

Hamburg University

Faculty of Law

Thesis

‘Immunity of Heads of State and its effects on the context of
International Criminal Law’

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Introduction

Crimes under international law are typically state crimes; leaving it up to the state of commission to prosecute international crimes would often mean making the perpetrators their own judges¹. Thus, first of all, must fill the gap of territorial jurisdiction.

I must analyze principles that allow exercise of extraterritorial jurisdiction, in major universal jurisdiction, their conditions, and obstacles. The main possible obstacle is international immunities. When Heads of State are in abroad, these two fundamental propositions may be conflict; 'exercise of universal jurisdiction' with 'international immunities'.

Then, should know crimes within universal jurisdiction, for determine that 'which crimes' displace 'which immunities', toward two final targets. On one hand, end impunity of Heads of State, as requirement of justice, and practically prevent them, as co-perpetrator of crimes under international law. On the other hand, in respect to international immunities as appropriate protection for senior state officials.

Therefore, in this dissertation, I try to know the balancing of two opposite interests, 'international accountability' with 'international immunities'. The immunity of Heads of State in international law “As rightly noted, this is an area of the law ‘which is in many respects still unsettled, and on which limited state practice casts an uneven light’.”²

This sentence, to best way describes reason of choice the subject of the dissertation. I have to research corresponding judicial practice, international judgments, international Conventions and Customs, and the opinion of jurist, etc. I

¹Werle Gerhard, Principles of International Criminal Law, 2005, p.63, [hereinafter, Werle, ICL2005]

²Watts Sir Arthur, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, 247 Recueil Des Cours 1994, at 52, In: Bianchi Andrea, Immunity versus Human Rights: The Pinochet Case, In: 10EJIL1999, p.255

hope to clear some dark situations, under the helpful comments and supervisory of Professor Dr. Oeter and jury Professors.

International immunities bar exercise of jurisdiction before ‘which courts’, national, internationalized and/or international criminal courts? In this respect, I distinguish enforcement of international criminal law in national law and in international law.

First Chapter for analyzing jurisdiction of national courts, and jurisdictional immunity of Heads of State, particularly, by consider the national legislation and judicial practice of Belgium, Germany, and France.

Second Chapter exclusively considers practice of international criminal courts, and internationalized courts, particularly immunity of Heads of State from their jurisdiction.

Chapter one:

**Evaluation of Encounter of National Law with the Subject
and Predicting Punishment of Heads of State:**

Section 1: International Crimes within Universal Jurisdiction:

Introduction:

The term ‘jurisdiction’ is most often used to describe the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons³. Jurisdiction is an attribute of state sovereignty⁴. International law determines which State has jurisdiction in which respects.⁵

In view of first chapter of the thesis, two fundamental objectives must be considered:

The first is to establish limits of jurisdiction that protect the independence and sovereign equality of States by balancing each State’s interest in exercising jurisdiction to advance its own policies with each State’s interest in avoiding interference with its policies resulting from the exercise of jurisdiction by foreign States.⁶

The second is to harmonize the rights of two or more States when they have concurrent jurisdiction that is when each of them has jurisdiction over the same matter.⁷

It is unclear whether a State may exercise jurisdiction only where there is a recognized basis for its exercise or, as asserted in the Lotus Case, in the absence of any prohibition on its exercise⁸. There are some recognized jurisdictions, particularly in the context of the international criminal law.

Traditionally, especially in the French, German, Italian, and Spanish legal tradition, one assigns to branch of law, called ‘criminal international law’(droit penal international), the whole area concerning the role of national courts in international

3Oxman Bernard H, Jurisdiction of States, In: Encyclopedia of Public International Law,1987,Vole 10, p.277 [This article was last updated November 2007, In: www.mpepil.com]

4Brownlie Ian, Principles of Public International Law, 2003, p. 297

5Oxman, op-cit, p.277

6Ibid

7Ibid

8 Ibid, (The Lotus Case (French v. Turkish) decided by the Permanent Court of International Justice (PCIJ) in 1927 about jurisdiction in criminal matters)

criminality, that is the grounds of jurisdiction asserted by national courts to adjudicate international crimes, the law applied by national courts to pronounce upon such crimes, as well as interstate judicial co-operation for the repression of criminal offences including extradition.⁹

