour of Adriian Bos*, (The Hague: T.M.C. Asser Press, 1999), 91-127, p.122; Giuseppe Nesi, 'The Obligation to Co-operate with the International Criminal Court and States not Party to the Statute', in Mauro Politi and Giuseppe Nesi (edited), *The Rome Statute*

The arguments set out above seem contrary to the language of Resolutions 1593 and 1970 which in recognizing that states not party to the Statute do not have an obligation under the Statute, ‘urges’ all states to co-operate fully with the ICC. It has been argued that Resolution 1593 only imposed “explicit obligations on one non-party”, i.e. Sudan, and that the Resolution does not contain any explicit obligation for other states to co-operate with the ICC outside urging states and concerned regional and international organizations to co-operate with the Court.⁸⁴ According to Akande,

“An urging to co-operate is manifestly not intended to create an obligation to do so. The word ‘urges’ suggests nothing more than a recommendation or exhortation to take certain action. That there is no obligation on non-parties to co-operate with the ICC is made clear by the Security Council ‘recognizing that states not party to the Rome Statute have no obligation under the Statute’.”⁸⁵

However, it is maintained that the arguments are not contrary to Resolutions 1593 and 1970. The Resolutions merely re-state an accepted principle of international law, i.e. *pacta tertiis nec nocent nec prosunt* that a treaty may not impose obligations on non-parties without its consent. It has not been argued in this chapter that states not parties to the Rome Statute have any obligation under the Statute. The argument canvassed in the chapter is that although states not party to the Rome Statute do not have an obligation under the Statute, they have an obligation under UN Charter to co-operate fully with the ICC with respect to the Darfur and Libyan referrals. To this end, the legal effect of the ‘urge’ upon states not party to the Rome Statute to co-operate with

of the International Criminal Court: A Challenge to Impunity, (Aldershot: Ashgate Publishing, 2001) 221-223, p.222. See also *Blaskic (subpoenae) case*, 110 ILR 607

⁸⁴ Akande, *supra* 61, p.343-344

⁸⁵ *Ibid.*

the ICC is that their obligation to assist and co-operate with the ICC is same as those of Sudan, Libya and state parties to the Rome Statute which are already determined by the Resolutions.

Without a doubt, the obligations of Sudan and Libya were explicitly provided in Resolutions 1593 and 1970. However, the obligations on other states not parties to the Rome Statute though implicit in the Resolutions as a Chapter VII measure for maintenance of international peace and security is explicit under Article 25 of the UN Charter. Therefore, Akande rightly argues that the ‘urging’ was not intended to create an obligation. The clear legal basis for the obligation on other non-contracting parties is Article 25 of the UN Charter. The exhortatory nature of the urging is, therefore, taken for granted and cannot be taken to mean more especially in view that the Council in urging co-operation with the ICC did not confine its urging to non-contracting parties but expressly “urges all states and concerned regional and other international organizations to co-operate fully.”

There was no need for the Council to urge states that are parties to the Rome Statute to co-operate with the ICC because their obligation to co-operate is clearly subsistent. Likewise, there was no need for the Council to urge Sudan and Libya to co-operate because the Council had established their obligation to co-operate with the Court. With the obligation of other non-contracting parties to co-operate with the Court having been established in this chapter, it makes the ‘urging’ completely redundant.

The use of exhortatory language rather than mandatory language in Resolutions 1593 and 1970 does not mean that there is no imposition of an obligation on all states to co-operate with the ICC. In fact, the ICJ has had occasion to specifically address this issue. According to the Court,

“It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that therefore, they do not purport to impose any legal duty on any state nor to affect legally any right of any state. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading up to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”⁸⁶

By virtue of general membership in the UN organisation, it is submitted that all states have an obligation under Article 25 of the Charter to co-operate fully with the ICC. This follows from the decision of the Security Council, acting under Chapter VII of the Charter, to refer the Darfur and Libya situations to the ICC as a means to restore international peace and security in those regions. The obligation to ensure the maintenance of international peace and security is not limited to only states parties to the Rome Statute. Moreover, the ICJ in the *(South West Africa) Advisory Opinion* stated as follows,

“Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member states to comply with that decision, including those members of the Security Council which voted

⁸⁶ *(South West Africa) Advisory Opinion*, *supra* 82, Paragraph 114

against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.”⁸⁷

The view has been expressed, by Professor Gaeta, that states parties to the Rome Statute are not under obligation to comply with the request of the ICC for the arrest and surrender of Al-Bashir because the request is “patently at odds” with Article 98.⁸⁸ The commentator argues that the enforcement of the warrant of arrest by any state with the exception of Sudan would violate the immunities, *ratione personae*, for incumbent Heads of states. According to her,

“The ICC has not obtained from the Government of Sudan any waiver of the immunities of President Al-Bashir; hence, it is not empowered by the Statute to proceed with a request for surrender. The steps taken by the ICC in this respect are *ultra vires* and at odds with Article 98(1). Therefore, states parties to the Statute are not obliged to execute the ICC request for surrender of President Al-Bashir, and can lawfully decide not to comply with it.... under the ICC Statute a referral by the Security Council is simply a mechanism designed to trigger the jurisdiction of the ICC, admittedly also with respect to crimes committed in the territory or by nationals of states not parties to the ICC Statute. It is nothing more than that. In other words, while the ICTY or the ICTR are subsidiary organs of the Security Council and constitute, in themselves, a measure to restore peace and security under Chapter VII of the UN Charter, the same is not true for the ICC... The obligations of states parties to co-operate with the ICC are and remain ‘only’ treaty obligations, irrespective of how jurisdiction of the Court has been triggered, including in the case of a Security Council referral.”⁸⁹

⁸⁷ *Ibid.*, Paragraph 116

⁸⁸ Gaeta, ‘Does President Al-Bashir enjoy Immunity from Arrest’, *supra* 76, p.316

⁸⁹ *Ibid.*, 329-330

An analysis of the obligation of states to co-operate with the ICC over the Darfur situation cannot be made without the contextual benefit of the effect of Chapter VII of the UN Charter in Resolution 1593. The binding effect of a decision of the Council is not dependent on whether the decision of the Council to act was taken under Chapter VII or not. The Security Council can take, and has taken, binding decisions not under Chapter VII of the Charter. It is wondered why the Rome Statute (Article 13(b)) required the Council to act under Chapter VII in referring a matter to the Court.⁹⁰

The import and effect of Chapter VII of the UN Charter was well known to the drafters of the Rome Statute and indeed the signatories. The negotiations at Rome preceding the adoption of the Statute of the ICC were in the wake of the establishment of the ICTY and the ICTR by the Security Council acting under Chapter VII. By providing for the Council acting under Chapter VII in referring a situation to the ICC, there are strong reasons for suggesting that this allowed the Council to confer jurisdiction on the ICC over situations it would not ordinarily have jurisdiction rather than going through the expensive and slow process of setting up an *ad-hoc* tribunal.⁹¹

The effect of the Council acting under Chapter VII is that the referral of the Darfur and Libya situations to the ICC, as well as the compliance by all states with requests for co-operation with the Court, are measures for the maintenance of international peace and security.⁹² Resolution 1593 is more than ‘simply’ a trigger mechanism for

⁹⁰ Sarooshi, *supra* 37, p.100-101

⁹¹ Robert Cryer, ‘Sudan, Resolution 1593, and International Criminal Justice’, (2006) 19 *Leiden Journal of International Law* 195, p.200-202

⁹² Sarooshi, *op.cit.*, p.104-109

the jurisdiction of the ICC; it is a Chapter VII measure for the maintenance of international peace and security in the Darfur region. Being a measure for the maintenance of international peace and security, this defines the obligations of states towards the ICC. It would be defeatist and futile for the Council to ‘simply’ trigger the jurisdiction of the ICC, only for Article 98 or for states not party to the Rome Statute to defeat the very purpose of the referral.

As such, the requests by the ICC for the arrest and surrender of Al-Bashir and Gaddafi are not *ultra vires* the Court and states parties to the Rome Statute have an obligation to arrest and surrender Al-Bashir and Gaddafi if present in their territories. The issue of conflict of obligations on the part of states parties with regards to the request for arrest and surrender of Al-Bashir and Gaddafi by the ICC, necessitating the application of Article 103 of the UN Charter does not arise.⁹³

By Article 103 of the UN Charter, obligations of member states arising under the Charter prevail over other international obligations in the event of a conflict of obligations. The effect of Article 103 in this regard, seemingly, would be that that the obligations of member states to be bound by decisions of the Security Council under Article 25 of the UN Charter would prevail over the obligations of state parties not to violate the immunities of third states and their Heads of states under Article 98. However, Article 103 of the Charter does not arise because there are no conflicting obligations on states parties because Sudan and Libya, though third states, are in a similar position to state parties of the Rome Statute. As such, the requirement for the

⁹³ Contrary to the view expressed by Williams and Sherif, *supra* 43, p.87-88

waiver of immunities by Sudan and Libya under Article 98 is dispensed with. A further argument can be made that a purposeful interpretation of Article 27(2) of the Rome Statute which provides that immunities shall not bar the exercise of jurisdiction by the ICC would mean that Article 27(2) removes, not just immunities before the Court, but also immunities before national authorities acting in support of the Court.⁹⁴

Interestingly, the ICC has very recently relied on the ‘urging’ of states to co-operate with the Court in Resolution 1593 in contending that there is a “clear obligation” on the part of Kenya to co-operate with the Court. This follows from the visits of Al-Bashir to Chad and to Kenya in defiance of the arrest warrant and the requests for his surrender, prompting the Court to report Chad and Kenya to the Security Council.

According to the Court,

“Noting that the Republic of Kenya has a clear obligation to co-operate with the Court in relation to the enforcement of such warrants of arrest, which stems both from the United Nations Security Council Resolution 1593 (2005), whereby the United Nations Security Council “urge[d] all states and concerned regional and other international organizations to co-operate fully” with the Court, and from article 87 of the Statute of the Court, to which the Republic of Kenya is a state party.”⁹⁵ (Emphasis added)

⁹⁴ See Akande, *supra* 61, p.342-348

⁹⁵ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision informing the UN Security Council and the Assembly of State Parties to the Rome Statute about Omar Al-Bashir’s presence in the Territory of the Republic of Kenya, Public Document No. ICC-02/05-01/09, 27 August 2010, available at <http://www.icc-cpi.int/iccdocs/doc/doc930979.pdf>, (Last accessed 16/08/2011). The Pre-Trial Chamber also similarly stated the obligations of the Republic of Chad to co-operate with the Court under Resolution 1593 and the Rome Statute, see *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision informing the UN Security Council and the Assembly of State Parties to the Rome Statute about Omar Al-Bashir’s recent visit to the Republic of Chad, Public Document No. ICC-02/05-01/09, 27 August 2010, available at <http://www.icc-cpi.int/iccdocs/doc/doc931075.pdf>, (Last accessed 16/08/2011).

The AU had requested the Security Council to defer the proceedings against Al-Bashir, in line with Article 16 of the Rome Statute.⁹⁶ Following the refusal of the Council to heed the request, the AU decided that its member states shall not co-operate under Article 98 of the Rome Statute.⁹⁷ In response to the decision of the ICC informing the Security Council of the failure of Chad and Kenya to arrest and surrender Al-Bashir to the ICC, the AU has stated that its decision that member states are not to co-operate under Article 98 of the Statute is binding upon Chad and Kenya and that “it will be wrong to coerce them to violate or disregard their obligations to the African Union.”⁹⁸

It is submitted that the view of the AU is misplaced. Chad and Kenya are states parties to the Rome Statute as well as members of the UN. They are obligated under the Rome Statute and the UN Charter to co-operate with the ICC.⁹⁹ Their obligation under the Charter must prevail over their conflicting obligations to the AU.

