

**IMMUNITY FROM PROSECUTION FOR GENOCIDE, CRIME AGAINST HUMANITY
AND WAR CRIMES: THE CASE OF HEADS OF STATE**

**A Dissertation Submitted in Partial Fulfilment of the Requirements of the LLM
(Human Rights and Democratization in Africa) Degree**

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Declaration

I, Mugemangango Paul, hereby declare that this thesis is my own original work and that it has not been submitted for examination for award of a degree at any other university or institution.

Signed

Approved by Supervisor

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Date : 31 October 2004

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List of Abbreviations

All ER	All England Report
Cr.	Circuit
Ch	Chancery Division
HL	House of Lords
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ILR	International law Reports
UK	United Kingdom
UN	United Nations Organization
USA	United States of America
AC	Appeal Cases

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CHAPTER I – INTRODUCTION

1.1 Background to the Study

The question of when Head of State of a country may be dragged to a foreign court or tribunal to stand trial for criminal offences has been an unsettled area of law. This has provoked several scholars to argue that if ever there is such a thing as Head of State immunity, the meaning and scope of that immunity remains completely unclear.¹ However, recent state practice has provided distinction between former Heads of State and the incumbent. It is interesting to see that some states have subjected former Heads of state to their criminal jurisdiction, as in the case of *Regina v Bow St. Metro Stipendiary Magistrate*.² In that case, the House of Lords denied immunity to Senator Augusto Pinochet and allowed the extradition process to proceed on the charges of torture in pursuance of a charge of conspiracy to commit torture. The court held that no immunity exists for former Head of State for crimes against humanity. The court further observed that acts performed by state officials under the color of state law are not necessarily state acts when the conduct violates international law.³

In *Marcoses*, the Appeals Court of the Fourth Circuit in the case of *Re Grand Jury Proceedings, Doe no 770* held that Head of State immunity was primarily an attribute of state sovereignty, not an individual right. Accordingly full effect should be given to the revocation by the Philippines Government of the immunity of President Marcos.⁴

In September 2000, Zimbabwe's President Robert Mugabe visited New York to attend the United Nations Millennium Summit and held a rally at a Harlem church. Prior to his arrival, he had been served with summons for a lawsuit alleging that he had organised assassinations, torture, rape, terrorism, and other acts of violence in a campaign designed to quash his political opposition.⁵ The U.S. State Department submitted an official suggestion to the court declaring that President Mugabe should be entitled to head-of-state immunity in U.S. courts and stressed that putting President Mugabe on trial would be incompatible with America's foreign policy goals. However, U.S. Congressman Henry Hyde warned against using the doctrine of Head of State

¹ Tunks, A "Diplomats or Defendants? Defining the future of head of state immunity", (2002) 52 *Duke Law Journal* 651.

² (2000) 1 AC 147, 205-6.

³ As above 323.

⁴ 806F.2d 1108 (1987); 81 ILR, 599. See also Shaw M, N, *International Law*, (3rd Ed), 454.

⁵ 'Zimbabwe President Accused of Orchestrating Terror in U.S. Suit', CNN.com, at <http://www.cnn.com/2000/WORLD/africa/09/10/us.mugabesued.ap/> > (accessed on 14

immunity to assist a political regime that denied basic democratic rights to its own people.⁶

The principle of immunity for Heads of States was for the first time ousted during the Nuremberg trials of those who committed war crimes during the Second World War. It is the jurisprudence of these trials that influenced the subsequent justification of arresting or trying Heads of state under the principle of Universal jurisdiction. The Charter of the Nuremberg Tribunal provided that "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment"⁷. The United Nations General Assembly declared this principle to be international law.⁸

The statutes of the international courts for the former Yugoslavia and Rwanda specify that the official status of a defendant, for example as a Head of State, does not exonerate such a person from criminal responsibility.⁹ In other words, a person who is no longer serving as a Head of State enjoys immunity only with respect to acts performed in an official capacity.¹⁰

1.2 Statement of the Problem

It is an accepted norm of International law that sitting Heads of State, have immunity from criminal prosecutions.¹¹ A Head of State is normally entitled to immunity from prosecution anywhere, even after he or she is no longer the head of state.¹² However in recent years, we have witnessed the dramatic shift from this customary international

September 2004)

⁶ Hyde, H,J Chicago Tribune, Feb. 19, 2001 19 "U.S. *Shouldn't rush to protect Mugabe*,". arguing that "The State Department must be careful that its desire to support the tradition of reciprocal diplomatic immunity does not lend aid and comfort to a brutal regime's political war on its own citizens .

⁷ Article 7.

⁸ Resolution 95 (I) of 11 December 1946.

⁹ International Tribunal for former Yugoslavia, Article 7 para 2 and International Tribunal for Rwanda, Article 6 para 2.

¹⁰ Application by analogy of article 32 and 39 of the Vienna Convention of 18 April 1961 on diplomatic relations.

¹¹ On September 23, 2003, Judge Matthew F. Kennelly of the U. S. District Court for the Northern District of Illinois ruled that Jiang as Head of state had immunity and could not be sued. In the case of Tatchell , Justice Workman ruled that *As President and Head of State of Zimbabwe 'Mugabe is entitled to immunity while in office and not liable to any form of arrest or detention.*

¹² Kirgis, F.L The indictment in Senegal of the former Chad Head of State, February, 2000 <<http://www.asil.org/insight.htm> > (accessed 31 March, 2004).

law principle where some jurisdiction have been arresting or threatening to arrest former and sitting heads of state in order to institute criminal prosecutions against them.¹³ There is however no uniformity in the application of this action. Those jurisdictions that determine who is to be arrested or prosecuted are so selective that not all those alleged to have committed these crimes are arrested or prosecuted.¹⁴ On the other hand, existing jurisprudence on this subject is not firm in its application.¹⁵ This problem therefore calls for harmonisation of the application of the principle of immunity for heads of state in order to make international law reflect the real consent of states.

1.3 Objective of the study

The objective of the study is to examine and show how courts have interpreted the principle of immunity of the incumbent and former head of state in international law and how consistently they have come up with different conclusions on the issue. The study seeks to demonstrate that throughout the development of the system of international criminal justice, states have been considering their economic, political, trade and security interests in the name of international relations.

1.4 Hypothesis/Research Questions

The discussion is based on the following hypotheses:

- (a) That the principle of immunity under international law is in conflict with the actual practice as regard to the prosecution of the Heads of State and Government for the international crimes, genocide, and war crimes.
- (b) That politics, economic and security interest influence the practical application of the principles on immunity of Heads of State in international law

The study therefore seeks to answer these questions:

- (a) What factors account for the discrepancy in the principles on immunity under international law and the actual practice, with respect to the prosecution of Heads of State and Government and other agents of States?

¹³Charles Taylor, former President of Liberia had his arrest warrant prepared signed and served to Ghanaian Government when he was the President attending ECOWAS meeting in Ghana.

¹⁴Mr Thatchell complained to the American District court against Henry Kissinger.and Victims of sabra and shatira complained against Ariel Sharon.

¹⁵While the House of Lords in Pinochet case ruled that former head of state has no immunity, the high court of Senegal in Habre 's case ruled that it cannot rule on offences committed outside Senegal.

(b) Is there simply no concept as immunity from prosecution for International crimes for a former Head of state or a sitting head of state/Government?

1.5 Significance of the Study

This study shows that although there has been some progress in the establishment of international judicial Institutions, there are however increasingly double standards in the function of these institutions. It is therefore relevant at this point in time to show the danger of contradictory jurisprudence in both national and international judicial organs and partisan approaches that have been adopted in the implementation of international obligations in which these institutions were created. It also shows the discrepancy in the application of international customary law, with reference to conflict of interest between law and politics in international system of criminal justice.

1.6 Literature Review

The immunity of Heads of State from legal process and from execution in criminal cases is a matter for international common (customary) law. Heads of State benefit from total immunity from criminal legal process in foreign states for all acts that are normally subject to the jurisdiction of these states¹⁶ The principle mentioned above is subject to qualification however in two cases. If a state expressly renounces the immunity of its head of state, the latter may not then claim immunity before foreign courts. Such immunity is in any case limited to the duration of a Head of State's official tenure.¹⁷ The immunity of heads of state from legal process in civil law cases does not meet with the same unanimity of opinion as in the case of criminal law.

Crimes against humanity and the norms of international law that regulate them form part of *jus cogens* (fundamental binding norms). As such, they are peremptory norms of general international law, which, are recognized. ¹⁸ therefore cannot be simply modified or revoked by treaty or national law. As an eminent authority has explained, "*Jus cogens* refers to the legal status that certain international crimes reach, and obligation *erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens* .Sufficient legal basis exists to reach the conclusion that all of these crimes including torture, genocide and crimes against humanity are parts of

¹⁶Immunity of Head of state <[http:// www.eda.admin.ch/sub](http://www.eda.admin.ch/sub)> (accessed 14 April 2004)

¹⁷ As above

¹⁸ Article 53 Vienna Convention of the Law of Treaties (1969)

the *jus cogens*"¹⁹ Indeed, as the ICJ recognized, the prohibition in international law of acts, such as those alleged case, is an obligation *erga omnes*, which is duty *all* states have a legal interest in ensuring is fulfilled²⁰:

Adam Isaac has argued that at the turn of the twentieth century, the international law of state immunity was broader than today. In general, under an absolute theory of immunity, a state and its property were entitled to immunity from the judicial process of another state. ²¹ Around 1900, however, a new concept of sovereign immunity emerged. Throughout the twentieth century, the immunity of a state and its leaders was narrowed under the widely accepted restrictive theory of immunity. Under this restrictive theory, a distinction is made between public and private acts, with a state entitled to immunity for the prior, but not the latter.²²

Monica Hans has argued that charges against Israel Prime Minister Sharon were brought in Belgium for genocide, crimes against humanity, and grave breaches of the Geneva Conventions.²³ However, Sharon asserted the defence of immunity, as he is a sitting Head of Government. Lawyers filed a complaint against Sharon alleging he was responsible for a 1982 massacre of Palestinians by a Lebanese Christian militia in the Sabra and Chatilla refugee camps in Lebanon. .

Professor Akinyemi has argued that although Charles Taylor was accused of war crime offences, the proper way to go about it was s not to arrest him while he is still in office. The warrant for Taylor arrest being issued while he was still a sitting President, makes the warrant void. ²⁴

Sir Arthur Watts²⁵ argued that head of state's official acts are acts of state and he cannot be sued for them even after he has ceased to be head of state. He went further

¹⁹ Bassiouni M. C, (1996), *International Crimes: Jus Cogens and Obligatio Erga Omnes, Law and Contemporary Problem* 25 63, 68.