Crimes under international law are all crimes that involve direct individual criminal responsibility under international law¹⁰. International criminal law encompasses all norms that establish, exclude or otherwise regulate responsibility for crimes under international law.¹¹

Compared to other branches of law, international criminal law has been slow in crystallization as a viable legal system; foremost among the reasons hindering its development is the shield of state sovereignty and its attendant ramifications.¹²

The dual movement of international criminal responsibility of individuals and international protection of individual and collective human rights eroded the barriers of state sovereignty, which historically left states with exclusive power over their citizens and over non-citizens on their territory¹³. ICL and IHRL have thus created exceptions to this exclusivity of state power over individuals by establishing duties and responsibilities which are incumbent on individuals irrespective of the laws and dictates of states, as well as by recognizing rights and privileges that attach to individuals and which states cannot infringe.¹⁴

International criminal law is an essentially hybrid branch of law: it is public international law impregnated with notions, principles, and legal constructs derived

⁹Cassese Antonio, *International Criminal Law*, First edition, 2003, p.15[hereinafter, Cassese, ICL2003]

¹⁰Werle, ICL2005, op-cit, p.25

¹¹In the terminology used here, international criminal law has the same meaning as 'Völkerstrafrecht', 'droit international penal' and 'derecho internacional penal'. Some authors use the term international criminal law in a broader sense, which includes not only the criminal aspects of international law, particularly crimes under international law, but also the international aspects of national criminal law, especially domestic rules on criminal jurisdiction over crimes with a foreign element, In: Ibid

¹²Kittichaisaree Kriangsak, *International Criminal Law*, 2001 .p.4

¹³Bassiouni M Cherif, *International Criminal Law*, Third edition, 2008, Vole I, p.41[hereinafter Bassiouni, ICL2008, V.I]

¹⁴Ibid

from national criminal law, IHL as well as human rights law¹⁵. With respect to ICL, individuals are deemed criminally responsible under international law for certain international crimes, namely *jus cogens* crimes, irrespective of what state law provides.¹⁶

Most international crimes first developed in customary international law and were thereafter embodied in conventional international law¹⁷. Since the Nazi atrocities and the Nuremberg trials, international law has recognized a number of offences as being international crimes.¹⁸

International crime consist of unimaginable atrocities which threaten the peace, security and well-being of the world as concern of international community as a whole that creates personal criminal liability on individuals.¹⁹

Let us return to the jurisdiction in accordance with requirements of international (criminal) law for prosecuting international crimes before national courts.

1: The Territoriality:

Exclusivity of jurisdiction of States over their respective territories is a central attribute of sovereignty²⁰. In all systems of law, the territorial character of criminal law is fundamental²¹. Historically, however, personality rather than territoriality was the basic principle of jurisdictional order, only in the seventeenth century did territoriality rise to prominence; although territoriality is nowadays the primary basis of jurisdiction.²²

¹⁵Cassese Antonio, International Criminal Law, Second edition, 2008, p.7

¹⁶Bassiouni, ICL2008, V.I, op-cit, p.41

¹⁷Ibid, p.129

¹⁸Wilkinson Browne (Lord in UK House of Lords)Judgment 24 March 1999, 38ILM 1999, p.582

¹⁹Preamble of the Rome Statute

²⁰Steinberger Helmut, Sovereignty, In: Encyclopedia of Public International Law, op-cit, p.413

²¹From Judgment of ICJ (1927), Lotus Case,p.20, In: Brownlie, op-cit, p.301

²²Ryngaert Cedric, Jurisdiction in International Law, 2008, p.42

Whenever a criminal offence occurs, the best judicial forum for its prosecution is the court of the territory where the crime has been committed²³. Montesquieu, Voltaire, Rousseau, and Beccaria insisted on the importance of territoriality in criminal law.²⁴

In 1764 Beccaria, more than any other developed the theory of territoriality; in his opinion, the adoption of this principle was warranted on two grounds²⁵. First of all, as State laws vary, one should only be punished in the place where one has infringed the law²⁶. Secondly, it is only just that a crime, which constitutes a violation of the social contract, be punished in the place where the contract was breached.²⁷

German legal experts, such as Kestlin and Martin, announce explicitly that the government must have complete supervision on all actions taken place in own domain, but what is taken place outside of this territory, the state is stranger with respect to them²⁸. The criminal does not infringe more than one law and that is the law of a country, commissioned in its territory and the criminal has refrained the obedience of that law's order, and if the state pays to crimes that have been placed in abroad with respect to own citizens or against its security, exerts own natural right self defense.²⁹