It has been argued earlier in this chapter that although states not parties to the Rome Statute do not have an obligation under the Statute, they have an obligation under the

⁹⁶ *Communiqué* of the 142nd meeting of the Peace and Security Council, 21 July 2008, PSC/MIN/Comm(CXLII), available at <http://www.africa-union.org/root/ua/actualites/2008/juillet/psc/142-communique-eng.pdf>, (Last accessed 16/08/2011)

⁹⁷ See S/RES/1828 (2008) and Decision of the Assembly/AU/Dec. 245(XIII) adopted by the 13th Ordinary Session of the Assembly of Heads of State and Government, reiterated in the Decision of the Assembly/AU/Dec. 296 (XV) by the 15th Ordinary session of the Assembly

⁹⁸ See Press Release N° 119/2010, On the Decision of the Pre-Trial Chamber of the ICC informing the UN Security Council and the Assembly of State Parties to the Rome Statute about the Presence of President Omar Hassan Al-Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya, 29 August 2010

⁹⁹ The refusal of Chad and Kenya to arrest and surrender Al-Bashir while on their territories, though reproachable is not surprising following the AU’s stance on the matter. While the AU is not, and cannot be, a member of the UN and so cannot be bound by Resolutions 1593 and 1970 as well as Article 25 of the Charter, AU member states are members of the UN and are bound by the Resolutions and the Charter to co-operate with the ICC- an obligation which supercedes other obligations to the AU.

UN Charter, to co-operate with the Court. The relationship between states not parties to the Rome Statute vis-à-vis Sudan and Libya is governed by customary international law on Head of state immunity, by which states are under an obligation to respect the absolute immunity and inviolability of incumbent Heads of states even for international crimes. There is an apparent conflict of obligations of states not parties to the Rome Statute implicit in Resolutions 1593 and 1970 and explicit under Article 25 of the Charter with their obligations under customary international law. Therefore, Article 103 of the Charter would be applicable in this situation making the obligations of states not parties to the Rome Statute to prevail over their obligations under customary international law.¹⁰⁰

¹⁰⁰ See the recent decision of the ECHR in *Al-Jedda v. UK* (Application No. 27021/08), Judgment of 7 July 2011, [2011] ECHR 1092, Paragraphs 17, 46-57, 89-91, 101 on the effect of Article 103. The question whether obligations under the Charter prevail over customary international law is a contentious one. This is because Article 103 of the UN Charter specifically provides that obligations under the Charter prevail over obligations arising under “any other international agreement.” The first school of thought is that Article 103 does not apply to customary international law because Article 103 expressly limits the obligations which can be prevailed upon to those under an ‘international agreement’. Based on this, customary international law, not being of a conventional nature, is clearly outside the scope of Article 103. For a detailed analysis of the legal effect of Article 103 and its supremacy over other international agreements, see Rain Liivoja, ‘The Scope of the Supremacy Clause of the United Nations Charter’, (2008) 57 *ICLQ* 583-612; see also Derek Bowett, ‘The Impact of Security Council Decisions on Dispute Settlement Procedures’, (1994) *EJIL* 89-101, p.92; Geoffrey R. Watson, ‘Constitutionalism, Judicial Review, and the World Court’, (1993) 34 *Harvard International Law Journal* 1-45, p.25; Alexander Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’, (2005) 16 *EJIL* 59-88, p.69. The proponents of this School of thought do not give any reason other than that it would be outside the contemplation of the ‘international agreements’ provision of Article 103 to argue otherwise. However, what is precisely within the contemplation of the drafters of the Article 103 as ‘international agreement’ is unclear, as Liivoja’s work shows, *ibid.*, pp. 602-612.

The Second School of thought is that Article 103 prevails over inconsistent obligations under customary international law. The uncertainty whether Article 103 is limited to agreements of a conventional nature, is best resolved by reliance on the international rule that treaties, as *lex specialis*, prevail over customary international law, as *lex generalis*, on the same issue. See Akande, *supra* 61, p.348; Rudolf Bernhardt, ‘Article 103’, in Bruno Simma, *etal* (edited), *The Charter of the United Nations: A Commentary*, 2nd edition, Vol. II, (Oxford: University Press, 2002), 1292, p.1298-1299.; Alina Kaczorowska, *Public International Law*, (London: Old Bailey Press, 2002) p.21; Martti Koskeniemi puts forward the view that,

“In any case, the practice of the Security Council has continuously been grounded on an understanding that Security Council resolutions override conflicting customary law. As the Security Council is a creation of the Charter, it would be odd if the

The obligation of states to co-operate with the ICC is defined by the pervasive nature of the Chapter VII powers of the Security Council. The Council had a choice not to refer the Darfur and Libya situations to the ICC, having made such a decision under Chapter VII of the Charter, the Council is bound by the decision as well as the nature of the obligations arising as a result. In negotiating the terms of Resolutions 1593 and 1970 and trying to avoid the veto of US which has vehemently opposed the jurisdiction of the ICC over nationals and officials of states not parties to the Rome Statute,¹⁰¹ it is not open to the Council to re-negotiate the Charter.

There are strong policy and practical reasons for arguing that the obligation to co-operate fully with the ICC over the Darfur and Libya situations redounds on all UN members. Firstly, parity of reasoning would suggest that since states are bound by the decision of the Council referring the matter to the ICC, concomitantly states are also bound to co-operate fully with the Court. Secondly, to maintain otherwise would rob the international legal order of its very essence by allowing a few states to re-negotiate the terms of the Charter without the consent and participation of all members. Thirdly, it would also have the insalubrious effect of allowing Security Council members not parties to the Rome Statute, to take advantage of the ICC without being obliged to the

prevailing effect of Security Council resolutions would not extend to the Charter itself. Therefore it seems sound to join the prevailing opinion that Article 103 should be read extensively - so as to affirm that charter obligations prevail also over United Nations Member States' customary law obligations."

See, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006, Paragraph 345

¹⁰¹ UN Doc. S/PV.5158 (Mrs Patterson)

Court.¹⁰² Finally, it would be wrong to impose the obligations of ensuring the maintenance of international peace and security in the Darfur and Libya regions on only parties to the Rome Statute.

6.6.1 THE EFFECT OF THE INCLUSION OF THE CHARGE OF GENOCIDE AGAINST AL-BASHIR

Article IV of the Genocide Convention removes the substantive and procedural defence of official capacity with respect to genocide by providing that persons committing genocide or genocidal acts shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.¹⁰³ In furtherance of which, Article VI of the Genocide Convention provides that persons charged with genocide shall be tried by a competent tribunal of the state possessing territorial jurisdiction over the acts of genocide or by an international criminal tribunal possessing jurisdiction with respect to contracting parties which shall have accepted its jurisdiction.¹⁰⁴

Having established that the immunity of Al-Bashir does not apply before proceedings of the ICC by virtue of Article 25 of the Charter, Resolution 1593 and Article 27 of the Rome Statute, it is imperative to consider whether the inclusion of the charge of genocide against Al-Bashir has an additional effect on the immunity of Al-Bashir before national jurisdictions as well as before the ICC.

¹⁰² Russia, though not party to the Rome Statute, voted in favour of Resolution 1593

¹⁰³ 78 *U.N.T.S.* 277

¹⁰⁴ *Ibid*

States parties to the Genocide Convention have an obligation to prevent and punish acts of genocide. Jurisdiction may be exercised under Article VI of the Genocide Convention by a state party to the Convention in whose territory genocide was committed or by an international criminal tribunal where parties to the Convention have accepted the jurisdiction of such international tribunal. Firstly, parties to the Genocide Convention are not obligated to exercise jurisdiction over genocide in Darfur, under the Convention, because territorial jurisdiction over genocide in Darfur can only be exercised by Sudan. According to the ICJ,¹⁰⁵

“Article VI only obliges the contracting parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit states, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.”

By the interpretation of the ICJ, only Sudan is under an obligation to exercise territorial criminal jurisdiction and while Article VI does not prohibit other states from exercising jurisdiction in line with international law, for instance on grounds of nationality of the accused, it does not oblige them to do so.

Secondly, there is the issue of whether states not parties to the Rome Statute have an obligation under the Genocide Convention to assist the ICC by arresting and surrendering Al-Bashir. Not having ratified the Statute the question whether such

¹⁰⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, (2007) *I.C.J. Reports* 1, Paragraph 442 [Hereinafter *Bosnia Genocide Convention Case*]

states can be said to have accepted the jurisdiction of the ICC arises. Article VI of the Genocide Convention specifically provides that the jurisdiction of the international tribunal must be with respect to the contracting parties of the Convention which shall have accepted the jurisdiction of such a tribunal. The ICJ in the *Bosnia Genocide Convention Case* stated that,

“The notion of an “international penal tribunal” within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III.”¹⁰⁶

It is not in doubt that the ICC falls within the contemplation of Article VI of the Genocide Convention as an international penal tribunal. It is an international criminal court which is potentially universal in scope and has jurisdiction over genocide as well as the Darfur situation. However, the phrase “which shall have accepted its jurisdiction” in Article VI remains unclear. Is the acceptance of the jurisdiction of such an international penal tribunal limited to only where states have contractually bound themselves to such a tribunal?

The ICJ, in the *Bosnia Genocide Convention Case*, stated that,¹⁰⁷

“The question whether the Respondent must be regarded as having “accepted the jurisdiction” of the ICTY within the meaning of Article VI [Genocide Convention] must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of

¹⁰⁶ *Ibid.*, Paragraph 445

¹⁰⁷ *Ibid.*, Paragraph 446

the Security Council resolution which established it, or of some other rule of international law?”

The test for the question of whether a state has accepted the jurisdiction of an international penal tribunal within the meaning of the Article VI of the Genocide Convention is not whether a state is a party to the constitutive instrument of the tribunal but rather it is whether a state is obliged to accept the jurisdiction and to co-operate with the Tribunal by virtue of its constitutive instrument or by some other rule of international law.¹⁰⁸

Based on this test, clearly the parties to the Rome Statute that are parties to the Genocide Convention come within the meaning of having accepted the jurisdiction of the ICC with respect to genocide in Darfur by virtue of their obligation to accept the jurisdiction of the Court and co-operate with the Court under the Rome Statute as the constitutive instrument of the Court.

With respect to states not parties to the Rome Statute that are parties to the Genocide Convention, a distinction can be made with regard to their status as members of the UN. Members of the UN that are parties to the Genocide Convention must be deemed to have accepted the jurisdiction of the ICC with regard to the Darfur situation for the purposes of Article VI of the Genocide Convention, irrespective of their not being parties to the Rome Statute. This is because an acceptance by such states, under Article 25 of the Charter, to be bound by the decisions of the Security Council is an

¹⁰⁸ This test has been criticised as being circular, see Akande, *supra* 61, p.350 and Sluiter, *supra* 80, p.371-372

acceptance of the jurisdiction of the ICC over the Darfur situation. The referral, in Resolution 1593, being a Chapter VII measure for the maintenance of international peace and security necessarily implies an obligation on UN members who are not parties to the Rome Statute but are parties to the Genocide Convention to co-operate fully with the ICC.

The decision of the Pre-Trial Chamber of the ICC to issue a supplementary arrest warrant including charges of genocide against Al-Bashir has a legal effect on parties to the Genocide Convention that are parties to the Rome Statute as well as parties to the Convention that are not parties to the Rome Statute but are members of the UN. These states have an obligation to accept the jurisdiction of the ICC and to co-operate fully with the Court under Resolution 1593 and the UN Charter, and failure to arrest and surrender Al-Bashir, if present in their territory, will engage their international legal responsibility under the Genocide Convention.¹⁰⁹

Non-members of the UN that are parties to the Genocide Convention but not the Rome Statute, are not under an obligation to accept the jurisdiction of the ICC because they are not bound by Article 25 of the Charter and as such they cannot be deemed to have accepted the jurisdiction of the ICC for the purposes of Article VI of the Genocide Convention. There can be no engagement of the international responsibility of such

¹⁰⁹ See *Bosnia Genocide Convention case*, *supra* 105, where the Government of the Republic of Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro) before the ICJ for failure of its international obligation under the Genocide Convention to prevent and punish acts of genocide. The ICJ found that Yugoslavia had failed in its obligation to co-operate with the ICTY and as such had failed to fulfil its obligation to prevent and punish acts of genocide under the Convention thereby engaging its international responsibility.

states under the Convention for failure to arrest and surrender Al-Bashir. However, the general membership in the UN makes this point moot.