²⁰ *Barcelona Traction, Light and Power Company Ltd.*, (1972) ICJ Report, 32, paras. 33-34

²¹ 'Extra territorial Jurisdiction and sovereign Immunity on trial: Noriega, Pinochet, and Milosevic- Trends in political accountability and Transactional Criminal law.' (2002) *Boston College International and Comparative law Review*,

²² As above

²³ Providing for uniformity in the exercise of universal Jurisdiction: Can either the Princeton Principles on universal Jurisdiction or an International Criminal court accomplish this goal? (2002) *Trans national Lawyer*.

²⁴ Vanguard news paper Lagos February 27, 2004

Watts, A (1994) " The Legal position in international law of Head of state, head of government and foreign Ministers" *Recueil des cours* III.

and argued that the position is similar to that of acts performed by an Ambassador in the exercise of his functions, for which immunity continues to subsist even after the Ambassador's appointment has come to an end.

Satow's guide to Diplomatic Practice argues that a head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as head of state. Rather he /she will be entitled to continuing immunity with regard to acts which he /she performed while head of state, provided that the acts were performed in his/her official capacity. In this, his/her position is no different from that of any agent of the state.²⁶

1.7 Scope of the study

This discussion is limited to an examination of the immunity of the Heads of States as provided for in International law principles, relevant international treaties, court decisions and work of eminent authors. It covers the principles of immunity and its application International law from 1945 up to 2002. While other cases may be referred to, the main references are the case of *Pinochet* as decided by the House of Lords, and the *Yerodia case* decided by the International Court of Justice.

1.8 Synopsis of the study

The study is divided into four chapters. Chapter one addresses the background, on which the study is premised, outlines the statement of the problem, objectives and their significance and the literature review. Chapter two discusses the principle of immunity as developed by prominent international lawyers, courts decisions and other generally applied principles in international law. Chapter three takes the practical application of the principle of head of state immunity against criminal prosecution in international law. This involves an examination of the application the principle from selected national jurisdictions and by the International Court of Justice. Chapter four concludes the discussion and provides for necessary recommendations on the way forward.

²⁶ *Satow's Guide to Diplomatic Practice* (1957) 9-10.

CHAPTER II – PRINCIPLE AND DOCTRINE ON IMMUNITY OF HEADS OF STATE IN INTERNATIONAL LAW

2.1 Historical Overview of Immunity of Heads of State

The concept of immunity in international criminal justice is as old as history itself. It is however important to discuss the principle of immunity in international criminal justice because, it raises controversial debate today than any other time before. From the beginning, the concept of immunity was not an issue because; it had no much impact in both national and international criminal justice. In early days of the societies, internal rules or regulations bound each citizen, including Kings. Although there were beliefs in some societies that kings were above the law, in practice it was not always true.

There are evidences that most war crimes were punishable offences and kings were also subject to the rules. For example, Kings in England passed ordinances to punish war crimes, crimes against humanity and other crimes associated to it. For example during the 13th century, around 1285, Richard II of Durham issued ordinances prohibiting robbery and pillage especially from the Church, as well as the killing or capture unarmed persons and women belonging to the Church.²⁷ The Ordinances proscribed the rape of women and offenders were to be punished by hanging.²⁸ To avoid impunity, Kings provided penal procedures to effectively punish the offenders. For example, in 1439, King Charles VII included in the ordinance elaborate jurisdictional and penal provisions and allowed all law enforcement officers and noblemen to fight the offenders.²⁹

Despite this strict letter of the law, subsequent years were characterised by arrogance among kings and princes, whereby they began to exclude themselves from the application and interpretation of the law. Tyrannical rulers demonstrated the arrogance of power by refusing to account for their acts.

This arrogance is traceable to the time when kings assumed a great deal of power and combined executive legislative and judicial power to the extent that Kings in many areas were appellate bodies. For example, King Charles I refused to follow the tenets of the “petition of right” which including the requirement that his citizen be allowed to sue him as the king, as a result the people of England forced him into court, convicted

²⁷ Merron , T (1998) War crimes comes of age 2

²⁸ As above

²⁹ As above 6

him and beheaded him. This was the message that no king was immune from the suit of his subject.³⁰

However, in the case of egregious excesses, the rudimentary system of checks and balances of medieval society could direct the enforcement of these basic rules against the sovereign himself. There was thus a normative system to which even the mighty were bound to pay lipservice, if not obey.³¹ Although Kings could ignore the application of the principle of separation of powers justice necessitated adherence to the principle. For example Chief Justice Edward Coke, when in dispute with King James argued that the King was subject to a dual set of restraints the orders of the Almighty, and the Common law. Using the thirteenth century maxim of Henry de Bracton, Coke developed a theory of “Government under God and law”.³²

For centuries, in tyrannical states, governmental officials were able to act with impunity, despite the increase of democratic practices and an overall improvements in human rights records it has not, until very recently, opened the door to the punishment of those officials who might continue to violate fundamental individual rights. Exceptions exist of course, from earlier times, such as the prominent trial of British soldiers for the 1770 killing of five citizens of Boston protesting Britain quartering of soldiers and subsequent acquittal of all of them.³³

However, the overall historical pattern was that of effective immunity from prosecution under domestic law for officials carrying out governmental acts. Ratner has argued that this pattern applied to those following the policies of Stalin, Hitler, or Mao, each with their millions of victims, or those in other countries including democracies otherwise committed to the rule of law who resorted with less intensity to murdering, torturing, or otherwise abusing their opponents.³⁴

Despite the existence of impunity against the punishment of officials and immunity from the prosecution of war crimes and crimes against humanity, international law, had little to contribute on this issue. International law principally governed relations between states (and between their sovereigns). In that respect, internal sovereignty was, until

³⁰ See Crawford, R C “The Evil of Sovereign Immunity “ <[http:// www.Justicelive.com](http://www.Justicelive.com)> (accessed 19 August 2004).

³¹ n 26 above 69.

³² As above 70

³³ Ratner R, S, & Abraham J.S *Accountability For human rights Atrocities in International Law; Beyond the Nuremberg legacy* (2001) 4

³⁴ As above

early in the twentieth century, nearly complete and insulated from the law of nations.³⁵ The only area of international law that systematically addressed violations of individual rights by states concerned actions by governments against the citizens of other states – acts deemed an affront to those states and thus within the ambit of international law. In addition, international law also regarded attacks on diplomatic staff as a crime.³⁶

2.2 The principle of Immunity in International Law

The term “immunity” is used to mean different things or it is used in different ways. Immunity can be defined as the ability of a state official to escape prosecution for crimes for which he would otherwise be held accountable. *Black’s Law Dictionary* defines the word immunity as “ Any exemption from a duty, liability, or service of process especially, such an exemption granted to a public official.³⁷ Also is immunity is defined as an exemption that a person or an individual or corporate body enjoys from normal operation of the law such as legal duty or liability, either criminal or civil.

Traditionally, immunity has been grounded in the principle of state sovereignty.³⁸ Therefore, state sovereignty was the traditional basis for allowing the immunity to states and officials acting on their behalf. The practical justification for state immunity is that immunity promotes respect among states and helps preserve the smooth functioning of international relations. Reciprocity is the key reason one state grants immunity to another, so that they in turn will respect the immunity of the forum state.³⁹ State sovereignty rests on the notion that for one state to be compelled to submit to the jurisdiction of another is offensive to the dignity of that state.⁴⁰ States were viewed as independent and interference with other states action was seen as a sign of disrespect that would erode international relations. Development of the doctrine of Head of State immunity is relatively recent and derived from the evolution of state sovereignty into state immunity, and finally, immunity of Head of state.⁴¹

³⁵ As above

³⁶ As above

³⁷ Blacks law dictionary (1999) (7th,edi) 752-3.

³⁸ Pierson C, ‘Pinochet and the end of immunity: England’s House of Lords held that a former Head of State is not immune for torture’ (2000) 14 *Temple International law and Comparative L aw Journal* 263, 269-70.

³⁹ As above.

⁴⁰ As above.

⁴¹ As above.

Pierson has argued that an Individual acting as Head of State was granted immunity because under state sovereignty, interference with the performance of their official duties was tantamount to interference with the state.⁴² He further argued that the essence sovereignty is that there be no authority higher than the state (*pari in parem non-habet imperium*) thus, removing a leader from the state he/she governs, in order to prosecute him/her, breached the prosecuting state 's duty to respect state sovereignty.

As already explained, state sovereignty is the basis for state immunity that was later extended to immunity of heads of state. Therefore any thing concerned with relations and the customs of states is a matter of international concern Therefore; a fitting place to begin any discussion on international law is the concept itself.

2.2.1 Custom

International law is a system of law regulating the interrelationship of sovereign states, including their rights and duties,⁴³ and their responsibilities and obligations to one another. The principle sources of international law, are those provided for in the statute of the International Court of Justice,⁴⁴ namely, international treaties and conventions, International customs, general principles of law recognised by civilised nations, judicial decisions and the writings of jurists as a subsidiary means of determining the rules of law.⁴⁵ Of these principal sources, treaties and customs are paramount. In the event of a conflict between treaties and customs, treaty provisions will override customary practices provided they are clear and unambiguously written.⁴⁶

The principle treaties relating to the issue of immunity are the Vienna Convention on Diplomatic Relations of 1961 and the European Convention on State Immunity (and additional protocol), which was adopted in Basel 1972. The Vienna Convention provides for immunity from civil and criminal process for Diplomats both while posted, and indeed thereafter, in respect of conduct which they committed in the performance of their official functions while in post.

⁴² As above.

⁴³ Oxford Dictionary of law (1997) 207.

⁴⁴ Article 38 (1) Statute of the International Court of Justice.

⁴⁵ Shearer, I.A, *Starke's International law*, (11th ed) (1994) 29.

⁴⁶ The Charter of the United Nations is the main source of International law taking precedence over all other treaties, and custom.

The European Treaty although a regional instrument has since served as the basis for domestic legislation in various state signatories.⁴⁷ A distinguishing feature of this convention is that it gives effect to the principle of “relative” immunity, as opposed to “absolute” immunity.⁴⁸ This convention has since formed the basis of the 1978 Immunity Act of the United Kingdom.⁴⁹ Although this Convention is important, the principle source of international law on state immunity lies in custom.