The territorial principle of criminal law is the first competence of execution of criminal jurisdiction. Jurisdiction over criminal matters is primarily territorial; territorial jurisdiction encompasses the power to enact law (legislative or prescriptive

23Cassese Antonio, The Rationale for International Criminal Justice, In: Cassese, Antonio(Editor in Chief) The Oxford Companion to International Criminal Justice, 2009, p.123

24Cassese, ICL2003, op-cit, p.278

25Ibid

26Ibid

27C. Beccaria, an Essay on Crimes and Punishments, translated from the Italian, Fourth edition (London: F. Newberry, 1775), repr. (Brooklyn Village: Branden Press Inc., 1983), at 64, In: Ibid

28Hosseinejad Hosseingholi, International Criminal Law, 1994, p.42

29Ibid

jurisdiction), the power to construe and apply the law (adjudicative jurisdiction), and the power to enforce the law (enforcement jurisdiction).³⁰

The positive aspect of territorial principle jurisdiction consists in the principle that any crime that has occurred in the domain of sovereignty of one country by anyone (national or foreigner) will be punished according to criminal laws of that country by criminal courts of the same country other than in exceptional cases (criminal immunity:1-parliamentary immunity 2-political and diplomatic immunity).³¹

Territorial jurisdiction over crimes is widely recognized in national legislation. Pursuant to §3 StGB, German criminal law shall apply to acts committed on German territory³². Where a criminal offence occurs, is usually the easiest place to gather evidence and protect the rights of the accused (defendant know the law of the territory or at least knows and speaks a language shared by the trial, judge and jury). It is the best place for the society, the victims and their families becoming aware about the consequences of committing the crime.

However, in the case of international crimes, a major obstacle to the territoriality principle is posed by the fact that these crimes are often committed by state officials or with their complicity or acquiescence³³. Consequently, state judicial authorities may be reluctant to prosecute state agents or to institute proceedings against private individuals that might eventually involve state organs³⁴. Thus we have to fill the gap of impunity by relying on the exercise extraterritorial jurisdiction.

The negative aspect of territorial jurisdiction consists of the fact that any crime committed by anyone outside of sovereignty domain of one country, is liable to penal

³⁰Kitichaisaree, op-cit ,pp.38-39

³¹Azmayesh Seyed Ali, notes from International Criminal Law Course, 2000 , p.13,(According with Article 46 of the Constitution of the F.R of Germany, determine immunities of parliamentary member for a vote cast or for any speech or debate in the Bundestag or in any of its committees, and Article 86, The Constitution of the I.R. of Iran, In the course of performing their duties as representatives, they may not be prosecuted or arrested for opinions expressed in the parliament or votes cast in the course of their duties as representatives)

³²Bohlander Michael, German Criminal Code, 2008, p.35, (Pursuant to §9(1) StGB, place of the offence:1. An offence is deemed to have been committed in every place where the offender acted or, in the case of an omission, should have acted, or in which the result if it is an element of the offence occurs or should have occurred according to the intention of the offender, Bohlander, p.38)

³³Cassese, ICL2008, p.336, margin no.1

³⁴Ibid, p.337

legislation of the same country, the place of occurrence of crime, and is not investigated and punishable by punitive legal authorities of the first country save in exceptional cases (nationality of offender(s) or victim(s), real profits, international contract) that causes the development of jurisdiction.³⁵

Traditionally, states bring to trial before their courts alleged perpetrators of international crimes on the strength of one of three principles: territoriality, passive nationality, or active nationality³⁶. In general, continental European countries will more readily exercise extraterritorial criminal jurisdiction than common law countries.³⁷

2: The Active Personality Principle:

Nationality, as a mark of allegiance and an aspect of sovereignty, is also generally recognized as a basis for jurisdiction over extra-territorial acts³⁸. This principle consists of domestic competence with respect to crimes that have been committed by nationals (Active personality principle) or against nationals (Passive personality principle) abroad.

Jurisdiction based on the nationality of the perpetrator is a generally accepted principle of international law³⁹. The nationality principle creates duties and responsibilities for nationals towards their home State, this means that a person is answerable in his home state for wrongful actions committed abroad and is therefore subject to the jurisdiction of his original nationality.⁴⁰

³⁵Azmayesh, op-cit, p.14

³⁶Cassese Antonio, International Law, 2005, p.451 (It should be noted that the principle of protective jurisdiction is not mentioned by Professor Judge, Cassese, about prosecution of international criminals, and I follow him in this point).