6.7 CONCLUSION

The establishment of the ICC is a water-shed in the development of a system of accountability in international criminal law and heralded the departure from *ad hocism* which characterised international criminal courts in the 1990s to permanence. This chapter has shown that the decision of the ICJ in the *Arrest Warrant* case including the ICC as one of the international courts before which immunities of officials including Heads of states will not be applicable is limited by the *pacta tertiis nec nocent nec prosunt* principle, i.e. the constitutive instrument theory.

Under a multilateral treaty like the Rome Statute, states parties can modify, and indeed have modified, existing customary international law on Head of state immunity between themselves, this does not mean that they can modify customary international law on Head of state immunity for non-contracting parties. The fact that the Assembly of states parties of the Rome Statute is made up of 116 states does not derogate from customary international law on Head of state immunity. After all, what one or two states cannot do, neither can 116.

This chapter has also shown that the Security Council can by-pass the *pacta tertiis nec nocent nec prosunt* principle by effectively removing the immunities of Heads of states of non-contracting parties to the Rome Statute by referring a matter to the ICC, acting under its Chapter VII powers. This would have the effect of putting a non-contracting party in a similar position with states parties. As such, the issue of Head of state immunity of third states which have been referred to the ICC by the Council is determined similarly to the ICTY and the ICTR, i.e. by Article 25 of the UN Charter which founds the jurisdiction of an international court in such instance. Where the Council so acts, non-contracting parties are under obligation like state parties to co-operate with the ICC. Also, where a charge of genocide is included against Heads of states, states parties as well as states not parties to the Rome Statute, where there has been a referral by the Council, may be further obliged under the Genocide Convention to co-operate with the ICC. Failure to do so would result in the engagement of the international responsibility of such states where they are parties to the Genocide Convention.

The ICC has great legal and political significance to the development of an international criminal system and is of vital importance to the discourse on whether, and the extent to which, there is a new international law on Head of state immunity. This is why the non-consideration of the very important issue of the immunity of Heads of states and the applicability or otherwise of Article 98 by the Pre-Trial Chamber as well as the Appeal Chamber of the ICC, in the cases concerning Al-Bashir and Gaddafi, is most regrettable. It is hoped that the Court will address this issue

especially in view of the stance of the AU and, in future, embrace the opportunity to contribute to the development of international law by fully examining and analysing all the issues involved in the case concerning Al-Bashir.

Having considered the last category of international courts, Chapter 7 will consider Head of state immunity before internationalised courts.

CHAPTER 7: HEAD OF STATE IMMUNITY BEFORE INTERNATIONALISED COURTS

7.1 INTRODUCTION

The fight against impunity has led to the establishment of a different generation of courts which are characterised by their mixture of national and international elements. More popularly termed ‘hybrid tribunals’ the definitional challenge inherent in the term lends preference, in this thesis, to the term ‘internationalised tribunals’. This is especially so because of the incorporation of international elements into the operations of otherwise domestic courts. This generation of courts is exemplified by the Special Panel for Serious Crimes in the Dili District Court in East Timor, ‘Regulation 64’ Panels in the Courts of Kosovo, the Extraordinary Chambers in the Courts of Cambodia, and the Special Court for Sierra Leone. These courts vary in their particular forms of hybridity.

Usually the products of international crisis, these courts are characterised by compositions of international and national staff, international and domestic financing, application of domestic and international laws in proceedings, and the co-existence of these tribunals alongside local judiciary.¹ These characteristics, while indicative of a degree of internationality, are not conclusive of the status of the courts. Rather, the constitutive instruments of the courts determine their status and question of immunity.

¹ Etelle R. Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’, (2005-2006) 23 *Arizona Journal of International and Comparative Law* 347, pp. 352, 356

On the one hand, there are the Special Panel for Serious Crimes in the Dili District Court in East Timor, the ‘Regulation 64’ Panels in the courts of Kosovo and the Extraordinary Chambers in the Courts of Cambodia (ECCC) which are essentially domestic courts within the existing court structures of the states. Space limitations make it imprudent to consider all three of the courts; rather only the ECCC will be considered because it is atypical of this class of internationalised courts, also the immunity of Heads of states before their states of origin has been considered in Chapter 3, and because Sampan Khieu, the former leader of Cambodia is currently standing trial before it.

On the other hand, there are the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL) which are internationalised courts resulting from treaties and which are not part of the court structures of Sierra Leone and Lebanon. These courts will also feature in the analysis in this chapter.

This chapter will consider the different internationalised courts with a view to ascertaining whether Head of state immunity is applicable before proceedings in internationalised courts, the emergent trends discernible from the practice of these courts and the extent to which these trends inform a new international law on Head of state immunity. The constitutive instrument theory will form the backdrop against which the analysis in the chapter will be undertaken. Similarly, the question of

obligation of states to co-operate with and assist internationalised courts will be addressed in this chapter.

7.2 THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Following the overthrow of Pol Pot's government by the invasion of Vietnam, the new government of Cambodia sought a mechanism for accountability of the atrocities committed by the Khmer Rouge.² In 1979, trials in absentia were held and Pol Pot was convicted and sentenced to death. In 1997, Cambodia which was yet to recover from the devastation of the Khmer Rouge, requested the assistance of the UN in responding to the serious violations of Cambodian and international law by the Khmer Rouge.³

The UN set up a Group of Experts to determine the nature of the crimes committed by Khmer Rouge leaders in the years 1975-1979 as well as to explore legal options for bringing them to justice before an international or national court.⁴ The Group of Experts recommended the establishment of an *ad hoc* international criminal tribunal under the control of the UN to ensure the accountability of the Khmer Rouge leaders.⁵

² Also known as the Communist Party of Kampuchea

³ Letter from the Prime Ministers of Cambodia to the Secretary-General (21 June 1997), UNDocA/51/930-S/1997/488, Annex

⁴ UNGA Res 52/135 (1997) UNDocA/RES/52/135; Letter from the Secretary-General to the President of the General Assembly (31 July 1998) UNDocA/52/1007

⁵ 'Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135' (16 March 1999) UNDocA/53/850-S/1999/231, Annex

In 2001, despite not having reached an agreement with the UN, the Cambodian Assembly passed the Law on the Establishment of Extraordinary Chambers in The Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (“Law on ECCC”).⁶ However in June 2003, following the resumption of negotiations, an agreement was finally reached between the Government of Cambodia and the UN on the Khmer Rouge Tribunal.⁷

Despite initial plans and efforts to have the ECCC established by an agreement between the Government of Cambodia and the UN, the legal basis, and the constitutive instrument, of the ECCC is the Law on the ECCC. Although it was originally envisaged that the Chambers was going to fall into the category of courts established by international agreement, it ended up differently.⁸ The ECCC is therefore, a domestic court established within the existing court structure and judiciary of Cambodia by the Government of Cambodia. The Chambers is internationalised to the extent that it shall apply Cambodian law as well as international law, and that it is composed of international as well as national staff in the form of judges and prosecutors.

⁶ Text available at <http://www.derechos.org/human-rights/seasia/doc/krlaw.html>, (Last accessed 16/08/2011)

⁷ Daniel Kemper Donovan, ‘Recent Developments: Joint U.N.–Cambodia Efforts to Establish a Khmer Rouge Tribunal’, (2003) 44 *Harvard International Law Journal* 551, p.564. Text of Agreement available at [http://www.cambodiatribunal.org/sites/default/files/resources/Agreement between UN and RGC.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/Agreement%20between%20UN%20and%20RGC.pdf), (Last accessed 16/08/2011)

⁸ Sarah Williams, ‘The Cambodian Extraordinary Chambers- A Dangerous Precedent for International Justice’, (2004) 53 *ICLQ* 227, p.232

Since the legal basis, and the constitutive instrument, of the Chambers is the Law on the ECCC, the question of the status of the Agreement arises. The purpose of the Agreement is the regulation of co-operation between the UN and Cambodia in bringing to trial the senior leaders and those most responsible for the crimes within the jurisdiction of the Chambers and the provision of the legal basis, the principles and modalities for such co-operation.⁹

The Agreement does not lay claims to the establishment of the Chambers; it is only concerned with the regulation of co-operation between the parties in the functioning of the Chambers.¹⁰ In fact the Agreement recognises the subject matter and personal jurisdiction of the Chambers as set forth in its constitutive instrument.¹¹ The Agreement is a treaty which is to be implemented through the Law on the ECCC.¹² Being a treaty, Cambodia cannot rely on its domestic law to defeat its obligations under the Agreement.¹³

The personal jurisdiction of the Chambers is with respect to senior leaders of Democratic Kampuchea, i.e. those who would ordinarily have been entitled to

⁹ Article 1 of the Agreement, which entered into force on 19 October 2004 following its ratification as specified under Article 31 of the Agreement.

¹⁰ Helen Horsington, 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal', (2004) 5 *Melbourne Journal of International Law* 462, p.474, argues that the substantive provisions of the Agreement on the operation and administration of the Tribunal contradicts its assertion of merely regulating co-operation between the UN and Cambodia.

¹¹ *Supra* 7, Article 2(1)

¹² *Ibid.*, Article 2(2) provides for the application of the provisions of Articles 26 and 27 VCLT to the Agreement.

¹³ Cambodia has amended the Law on the ECCC in line with the Agreement, see Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (As Amended), available at http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (Last accessed 16/08/2011)

functional immunities, and those bearing the most responsibility for the crimes within the subject matter jurisdiction of the Chambers.¹⁴ The functional immunities of these senior leaders including Head of state is removed by Article 29 of the Law on the ECCC (As Amended), which provides that,

“The position or rank of any suspect shall not relieve such person of criminal responsibility or mitigate punishment.”

International immunity is a sovereign attribute pertaining to a state. The right of a state cannot be used to the detriment of the state. As such, Samphan Khieu who was Head of state of Democratic Kampuchea and a full rights member of the Khmer Rouge from 17 April 1975 to 6 January 1979 who is charged with crimes against humanity and war crimes before the Chambers cannot rely on immunity to bar the jurisdiction of the Chambers. The ECCC is trying Cambodians and so the issue of international immunities will not arise. In Sampan Khieu’s case it is not international immunities that would have been implicated before the Chambers but rather national immunities which are effectively removed by Article 29 of the Law on the ECCC. Moreover, the House of Lords in *Pinochet* (No.3) stated that the commission of crimes cannot come under the official functions of Heads of states so as to entitle former Heads of states to immunity *ratione materiae*.¹⁵

¹⁴ *Ibid.*, Articles 1 and 2

¹⁵ [1999] 2 *All E.R.* 97; see Chapter 3 of thesis

7.2.1 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE ECCC

States are not obligated to assist or co-operate with the Chambers. Neither does the Agreement purport to impose such obligation on states.¹⁶ Rather, by Article 25 of the Agreement the Government of Cambodia is obligated to comply without undue delay to any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers. The obligation under Article 25 is limited to Cambodia and it is an agreement which Cambodia is privy to and is bound by. The ECCC, being essentially a national court by virtue of the Law on the ECCC, can only rely on bilateral or multilateral agreements to secure the co-operation and assistance of states.

7.3 THE SPECIAL COURT FOR SIERRA LEONE

In June 2000, the President of Sierra Leone requested assistance from the UN to bring to justice those responsible for crimes against the people of Sierra Leone.¹⁷ The Government requested the UN to establish an international court to prosecute those responsible for war crimes committed in the course of the civil war.¹⁸ The Security Council, on 14 August 2000, adopted Resolution 1315 requesting the Secretary-

¹⁶ Even if the Agreement did, states are not bound by the Agreement- only the Government of Cambodia and the UN are bound by it.