Custom is best defined as, a clear and continuous habit of doing certain actions which has grown up under the conviction that these actions are, according to international law, obligatory or right”.⁵⁰ De Visscher highlights the merits of custom as a primary source of international law, stating:

What gives international custom its special value and its superiority over conventional institutions, in spite of the inherent imprecision, is the fact that, developing by spontaneous practice, it reflects a deeply felt community of law. Hence the density and stability of its rules.⁵¹

Immunity for a head of state is a creature of international customary law, just as the principle of sovereign immunity. Although the terms “state immunity” and “sovereign immunity” are often used interchangeably, it would seem that they are separate concepts rooted in the same principle of sovereign independence.⁵² Formerly, to sue a head of state effectively meant suing the state itself, extra-territorially. Customary practice was therefore not to sue another nation. Sovereign nations were sovereign in their own right. Throughout the 1800s, this principle of community came to be well accepted both in international political practices and in legal circles.⁵³

In the case of *Schooner Exchange v MacFaddon*⁵⁴ Supreme Court Justice Marshall justified the doctrine of state immunity on the basis of the equality, independence, and dignity of individual sovereign state, when he stated *inter alia* that:

One sovereign being in respect amenable to the other, and being bound by the obligation of the highest character not to degrade the dignity of his nation, by placing him or its sovereign rights

⁴⁷ Black-Branch, J ‘Sovereign Immunity under International Law : The case of Pinochet’ in Woodhouse , D (Ed) (2000) *The Pinochet case A legal and Constitutional Analysis* 94.

⁴⁸ As above.

⁴⁹ As above 95.

⁵⁰ Jennings R & Watts A (Eds.) (1992) *Oppenheim’s International law* (9th Ed) 27.

⁵¹ Black –Branch (n 47 above) 95.

⁵² As above.

⁵³ As above.

⁵⁴ (1812) 7 Cranch 116.

within the jurisdiction of another, can be supposed to enter a foreign territory only under express license or in the confidence that immunities belonging to his independent sovereign station, though not expressly stipulated, are reversed by implication, and will be extended to him.

This case reiterated the custom of the day in the Latin maxim *par in parem non-habet imperium* (an equal state has no domain over an equal), a custom that stands up until today.

In 1848, the British Lord Chancellor issued a similar ruling regarding extra-territorial legal disputes in the *Duke of Brunswick v The King of Hanover*⁵⁵ stating that: “ a foreign sovereign... cannot be made responsible here for an act done in his sovereign character in his own country.⁵⁶ The ruling illustrates the widely accepted customary practice of the day,, and was upheld in *Buttes Gas and Oil Company v Hammer*.⁵⁷ Indeed, through custom and practice, state immunity came to be recognised in two separate areas, immunity as to the process of the court and immunity with respect to property belonging to the foreign state or sovereign.⁵⁸ Shearer concludes that “the English authorities laid it down that the courts would not by their process “implied “a foreign state or foreign sovereign, in other words, they would not, against its will make it a party to legal proceedings“.⁵⁹

2.2.2 Judicial Decisions

Judicial decisions are quite valuable in shaping international opinion in relation to legal matters. Previously decided cases can provide persuasive argument pertaining to current issues. On the issue of immunity, the *obiter* opinion of the Swiss Federal tribunal in *Marcos and Marcos*⁶⁰ are of important. The court stated that,

The privilege of the immunity from criminal jurisdiction of head of state ... has not been fully codified in the Vienna convention (on Diplomatic Relations) ... but it cannot be concluded that the texts of conventions drafted under the aegis of the United Nations grant a lesser protection to heads of foreign states than to the Diplomatic representatives of the state which those heads of state lead or universally represent.... Article 32 and 39 of the Vienna Convention must therefore apply by analogy to the heads of state.⁶¹

⁵⁵ (1848) 2 HL 1.

⁵⁶ As above 17.

⁵⁷ {1982} AC 888.

⁵⁸ Shearer (n 45 above.)

⁵⁹ As above

⁶⁰ *Marcos and Marcos v Federal Department of police* (1989) ILR 198

⁶¹ As above pp 202- 203

However in the *King of Hanover case* (referred above),⁶² the Lord Chancellor made it perfectly clear that it was improper for a foreign court to interfere in the king's home affairs stating:

A foreign sovereign, coming into this country cannot be made responsible here for an act done in his sovereign character in his own country; whether be it an act right or wrong, whether according to the constitution of that country or not the "act is according to the constitution of that country or not the courts of this country cannot sit in judgement upon an act of sovereign, effected by virtual of his sovereign authority abroad..."⁶³

The *King of Hanover* ruling established three important points under international case law. Firstly, heads of state are immune. Secondly, it does not matter whether or not the "act is according to the constitution of that country". Thus even if there are statutory provisions in the country, which are being violated, this is quite Irrelevant. And thirdly, it is irrelevant whether the act in question is right or wrong. There is therefore no place for judicial intervention in these affairs, even if they may be "wrong". This is the point the Lord Chancellor reiterated later in the judgement thus:

If it be a matter of sovereign authority we cannot try that fact, whether it be right or wrong. The allegations that it is contrary to the laws of Hanover, taken in conjunction with the allegations of authority under which the defendant had acted, must be considered as to be an allegations, not that it was contrary to the existing laws as regulating the right of individuals, but that it was contrary to the laws and duties and rights and powers of a sovereign exercising sovereign authority. if that be so , it does not require another observation to shew , because it had not been doubted , that no court in this country can entertain questions to bring sovereigns to account for their acts done in their capacities abroad.⁶⁴

This precedent was upheld in the United Kingdom in 1982 by Lord Wilberforce, who referred to *King of Hanover* as "a case in this house which is still authoritative and which has influenced the law both here and overseas",⁶⁵ and accepted by Lord Slynn in *Pinochet case* as relevant law, being cited both in judicial decisions and in writings of eminent jurists.⁶⁶

⁶² Duke of Brunswick (no 55 above)

⁶³ as above p 17

⁶⁴ As above p 22

⁶⁵ Duke of Brunswick (no 55 above) 932

⁶⁶ *R v Bow Street Metropolitan Stipendry Magistrate and Others , ex parte Pinochet Ugarte* {1998} 3 WLR 1465.

In *Hatch v Baize*⁶⁷ the plaintiff claimed that he had suffered injuries in the Dominican Republic as a result of the acts done by the defendant in his official capacity of President of that Republic. Because the defendant was in New York State, the court accepted territorial jurisdiction to hear the case. However, it noted:

But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on International law. It is also recognised in all the judicial decisions on the subject that have come to my knowledge That the fact that the defendant has ceased to be President of St. Domingo does not destroy his immunity. The springs from the capacity in which the acts were done, and protect the individual who did them, because they emanated from a foreign and friendly government.⁶⁸

2.2.3 Juristic Opinion

Through appraisal, academic writers indirectly influence the evolution of international law, thus assisting in the development of its customs. There have been numerous writings by learned authors and renowned jurists in support of immunity claims. The position of a former head of state as accepted in the king of Hanover continues to be cited as authoritative amongst jurists. Similarly, the principle in *Hatch* is still broadly applied. In that regard, Sir Robert Jennings and Sir Arthur Watts maintain that:

All privileges mentioned must be granted to a head of state only so long as he holds that position. Therefore.... He may be sued, at least in respect of obligations of a private character entered into while head of state. For his official acts as head of state he will, like any other agents of a state, enjoy continuing immunity.⁶⁹

The same point is affirmed in *Satow's Guide to Diplomatic Practice*.⁷⁰ In relation to the position of a visiting head of state, after considering the relevant conventions (Vienna convention on Diplomatic Relations 1961, New York convention on special missions 1969 and European convention on state immunity 1972), the editors concluded that:

The personal status of a head of foreign state therefore continued to be regulated by long established rules of international law, which can be stated in simple terms. He is entitled to immunity – probably without exception – from criminal and civil jurisdiction.⁷¹

⁶⁷ (1876) 7 Hun 596.

⁶⁸ *ibid* 600.

⁶⁹ Jennings & Watts A (n 50 above) 1043-44, para 456

⁷⁰ *Satow's Guide to Diplomatic practice* (4th ed) (1957) .

⁷¹ As above 9-10

The same author further highlights that:

A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts, which he performed while head of state, provided that the acts were performed in his official capacity..⁷²

Sir Arthur Watts in his noted work⁷³ discusses the loss of immunity of a head of state that is deposed in a foreign visit:

A head of state's official acts performed in his public capacity as head of state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be head of state.⁷⁴

2.2.4 International Jus cogens

An overriding principle of international law is the doctrine of *jus cogens*. Effectively, this principle establishes that a rule or principle in international law is so fundamental that it binds all states and does not allow any exceptions. These rules are often referred to as “peremptory norms”.⁷⁵ In recent years, many authorities have agreed that laws prohibiting acts such as genocide are *jus cogens* laws. Others suggest that human rights abuses and international crimes generally should also be *jus cogens* laws.⁷⁶ It should seem that the principle of immunity is *jus cogens* law in its own. Learned writers and jurists cited through out this study affirm that immunity for heads of state is a well recognised principle of international law, a “peremptory norm” widely accepted throughout the global community, in relation to the official acts of a head of state.

They are peremptory norms of general international law as recognized by Article 53 of the Vienna Convention of the Law of Treaties (1969). The article provides that:

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. The prohibition in international law of acts, such as those alleged in this case, is an obligation *erga omnes*, which is duty all states have a legal interest in ensuring is fulfilled. The

⁷² As above

⁷³ Watts A (1994) ‘The Legal position in International Law of Head of State, Head of Government and Foreign Ministers Recueil des Cours III

⁷⁴ As above 88-9.

⁷⁵ Black-Branch (n 47 above) 101.

⁷⁶ As above

legal interest *erga omnes* permits any state to exercise universal jurisdiction over persons suspected of committing crimes against humanity⁷⁷

So it could be argued that crimes of torture and immunity of state are *jus cogens* law. Indeed, customary practice, as evidenced by the writings of eminent jurists, indicates it is a long-standing and well-established set of principles within the international community. In addition, "A treaty which conflicts an existing *jus cogens* norm is void".⁷⁸ In this regard, state immunity has had longer support in more countries throughout the world and therefore takes priority in the hierarchy of principles. Thus, it could be argued that the applicable parts of the torture convention are void to the extent that conflict with the *jus cogens* norms on state immunity.⁷⁹

Surely, the framers of the legislation could not have intended this conflict. Moreover, given the special position of heads of state as it relates to immunity, had the framers intended former heads of state to be liable for such alleged acts, they would have stated that expressly.

2.2.5 Comity of Nations

For the smooth working of international relations immunity of heads of state is pressing international concern. Indeed, this itself enshrines a long-standing principle of international law known as comity. Comity of nations operates on the basis that nations are willing to grant privileges, not as right as such, but as a matter of good will, for the smooth functioning of international affairs. Comity of nations is thus defined as:

The recognition one nation allows within its territory to legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.⁸⁰

The courts in some jurisdiction have supported the principle of comity. In *Buck v Attorney General*⁸¹ Diplock L.J stated:

As a member of family of nations, the Government of the United Kingdom (of which this court forms part of judicial branch) observes the rule of comity, videlicet, the accepted rules of mutual

⁷⁷Bassiouni, C.M, *Crimes against Humanity* (1992), 510-527 ; Graefrath, B 'Universal Criminal Jurisdiction and an International Criminal Court', (1990) 1 *European Journal of International Law* 67, 68.