³⁷Ryngaert, op-cit, p.85

³⁸Brownlie, op-cit, p.301

³⁹Harvard Research in international law, Draft Convention on Jurisdiction with Respect to Crimes, 29 A. J. Int'l L.435(Supp.1935), in: Blakesley Christopher L. Extraterritorial jurisdiction, In: Bassiouni M Cherif, International Criminal Law, Third Edition, 2008, Vole II, p.116, [hereinafter, Bassiouni, ICL2008, V.II]

⁴⁰Malekian Farhad, International Criminal Law, Vole 1.1991, p.13

Europeans have important reasons for asserting jurisdiction over nationals who have committed offences outside national territory⁴¹. A national who has committed an extraterritorial offense, but who has returned to his country before the foreign authorities have caught up with him, is exempt from extradition⁴². As states often refuse to extradite their own nationals, active personality jurisdiction may even be necessary if offenders are not to go unpunished⁴³. The nationality principle is considered a complementary principle to the territorial principle by the legislations of most European States.⁴⁴

Some countries, for exercise of active personality, need double incrimination (punishable under the law of the commission of the crime and also under the law of the Forum State).

For example, §7(2)(1) StGB provides:

“German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender was German at the time of the offence or became German after the commission”.⁴⁵

For international crimes, they normally do not require that the offence be also punishable by the territorial state, as it is sufficient for the offence to be regarded as an international crime by international rules (be they customary or treaty provisions)⁴⁶. In Germany, it seems that the word ‘other offences’ in §7(2)(1) StGB

41Roger Merle and Andre Vitu, *Traite de Droit Criminel*(4th ed.1989)at 394 In: Blakesley, op-cit, p.117

42Blakesley, Ibid

43Ryngaert, op-cit, p.90 , (The French Law of March 10, 1927, for example, prohibits extradition of nationals. It should be noted that extradition of nationals is constitutionally forbidden but by December 2000 amendment (in Germany) allows for exceptions to the International Criminal Court and to European Union countries)

44Van BemmeLen, J.M. Reflections and observations on International Criminal Law, p.84 In: Malekian, op-cit, ,p.13

45Bohlander, op-cit, p.38, (It seems that the last subject ‘became German after the commission’ is very important in the fight against impunity and ensuring the punishment of any crime)

46Cassese, ICL2008, op-cit, p.337,margin no.2

explicitly that double incrimination is not necessary for conventional international crimes that were mentioned in §6(9) StGB.⁴⁷

3: The Passive Personality Principle:

The victim's nationality of the prosecuting state is the basis of the passive personality principle. A state can protect its nationals abroad when their rights have been violated by the nationals or the government of another state.⁴⁸

This jurisdiction is the most controversial basis of jurisdiction because it means the lack of confidence in the criminal system of another foreign country concerning the protection of other country's nationals. Also from a sovereignty perspective the application of a foreign state's criminal law in a given territory raises concerns⁴⁹. The principle is grounded both on: (i) the need to protect nationals living or residing abroad; and (ii) a substantial mistrust in the exercise of jurisdiction by the foreign territorial state.⁵⁰

Normally states invoking this ground of jurisdiction also provide that, whenever the accused is abroad, a double incrimination is required for prosecuting a crime, namely that the offence be considered as such both in the territorial state and in the state of the victim⁵¹. The rationale for this requirement may be found in the general principle of legality (*nullum crimen sine lege*) which is common to all national legal systems, in addition to being a general principle of international criminal law.⁵²

47(§6 StGB: Offences committed abroad against internationally protected legal interests: German criminal law shall further apply, regardless of the law of the locality where they are committed, to the following offences committed abroad: (9): Offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad).