¹⁷ Letter from President of Sierra Leone to the UN Secretary-General, Kofi Annan UNDocS/2000/786, Annex

¹⁸ For background, see Tom Perriello and Marieke Wierda, 'The Special Court for Sierra Leone Under Scrutiny', *International Center for Transitional Justice*, March 2006; James L. Miglin, 'From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone', (2007) 16 *Dalhousie Journal of Legal Studies* 21

General to negotiate an agreement with the Government of Sierra Leone for the establishment of an independent criminal court in response to the crimes.¹⁹

The Council in its recommendation for the establishment of the SCSL proposed that the personal jurisdiction of the Court should extend to “leaders” and others who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law as well as crimes under Sierra Leonean law committed in Sierra Leone.²⁰ However, it is important to remember that jurisdiction does not automatically imply an absence of immunity.

The Secretary-General recommended the establishment of the SCSL by an agreement between the Government of Sierra Leone and the UN which would be “a treaty-based *sui generis* court of mixed jurisdiction and composition”.²¹ The SCSL was created following the conclusion of the ‘Agreement on the Establishment of a Special Court for Sierra Leone between the UN and the Government of Sierra Leone’.²²

Like the Statutes of the ICTY, ICTR and ICC, Article 6(2) of the Statute of the SCSL specifically provides that,

“The official position of any accused persons, whether as Head of State or Government or as a responsible

¹⁹ S/RES/1315 (2000); see Michael Scharf, ‘The Special Court for Sierra Leone’, (October 2000) *ASIL Insights*

²⁰ S/RES/1315 (2000), Operative Paragraph 3

²¹ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UNDoc.S/2000/915, especially paragraph 9

²² Appendix II to the “Letter Dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council”; text available at www.sc-sl.org

government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”²³

In March 2003, the SCSL issued a 17-count indictment against Charles Taylor while he was still President of Liberia for crimes against humanity and grave breaches of the Geneva Conventions.²⁴ In December 2003, an international arrest warrant was issued against Taylor during a visit to Ghana which was hosting peace negotiations. The Ghanaian authorities did not effect the arrest warrant.

In August 2003, Taylor stepped down as Head of state and was granted exile by the Nigerian Government. However, due to mounting international political pressure on Nigeria particularly by the US, and a request for the surrender of Mr Taylor by the Government of Liberia, Nigeria released Taylor to Liberia despite the absence of a bilateral extradition agreement. He was arrested by the United Nations Mission in Liberia (UNMIL) and was transferred to the SCSL in November 2006 to stand trial.

7.3.1 HEAD OF STATE IMMUNITY BEFORE THE SPECIAL COURT FOR SIERRA LEONE: PROSECUTOR V. CHARLES TAYLOR

In 2003, Charles Taylor filed a motion under protest and without waiving his immunity, before the SCSL Trial Chamber to quash the indictment against him and to

²³ Statute of the SCSL available at www.sc-sl.org

²⁴ *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01, Indictment, 3 March 2003, www.sc-sl.org;

declare his arrest warrant as null and void. The motion was referred to the Appeals Chamber of the Court.²⁵

Taylor challenged the jurisdiction of the Court on a number of grounds.²⁶ In the main, he contended firstly that he had absolute immunity from criminal prosecution based on the decision of the ICJ in the *Arrest Warrant case* and his incumbency at the time of the indictment. Secondly that rules derogating from the international rule providing for immunities can only derive from other rules of international law such as Security Council Resolutions passed under Chapter VII of the UN Charter. Thirdly that the SCSL not having Chapter VII powers, its judicial orders are at par with those of national courts; and that the indictment was invalid due to his personal immunity. Furthermore, the timing of the disclosure of the indictment and the arrest warrant was with a view to frustrating his peace-making efforts and prejudiced his functions as Head of state.

In response to these contentions, the Prosecutor submitted that the *Arrest Warrant case* concerns the immunities of serving Heads of states from the jurisdiction of national courts of other states and customary international law allows the indictment of serving Heads of state by international criminal courts. The Prosecutor contended that the SCSL is an international criminal court established under international law; and that the lack of Chapter VII powers does not affect the Court's jurisdiction over

²⁵ Under Rule 72(E) of the Rules of Procedure of the Court, Preliminary motions made in the Trial Chamber which raise a serious issue relating to jurisdiction shall be referred to the Appeals Chamber.

²⁶ *Prosecutor v Charles Ghankay Taylor* (Case No. SCSL-2003-01-1), Decision on Immunity from Jurisdiction, 31 March 2004, www.sc-sl.org; [Hereinafter *Taylor case*]

Heads of states as illustrated by the ICC which though lacks the Chapter VII powers, its Statute expressly denies Heads of state immunity for international crimes.²⁷

Essentially, the arguments of Taylor and the Prosecution concern the effect of the decision of the ICJ in the *Arrest Warrant case*, the status of the SCSL and the effect of Chapter VII of the UN Charter on the powers of a court.

The ICJ after analysing state practice, in the *Arrest Warrant case*, held that serving senior officials like Heads of states enjoy absolute immunity from criminal proceedings.²⁸ However, the ICJ qualified its position by saying that there are exceptions to such immunities including “certain international courts where they have jurisdiction”.²⁹ It is manifest from the phrase that the ICJ that it did not envisage that any international criminal court could override immunities, only *certain* kinds of international court where they have jurisdiction. Unfortunately, the ICJ did not elaborate on what makes an international court come within the contemplation of Paragraph 61 of its Judgment.

An international court can only come under the contemplation of Paragraph 61 if its constitutive instrument is such that expressly or impliedly removes jurisdictional immunities and is binding on the state, the immunity of whose official is sought to be removed. Any rule of international law allowing the indictment of serving Heads of states, if existent, is limited to the ICTY, ICTR and the ICC (with respect to state

²⁷ *Ibid.*

²⁸ (2002) *ICJ Reports* 3, Paragraph 58

²⁹ *Ibid.*, Paragraph 61

parties or where there has been a referral by the Security Council acting under its Chapter VII powers).

Contrary to Taylor's assertion, the SCSL is not a national court. Neither is it a purely international one like the Prosecutor argues. The status of the SCSL is determined primarily by its constitutive instrument and secondarily by its features as well as in comparison with other international criminal courts.

7.3.2 STATUS OF THE SCSL AND THE IMMUNITY OF CHARLES TAYLOR

The treaty-based nature of the SCSL sets the path of enquiry into the status of the Court within an international context. The foundation of the Court in the Agreement between the UN and Sierra Leone is an important factor which goes to the international status of the Court. Other important indices as to the international nature of the SCSL include the international funding of the Court;³⁰ its separate legal personality and its capacity to enter into agreements with states;³¹ immunity and privileges as provided in the Vienna Convention on Diplomatic Relations of 1961 enjoyed by officials of the Court;³² the application of the Rules of Evidence and Procedure of the ICTR to the Court's proceedings;³³ provision for recourse to the sentencing practice of the ICTR;³⁴ the enforcement of its sentences in penitential

³⁰ Agreement to Establish the Special Court of Sierra Leone, *supra* 22, Article 6

³¹ *Ibid.*, Article 11

³² *Ibid.*, Article 12

³³ Statute of the Special Court, *supra* 23, Article 14

³⁴ *Ibid.*, Article 19

institutions of foreign states;³⁵ and the requirement of submission of an annual report by the President of the Court to the UN Secretary-General.³⁶

Furthermore, by Section 11(2) of the Special Court Agreement (Ratification) Act 2002 the Court shall not form part of the Judiciary of Sierra Leone.³⁷ The Court is to be staffed by international judges, prosecutor and registrar for the Court with the Secretary-General and the Sierra Leonean government sharing responsibility for their appointment.³⁸

Thus, the SCSL is an international court. It also has a national dimension and the Secretary-General, in his Report to the Council, had proposed that the Special Court would be a “treaty-based *sui generis* court of mixed jurisdiction and composition”.³⁹

The treatment of the status of the Court by the parties and the Appeals Chamber was simplistic. On the one hand, it was considered that the fact that the Court is not part of the judiciary of Sierra Leone and as well as other indices showing that the Court is not a national court were such to make the Court an international one with the implication that Head of state immunity is inapplicable before its proceedings. On the other hand, those who assert its national status contend that there is nothing in the Agreement or the Ratification Act to suggest that the Court is an international court and as such cannot arrogate to itself the powers of an international tribunal. There is no

³⁵ *Ibid.*, Article 22

³⁶ *Ibid.*, Article 25

³⁷ www.sc-sl.org

³⁸ Statute of the Special Court, *op.cit.*, Article 12, 15 and 16

³⁹ Report of the Secretary-General on the establishment of the SCSL, *supra* 21, Paragraph 9

consideration of the constitutive instrument of the SCSL and whether states are bound by it.

The Appeals Chamber's over-emphasis on the involvement of the Security Council in the establishment of the SCSL is evident in other decisions of the Court.⁴⁰ This misconception has resulted in the misanalysis of the issue of the powers of the Court and is evident in its reasoning in *Taylor* case.⁴¹ The Appeals Chamber asserted that the preamble to Security Council Resolution 1315 recommending the establishment of the Court shows that the Court was established to fulfil an international mandate as part of the machinery of international justice and therefore is an international court.⁴² The Chamber relied on Resolution 1315 and the powers of the Council in Articles 39 and 41 of the UN Charter in its conclusions on the status of the SCSL.⁴³

As stated earlier in Chapter 6, the preamble of an international instrument is merely exhortatory and is not legally binding. The Chamber's attempt to connect the establishment of the SCSL to the Security Council, however remotely, seems desperate and was unnecessary. Arguably, the awareness of the limitations of the bilateral nature of the Agreement and its non-obligatory nature towards third states compelled the Appeals Chamber to desperation.

⁴⁰ See *Prosecutor v. Augustine Gbao* (Case No. SCSL-2004-15-AR72(E)), Decision on Preliminary Motion on the Invalidity of the Agreement between the UN and the Government of Sierra Leone on the Establishment of the Special Court, 25 May 2004, Paragraph 5 and also *Prosecutor v. Moinina Fofana* (Case No. SCSL-2004-14-AR72(E)), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 25 May 2004, Paragraphs 23 and 27

⁴¹ *Supra* 26, Paragraphs 37-39

⁴² *Ibid.*, Paragraphs 39 and 42

⁴³ *Ibid.*, Paragraphs 37-39

Although the establishment of a special court was envisaged by the Security Council in Resolution 1315, the Council clearly did not establish the SCSL.⁴⁴ The Council expressly requested the Secretary-General to negotiate an agreement for the establishment of a special court.⁴⁵ The Council was not involved in the negotiations and is not party to the Agreement. The legal basis of the Court is the Agreement on the Establishment of a Special Court for Sierra Leone. As such, the Statute of the SCSL, including Article 6(2), is effective only between Sierra Leone and the UN as an entity.

The Appeals Chamber was of the view that,

“The Agreement between the United Nations and Sierra Leone is thus an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community.”⁴⁶

Though attractive, this view is extreme. Such a liberal interpretation, if taken to its logical end, is at variance with the sovereignty of states. States are at liberty to choose whether, or not, to participate in treaties- this is the hallmark of sovereignty. Does the conclusion of a treaty under the auspices of the UN make all UN member states parties to the treaty? It is difficult to reconcile the view of the Appeal Chamber with the fact that many UN conventions, to the extent that they have not become customary international law, are binding only on some of its members who have chosen to ratify those treaties. An apt example of the extremity of the view of the Appeals Chamber would be arguing that the US, which is not a party to the Rome Statute of the ICC, is

⁴⁴ A distinction must be made between the involvement of the Council and the establishment of the Special Court.

⁴⁵ S/RES/1315 (2000), Operative Paragraph 1

⁴⁶ *Taylor case*, *supra* 26, Paragraph 38

bound by the Rome Statute because the Statute was adopted under the auspices of the UN.

The SCSL has the definitive features of international institutions and its international status is irrespective of Resolution 1315.⁴⁷ Although the Court shares certain features of the mainstream international courts, it is fundamentally different from the ICTY and the ICTR with regard to the non-applicability of Head of state immunity to these Tribunals.