⁷⁸ Oxford Dictionary of Law (1997) (3 ed) 218-9.

⁷⁹Black-Branch (n 47 above) 101.

⁸⁰ Black's Law dictionary (1979) (5thed 242).

⁸¹ (1965) Ch 475, 770.

conduct as between state and state which each state adopts in relation to other state to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law. A foreign state cannot be impleaded in the English courts without its consent ...that would be a breach of the rules of comity.⁸²

2.3 Acts of Head of state and the Scope of Immunity

Questions are raised as to what actually constitutes official acts in the exercise of the functions as head of state. The multitude of duties and functions performed by a head of state are voluminous and the list would vary from one country to the next, based on their respective constitutions, their locations in the world, and their unique arrangements with other states. Nevertheless, it has been asserted that certain functions are not to be equated with heads of state, for instance, acts of genocide, torture, and crimes against humanity, in general.

While there is little doubt that the world would be a better place if such atrocities were eradicated, it is difficult to determine whether certain acts of state, which amounts to this type of actions are legitimate within the political context within a given state, at a given time. If today there is a concerted world movement to eradicate these types of abuses, then the United Nations should deal with them decisively and agree to institute clear legislation with enforcement mechanisms.⁸³

Sir Arthur Watts, QC, in his Hague Lectures, stated that:

A head of state clearly can commit a crime in his personal capacity. However, a Head of state, can also 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 other states whether or not it was wrongful or illegal under the law of his own state.⁸⁴

In *Pinochet case*, Lord Slynn drew attention to the fact that it was accepted in the international warrant of arrest that in relation to the repression alleged, "the plans and the instructions established before hand from the government enabled these actions to be carried out...In this sense the Commander in chief of the Armed Forces and Head

⁸² As above.

⁸³ Black-Branch (no 47 above) 109

⁸⁴ As above

of Chile an Government at the time committed punishable acts“. Although one may disagree with the action taken by Pinochet, This provides evidence that the acts in question were undertaken as part of Pinochet 's functions when he was head of state, and a consequence, takes immunity.⁸⁵

2.3.1 From Nuremberg Principles to the Vienna Convention on Diplomatic Relations 1961

The scale of destruction of the first and Second World War necessitated changes in the international community against state sponsored abuse, which compelled an international reaction. Following World War 1, the Allies created a fifteen –member commission to look into the question of war crimes. In its report to the 1919 preliminary peace conference, the majority of the commission found that the central power had committed numerous acts in violation of established laws and custom of war and the elementary laws of humanity ⁸⁶ and the Allies eventually inserted into the treaty of Versailles three articles providing for the punishment by allied military tribunal of persons accused of violating the laws and custom of war.⁸⁷

Accountability of state officials derives from the emergence in customary international law of provisions based on the consciousness that certain acts (international crimes of individuals) cannot be considered as the legitimate performance of official functions.⁸⁸ This principle was first enshrined in the Versailles Treaty,⁸⁹ whereby 'the Allied Powers publicly arraigned the former German Emperor, for a supreme offence against international morality and the sanctity of treaties'. Moreover, the same principle was proclaimed in the Charter of the Nuremberg Tribunal,⁹⁰ subsequently endorsed by the UN General Assembly, with its resolution affirming the principles of Nuremberg.⁹¹ Additionally, a rule in the very same direction was adopted in Article IV of the Genocide Convention of 1948.

⁸⁵ As above

Commission on the Responsibility of the authors of the war and on enforcement of penalties , report presented to the Preliminary Peace conference , March 29, 1919

⁸⁷Treaty of peace , June , 28,1919, articles 228-230

⁸⁸Compare the Judgement of the Nuremberg International Military Tribunal: 'The principle of 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.

⁸⁹Art. 227

⁹⁰Article 7 of the IMT Charter

UN General Assembly Res. 1/95 (1946), in which the General Assembly 'affirms the principles recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal'.

The International Military tribunal eliminated the defences of superior orders, command of law, and act-of – state immunity, thereby subjecting even heads of state to criminal liability. These principles were included in the Charter of Tokyo tribunal and in control council law no 10 the latter of which governed many significant prosecutions of Nazi's below the level of those tried before the international military tribunal, and endorsed by the United Nations general assembly in 1946.⁹² The same principle is now contained in Article 7 of the ICTY Statute⁹³, Article 6 of the ICTR Statute⁹⁴ and Article 27 of the ICC Statute.⁹⁵

However, the drafters of the Vienna Convention on Diplomatic immunity of 1961 were very careful in drafting the convention such that they did not accord absolute immunity to Diplomats or to other senior state agents. The sensitivity of the matter no doubt stemmed from the Nuremberg jurisprudence that waived even the well-established principle of immunity for head of states.

Immunity has been considered in the classic case of *Empson v. Smith* where the judge said that it is elementary law that diplomatic immunity is not immunity from legal liability, but immunity from suit⁹⁶. This means that diplomatic agents are not above the law; on the contrary, they are under an obligation “to respect the laws and regulations of the receiving State⁹⁷, and if they breach the law they are still liable, but they cannot be sued in the receiving state unless they submit to the jurisdiction.⁹⁸ While personal inviolability is a physical privilege, diplomatic immunity is a procedural obstacle.

Diplomatic immunity from criminal jurisdiction is unqualified and absolute, while in the case of civil and administrative jurisdiction there are certain exceptions.⁹⁹ a diplomatic

⁹² UN general Assembly Res 95(1) of 11 December 1946.

⁹³ UN Security Council Res. 827 (1993).

⁹⁴ UN Security Council Res. 955 (1994).

⁹⁵ See the UN Webster at <http://www.un.org/icc>.

⁹⁶ See Vark R 'Personal liability and diplomatic immunity in respect of serious crimes' <<http://www.juridica.ee/juridica>> (accessed 2 September 2004)

⁹⁷ As above

⁹⁸ As above.

Article 31(1) provides that, a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

- (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

agent shall enjoy immunity from the criminal jurisdiction of the receiving state. It also seems to be so that enjoyment of immunity by a diplomatic agent is not connected with the function *expressis verbis* enumerated in article 3.¹⁰⁰ The legal consequence of diplomatic immunity from criminal jurisdiction is procedural in character and does not affect any underlying substantive liability.¹⁰¹

2.3.2 The International Criminal Tribunals for the former Yugoslavia and Rwanda

In 1993, the International Criminal Tribunal for the former Yugoslavia was given power to prosecute persons "responsible for serious violations of international humanitarian law" including grave breaches of the Geneva Conventions of 1949, torture and taking civilians as hostages, genocide, crimes against humanity "when committed in armed conflict whether international or internal in character, and directed against any civilian population" including murder, torture, and persecution on political, racial or religious grounds.

In dealing with individual criminal responsibility Article 7 provided that "the official position of any accused person whether as Head of State or Government or as a responsible Government Official shall not relieve such person of criminal responsibility." The Statute of the International Criminal Tribunal for Rwanda (1994) also empowered the tribunal to prosecute persons committing genocide and specified crimes against humanity "when committed as part of a widespread or systematic attack against any civilian population on national political ethnic or other specified grounds." The same statute under article 6(2) reiterated that the official functions of the defendant for example as a head of State, do not exonerate such a person from criminal responsibility.

The International Criminal Tribunal for the former Yugoslavia held that Sovereign rights of states cannot and should not precede over the right of the international community to act appropriately as crime against humanity affects the whole of mankind and shock the conscience of all nations of the world.¹⁰² Where the court argued that “

It would be travesty of law and a betrayal of universal need for justice, should the state sovereignty be allowed to be raised successfully against human rights. State sovereignty was created as a defence to the protection of independent political acts of the states. However human

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

¹⁰⁰ As above

¹⁰¹ As above

¹⁰² *Prosecutor v Tadic*, (1995) I.L.M 35 32, 52,

rights abuses are so universally offensive and undermine the very reason for the creation of state sovereignty that the defence of immunity cannot stand.

Immunity has been progressively viewed as a barrier to post conflict peace and stability.¹⁰³ Britain's highest Court held in 2000 that because International law proscribes crime against humanity, then sovereign immunity traditionally granted to former head of state had been abolished.¹⁰⁴

2.3.3 The Statute for International Criminal Court

There is thus no doubt that States have been moving towards the recognition of the principle that some crimes as those which should not be covered by claims of State or Head of State or other official or diplomatic immunity when charges are brought before international tribunal.

The above principle has been codified in Article 27 of the Statute of the International Criminal Court. In drafting the Statute, this principle was never challenged and was consistently proposed at all stages of the drafting. The ICC Statute constitutes important evidence of the *opinio iuris* of members of the international community.

The ICTY, on at least two occasions, referred to provisions contained in the ICC Statute underscoring that it was approved by a large majority of states and was therefore *indicative* of the legal views of those states on matters of international criminal law.¹⁰⁵ Additionally, it should be noted that none of those who abstained or voted against ever suggested that they did so because they rejected the principle that Heads of State could be held responsible for the commission of international crimes.

The Rome Statute of the International Criminal Court provides for jurisdiction in respect of genocide and crimes against humanity as defined but in each case only with respect to crimes committed after the entry into force of the statute. Official capacity as a Head of State or Government shall in no case exempt the person from criminal responsibility under this statute. Although it is concerned with jurisdiction, it does indicate the limits, which States were prepared to impose in this area on the tribunal.

Responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment'), contained in a US memorandum

¹⁰³ Akhavan ,P 'Beyond impunity: Can International Criminal Justice Prevent Future Atrocities?', (2001) 95 American Journal of International Law 7, 9

¹⁰⁴ *ex parte Pinochet* , (2000) 1 A.C 147 (HL 1999) reprinted in 38 I.L.M 581, 594-95 (1999)

¹⁰⁵ <[http:// www.ejil.org/journal/vol12/no3/art2-4.html](http://www.ejil.org/journal/vol12/no3/art2-4.html)> (accessed on 2 September 2004)

presented at San Francisco on 30 April 1945, nor should such a defence be recognized as the obsolete doctrine that a head of state is immune from legal liability.

2.4 Concluding Remarks

This Chapter has discussed the development of the principle of immunity in different times and indeed custom of nations, judicial decisions, and juristic opinions towards the immunity of Heads of State. It is evident however that the principle of immunity of Head of State both sitting and former is a well established principle in International law and there is no consensus among nations to outlaw it. It has also been observed that there is a trend to ignore such immunity and consensus of punishing the perpetrators of international crimes regardless of their official position is gaining momentum. However this trend has not gained the status of a peremptory norm since some states feel that they have immunity against criminal prosecution and are in forefront to determining who are to be prosecuted.

If however the world community feels that the perpetrators of international crimes are to be punished regardless of their official position, which has an effect of eroding the immunity of Head of state in some instances, the international community must act towards achieving this goal. It is important because all incumbent will be former Head of State. The international community should therefore clarify whether immunity of Head of State is an obsolete principle and that domestic court should decide on it in order to avoid unilateral decision to prosecute Head of State by the foreign courts.