48Malekian, op-cit, p.13, [German criminalists of the 19th century promoted the notion of Real system, a combination of the passive personality and the protective principle theory. It emphasized the protection of the state-injury to a victim injured state. In: Blakesley, op-cit, p.121]

49Ryngaert, op-cit, p.93

50Cassese, ICL2008, op-cit, p.337, margin no.3

51Double criminality is usually considered a procedural requirement of extradition, In: Ibid

52Ibid

In accordance with §7(1) StGB, German criminal law shall apply to offences committed abroad against a German, if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal jurisdiction.⁵³

However, as far as international crimes are concerned, this requirement is replaced by the requirement that the offence be considered as an international crime by international law, whatever the content of the legal regulation in the territorial state⁵⁴. In this connection, the decision of the Supreme Court of Argentina explicitly held that as the offence of which the defendant stood accused, namely a war crime, was internationally regarded as an international crime, this sufficed for the purpose of the double incrimination principle.⁵⁵

Notwithstanding the above, as correctly was written: Donnedieu de Vabres forcefully criticized passive personality jurisdiction as a solution that would, unlike the universality principle, not correspond to the way the judicial system is domestically recognized, would not close an enforcement gap, and would lack any social aim of repression⁵⁶. Instead, it would merely be predicated on the egoism of States, and increase competency conflicts between States.⁵⁷

The passive nationality principle should only be relied upon as a fall-back, whenever no other state (neither the territorial state, nor the state of which the alleged criminal is a national, nor other states acting upon the universality principle) is willing or able to administer criminal justice.⁵⁸

⁵³Bohlander, op-cit, p.38, [France has also passed legislation based on the passive personality principle (Art. 113-7 of the Penal Code). The principle has been included in a number of treaties dealing with terrorist offences or human rights violations, in : Akande Dapo, Passive Personality Principle, In: The Oxford Companion to International Criminal Justice, 2009, p.452]

⁵⁴Cassese, ICL2008, op-cit, p.337, margin no.3

⁵⁵The Supreme Court of Argentina delivered in Priebke on 2 November 1995, concerning the extradition to Italy of a German national who had allegedly committed crimes in Italy and subsequently acquired Argentinean nationality, In: Ibid

⁵⁶HFA Donnedieu de Vabres, Les Principes modernes du droit penal international(1928)170, In: Ryngaert, op-cit, p.93

⁵⁷Ibid

⁵⁸Cassese, ICL2008,op-cit, p.338, margin no.3

A. Universal Jurisdiction:

The subject of aforementioned jurisdictions is common crimes and international crimes. On the contrary, the subjects of universal jurisdiction are in majorly⁵⁹ international crimes. The universality principle is also relevant in the context of international criminal law, since it establishes the jurisdiction of domestic courts to prosecute and punish crimes under international law.⁶⁰

The term ‘universal jurisdiction’ appears to have been coined by Cowles in 1945.⁶¹ Jurisdiction over ordinary crime depends on a link, usually territorial, between the state of trial and the crime itself, but in the case of crimes against humanity that link may be found in the simple fact that we are all human beings.⁶²

Crimes under international law are directed against the interests of the international community as a whole⁶³. It follows from this universal nature of international crimes that the international community is empowered to prosecute and punish these crimes, regardless of who committed them or against whom they were committed⁶⁴. The authority to punish derives here from the crime itself (‘criminal jurisdiction is based solely on the nature of the crime’).⁶⁵

Crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied; first, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*⁶⁶. Secondly,

⁵⁹It must be noted that the principle of universal jurisdiction applies to crimes under international law, plus piracy, slave trade and torture, In: Werle, ICL2005, op-cit, pp.59-60, margin no.327

⁶⁰Ibid, p.39

⁶¹Willard B Cowles, Universal Jurisdiction over War Crimes 33Cal.L.Rev.177(1945) In: Kamminga Meno T, lessons learned from the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offenses, 23 HRQ 2001,p.943

⁶²Robertson Geoffrey, Crimes against Humanity, The Struggle for Global Justice, 1999, p.222

⁶³Werle, ICL2005,op-cit,p.58

⁶⁴Ibid

⁶⁵As is correctly stated in Principle 1(1) of the Princeton Principles on Universal Jurisdiction, in S. Macedo (ed.), Universal Jurisdiction (2004), p.21, In: Ibid, p.59

⁶⁶Millet (Lord in UK House of Lords) Judgment 24 March 1999, 38 ILM 1999, p.649

they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.⁶⁷

The authors of the Princeton Principles proposed the following definition of universal jurisdiction:

For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.⁶⁸

Universal jurisdiction for certain international crimes is a theory of jurisdiction that is predicated on the policy of enhancing international criminal accountability, whereby the enforcing state acts on behalf of the international community in fulfillment of its international obligations, and also in pursuit of its own national interest.⁶⁹