The SCSL cannot arrogate to itself the powers of an international tribunal like the ICTY or the ICTR, powers which even the ICC lacks. The ICTY and ICTR are subsidiary organs expressly established by the Security Council.⁴⁸ The constitutive instruments of the ICTY and the ICTR (including Articles 6(2) and 7(2) of their respective Statutes) are binding upon all states which are members of the UN. The ICC on the other hand has its legal basis in a treaty; and its constitutive instrument (including Article 27(2)) is binding only upon parties to the treaty.⁴⁹ Being a treaty-based institution, the SCSL is like the ICC in this regard.

⁴⁷ Charles Chernor Jalloh argues that the conclusion of the Special Court is undermined by the methodology adopted in arriving at the conclusion as well as the “weak justifications” given in support, see ‘The Contribution of the Special Court for Sierra Leone to the Development of International Law’, (2007) 15 *African Journal of International and Comparative Law* 165, p.192, 197-198

⁴⁸ S/RES/827 (1993) and S/RES/955 (1994); see Chapter 5 of thesis.

⁴⁹ Or where the Security Council, acting under Chapter VII of the Charter, refers a matter to the ICC; see Chapter 6 of the thesis.

The international status of the SCSL, by itself, is not decisive of the issue of Head of state immunity before the Court.⁵⁰ The Appeals Chamber in summarising the submissions of Philippe Sands stated thus,

“...In respect of international courts, international practice and academic commentary supports the view that jurisdiction may be exercised over a serving Head of state in respect of international crimes. Particular reference may be had to the Pinochet cases and the Yerodia case.”⁵¹

Also, the Court summarised the submissions of Diane Orentlicher thus,

“For the purposes of the distinction between prosecutions before national and international criminal courts recognised by the ICJ and other authorities, the Special Court is an international court and may exercise jurisdiction over incumbent and former Heads of state in accordance with its statute.”⁵²

The Appeals Chamber, in dismissing the application on behalf of Charles Taylor, relied on the *Arrest Warrant* case as well as the fact that Article 6(2) of its Statute was materially same as the relevant provisions of the Statutes of the ICTY, ICTR, ICC and even the IMT at Nuremberg removing Head of state immunity before their proceedings.⁵³ It also relied on the view of Lord Slynn of Hadley in *Pinochet* that there is a trend towards the non-recognition of immunity for certain crimes before international tribunals.⁵⁴ The Court found that since Article 6(2) of its Statute was not

⁵⁰ *Taylor case, supra* 26, pp.11-12.

⁵¹ *Ibid.*, Paragraph 17(a)

⁵² *Ibid.*, Paragraph 18(a)

⁵³ *Ibid.*, Paragraphs 44-47, 50

⁵⁴ *Ibid.*, Paragraph 52

in conflict with any peremptory norm of general international law it must be given effect.⁵⁵

The scope of the decision of the ICJ in the *Arrest Warrant case* has been established in this thesis and is not authority for an argument that any international court may exercise jurisdiction over incumbent Heads of states. The SCSL does not come within the contemplation of the ICJ decision that there are ‘certain international courts’ before which there can be no immunity.⁵⁶ Additionally, the House of Lords’ decision in *Pinochet* is limited by the applicability of the Torture Convention and Section 134 of the UK Criminal Justice Act.⁵⁷

The similarity between the provisions of the Statute of the SCSL and those of the ICTY, ICTR, ICC and IMTs does not change the nature of the constitutive instrument of the SCSL and the extent to which states are bound by it, which is fundamental to the question of immunity of Taylor. Neither does the view of Lord Slynn in *Pinochet* justify the dismissal of the application by the Appeals Chamber. The trend towards the non-recognition of immunity for certain international crimes before international tribunals does not establish the non-applicability of immunities for Heads of states for international crimes before any international tribunal.

⁵⁵ *Ibid.*, Paragraph 53

⁵⁶ *Supra* 28, Paragraph 61

⁵⁷ See Chapter 3 of thesis

The non-applicability of immunities before international courts is not automatic. In his Dissenting Opinion in *Prosecutor v Radislav Krstic* before the ICTY, Judge Shahabudeen asserts that,

“...there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts. If that is the result, it does not come about, as it were, through some simple repulsion of opposed juridical forces; a recognisable legal principle would have to be shown to be at work, such as an agreement to waive the immunity. International criminal courts are established by states acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of states members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court states signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise.”⁵⁸

It is submitted that the decision of the Appeals Chamber is flawed. The Chamber adopted a ‘one-size fits all’ approach in its treatment of the issues of the status of the SCSL and the immunity of Charles Taylor. There was no regard to the constitutive instrument theory resulting in flawed analysis and conclusions.

Much is made about the lack of Chapter VII mechanism in the establishment of the Court- an argument relied on by Taylor in asserting that because the SCSL was not established by the Security Council acting under Chapter VII of the Charter, the Court cannot therefore be said to be an international tribunal like the ICTY and ICTR. As a

⁵⁸ Case IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, Paragraphs 11-12, available at www.icty.org, cited in Dapo Akande, ‘International Law Immunities and the International Criminal Court’, (2004) 98 *AJIL* 407, p.418, note 79

result, the SCSL is a national court and must respect the immunities of states. This view is drastic. Denying the SCSL an international status, which is in all important respects due to it, because it was not established like the ICTY(R) is tantamount to ‘throwing the baby out with the bath water’.

Even more drastic, is the view of the Appeal Chamber, making irrelevant Chapter VII powers despite the treaty-based nature of the Court, in its assertion that the Court having been established by an Agreement between the UN and Sierra Leone, all UN members must be deemed to have entered into the Agreement with Sierra Leone and cannot avoid obligations arising under the Agreement.

In view of the treaty-based nature of the SCSL and in the absence of a waiver of immunity by Liberia, the Court cannot remove the immunities of third states and their officials. The treaty-based nature of the constitutive instrument of the SCSL, and by virtue of Article 34 VCLT, is such that the SCSL cannot remove the immunity *ratione personae* of Charles Taylor established under customary international law.

The SCSL does not enjoy a nature that enabled it to issue an indictment against Taylor while in office in violation of his personal immunity as Head of state.⁵⁹ However, the personal immunity of Taylor is limited to the period of his incumbency as Head of state. Having vacated office, Taylor is no longer entitled to immunity *ratione personae*

⁵⁹ It is arguable that the Council never intended the Special Court to have jurisdiction over Taylor while he was still the President of Liberia. If the Council did, then it is wondered why the Council did not establish the Special Court under Chapter VII like the ICTY and the ICTR, knowing fully the implications of such an action, rather than making a ‘recommendation’ to the Secretary-General.

but rather is subject to the jurisdiction of the SCSL for acts which he does not enjoy immunity *ratione materiae*.⁶⁰

The SCSL should have cancelled the indictment and arrest warrant against Mr Taylor, as Belgium was directed to do by the ICJ in the *Arrest Warrant Case*, and issued a new indictment and arrest warrant against him. As a former Head of state, Taylor is but an ordinary citizen of Liberia who has committed criminal acts in the territory of Sierra Leone, and the only immunity he can enjoy will be *ratione materiae* in nature which will avail him only with regards to official acts. Acts of the kind with which Taylor is charged were pursued in his private capacity and fall outside the realm of functional immunity.

The Appeals Chamber in its decision in *Prosecutor v. Taylor* even entertained, albeit in passing, the possibility of issuing a fresh indictment but only had Taylor's application challenging the jurisdiction of the Court succeeded.⁶¹ In view of the fact that the Chamber noted in its decision that Taylor no longer being the Head of state and the immunity *ratione personae* he enjoyed no longer attached to him, one fails to see why the Court did not cancel the existing indictment and order the issuance of a new indictment.⁶² Proceeding to the merits of the case on an invalid indictment flaws the whole of the proceedings. The invalidity of the indictment is not just a mere procedural error; it is a fundamental error that goes to jurisdiction of the SCSL and the entire proceedings.

⁶⁰ Chapter 1 of thesis

⁶¹ *Taylor case*, *supra* 26, Paragraph 59.

⁶² *Ibid.*

Legal proceedings do not contain a self-correcting mechanism, especially proceedings of criminal nature.⁶³ Being a jurisdictional issue that even the Appeals Chamber had the competence to raise *suo motu*, the decision of the Appeals Chamber is disappointing. Any judgment founded on such a fundamental flaw will ultimately affect the legitimacy of the Court's decision and will not secure confidence in the outcome of the proceedings against Taylor, whether a conviction or a most unlikely acquittal.

Although the indictment was amended in May 2007, it is submitted that an amendment does not cure the original fundamental defect. A fresh indictment is necessary to address this pertinent issue.

7.3.3 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE SCSL

In June 2006, following the arrest of Taylor by UNMIL forces and his transfer to the SCSL, the Security Council passed Resolution 1688.⁶⁴ The Council, in Resolution 1688, voiced concern that although Taylor had been brought before the SCSL in Freetown, his continued presence in the West African sub-region would impede stability and be a threat to the peace of Liberia and Sierra Leone and to international

⁶³ That is the whole essence of amendment of charges in criminal law.

⁶⁴ S/RES/1688 (2006). In S/RES/1638 (2005), the Council determined that Taylor's return to Liberia, i.e. without his standing trial before the Special Court, 'would constitute an impediment to stability and a threat to the peace of Liberia and to international peace and security in the region. As a result, the Council extended the mandate of UNMIL to include Taylor's arrest and transfer to Sierra Leone for prosecution by the Special Court. See Alexander Orakhelashvili, 'The Power of the UN Security Council to Determine the Existence of a 'Threat to the Peace'', (2006) 1 *Irish Yearbook of International Law* 61, p.83

peace and security in the region. Importantly and for the first time since its decision requesting the establishment of the SCSL, the Council imposed obligations on states to co-operate with the Court. Operative Paragraph 4 of Resolution 1688 provides that,

“[The Security Council Acting under Chapter VII of the Charter of the United Nations], requests all states to co-operate to this end, in particular to ensure the appearance of former President Taylor in the Netherlands for purposes of his trial by the Special Court, and encourages all states as well to ensure that any evidence or witnesses are, upon the request of the Special Court, promptly made available to the Special Court for this purpose.”

The application of the principle of non-retroactivity to Resolution 1688 would mean that the issue of obligation of states to co-operate with and assist the SCSL must be considered in two phases.⁶⁵ Firstly, the period between the entry into force of the Agreement establishing the SCSL (25 April 2002) and 16 June 2006, and secondly from 16 June 2006.

The Agreement establishing the SCSL and the Statute of the Court make no provision for third states to co-operate with or judicially assist the SCSL. To do so would violate the *pacta tertiis nec nocent nec prosunt* principle and Article 34 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986.⁶⁶ Furthermore, prior to 2006 the Council did not invoke its Chapter VII powers in its exhortation of states to co-operate with the

⁶⁵ See *Lockerbie* Case, Preliminary Objection, (1998) *I.C.J. Reports* 9, p.26, Paragraph 44; Marko Divac Öberg, ‘The Legal Effect of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’, (2006) 16 *EJIL* 879, p.893

⁶⁶ (1986) 25 *I.L.M.* 543. The Convention is not yet in force but its provisions are reflective of customary international law. Article 34 of the Convention is *in pari materia* with Article 34 VCLT, 1969.

SCSL.⁶⁷ Even in Resolutions under Chapter VII, the Council ensured that the exhortations did not come under the sections passed under Chapter VII.⁶⁸

The Agreement establishing the SCSL is not binding on other states for example, Nigeria, Ghana or Liberia. States cannot lawfully come to an agreement to deprive another state of its sovereign right. The number of parties to such an agreement is irrelevant so long as the state whose right is sought to be deprived has not given its consent to the deprivation.⁶⁹ The Secretary-General cannot make decisions or take actions binding on the individual members of the UN.⁷⁰ The involvement of the UN in the establishment of the Court cannot justify a reliance on Article 103 of the UN Charter. This provision is clearly inapplicable to the situation since there is no conflict of obligations of states.