While the ICC purports to provide an answer to this legal dilemma, it should be remembered that it is complimentary court and not exclusively international criminal court. The American opposition to ICC reflect the challenge in future on the efficiency of the court in fighting the immunity of head of state likely to be entrenched in national constitutions, by arrogance behaviour of powerful states or Amnesty provisions against criminal prosecution for the former Head of State.

CHAPTER III - THE PRACTICAL APPLICATION OF THE PRINCIPLE OF IMMUNITY OF HEAD OF STATE AGAINST CRIMINAL PROSECUTION IN INTERNATIONAL LAW

3.1 Introduction

As we have seen from the preceding chapter, the principle of immunity in international law is controversial subjects. It is controversial because, there is a dearth of international law literature, which supports the immunity of both sitting Head of State and former or Head of government against criminal prosecution and civil claims in international law.¹⁰⁶ There is also a considerable literature that supports the notion that both a sitting Head of State and a former one are not immune from criminal prosecution against war crimes and crimes against humanity.

The argument is based on the principle that the official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment .as stipulated in article 7 of the Charter of the International Military Tribunal at Nuremberg. However different jurisdiction had been interpreting them differently as a result they reached different conclusions. The motive behind this practice is different interests of those who purport to comply with international norms.

This chapter intends to discuss the controversy surrounding these principles. It will to show the discrepancies in their application and provide the possible reasons for such differences in application and suggest a way forward to harmonise the two principles for the betterment of international relations, global political stability and security.

3.2 The genesis and evolution of the waiver of head of state immunity

Although the benchmark of the waiver of immunity of the head of state from criminal prosecution is the decision in the Nuremberg Military Tribunal, the fundamental rule of international law that heads of state and public officials may be held individually responsible for crimes against humanity has been long established and it was widely accepted before the adoption of the Nuremberg Charter on 8 August 1945 that heads of state could be held criminally responsible for crimes under international law. As Vattel observed, a head of state who commits murder and other grave crimes in the course of a war:

is chargeable with all the evils, all the horrors, of the war; He is guilty towards the enemy, of attacking, oppressing, massacring them without cause, guilty towards his people, of drawing them into acts of injustice, exposing their lives without necessity, without reason, towards that part of his subjects whom the war ruins, or who are great sufferers by it, of losing their lives, their fortune, or their health. Lastly, he is guilty towards all mankind, of disturbing their quiet, and setting a pernicious example¹⁰⁷

This position was echoed by the Treaty of Versailles of 28 June 1919 that immunities of heads of state under international law have limits particularly when crimes under international law are involved. Its article 227 was based on the report presented to the 1919 Preliminary Peace Conference by a commission of 15 leading international law scholars, The Commission, noted the grave charges, including crimes against humanity, stated that 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".¹⁰⁸ This is – as Justice Robert Jackson, the United States Prosecutor at Nuremberg and one of the authors of the Charter explained, in his 1945 report, to his President – the legal basis for the trial of persons accused of crimes against humanity and war crimes,

Nor should such a defence be recognised as the obsolete doctrine that a head of State is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law'¹⁰⁹.

¹⁰⁶ Some of the literature emanates from international instruments like Vienna Convention on Diplomatic Relations 1961. Although it gives effect to relative immunity as opposed to absolute immunity the customary international law has consistently accepted immunity of heads of state.

¹⁰⁷ Quoted in Wright, Q 'The Legal Liability of the Kaiser', (1919),13 *American. Political Science Review* 20, 126.

¹⁰⁸ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, reprinted in (1920) 14 *American. Journal of International Law* 95,116.

¹⁰⁹ Jackson, R H 'Report to President Truman on the Legal Basis for Trial of War Criminals' (1946) *Temp. Law Quarterly* 19 148.

In its Judgment, the International Military Tribunal at Nuremberg declared that Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced¹¹⁰ The Nuremberg Tribunal went beyond the Charter by concluding that state immunities do not apply to crimes under international law. It was submitted that:

... Where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, this contention must be rejected. The principle of international law, which under certain circumstances protects the representative 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.¹¹¹

The Tribunal also established that sovereign immunity of the state did not apply when the state authorized acts, such as crimes against humanity, which were outside its competence under international law: It provided that:

The very essence of the Charter is that individuals have international duties, which transcend the national obligations of obedience imposed by the Individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law¹¹²

The Tokyo Tribunal applied the same principle. However, the Emperor of Japan was not charged with crimes against humanity, war crimes or crimes against peace by the Prosecutor of the Tokyo Tribunal, the decision not to prosecute him was not based on the belief that he was immune under international law as head of state, but was made "by the good grace of General Douglas MacArthur".¹¹³ Roling also opined that that the decision not to prosecute the Emperor was the result of a political, rather than a legal, decision by the American President, contrary to the wishes of Australia and the Soviet Union.¹¹⁴

The principle of individual criminal responsibility of heads of state for crimes against humanity is part of customary international law. The evidence can be founding in resolutions of the UN General Assembly, international treaties and instruments,

¹¹⁰ Judgement of the Nuremberg Military Tribunal (1946) 41.

¹¹¹ As above 41-42

¹¹² As above 42.

¹¹³ Bassion, (1992) Crimes against humanity 466.

¹¹⁴ Roling, B V & Casese , *A The Tokyo Trial and beyond* (1994) 40.

decisions of national courts, codification of international law by the International Law Commission, and writings of international law scholars. United Nations General Assembly unanimously endorsed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal" in General Assembly Resolution no 95 (I) of 11 December 1946. Article 6 of the Charter of the International Military Tribunal for the Far East (1946); Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948); Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgement thereof, Article III of the Convention on the Suppression and Punishment of the Crime of Apartheid ("individuals. and representatives of a State"), Article 7 (2) of the 1993 Statute of the International Tribunal for the former Yugoslavia, Article 6 (2) of the 1994 Statute of the International Criminal Tribunal for Rwanda as well as in Article 27 of the Statute for the International Criminal Court, adopted in Rome on 17 July 1998.

The United Nations Secretary-General made clear in his report to the Security Council on the establishment of the International Criminal Tribunal for the former Yugoslavia, which has jurisdiction over crimes against humanity, when he stated that, the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.¹¹⁵

3.3 International Crime and the Universal Jurisdiction Principle

The crimes against humanity are subject to universal jurisdiction. This principle has been recognized under international law since the establishment of the International Military Tribunal of Nuremberg, which had jurisdiction over crimes against humanity regardless where they had been committed. Crimes against humanity and the norms, which regulate them form part of *jus cogens* as such,

One of the International crime which is subject to universal jurisdiction is the crime of genocide, as provided for by the Convention for the Prevention and Punishment of the Crime of Genocide of 1948¹¹⁶ Although the framers of the Convention for the Prevention and Punishment of the Crime of Genocide in 1948 did not extend the scope of jurisdiction under that treaty beyond territorial jurisdiction and the jurisdiction of an

¹¹⁵ Report of the secretary-general pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34.

¹¹⁶ UN General Assembly Res. 96 (I) (1946);.

international criminal court, genocide is a crime under customary international law over which any state may exercise universal jurisdiction¹¹⁷ as is a crime against torture.¹¹⁸

Although the principle of Universal jurisdiction in as far as prosecuting international crimes has been entrenched in international norms, which forms the basis of waiver of immunity of head of state, its application has not whole accepted by the nations. This scenario explains why the two principles for and against immunity of heads of state against criminal prosecution contradict each other in different jurisdictions.

The reasons for the existence of these parallel principles can be retraced to the development of the international law itself. International law developed from the law of war where victors established principles against the vanquished after the first and the second World wars. That is why it was simple for them to establish the principle of individual criminal responsibility, which included the waiver of the immunity of head of state. However, the best way to understand this legal development, which contradicts each other, is by tracing the proceedings and the nature of trials of the Nuremberg tribunal with reference on who to prosecute and for what motive. The nature and proceedings in the Nuremberg tribunal with reference to the current adhoc international tribunals for both the former Yugoslavia and Rwanda and subsequent decisions in some national and international courts reflects the dilemma of the application of the principle of immunity of the head of state against criminal prosecution in international law.

3.4 Criticism and Reluctance over Universal Jurisdiction and immunity Principle

Critics of the Nuremberg International Military Tribunal have argued that, the trials represented "victors' justice" and vengeance is seldom justice,¹¹⁹ because they were imposed on the losers at the end of the war. Although the Nazi atrocities remind the international community of its horrific nature, many critics contend that it sets a bad precedent to invent a legal basis for prosecution solely to achieve vengeance. It is important to consider that war is a political act and not a legal act. Therefore a crime must be defined before one can be guilty of committing it.

¹¹⁷ Meron, T , 'International Criminalization of Internal Atrocities', (1995) 89 *American Journal of International Law* 569.

¹¹⁸ Herman B J & Danelius, H , (1988), *The United Nations Convention against Torture* (1998)

¹¹⁹United States Senator Robert A. Taft in war crime trials,

<[http:// www.stormfront.org/revision](http://www.stormfront.org/revision)> (accessed on 19 August 2004)

Although its supporters said that the Allies had a moral imperative to punish the Nazi leaders, the crime for which Nazis were tried had never been formalised as a crime with the precision required by the recognised legal standard. Professor Harry Elmer Barnes argued that the Nuremberg war-crimes trials were based upon a complete disregard of sound legal precedents, principles and procedures, the court had no real jurisdiction over the accused or their offences; it invented *ex post facto* crimes; it permitted the accusers to act as prosecutors, judges, jury and executioners; and it admitted to the group of prosecutors those who had been guilty of crimes as numerous and atrocious as those with which the accused were charged.¹²⁰ Justice William O. Douglas of the United States Supreme Court shared the same view.¹²¹

There is therefore one main legal principle established by the Nuremberg Military Tribunal, the waiver of the command theory and the immunity of head of state. This precedent influenced the international community to adopt various international conventions in criminalising certain acts like torture, war crimes, crimes against humanity and genocide among others. While the international community accepted this common stand of punishing the perpetrators of these international crimes, they were not able to establish the permanent international criminal court until 1998 where the Rome statute was adopted.

Despite the reluctance of establishing the permanent International Criminal Court for the last fifty years, few *ad hoc* international tribunals have been established for the purposes of prosecuting some heads of state and senior government officials accused of international crimes. However, the decision of who is to be prosecuted had been determined by the strong western powers and the prosecuted officials have been weak states of the south. On the other hand, there was consensus on the application of the Universal jurisdiction worldwide. However, it has also failed to attract majority of the international Community. One of the reasons for this reluctance is attributed to the fact that the victor nations set up the elements of international criminal justice, but excluded themselves from its application and its rules of procedure.