Universal jurisdiction is the right of a state to ‘define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern’.⁷⁰ The doctrine of universal jurisdiction over crimes against humanity is justified because it may make some torturer pause at the prospect that sometime, somewhere, some prosecutor may feel strongly enough about his crime to put him on trial.⁷¹

In most international treaties about every kind of international crime and crimes under international law this rule has been used; universal jurisdiction is then the

67Ibid, [Exercise of Universal Jurisdiction allowed by Customary International Law; It would appear that the first case in which a person accused of crimes against humanity was tried in a State with which he had no formal links was Eichmann, in 1962 by the Supreme Court of Israeli. This proposition was taken up by US courts in Yunis and in two decisions in Demjanuk and, in Pinochet. These propositions were taken up and restated by an Argentinean judge in Simon Julio, Del cerro Juan Antonio , In: Cassese, ICL2003,op-cit, pp.293-294, passim]

68The Princeton Principles on Universal Jurisdiction, Principle 1(1), 23 Jul 2001(available at www.princeton.edu/lapa/univ_jur.pdf), In: Kemp Gerhard, Individual Criminal Liability for the International Crime of Aggression,2010,p.175

69Bassiouni M Cherif, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, In: Bassiouni , ICL2008, Vole. II, op-cit, p.167 [hereinafter, Bassiouni, Universal Jurisdiction]

70Restatement (Third)of the foreign relations law of the UNITED STATES, § 404 Cmt.a(1987)stating that ‘international law permits any state to apply its laws to punish certain offences although the state has no links of territory with the offense, or of nationality with the offender(or even the victim)’ , In: Geraghty Anne H, Universal Jurisdiction and Drug Trafficking: A Tool for Fighting one of the World’s Most Pervasive Problems, 16 FJIL 2004, p.377

71Robertson,op-cit,p.22

negation of the right of states to grant asylum to offenders⁷². Current international law, however, increasingly requires states to deny a safe haven to those who have committed certain international crimes such as genocide, crimes against humanity, war crimes, and torture.⁷³

The extension of jurisdiction through the principle of universality is independent of the law of the place where the crime is committed and does not presuppose cooperation between states, as do extradition negotiations.⁷⁴

Universal jurisdiction is the right of any state to try alleged offenders of certain international crimes that violate fundamental values recognized by the international community as a whole, even though those crimes were committed abroad by foreigners against foreigners.

A.1: The Vicarious Administration of Justice:

There is a distinction between the principle of vicarious administration of justice and the Universality principle⁷⁵. Pursuant to the former, which is not widely used by States, States prosecute an offence as representatives of another State, if the act is also an offence in the territorial State and extradition is impossible for reasons not related to the nature of the crime.⁷⁶

The notion of international solidarity in combating crime is best reflected in the principle of the vicarious administration of justice, based on the postulate *aut dedere aut punire* (or better: *judicare*)⁷⁷. (West) German criminal law applies to crimes

⁷²Ryngaert, op-cit, p.119

⁷³Bassiouni, ICL2008, V. II, op-cit, p.44

⁷⁴Meyer Jurgén, The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction, 31 Harvard ILJ1990, p.115

⁷⁵Several principles of extraterritorial jurisdiction can be distinguished: the nationality, the passive personality, the protection principle, the principle of vicarious administration of justice and the universality principle. In: Werle op-cit p.39, and Meyer, op-cit, p.115

⁷⁶In a 1958 case, the Supreme Court of Austria defined representational jurisdiction as follows: "The extraditing State also has the right, in the cases where extradition for whatever reason is not possible, although according to the nature of the offence it would be permissible, to carry out a prosecution and impose punishment, instead of such action being taken by the requesting State" (1958) 28 ILR 341, 342. Because of these restrictive conditions, petty or political crimes are not eligible for vicarious jurisdiction, In: Ryngaert, op-cit, p.102

⁷⁷Meyer, op-cit, p.115, [The maxim *aut dedere aut judicare* originated in a longer formula developed by Hugo Grotius in 1624 as '*aut dedere...aut punire*', in 1973 Professor Bassiouni postulated the Grotian maxim as *aut punire* to *aut judicare*, since the purpose of contemporary criminal law is to judicare those who are believed to

committed by foreigners who have been apprehended on German territory but have not been extradited because a request for extradition was never made, was refused, or was infeasible⁷⁸. Such conduct must be punishable by the law of the place where it occurred, unless that place lacks criminal law enforcement.⁷⁹