Unlike the ICTY and ICTR which have primacy over states and their constitutive instruments effectively imposing obligations of co-operation and assistance on states, the SCSL is devoid of such powers. *A priori*, the SCSL having its legal basis in an agreement between the UN and the Government of Sierra Leone, it cannot assert primacy over third states and compel them to try accused persons in their territory or to surrender them to the Court or even subpoena witnesses or documents.⁷¹ As such,

⁶⁷ See S/RES/1315 (2000), S/RES 1620 (2005)

⁶⁸ See S/RES/1562 (2004); S/RES/1610 (2005)

⁶⁹ Akande, *supra* 58, p.417

⁷⁰ However, the acts of the Secretary-General are not without legal effect. This is because his involvement in the creation of the Special Court arose from a Security Council recommendation and while these recommendations may not have a binding effect, they may produce effects of legality if taken up by states. However, this alone cannot confer on the Special Court a power it does not lawfully have.

⁷¹ See *Blaskic (Subpoena) case*, 110 ILR 607

Ghana was not under an obligation to co-operate with the Court when it sought Taylor's arrest in 2003.⁷² Likewise, Nigeria could not have been legally compelled to surrender Taylor to the SCSL. The only option that was open to the SCSL was to enter into agreements for co-operation and assistance with states, like the ICC.⁷³ The argument therefore, that UN members are bound by the Agreement between the Secretary-General on behalf of the UN and the Government of Sierra Leone is too remote to create obligations for states to co-operate with the SCSL.

Prior to Resolution 1688, the SCSL did not enjoy primacy over third states and could not compel co-operation and assistance by these states. The orders of the Court were at par with those of national courts- they could not be enforced in another state without the consent of that state established in a legal agreement. However, despite the absence of an extradition agreement with Liberia, Nigeria released Taylor to Liberia and he was arrested by peacekeeping forces in Liberia and transferred to the SCSL.⁷⁴

However, effective from 16 June 2006 states are under an obligation to co-operate with and assist the SCSL by ensuring the appearance of Charles Taylor at his trial in the Netherlands and promptly making available to the Court any evidence or witnesses requested by the Court for the purpose of the trial. This is because of the decision of the Security Council to invoke its Chapter VII powers in the imposition upon states

⁷² In fact, Ghana would have violated its customary law obligation to respect the immunity of Liberia and its Head of state had it arrested Taylor in 2003 when he was still a serving Head of state upon his visit to Ghana for peace talks.

⁷³ Rome Statute, 2187 U.N.T.S. 90, Article 87(5)

⁷⁴ Before extradition proceedings may be instituted, there is a requirement for an agreement to that effect to be in existence between the party seeking extradition and the party effecting the extradition, see Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd edition, (London: Cavendish Publishing, 2003), p.179

the obligation of co-operation with the SCSL in Resolution 1688. By Article 25 of the UN Charter, states are bound by the decision of the Security Council expressed in Resolution 1688. The source of the obligation of co-operation proceeds from the Charter and by virtue of Article 103, the obligation of states to co-operate with the SCSL, since 16 June 2006, prevails over any other international obligation. The use of the terms 'requests' and 'encourages' in the language of Resolution 1688 does not affect the binding nature of the obligation.⁷⁵

7.4 THE SPECIAL TRIBUNAL FOR LEBANON

Following the assassination of former Prime Minister of Lebanon Rafic Hariri, and 22 others on 14 February 2005, in Beirut, Lebanon the international community decried the assassination as an act of terrorism against Lebanon.⁷⁶ The Security Council, having reaffirmed acts of terrorism as one of the most serious threats to international peace and security,⁷⁷ decided to establish an international independent investigation commission to assist the Lebanese authorities in the investigation of all aspects of the assassination.⁷⁸

The Government of Lebanon requested the Council to establish a tribunal of an international character to try all persons involved in the assassination. Following this

⁷⁵ See *(South West Africa) Advisory Opinion*, (1971) *I.C.J. Reports* 16, Paragraph 114, p.53; Chapter 6 of thesis.

⁷⁶ S/RES/1636 (2005) which described the assassination as a terrorist act and determined that the terrorist act and its implications constitute a threat to international peace and security.

⁷⁷ See S/RES/1373 (2001), S/RES/1611 (2005)

⁷⁸ S/RES/1595 (2005)

request, the Council asked the Secretary-General to negotiate an agreement with the Government of Lebanon for the establishment of such tribunal.⁷⁹

An Agreement to establish the STL was reached and signed between the Government of Lebanon and the UN. Unfortunately, the Agreement was not ratified by the Lebanese Parliament because of the political crisis between the Government and the opposition which prompted the refusal of the Speaker of the Parliament to convene the Parliament for the ratification of the Agreement.⁸⁰ The deadlock in Lebanese domestic politics pre-empted the decision of the Security Council, acting under Chapter VII, to bring into force the Agreement to establish the Tribunal for the investigation and prosecution of the perpetrators of the Hariri assassination and related attacks.⁸¹ It becomes pertinent to consider, in light of Resolution 1757, the status of the STL- whether it is a treaty-based Tribunal or whether it was established by the Government of Lebanon or Security Council. This would have implications for the question of Head of state immunity before the STL and judicial assistance and co-operation with the Tribunal.

⁷⁹ S/RES/1664 (2006)

⁸⁰ See Nadim Shehadi and Elizabeth Wilmhurst, 'The Special Tribunal for Lebanon: The UN on Trial?', Chatham House, July 2007; Marieke Wierda, Habib Nassar and Lynn Maalouf, 'Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon', (2007) 5 *JICJ* 1065, pp. 1066, 1074; Jan Erik Wetzel and Yvonne Mitri, 'The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country', (2008) 7 *The Law and Practice of International Courts and Tribunals* 81, pp.82- 86 for background on the domestic crisis in Lebanon.

⁸¹ S/RES/1757 (2007). See Wierda, Nassar and Maalouf, *ibid*.

7.4.1 THE NATURE OF THE STL

The effect of Chapter VII of the Charter in Resolution 1757 and the establishment of the STL is circumscribed by the Resolution itself. Operative paragraph 1 of Resolution 1757 expressly provides as follows,

“[The Security Council] *Decides*, acting under Chapter VII of the Charter of the United Nations, that:
(a) The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date.”

Following the failure of the Government of Lebanon to notify the UN in writing of compliance with the legal requirements for entry into force of the Agreement establishing the STL, the Security Council merely acted under Chapter VII of the Charter to bring the Agreement already concluded between the Government of Lebanon and the UN into force. Resolution 1757 did not establish the STL- the Tribunal had already been established by the Agreement.⁸² The decision of the Council to act under Chapter VII of the Charter was simply to by-pass the constitutional ratification procedure of Lebanon and to ensure the entry into force of the Agreement thereby making it binding on Lebanon.⁸³ The Council has come under criticism for undermining state sovereignty and interfering with domestic affairs of states contrary to Article 2(7) of the UN Charter.⁸⁴

⁸² See Shehadi and Wilmhurst, *op.cit.*

⁸³ Choucri Sader argues that the Resolution decisively addressed the constitutionality of the STL, see ‘A Lebanese Perspective on the Special Tribunal for Lebanon’, (2007) 5 *JICJ* 1083, p.1084.

⁸⁴ See Records of 5685th Meeting of the Security Council, 30 May 2007, UN Doc. S/PV.5685 for opinions of the representatives of Indonesia, South Africa, China and Russia. However, S/RES/1757 (2007) was voted for with ten votes in its favour, none against and five abstentions.

It is proposed by a School of thought that the STL was established directly by the Security Council.⁸⁵ The most articulate expression of this view comes from Fassbender.⁸⁶ He argues that the ‘legal quality’ of the Agreement is uncertain because Resolution 1757 does not mention the Agreement but rather refers to it as ‘the annexed document’. He argues that it can be argued that operative paragraph 1(a) of the Resolution integrates the Agreement into the Resolution. Secondly, he argues that the decision of the Council to substitute the ratification requirement of a treaty by a Chapter VII decision is unprecedented. To him, the action of the Council was *ultra vires* the powers of the Council under the Charter as it had the effect of generating a treaty obligation, in the form of a treaty between Lebanon and the UN without the consent of Lebanon. Furthermore, the fundamental element of consent in treaty-making is absent by virtue of Resolution 1757. As such “in the absence of clear indications to the contrary, it therefore appears that the Security Council did not intend to bring the Agreement into force as an international treaty binding upon Lebanon under the law of treaties.”⁸⁷

Firstly, the issue of uncertainty of ‘legal quality’ of the Agreement establishing the STL is misleading. An agreement is either legal or illegal. If the Agreement establishing the STL is an illegal agreement, the fact of its integration into Resolution 1757 cannot imbue it with legality. Likewise, if the Agreement establishing the STL is

⁸⁵ Bardo Fassbender, ‘Reflections on the International Legality of the Special Tribunal for Lebanon’, (2007) 5 *JICJ* 1091-1105 and Bert Swart, ‘Co-operation Challenges for the Special Tribunal for Lebanon’, (2007) 5 *JICJ* 1153-1163. For contrary views see, Shehadi and Wilmhurst, *supra* 80; Wetzel and Mitri, *supra* 80; Wierda, Nassar and Maalouf, *supra* 80; Sader, *supra* 83

⁸⁶ *Ibid.*, pp.1096-1101.

⁸⁷ *Ibid.*, pp.1097

a legal agreement, then the fact of its non-integration into Resolution 1757 does not affect its legality.

Secondly, the fact that an action of the Council is unprecedented cannot make illegal an otherwise legal action of the Council. Prior to the 1990 it was unprecedented for the Security Council to establish a judicial body. The unprecedented action of the Council in the establishment of the ICTY does not make illegal, the otherwise legal action of the establishment of the *ad hoc* tribunal. Although Resolution 1757 is unprecedented to the extent that the Council had expressly by-passed the requirement of ratification by Parliament of a state, previous actions of the Council have had similar effect. In 1998, the Council imposed on the UK Government the obligation to make necessary arrangements allowing for a Scottish court to sit abroad without a jury in the *Lockerbie* case- an obligation that had the effect of enabling the Government to act by by-passing the requirement for the introduction of primary legislation in Parliament.⁸⁸

Thirdly, the action of the Council was not *ultra vires* its powers under the Charter. Resolution 1757 did not generate a treaty obligation for Lebanon. Lebanon had assumed the treaty obligation by the request for the establishment of the STL, the negotiation and signing of the Agreement establishing the Tribunal. Resolution 1757 merely avoided the impasse that was created by domestic political squabbles in Lebanon by ensuring the entry into force of the Agreement. It is important to note that the Government of Lebanon supported by members of Parliament, following the

⁸⁸ See S/RES/1192 (1998); Shehadi and Wilmhurst, *supra* 80

failure to convene Parliament, had requested the Council to exercise its powers under Chapter VII.⁸⁹

Ratification of a treaty and consent to a treaty are separate issues. That a treaty is not ratified does not mean that the treaty was concluded without consent. Consent of a state to a treaty is manifest in the authority of its representative to negotiate and sign the treaty. Parliamentary ratification of a treaty is merely an approval of a treaty and is distinguishable from international ratification of a treaty.⁹⁰ It would, therefore, be wrong to argue that Lebanon did not consent to the treaty or that the wording of Resolution 1757 is such that coerces consent from Lebanon to the Agreement establishing the STL.