There are several explanations for the reluctance of national courts to apply the principle of universal jurisdiction. National courts, (where they are independent,) are concerned with the political implications following from one state's assertion of jurisdiction over the nationals of another state. Because Politicians and publics tend to be very attached to traditional concepts of sovereignty they feel greatly affronted by the

¹²⁰ As above.

¹²¹ As above.

legitimate application of widely accepted rules of international law. In most cases, judges, who are attached to the government in power at that time consider political or economic benefits at the expense of enforcement of international criminal law.

The strong western powers through their influence in establishing international criminal tribunals encouraged the demise of state immunity and the immunity of the Head of State and government. They have also agitated and determined who was to be prosecuted and for what crimes. Using the Security Council of the United Nations in which they are permanent members with veto power, and the General Assembly of the United Nations in which it is easy to influence allies, they not only influenced the establishment of tribunals, but also the appointment of Judges and Prosecutors to sit in those tribunals where they also provide funding. The effect of these actions is to heighten the sovereign inequality among nations. It is pertinent to remember that International law derives its legitimacy from the voluntary assent of nation-states with equal sovereignty. Without such consent, based on formal equality, and the equal application of the law, between its subjects, the international law notion ceases to have meaning.

While weaker states feel that the law does not fully apply to them, powerful states claim immunity against application of the rule of international community on their citizens.¹²² It is my view that there can be no international law without equal sovereignty, nor system of rights without state-subjects capable of being its bearers. Sovereignty is the quality that makes this equality possible because when it comes to the formation and implementation of international law, weak states have the same rights as powerful ones.

The proceedings of the International Criminal Court for the former Yugoslavia provide a good example. The Serb leader, Milan Martić, has been indicted for the use of cluster bombs on the Croatian capital Zagreb in May 1995.¹²³ However, the world witnessed through International television stations the bombing of Yugoslavia and NATO forces

¹²² The American Service members' Protection Act of 2000 grants the President authority to use military force to free American citizen from the ICC for further reference see Clark, D "Down the ICC slope", New court nothing like ICC found at <[http:// www.shinebone.home.att.net/icc.html](http://www.shinebone.home.att.net/icc.html)> (Accessed on 19 August 2004)

¹²³ Hayden, R. M (2000) "UN War Crimes Tribunal Delivers a Travesty of Justice", See also Black C and Herman, E (2000) "Louise Arbour: Unindicted War Criminal", Tribunal Watch, 17 February 2000. See also <[http:// www.listserve.acsu.buffalo.edu/archives/justwatch-l.html](http://www.listserve.acsu.buffalo.edu/archives/justwatch-l.html) > (Accessed at 19, September 2004)

using the same cluster bombs in its attack.¹²⁴ There is no concrete and undisputed evidence however showing that NATO commanders deliberately targeted non-military installations, which killed innocent civilians, achieved any military significance. The 'impartiality' of the Tribunal in such a situation is not forthcoming.

Article 16 of the International Criminal Tribunal for the former Yugoslavia states that the prosecutor shall act independently and shall not seek or receive instructions from any government. However, at a joint press conference with Tribunal prosecutor Louise Arbour, British Foreign Secretary Robin Cook declared, that 'we are going to focus on war crimes being committed in Kosovo and our determination to bring those responsible to justice': as if he and Arbour were part of the same team.¹²⁵ James Shea, NATO spokesman during the conflict, replying to a question at a press conference on 17 May 1999 as to the possibility of NATO leaders being investigated for war crimes by the Tribunal stated that it could not be possible as it was the NATO countries who established the Tribunal, who funds it and support it on a daily basis.¹²⁶

One Tribunal judge, Gabrielle Kirk McDonald, has referred to Madeline Albright the former US Secretary of State as the 'Mother of the Tribunal..¹²⁷ In breach of legal norms, NATO was assigned the function of arresting suspects and collecting data.¹²⁸ While the former President of Yugoslavia is being prosecuted, others who are accused of committing international crimes else where like Ariel Sharon, Henry Kissinger, allied forces in Iraq war, and NATO commanders with their Commander in-chiefs have not been arrested or charged.

There is no doubt that these tribunals are selective in the way they operate and that they depend on the world balance of power. In effect, it is the law desired, or permitted, by the strongest powers and their allies. For example, while Slobodan Milosevic, a "friend" of Russia, was rightly indicted, the same proceedings were not brought against the president of Croatia – a self-declared pro-Western nation – who was responsible, some years earlier, for a similar variety of ethnic cleansing against thousands of Serbs.¹²⁹

¹²⁴ As above

¹²⁵ As above <www.listserve.acsu.buffalo.edu/archives/justwatch-I.html > (Accessed on 14th, September 2004)

¹²⁶ Chandler D ' International Justice <http://www..Newsleftreview.net/NLR6.shtml> (accessed 14 September 2004)

¹²⁷ As above

¹²⁸ As above

¹²⁹ As above

The Belgium's highest court dismissed the case involving Us Secretary of State Colin Powell and Israeli Prime Minister Ariel Sharon, for genocide, crimes against humanity and grave breaches of the Geneva Conventions.¹³⁰ It was reported that the decision was expected to improve Belgium's diplomatic relations with the United States and Israel, which hit their lowest points in decades over the complaints. Under international pressure, Parliament amended the 1993 law to require that human rights complaints could only be filed if the victim or suspect was a Belgian citizen or long-term resident at the time of the alleged crime. Parliament also guaranteed diplomatic immunity for world leaders and other government officials visiting the country.¹³¹

The Belgian anti-atrocity law limits the ability of victims to file complaints directly and grant the Belgian government the power to transfer some cases out of Belgium. They also contain provisions designed to harmonize the Belgian law with the Rome Statute of the ICC and international law on immunity. The Bush administration had threatened to move NATO headquarters out of Belgium over the country's use of the law to file complaints against United States.¹³² On the same issue Belgian Foreign Minister Louis Michel said that as long as complaints based on the universal jurisdiction law were not thrown out, they can not resume high level official contacts with the United States.¹³³

In another case brought against Ariel Sharon, former Israeli General Amos Yaron and others for their alleged role in the 1982 Sabra and Shatilla massacres, filed in Belgium on 18 June 2001 by 23 survivors, the Belgian Court of Cassation, ruling in February 2003, dismissed the charges against Sharon pursuant to principles of customary international law regarding immunity for sitting heads of Government but held that the case could go forward against Yaron.¹³⁴ If the main aim of international justice is, as noted by Bassiouni, "to bring about some form of prevention and deterrence, then it cannot be selective". Until now, however, as Bassiouni recognizes, "international criminal law has never been free from political influence"¹³⁵..

¹³⁰ ' The Belgian court dismissed war crime case 'The Associated press 24 September 2003 also available at <http://www.globalpolicy.org/intljustice/universal/2003/0924bush.htm> (accessed on 24 September 2004)

¹³¹ As above

¹³² As above

¹³³ As above

¹³⁴ King L , 'International campaign for justice for the victim of Sabra and shatiraavailable at <http://www.indictsharon.net/case-guide.shtml> (accessed 24 September< 2004)

Montana A, 'The increasing demand for international Justice' at <http://www.federalist-debate.org> > (accessed 19 August 2004)

3.5 Immunity of Heads of State against prosecution before the Court

3.5.1 An overview of Concerns

We have mentioned elsewhere in this paper that it is a well-established principle in both national and International Law that both sitting and former head of state are immune from criminal prosecution. We have also showed the recent trend in international law since the Nuremberg International Military Tribunal that no person who should hide him/her self behind his/her official function to avoid criminal charge for an international crime. However the legal development of this position has not yet in reality settled. It seems that international community expressed their aspiration of punishing international crimes but were cautious not to apply it in a conventional sense.

In November 1999, South African Government refused NGO demands that the former tyrant of Ethiopia, Mengistu Haile Mariam be arrested when he visited the country from to receive medical treatment. A foreign Ministry official laughed out the suggestion and a request to arrest him saying as Africans, we cannot be seen to be arresting fellow Africans on the basis of law of tenuous status.

The Danish Centre for rehabilitation of victims of torture lobbied French authorities to get Mugabe arrested during his last visit in France in 2002 citing article 6 of Convention against torture, The French authorities took no interest on the request until Mugabe left for Zimbabwe before they replied saying that he is out of their jurisdiction.

In a criminal complaint filed in Dakar against former Chadian President Habré for political killings, torture, disappearances, and arbitrary arrests, the judge asserted that Senegalese courts had no competence over crimes committed in Chad. The prosecutor's office, in a reversal, joined his motion, and a state panel transferred the presiding judge off the case.¹³⁶ An appeals court nevertheless ruled that Senegalese courts had no competence to pursue crimes that were not committed in Senegal and Senegal's court of final appeals upheld the dismissal ruling on March 20, 2001.¹³⁷

All these examples reflect lack of political will to invoke international law even if all ingredients of crime are present.

In the *Pinochet case*, British police immediately executed the arrest warrant sent by Spain, and Britain's Home Secretary Jack Straw then twice decided to allow Spain's

www.hrw.org/justice/habre (Accessed 14 September 2004), also see Senegal- jurists Deplore Senegal's dismissal of torture charges against Hissene Habre available at <<http://www.icj.org//news>> (accessed on September 2004)

extradition bid to proceed it was after the House of Lord's decision for the third time. Mr Straw subsequently ordered his release and allowed him to go home allegedly for health reasons. Among of reasons for this international behaviour is the fact that, the application of this accepted norm through universal Jurisdiction has not freed from political influence. And indeed as current world politics suggests, those who are to appear in the International Criminal Court will be those without superpower support.

3.5.2 Judicial distinction between immunity of Sitting and Former Heads of State

It is interesting to note that while other jurisdictions deny immunity of Head of State there is no in international legal and political plane which altered the traditional application of sovereign equality and head of state immunity of the. There is however practice of some national courts which have attempted to interpret these principles based on development of international law although they have reached different conclusions in some cases.

It seems that there's stability in legal developments in so far as sitting or incumbent Head of State with respect to the most serious international crimes. For example. In Spain, the National Court decided in 1999 that it had no authority to prosecute sitting Cuban head of state Fidel Castro.¹³⁸ In March, 2001, France's highest court, the Cour de Cassation, held that Libyan Head of State Muammar el-Qaddafi was entitled to immunity in a suit alleging that Qaddafi was responsible for bombing a French DC-10 aircraft in an attack that killed 170 people.¹³⁹ The decision reversed a lower court ruling that had refused to recognise the sitting Libyan leader's head-of-state immunity.¹⁴⁰

Similarly, the United States has denied immunity to former Heads of State,¹⁴¹ but has never abrogated the immunity of a sitting head of state or head of government.¹⁴² Furthermore, even though some international agreements have called for stripping away head-of-state immunity, and although some countries have considered taking

¹³⁷ As above

¹³⁸ Fitzgerald, (2001) *The Pinochet Case: Head of state immunity within the United States* , 22 *Whittier Law Review* 1012-13.