Talmon contends that,

“In Resolution 1757 (2007), the Security Council in effect set an ultimatum to Lebanon to ratify the treaty within ten days or have the content of the treaty imposed upon it. While the Security Council could not substitute

⁸⁹ Wetzel and Mitri, *supra* 80, pp.85-86

⁹⁰ This view is supported by state practice and the opinion of leading commentators, see Robert Jennings and Arthur Watts (edited), *Oppenheim's International Law*, 9th edition, Volume 1: Peace, (London: Longman, 1992), §602, p.1227-1228, who assert that, ,

“It has been maintained that, as a treaty is not binding without ratification, it is the latter which really concludes the treaty. Before ratification, they maintain, no treaty has been concluded, but a mere mutual proposal to conclude a treaty has been agreed to. However, this opinion does not accord with the facts. For the representatives are authorised, and intend, to conclude a treaty by their signatures. Even where a treaty is subject to ratification governments act, as a rule, on the view that a treaty exists from the time of signature. It is for that reason that a treaty cannot be ratified in part, that no alterations of the treaty are possible through the act of ratification, that a treaty may be tacitly ratified by its execution, that a treaty is always dated from the day when it was duly signed by the representatives, and not from the day of its ratification, and that there is no essential difference between such treaties as need, and such as do not need, ratification.”

a Chapter VII decision for the ratification by Lebanon and, consequently, could not bring into force the Agreement itself, it could and indeed did prescribe the provisions of the annexed Agreement for Lebanon in a binding decision... There is thus no treaty in force between the United Nations and Lebanon on the establishment of the Special Tribunal. The STL is not a treaty-based internationalised tribunal, such as, for example, the Special Court for Sierra Leone, but an independent international tribunal set up by the Security Council using its Chapter VII powers.”⁹¹

This would mean that the STL is a subsidiary organ of the Security Council with the attendant financial obligation of the UN to fund the Tribunal, like the ICTY and ICTR. Knowing the implications of this obligation and the reluctance of the Council to assume such obligations, it is doubtful that the Council would have intended the creation of the STL as its subsidiary organ or have passed Resolution 1757 if it remotely purported to do so. Moreover, by Article 5(1) of the Agreement establishing the STL the funding of the STL is from voluntary contributions from states (51%) and the Government of Lebanon (49%). If the STL were set up by the Council, it becomes difficult to see how the Council can shirk the responsibility of funding a subsidiary organ by prescribing differently in a binding resolution.

Talmon’s position is not borne out by the express language of Resolution 1757. Suffice it to re-iterate that the Resolution expressly provides that the provisions of the Agreement establishing the Court shall enter into force on 10 June 2007 failing notification of ratification by the Government of Lebanon as provided under the Agreement. It is difficult to reconcile the argument that the Council could not bring

⁹¹ Stefan Talmon, ‘Security Council Treaty Action’, (2009) 62 *Revue Hellenique de Droit International* 65, pp.105-106

into force the Agreement with the express provision of the Resolution.⁹² Also, if Resolution 1757 is taken to prescribe the provisions of the Agreement and not to make it enter into force, one wonders the fate of certain provisions of the Agreement, for instance Article 19 providing for the entry into force of the Agreement, Article 20 on amendment of the Agreement and Article 21 on the duration of the Agreement. Do they survive Resolution 1757, bearing in mind the difficulty of prescribing these provisions into the Resolution? Furthermore, if the STL was established by the Council using its Chapter VII powers, then what was the need for the ratification or entry into force of the Agreement?

It is submitted that the better view is that the STL is a treaty-based internationalised court established by an agreement between the UN and the Government of Lebanon.⁹³

In his Report on the establishment of the STL, the Secretary-General copiously referred to the international character of the Tribunal.⁹⁴ Other factors which support the international character of the Tribunal, but which are not on their own conclusive

⁹² Talmon argues, *ibid.*, pp.67-68, that,

“As the Security Council enjoys a wide margin of discretion not only with regard to the determination of what constitutes a “threat to the peace” but also with regard to the “measures” that are to be employed to maintain or restore international peace and security, it will be difficult to establish that the ad hoc adaptation of a treaty (or the prescribing of certain provisions of a treaty) is generally outside the Council’s Chapter VII powers.”

Going by another argument of Talmon that the Council, when acting under Chapter VII, is not bound to respect international law apart from the UN Charter and *jus cogens*, and that the Charter imposes the principle of proportionality on the actions of the Council, his contention that the Council could not bring into force the Agreement establishing the STL becomes even more difficult to sustain, *ibid.*, p.68; see also pp. 97-98.

⁹³ Proponents of this view include Daphne Shraga, ‘Mixed or Internationalised Courts’, in Antonio Cassese (edited), *Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) 424.

Agreement establishing the STL contained in S/RES/1757 (2007) Annex

⁹⁴ UNDocS/2006/893

evidence of internationality of a court, include the composition of the Chambers,⁹⁵ the appointments of the judges,⁹⁶ the Prosecutor⁹⁷ and Registrar⁹⁸ of the Tribunal by the Secretary-General of the UN who shall also be consulted by the Government of Lebanon on the appointment of the Deputy Prosecutor of the Tribunal, as well as the financing of the Tribunal⁹⁹ and the seat of the Tribunal in the Netherlands.

The applicable law to the crimes within the jurisdiction of the Tribunal is the Lebanese Criminal Code.¹⁰⁰ International crimes, like genocide, crimes against humanity and war crimes are excluded from the jurisdiction of the Tribunal, which is limited to only domestic crimes. The jurisdiction of the STL over domestic crimes alone, cannot take away a status which the Court has. Likewise, the exercise of jurisdiction over international crimes by domestic courts does not change the character of the court to an international one.

7.4.2 HEAD OF STATE IMMUNITY BEFORE THE STL

Immunities of Heads of third states are not affected by the Statute of the STL. Firstly, for the reason that the constitutive instrument establishing the STL draws its legality and consequent legal effect not from Resolution 1757, but from the Agreement establishing the Tribunal annexed to Resolution 1757. Secondly, the Statute of the

⁹⁵ Agreement establishing the STL, *op.cit.*, Article 2(3)

⁹⁶ *Ibid.*, Article 2(5)

⁹⁷ *Ibid.*, Article 3

⁹⁸ *Ibid.*, Article 4

⁹⁹ *Ibid.*

¹⁰⁰ See Statute of the STL, Article 22. Statute contained S/RES/1757 (2007) Attachment

STL and the Agreement establishing the Tribunal do not contain any provision removing immunities from its proceedings. Cécile Aptel argues that,

“This omission of a fundamental principle of international criminal justice could be construed as deliberate, for derogations to the general rules on the immunity of state officials are usually limited to international crimes *stricto sensu* (i.e. genocide, crimes against humanity and war crimes) and could not therefore apply before the STL.”¹⁰¹

Even if the Statute and the Agreement contained a provision purporting to remove the immunities of Heads of states before the STL, such a provision would have no effect. The constitutive instrument of the Tribunal being treaty-based, it is limited by the *pacta tertiis nec nocent nec prosunt* principle. The STL falls outside the scope of ‘certain international courts’ in Paragraph 61 of the ICJ decision in the *Arrest Warrant* case.¹⁰² Therefore, the immunities of Heads of states would be extant before the STL.

The fact that the UN is a party to the Agreement cannot justify an argument that the immunities of Heads of UN member states would be inapplicable before a court that was established as a result of an agreement between a state and the UN. The obligation of states to accept and carry out the decisions of the Security Council under Article 25 of the UN Charter is restricted to decisions of the Council. It does not extend to other organs of the UN. These arguments are rendered moot by the fact that the Statute of the STL, does not remove Head of state immunity before the STL as well as by the

¹⁰¹ ‘Some Innovations in the Statute of the Special Tribunal for Lebanon’, (2007) 5 *JICJ* 1107, p.1111.

¹⁰² William A. Schabas, ‘The Special Tribunal for Lebanon: Is it a ‘Tribunal of an International Character’ Equivalent to an ‘International Criminal Court’?’, (2008) 21 *Leiden Journal of International Law* 513, pp.524-527

express provisions of Resolution 1757, whereby the action of the Council was only to ensure the entry into force of the Agreement establishing the STL.

It has been argued that the issue of immunity is left to the STL to decide for itself.¹⁰³ This argument seems to hinge the non-applicability of Head of state immunity on the disposition of a particular tribunal. In essence, if the judges of a Tribunal are inclined towards removing a right pertaining to states then it would mean that immunity would be inapplicable in the proceedings of that Tribunal. The constitutive instruments establishing the *ad hoc* tribunals (ICTY and ICTR) are by their nature binding upon states including the express provisions removing the immunities of Heads of states. The matter of immunities before the ICTY and ICTR was not left for them to decide; it was settled by Articles 25 and 103 of the Charter irrespective of the disposition of the Tribunals.

7.4.3 JUDICIAL ASSISTANCE AND CO-OPERATION WITH THE STL

By virtue of Article 15(1) of the Agreement establishing the STL, Lebanon is obligated to co-operate fully with the STL at all stages of the proceedings. There is also an obligation on Lebanon to comply without delay with any request for judicial assistance by the Tribunal.¹⁰⁴ These obligations are contractual terms which the Government of Lebanon had agreed to in the negotiation and signing of the

¹⁰³ Shehadi and Wilmhurst, *supra* 80

¹⁰⁴ Agreement establishing the STL, *supra* 95, Article 15(2)

Agreement. As such, Lebanon is bound by the principle of *pacta sunt servanda* to keep to the terms.¹⁰⁵

Having brought into force the Agreement establishing the STL, Resolution 1757 does not create any obligation of judicial assistance and co-operation for states not parties to the Agreement. The Statute of the STL, being a product of an agreement, cannot and does not impose any obligation of co-operation on states not parties to the Agreement. Additionally, there is no provision in the Agreement imposing an obligation of co-operation upon third states, in line with the *pacta tertiis nec nocent nec prosunt* principle.

Neither can it be remotely argued that the decision of the Security Council to act under Chapter VII in Resolution 1757 expressly or impliedly creates such obligations on states. The Council is silent on co-operation with the STL in Resolution 1757, unlike Resolutions 1595, 1636 and 1644 where the Council expressly imposed the obligation of co-operation with the Independent Investigative Commission (UNIIC).¹⁰⁶ Resolution 1757 is solely concerned with the entry into force of the Agreement and nothing more. To argue otherwise would be against the express and clear provision of the Resolution.

¹⁰⁵ This principle of customary international law is also reflected in Article 26 of the Convention on the Law of Treaties between States and International Organisations or between International Organisations, *supra* 66.

¹⁰⁶ S/RES/ 1595 (2005), S/RES/ 1636 (2005), S/RES/ 1644 (2005). See also Swart, *supra* 85, p.1156

In the absence of agreements on co-operation and assistance between states and the STL, states are at liberty to choose to co-operate with, or render judicial assistance to, the STL.

7.5 CONCLUSION

The establishment of internationalised courts has transformed the traditional binary categorisations of courts as either international or national. Internationalised courts operate essentially either as national courts (for instance the ECCC) or an international court (for instance the SCSL). As such, despite the term ‘internationalised courts’, the issue of Head of state immunity before these courts is dependent upon this traditional binary categorisation and subjected to the linear test of the constitutive instrument theory.

Although, in substance the immunities of Heads of states before internationalised courts is circumscribed by the *pacta tertiis nec nocent nec prosunt* principle manifest in the constitutive instrument theory, a trend is evident in this chapter that the Security Council can act subsequently, even where the Council does not establish an internationalised court, to impose obligations of co-operation to ensure the trial of Heads of states. Additionally, where an internationalised court results from a treaty, the Council can employ its Chapter VII powers to bring the treaty force. As such, if a treaty effectively removes Head of state immunity but is rendered inoperative due to internal constitutional challenges, the Council can act to ensure the entry into force of

such a treaty. Such action is validly within the competence of the Security Council under its peace and security mandate.

CONCLUSION: WHITHER A NEW INTERNATIONAL LAW ON HEAD OF STATE IMMUNITY?

The unfettered nature of state autonomy and its likelihood of abuse necessitated a consideration, in the introductory chapters of this thesis, of the value-content of sovereignty, i.e. whether there are values to be promoted and achieved through the exercise of sovereignty and in the event of a conflict of values, how the values are to be reconciled.

Chapter 1 establishes that sovereignty is not devoid of value and justifies the existence of Head of state immunity. By defining institutional competences both at the national and international level and by establishing a framework for a pluralistic international order, sovereignty and sovereign equality represent an intricate network of rights, duties, privileges and immunities developed to regulate the international system. Despite the fact that there have been erosions into the idea of sovereignty of states within the economic sphere, this has not been achieved in the political sphere. The criticisms levelled against the foundational principles of immunity call for a re-examination of the theories resulting in the proper application of immunities.

Despite agitations to the contrary, a system of immunities including Head of state immunity does not conflict with international human rights because the substance of the former does not negate the normative content of latter. The prescriptive nature of human rights when faced with the exemptible nature of immunities highlights a

problem of enforcement of the normative content of human rights instruments as seen in Chapter 2. Chapter 2 considers the various approaches adopted to resolve the competing interests of human rights and immunities and the weaknesses of the approaches, ranging from the uncertainty and artificiality that plagues the normative hierarchy theory of *jus cogens*, the lack of state practice in support of universal jurisdiction for violations of *jus cogens*, the non-existence of a human rights exception to legal instruments on immunity as well as the non-acceptance of the theory of implied waiver of immunity.

Other policy and practical arguments against the approaches include the fact that the nature of *jus cogens* is necessarily such that it is vulnerable to its biggest criticism of a system of immunities, namely abuse. There is the potential of frivolous litigation which will benefit the lawyers, not victims and may inundate judiciaries. Again, there is the likelihood of breakdown of international relations which may adversely affect international peace and security; as well as the inundation of governments and officials thereby affecting the efficiency of governance; the implication of political considerations better left to diplomatic channels; and very importantly, the possibility of adverse effects on transitional societies.

Chapter 3 distinguishes national immunities of Heads of state from international immunities. The chapter shows that the jurisprudence of the courts of UK, US, France and Senegal uphold the customary law principles that serving Heads of states have absolute immunity *ratione personae* while former Heads of states have limited

immunity *ratione materiae* and that the immunity of a Head of state may be waived by his state. It also establishes that where a court is lawfully established in accordance with international humanitarian law following the conduct of an invasion, the legality of which is doubtful, the lawful jurisdiction of the court even over Heads of state remains unaffected by the illegality of the invasion.

Chapters 4, 5 and 6 consider Head of state immunity before international courts established by a peace agreement between states in the aftermath of hostilities, by the Security Council under its peace and security mandate and by treaty, respectively. Chapter 4 establishes that a victorious state can exercise jurisdiction over the Head of a vanquished state where there has been an unconditional surrender and the possibility of criminal accountability of state officials is included in a peace agreement between the parties.

Chapter 5 shows that the peace and security mandate of the Security Council includes the establishment of the judicial bodies as subsidiary organs of the Council under Article 29 of the UN Charter.

While the issue of Head of state immunity before a court established by treaty between parties is straightforward, Chapter 6 addresses the more difficult issue of whether the Security Council can alter the customary obligations and rights of non-parties to a treaty by placing them on a similar footing with parties.

As the last substantive chapter of the thesis, Chapter 7 considers Head of state immunity before internationalised courts. The constitutive instrument of internationalised courts being either national or international in nature, the trends elicited and the conclusions reached in Chapter 7 are essentially same as Chapters 3 and 6.

The absence of enforcement machinery in the international system and the inability of international courts to enforce their orders made the consideration of the obligation of states to judicially assist and co-operate with international courts were considered in Chapters 4, 5, 6 and 7 imperative. These chapters establish that the obligation of judicial assistance and co-operation is also determined by the constitutive instrument theory.

In the main, this thesis has utilised the theory that the question of Head of state immunity before international courts is determined by the nature of the constitutive instrument establishing the court and whether states are bound by the instrument, a theory which is necessary for the consideration of emergent trends in Head of state immunity.

Emergent trends in Head of state immunity are rife in the thesis. The Treaties of Versailles and Sèvres represent a shift in international law because prior to these Treaties, there were no efforts to set up tribunals for trial of war crimes by state officials, including Heads of states. However, the provisions of the Treaties are to be

interpreted subject to the customary international law principle of *pacta tertiis nec nocent nec prosunt* contained in Article 34 VCLT and manifest in the constitutive instrument theory.

Despite the criticisms of the Nuremberg and Far East Tribunals as instances of victor's justice and being show trials, their proceedings impacted on the development of international criminal law by establishing legal criteria for judging official conduct. The trials were pivotal in the establishment of contemporary international courts and are indicative of a shift from the classical international law approach of sovereign immunity for international crimes by the provision of a normative and substantive framework for the assessment of individual criminal responsibility.

While it may be unfortunate that political considerations took precedence over legalism in the Far East, it is clear that both Nuremberg and Far East are indicative of an emergent trend in the Head of state immunity for international crimes. However, this trend is limited by the constitutive instrument theory which is evident in the application of the *pacta tertiis nec nocent nec prosunt* principle.

The establishment of the ICTY and the ICTR by the Security Council is groundbreaking in the sense that it represented a departure from international practice prior to the 1990s. A trend is evident, from 1993, of the Council's involvement in establishing international criminal tribunals as measures under its peace and security mandate. The decisions of the ICTY in the *Tadic*, *Milosevic* and *Blaskic* cases as well as the decision

of the ICTR in the *Kambanda* case support the proposition that there is an emergent trend removing Head of state immunity for certain international crimes.

The trend which became evident in the beginning of the 1990s is that the Security Council is empowered under the UN Charter to establish judicial bodies of a criminal nature and that by virtue of Articles 25 and 103 of the Charter, Heads of states are not entitled to immunity before such tribunals. It is submitted that by virtue of Articles 25 and 103 of the Charter, states have modified their customary international law rights according immunity to their Heads of states. This modification is manifest where the Security Council establishes an international criminal tribunal under its Chapter VII powers effectively removing the immunities of Heads of member states.

The *Pinochet* and Habré cases are illustrative of a trend of states entering into contractual agreements like the Convention against Torture to limit their rights under customary law. Likewise, the establishment of the ICC illustrates the conventional trend of states limiting their sovereign rights and prerogatives under customary international law. Again, these trends are circumscribed by the *pacta tertiis nec nocent nec prosunt* principle.

The establishment of the ICC is a culmination of the development of the trend of accountability in international law and has made permanent the *ad hoc* practice of the Security Council, first utilised in the Balkans, of using international criminal proceedings as a means of restoring international peace and security. This trend is also furthered by the practice of internationalized courts as evident in the Special Tribunal for Lebanon and the Special Court for Sierra Leone. A further trend is manifest in the

Al-Bashir and Gaddafi cases of the Security Council, despite the consensual nature of international law, acting to place non-parties to a treaty in a similar position with parties by referring a situation to the ICC as a necessary measure under its peace and security mandate.

There is the discernible trend of the Security Council acting under its peace and security mandate to by-pass the constitutional ratification procedure of states to ensure the entry into force of agreements for the establishment of criminal tribunals which may affect existing customary international law on Head of state immunity.

As stated in the introduction, the methodology adopted in this thesis in the determination of whether there is a new rule of customary international law on Head of state immunity is case law specific. The reliance on mostly case law to elicit state practice and *opinio juris* in the determination of the customary status of the international law rule on Head of state immunity is one necessitated by the procedural nature of the concept of jurisdictional immunities. Nevertheless, recourse is had in the thesis to various national, regional and international instruments on state immunity as well as the Reports of the Special Rapporteur of the ILC on the immunity of state officials from foreign criminal jurisdiction.

It has been thematically maintained that the non-applicability of immunities before an international court is dependent on the extent to which states are bound by the constitutive instrument establishing the court. It is an accepted principle of international law that states can alter their rights under customary international law by

entering into an agreement to the contrary, i.e. states by ratifying a multilateral treaty can modify existing custom. However, this conventional trend of modification of custom is limited to parties to the treaty. The question is to what extent can a conventional agreement be a source of customary international law?

It is inherent in the term ‘customary international law’ that it is applicable to the generality of states and must be a source of rights and obligations for the generality of states. This thesis has shown that the customary international law nature of the rule on absolute immunity for Heads of states even for international crimes is supported by ample state practice, for example the *Pinochet* case, *Tachiona v. Mugabe*, *Gadaffi* case, and is evident in the ICJ decisions in the *Arrest Warrant* case and *Djibouti v. France*, just to name a few. Likewise, evidence of state practice in support of this rule is evident in the various State Immunity legislations of US, UK, Australia, Canada, South Africa, Singapore and Pakistan as well as the UN Convention on the Jurisdictional Immunities of States and their Properties and regional State Immunity conventions in force, for example the European Convention on State Immunity 1972 which in codifying a restrictive approach to State immunity, exclude criminal proceedings from the scope of their provisions.

The subjective nature of *opinio juris* makes it difficult to evidence. However, *opinio juris* as to the absolute nature of Head of state immunity *ratione personae*, can be seen in the US practice of filing suggestions of immunity, in the Memorial of France before the ICJ in *Djibouti v. France*.

This thesis has also shown that it is a rule of customary international law that former Heads of state are entitled to a limited immunity *ratione materiae*, only with respect to official acts. The *Pinochet* case is at the forefront of state practice with regard to the limited nature of Head of state immunity, *ratione materiae* for international crimes like torture and *opinio juris* is evident in the practice of the UK and Spanish governments which vigorously challenged the immunity of Pinochet and the deportation of Pinochet by the UK government back to Chile, having found that he could not be extradited to Spain because of the requirement of double criminality under English Law.

The requirement for a conventional rule to become a customary rule of international law, as held by ICJ in the *North Sea Continental Shelf* cases, include widespread and representative participation in a convention and that it is imperative that state practice, especially of affected states, is such as to show a general recognition that a rule of law is involved.

The conventional trends in Chapters 4, 6 and 7 of the thesis show a different source of obligation of state parties and as such, it would be misplaced to rely on them as source of a new customary international law on Head of state immunity. They are merely contractual terms, *inter partes* and no more. However, these chapters are authority for the proposition that states may vary customary international law on Head of state immunity in three instances: firstly, by an express agreement between states parties to

a treaty. Secondly, where a state not party to an agreement to establish an international court consents implicitly to the exercise of jurisdiction by the international court over its Head of state by its unconditional surrender to a group of states that have expressed their intention to prosecute the Head of the surrendering state. Finally, where a state, not privy to an agreement to establish an international court expressly, consents to the exercise of jurisdiction by that international court over its Head of state.

Though the trends in Chapters 4, 6 and 7 are not reflective of a new rule of customary international law on Head of state immunity *de lege lata*, they are indicative of international law on Head of state immunity *de lege ferenda*.

However, the generality of membership of states in the UN, the provisions of Articles 25 and 103 of the UN Charter and the trend evident in the practice of the ICTY(R), as established in Chapter 5 of this thesis are such that it is submitted that there is in existence a new rule of customary international law on Head of state immunity which is limited to where the UN Security Council, acting under its Chapter VII powers, establishes a international criminal tribunal and its constitutive instrument expressly makes Head of state immunity inapplicable in its proceedings. State practice in support of this rule of custom is evident in the *Milosevic* and *Kambanda* cases. *Opinio juris* in support of this rule of custom can be found in the very fact of membership of the UN which is not obligatory but rather open to states which accept the obligations contained in the Charter.

Approaching the concept of immunities from the perspective of responsibility complicates issues in the discourse on reconciling human rights imperatives and immunities. The matter is better dealt with where immunities are approached from the perspective of the adjudicatory competence of a court over actions of other states and state officials. It is maintained, alongside the ICJ, that immunity does not mean impunity. Immunity does not mean absence of liability; rather it means that the enforcement of the liability against those to whom the immunity attaches could be limited in time or depending on the forum seeking to enforce this liability. If there were no means of addressing the impunity of Heads of states then one would be endorsing a *carte blanche* for atrocities and human rights devastations but the reality is that there exist avenues for addressing impunity.

The reality of international law is that immunity does not necessarily mean impunity. While the multiplicity of mechanisms, whether national, international or internationalised, to deal with international crimes of state officials may complicate matters because of inconsistencies of practice, the imperfections of international law are not such as to render it impotent in the face of egregious violations of human rights norms by Heads of state.

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