¹³⁹ *Gadhafi Will Not Face Bomb Charge*, CNN.com, at <<http://europe.cnn.com/2001/WORLD/europe/france/03/13/crime.france.gaddafi>>(accessed 14 September 2004).

¹⁴⁰ As above.

¹⁴¹ *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1994).

¹⁴² Tunks M. A 'Diplomats or Defendants? Defining the future of Head of State immunity' (2002) 52 *Duke Law Journal* 663.

jurisdiction over foreign leaders, it is significant that no nation has yet gone so far as to actually pass judgement against a sitting head of state.¹⁴³

Considering the justifications for the Head-of-State immunity doctrine and recent state practice, the International Court of Justice declared that it "has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs."¹⁴⁴

There is no consensus based on international treaty to clarify or alter Head-of-State immunity law; other than those developed through international custom. It is however clear that international custom is recognised as one source of international law as per article 38 of the statute of October 24 1945 International Court of justice Therefore, to monitor the development of the customary law of head-of-state immunity, one should analyse how national and international courts have addressed recent immunity questions, how states have reacted to these decisions, what actions political branches have taken with respect to immunity issues, and any general statements nations have made about the degree of immunity enjoyed by Heads of State.¹⁴⁵

Emmanuel Noriega, the former President of Panama was arrested by the United States government and prosecuted on drug charges. Drug charges however has not been recognised by international law to be an international crime. The court rejected Noriega's argument that he was entitled to Head of State immunity, noting that the United States had never recognised him as a legitimate Head of State.¹⁴⁶ This decision is interesting on the one hand because it is contrary to the already established rule of immunity of incumbent head of state, while on the other, failure of the United states to recognise certain head of state doesn't bar recognition of that head of state by other countries.

The same development has also indicated double standards in application of international law. For example, while Noriega was denied immunity as Head of State, the United States Government has constantly recognised ousted head of State as legally head of state though had not established effective control of the nation. For

¹⁴³ Malanczuk, P, Akehurst's *Modern Introduction to International Law* (1997) 118 at 43 " State practice also includes omissions; many rules of international law forbid states to do certain acts, and, when proving such a rule, it is necessary to look not only at what states do, but also at what they do not do."

¹⁴⁴ Judgement by the ICJ in the case of *Congo v. Belgium*, 14 February 2002, para. 54

¹⁴⁵ Malanczuk (See n 142 above) 39.

¹⁴⁶ *United States v Noriega* 117F. 3D1206, 1212.

example, Haiti's President Jean-Bertrand Aristide was ousted in a military coup in 1991, but the United States continued to recognize him as Haiti's legitimate Head of State. Accordingly, a federal district court sitting in New York dismissed a lawsuit against Aristide that had accused him of orchestrating a political assassination, relying on the concept that Aristide enjoyed Head-of-State immunity under American law.¹⁴⁷

In another case, Charles Taylor, the Former Liberian President was served with an arrest warrant while he was a sitting Head of State attending an ECOWAS meeting in Accra, a Ghana's capital.

There is however a degree of confusion about the law in as far as immunity of former Head of State is concerned. After British authorities arrested Augusto Pinochet, on an international arrest warrant issued by Spain, The British Law Lords denied him immunity for acts of torture. Even though the ruling was decided on narrow grounds, the case cleared the ground for future cases on the immunity for former Heads of State, because, such serious abuses cannot fall within the scope of a Head of State's legitimate functions. Because crimes against humanity, torture, and other international crimes are outside the scope of what can be considered a state's official public functions, seeking accountability for these acts does not infringe up on a state's sovereignty.¹⁴⁸ Therefore, holding former heads of state accountable for their international crimes does not interfere with the goal of promoting diplomatic relations functions, because exercising jurisdiction over a former leader would not prevent current diplomats from travelling abroad and would not otherwise unduly disrupt international relations.

3.5.3 The Case of Senator Augusto Pinochet before the House of Lords in Britain

The world has recently witnessed dramatic developments and radically different interpretations of international law. This scenario was necessitated by the growing demand of the international community to do justice for the victims of brutality and atrocities committed by state's agents on one hand and traditional practice of the principle of sovereign equality and immunity of heads of state in international law on the other.¹⁴⁹

¹⁴⁷ Tunks, A (n 1) 672.

¹⁴⁸ As above 660

Bradley C A. & Goldsmith J L., 'Pinochet and International Human Rights Litigation', (1999) 7 *Michigan Law Review*. 2129, 2130 discussing the "growing tension between the international law principle of sovereign equality and the quest for universal justice.

The case of *Pinochet* is a landmark on the principle of immunity against criminal prosecution in international law. It is a landmark because, Pinochet is the first former head of state to be convicted in foreign court, and also the first former head of state whose immunity has been waived by the foreign national court.

Senator Pinochet was arrested when he was admitted at London Hospital on 16th, October 1998. His arrest was due to an extradition application by the Spanish court, which indicted him of torture, murder, and hostage taking of Spanish Citizens in Chile when he was the head of state in the Republic of Chile. The extradition request was ordered by the Spanish National Court of Criminal division, which held a plenary session of 5th, November 1998 and concluded that Spain is competent to judge the events by virtue of the principle of universal jurisdiction for certain crimes, a category of international law established by our internal legislation.

The court argued that the systematic use of torture was an international crime for which there could be no immunity even before the convention came into effect and consequently there was no immunity under customary international law for the offences related to torture alleged against the applicant. This view was shared by Lord Millet and Lord Phillips in the case of *Pinochet*¹⁵⁰

The two main issues raised in the House of Lords were whether under British law, persons could be extradited from the United Kingdom to stand trial in another country for an alleged offence. The Court listed conditions that the state seeking extradition (in this case Spain) has required to fulfil. The offence should be serious carrying potential sentence of at least six months of imprisonment; there must be sufficient evidence that the offence was committed; the offence must constitute an offence under the law of both countries in this case the United Kingdom and Spain, and that the “double criminality” rule must exist at the time of the commission of the alleged offence, not at the time of the bringing of the extradition proceedings.¹⁵¹ The second issue was whether the offences alleged to have been committed were extraditable. Did Senator Pinochet former head of state have immunity against prosecution?

Rv Bow Street Metropolitan Stipendiary Magistrate and others , ex parte Pinochet Ugarte , {1998} 3 WLR 1456 at 1463

¹⁵¹ Barker CJ, The Case against Pinochet some legal and political implications at <[http:// www.unc.edu/dept](http://www.unc.edu/dept)> (Accessed on 19 August 2004)

The majority decided the case, in favour of extradition, holding that a head of state that ordered or committed torture was not, when so doing, acting as a head of state. Lord Steyn wrote:

The development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'état, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State.¹⁵²

In response to this decision, the Chilean Government requested, on October 14, 1999, that the Home Secretary consider releasing Pinochet on medical grounds. Home secretary Straw responded by arranging for a medical examination by four prominent British doctors. The examination took place on January 5, 2000 and established that Pinochet was unfit to stand trial though the report presented to Straw was not released to the press or, more importantly, to the foreign judicial authorities requesting Pinochet's extradition. This, it was explained, was because of medical confidentiality. Instead, Straw merely declared that, on the basis of what he had seen, he was "minded" to order the release of Pinochet¹⁵³.

The intertwined character of the law and politics in the *Pinochet* case, and the way in which rules and legal institutions constrained the behaviour of politicians and judges, may be best exposed through a consideration of the different decisions of Minister Jack Straw and an appeal for his release by the former Prime Minister Baroness Margaret Thatcher.

Throughout the two appeals in the House of Lords, the court reached the conclusion that Pinochet had no immunity due to the commission of the international crimes, and Jack Straw consistently allowed the extradition of Pinochet to Spain to proceed under his discretion. However, in the third appeal he allowed Pinochet to go home free for health reasons.

In the course of the trial, the Amnesty International with other Human Rights organizations asked the attorney general to give consent to a private prosecution and he refused, as did the British government with respect giving consent to. This position strongly suggested that the British Government preferred to have seen Pinochet

¹⁵² As above p1506

¹⁵³ Byers, M 'The law and politics of Pinochet case' (2000) 10 *Duke Journal of international law* 438.

returned to Chile. In his public statements, however, Jack Straw was careful to insist that the matter was one for the courts, and not for politicians.¹⁵⁴ The Government had undoubtedly been advised that the chances of the courts ruling against Pinochet were extremely slim, and concluded that the potential for political damage could dramatically be reduced by having it seem that the law was entirely responsible for what, in some quarters (including the grassroots of the Labour Party) would have been an extremely unpopular decision¹⁵⁵.

One cannot however undermine Margaret Thatcher's influence over Straw's decision to allow Pinochet return home. The Ex-Conservative Prime Minister demanded that former dictator Augusto Pinochet be allowed to return to Chile. In her letter dated October 21, she wrote:

I have better cause than most to remember that Chile, led at that time by General Pinochet, was a good friend to this country during the Falklands War," An essential part of that process has been the settlement of the status of General Pinochet and it is not for Spain, Britain or any other country to interfere in what is an internal matter for Chile. Delicate balances have had to be struck in Chile's transition to democracy, balances with which we interfere at our peril."¹⁵⁶

There were other reasons for British politicians to seek to influence the Home Secretary's decision in allowing Pinochet to return home. Pinochet helped Thatcher's 1982 military adventure against Argentina by providing a crucial base for British soldiers and their planes and detailed intelligence about Argentine military preparations. Other newspapers have commented that Pinochet allowed British warplanes to use Chilean airbases and even repainted them in Chilean Air Force colours. A former Special Air Service officer, Ken Conner, told the *Guardian* that British troops were allowed to spy on Argentine airfields from Chile.¹⁵⁷ Mario Artaza, Chile's ambassador to London, said that medical treatment was not the only reason for Pinochet's trip to London. According to Chilean sources, at the time of his arrest, Pinochet, was on a "special mission" negotiating an arms contract, including the possible purchase of two frigates from British companies.¹⁵⁸

¹⁵⁴ Carrol ,R 'Pinochet decision for straw', *Guardian* London October 19th, 1998

¹⁵⁵ Parker, A Ruling 'Cheers labour Party Financial times', December 10, 1998 6

¹⁵⁶ 'Former British Prime Minister calls for Pinochet Release' *Times* of London, 23 October, 1998,also available at <[http:// www.wsws.org/index.shtml](http://www.wsws.org/index.shtml)> (accessed 24 September 2004)

¹⁵⁷ As above

¹⁵⁸ As above.

3.5.4 The Case of Yerodia before the International Court of Justice

A year after the House of Lords gave judgment against Pinochet, a Belgian judge issued an international arrest warrant against Yerodia, the Minister of Foreign Affairs of the Democratic Republic of Congo. The warrant accused Yerodia of crimes against humanity and grave breaches of the 1949 Geneva Conventions and their Additional Protocols. Other charges included delivering speeches inciting racial hatred.¹⁵⁹ Belgium asserted that it was exercising its universal jurisdiction to try international crimes, and that Belgian law did not recognize any special immunity.

The Congo asked the ICJ to require Belgium to annul the arrest warrant on the grounds that (a) Belgium's purported claim to be able to exercise universal jurisdiction violated the sovereignty of the Congo and (b) failing to recognize Mr. Yerodia's immunity was unlawful under international law. The Court then compares the functions of Foreign Ministers with those of Ambassadors and other diplomatic agents on the one hand, and those of Heads of State and Heads of Governments on the other, whereupon it reached the following conclusion:

a Minister for foreign affairs are such that, throughout the duration for his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and inviolability protect the individual concern against any act or authority of another state, which would hinder him or her in the performance of his or her duties.¹⁶⁰

On the other hand, the Court, on considering State practice in the field of war crimes and Crimes against humanity decides that:

"It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."¹⁶¹

This reasoning is unfortunate; first, of all, there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution. I agree that international comity and political wisdom may command restraint, but there is no obligation under international law on States to refrain from exercising jurisdiction in the case of incumbent Foreign Ministers suspected of war crimes and crimes against humanity. Secondly, international law does not prohibit, but instead encourages States to investigate allegations of war crimes and crimes against humanity, even if the

¹⁵⁹ Warrant Arrest of April 11, 2000,

¹⁶⁰ Judgment by ICJ (n 144 above.)

¹⁶¹ As above , para. 58

alleged perpetrator holds an official position in another State. For this matter, Belgium did not violated an obligation under international law by issuing and internationally circulating the arrest warrant against Mr. Yerodia.

While the ICJ was delivering its judgment the majority of judges did not consider its own previous decision, which would have influenced them to reach different conclusion. one of the leading precedents on the formation of customary international law is the *Continental Shelf* case, where the Court stated,:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremony and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.¹⁶²

In the *Nicaragua* case, the Court held that:

Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice . . . The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.¹⁶³

In the present case, there is no settled practice (*usus*) about the postulated "full" immunity of Foreign Ministers to which the International Court of Justice refers in paragraph 54 of its present Judgment. There may be Limited State practice about immunities for current¹⁶⁴ or former Heads of State¹⁶⁵ in national courts, but there is no such practice concerning Foreign Ministers.

At a time when the international community was hailing the House of Lords decision in Pinochet case, the decision of the ICJ granting immunity to a Minister of Foreign Affairs undermined the progress of international humanitarian law as consecrated in the

¹⁶² *North Sea Continental Shelf case*, Judgment, I.C.J. Reports 1969, 44, para. 77.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, 97-98.

¹⁶⁴ Cour de Cassation (Fr.), 13 Mar. 2001 (Qaddafi).

¹⁶⁵ *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, 25 Nov. 1998, All. ER (1998), 897

statutes of international tribunals. It will also lead to 'a watered-down system of international criminal justice. Will also encourages governments to appoint persons to cabinet posts in order to shelter them from prosecutions on charges of international crimes. The Yerodia case is an example of this reasoning. When Yerodia was charged of the offence he was a minister of foreign affairs for fear of the arrest should he visit foreign countries, he was appointed minister of education, It is however interesting to find that after the International Court of Justice decision he was appointed to a higher senior post of Vice President of the Democratic Republic of Congo which he holds today.

With the recent decision by the UK House of Lords in the Pinochet case, which created ground for the future commitment to rooting out impunity for the gravest international crimes' the ICJ would be called on to consider it instead of deciding towards facilitation of relations between states as opposed to strengthening jurisprudence on international law and international crimes.

3.6 Concluding remarks

This chapter has tried to show that there are both contradicting judicial decision and their implementation when the principle of immunity of both former Head of State and incumbent are tested in different jurisdictions. Different interpretations of this principle are however attributed to different interests those jurisdictions have in defendants, ranging from economic, political and security interests or both.

The chapter has also tried to show that the erosion of equality among nations in determining international issues has led to the instability of some international rules, including, *inter alia* the application of the principle of universal jurisdiction in prosecuting alleged war crimes, and crimes against humanity.

There are selective tendencies in determining who should to be prosecuted for alleged international crimes. This has led to some states threatening others with imposition of political or economic sanctions should those other state prosecute their political allies. The American attitude on Belgium attempted prosecuting Ariel Sharon, Bush and Colin Powell for war crimes and crimes against humanity are good examples of this. Also, American and Israel opposition to the International Criminal Court express lack of political will to respect international consensus on international criminal justice.

It is sad to see Congolese Tutsi who perished as a result of Yerodia's ethnic hatred and incitement to commit genocide find no legal remedy in international law. While

yerodia would be legally answerable for his acts after his term of office ends, there is no sign of such occasion as his government will retain him in office in order shelter him from this crime. The dead and their relatives there fore remain without remedy.

CHAPTER IV – CONCLUSION AND RECOMMENDATIONS

4.1 Conclusions

This study has concentrated on the principle and practice of Head of state immunity under international law. The main focus however has been on the interpretation of different international conventions allegedly restricting immunity of both former and incumbent Head of State. This study did not intend to suggest that Head of State, whether former or incumbent, should have immunity neither did it suggest that Head of State, should not be punished through international legal procedure. on the contrary, it has consistently argued that for the purpose of international harmony to exist, international law, norms and practices should be complied with.

It is also our argument that states are the main actors in international law and thus their consent is needed to harmonise international law and justice. However, this study has shown that there is an erosion of this practice. Some states have created a situation of being above other states in deciding international matters. The acts of aggression in the name of international humanitarian intervention should not always be condoned without international consent through the United Nations. This will lead to one state becoming international police, which will cause more harm than good.

The inequality of states in determining international issues undermines international consensus, which is the foundation of international stability and international law. The application of the principle of universal jurisdiction has proved that inequality between States is still dominant among western states. For example, has the international community opted for punishing Head of State would have been stated earlier through international convention? This means that different states practice has become *jus cogens*, no doubt the principle of immunity of head of state as applied in customary international law is *jus cogens* in itself. I agree that the crime of torture and state immunity are *jus cogens*, however a treaty which is in conflict with an existing *jus cogens* norm is void, no doubt thus that immunity of Head of State or of the state has long established and accepted by many states throughout the world, and therefore takes priority in the hierarchy of principles. It implies that parts of torture convention are therefore void to the extent of conflict with the *jus cogens* norms on state immunity.

Surely the framers of the legislation would not have intended this conflict. Moreover, given the position of Head of State as it relates to the doctrine of immunity had the framers intended former Heads of State to be liable for alleged acts, they would have made express provision for such leaders. In that regard, it is highly unlikely that

Senator Pinochet would have as Head of State signed a document, which led to his possible extradition to Spain for alleged acts of torture. The statutes of the International Criminal Courts for the former Yugoslavia and Rwanda and that of International Criminal Court specify however that the official functions of a defendant for example as Head of State, do not exonerate such a person from criminal responsibility.

Although the *Pinochet case* is a celebrated one for human rights and humanitarian activists, on the other hand it has created confusion on future of international sovereignty, harmony and security. All incumbent Heads of State will at one time exit office, unless he or she dies in office. There is a likelihood therefore, that many states will utilise this judgment to apply for extradition of former heads of states who are believed to have committed international crimes in their countries. For example, future Iraq leaders may apply for the extradition of US President George Bush to be tried in Iraq, or the Serbia authorities may apply for the extradition of Tony Blair, or former President Bill Clinton, while Argentinean authorities may apply for the extradition of Baroness Margaret Thatcher for atrocities committed during the Falklands war.

There is also the likelihood of incumbent Heads of State refusing to relinquish power in fear of being prosecuted by their opponents or Western governments for their past human rights records. Considering the nature of the office of Head of State, which is likely to be tainted by blood through state actors, the international community should set the standard of solving this impasse.

The paper has also argued that states are not equal. There can be no “dignity” or “respect” when statehood is an attribute of the governments, which presently rule others through proxy. The movement for global justice’ is ‘a struggle against sovereignty’. Sovereign equality is seen, by these ideologues as a legal fiction, and as a mask for the abuse of power. International law is merely an ‘anachronism’, a historical hangover, while ‘some of its classic doctrines—sovereign and diplomatic immunity, non-intervention in internal affairs, non-compulsory submission to the ICJ, equality of voting in the General Assembly—continue to damage the human rights cause and practice.

The combination of the demise of head of state immunities with the notion of command responsibility (whereby the supreme military or civilian authorities of a State may be held criminally liable for crimes perpetrated by their subordinates, if they failed to prevent or repress those crimes) marks the end of traditional impunity. It is indeed this

innovative step that scares so many States and makes them unwilling to ratify the court's statute.

4.2 Recommendations

The experience of NATO intervention which ended in establishing the International Criminal Court for the former Yugoslavia, and current aggression of Iraq by the United States and Britain without United Nations approval (which also involved establishing an Iraq court to prosecute Saddam Hussein,) increasingly convinces weaker states that there is nothing like international justice where the prosecution of international justice turns out to be the prerogative of the West. This trend is dangerous to world peace and security. It is therefore recommended that the traditional practice of consent of states in determining international matters with equality of nations should be enhanced.

While it is appreciated that national interest should be considered in the cause of determining international matters, the custom and practice of nations, which forms rule of *jus cogens* should be adhered to. The Principle of nations to prosecute offenders in international law should be equally applied to avoid the insubordination. It is inconceivable to see that the general application of rules of international law is very selective where it punishes some and exonerates others. The application of rules of Universal jurisdiction is the case in point.

Considering the contradictions existing in the jurisprudence on immunity of Heads of State in international law, it is recommended that the international community adopt a standard measure which expressly defines the position of former Heads of State instead of leaving the issue to unilateral decision as was the case in Spain and Britain with regard to *Pinochet* in the House of Lords.

While the Statute of the International Criminal Court seems to remedy this anomaly by providing that every person regardless of his or her position is subject to the jurisdiction of the court in case of commission of an international crime, it is no guarantee either because ICC is a complimentary court and not an exclusive court in international matters. After all the United States, attitude towards the court and its influence in determining the prosecution of others raises the danger of an sustainable international criminal justice system and international law in general.

It is recommended that the Security Council as it did in the case of former Yugoslavia and Rwanda should be able to adopt a resolution to establish International tribunal which has the capacity to prosecute former Heads of State instead of being prosecuted

by their national courts after leaving office. This is necessary because most of the time before leaving office a Head of State influences enactment of his/her amnesty, or threaten democracy by refusing to relinquish power in fear of future prosecution by his political rivalries. This process will also create confidence in the succeeding regime and the people of that country who will see this as an international act rather than being referred to as revenge from the successor, which could cause political instability.

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