In accordance with § 7(2)(2) of StGB, German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender: 1... 2. was a foreigner at the time of the offence, is discovered in Germany and, although the extradition Act would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible.⁸⁰

The offense must be one for which extradition is permissible; petty offenses and offenses of a purely military or political nature cannot, therefore, be punished on this ground⁸¹. The comprehensive clause, StGB §6(9), should be seen as an example of the vicarious administration of justice.⁸²

It must be noted that this ground of jurisdiction only applies if the extradition request was never made, was refused or was infeasible. On the contrary, under the maxim *aut dedere aut judicare*: ‘There is a genuine right to choose between the two alternatives; to try perpetrators itself or hand them over to a state that is willing to prosecute’.⁸³ According to German doctrine, the first is an exercise of criminal jurisdiction on behalf of another State, whereas jurisdiction on the basis of the latter is exercised on behalf of the world community.⁸⁴

Even though its efficacy depends on the nature of the applicable extradition scheme, a combination of territoriality and the vicarious administration of justice

have committed a crime, and not to punish, until after guilt has been established. This maxim is the cornerstone of international cooperation in penal matters. In:

Bassiouni, JCL2008, V.II, op-cit, p.35 and p.45]

⁷⁸Meyer, Ibid

⁷⁹Ibid

⁸⁰Bohlander, op-cit, p.38

⁸¹Meyer, op-cit, pp.115-116

⁸²A. Schonke & H. Schröder, Strafrechtsgesetzbuch Kommentar, at 81, § 6(1), In: Ibid, p.115

⁸³Werle, JCL2005, op-cit, p.63, passim

⁸⁴Reydam Luc, Universal Jurisdiction International and Municipal Legal Perspectives, 2003, p.143

makes possible effective international cooperation⁸⁵. The Harvard Research on International Law (1935) considered the principle of vicarious jurisdiction not as an autonomous jurisdictional ground but as a modality of the universality principle⁸⁶. In 2004, France adopted a law similar to the German law.⁸⁷

Because of the absence of international protest against assertions of vicarious jurisdiction, such assertions appear as lawful under international law⁸⁸. This jurisdiction is very important for filling the gap of impunity, even for international crimes.

A.2: Universality and Sovereignty:

It is clear that here we are witnessing a confrontation between two different conceptions of the international community⁸⁹. The first is an archaic conception, under which non-interference in the internal affairs of other States constitutes an essential pillar of international relations⁹⁰. The second is a modern view, based on the need to further universal values; it implies that national judges are authorized to circumvent, if not remove, the shield of sovereignty.⁹¹

In conflicts between state sovereignty and the protection of human rights, international criminal law intervenes on the side of humanity; in this way it supplements and safeguards other human rights protection mechanisms, and to this extent aids in the protection of human rights⁹². In the present international community, respect for human rights and the demand that justice be done whenever

⁸⁵Meyer, op-cit, p.116

⁸⁶Harvard Research on International Law, Draft Convention on Jurisdiction with Respect to Crime, (1935) 29 AJIL 573, In: Ryngaert, op-cit, p.103

⁸⁷France now applies its criminal law to any felony or misdemeanor subject to a penalty of at least five years' imprisonment committed outside France by an alien whose extradition to the requesting State has been refused by the French authorities because the offence for which the extradition has been requested is subject to a penalty or to a safety measure that is contrary to French public policy, or because the person in question has been tried in the aforesaid State by a court which does not respect the basic procedural guarantees and the rights of the defence, or because the matter in question shows the characteristics of a political offence. Article 113-8-1, §1 French CP, In: Ibid, pp.103-104

⁸⁸Ibid, p.104

⁸⁹Cassese, ICL2003, op-cit, p.292

⁹⁰Ibid, [The prohibition of intervention in the exclusively internal affairs of a State has been firmly established as a principle of general international law as well as of UN law, UN GA Res.2625(XXV) although some aspects of its scope are still controversial, In: Steinberger, op-cit, p.411]

⁹¹Ibid

⁹²Werle, ICL2005, op-cit, pp.40-41

human rights have been seriously and massively put in jeopardy, override the traditional principle of respect for state sovereignty.⁹³

The exercise of this jurisdiction does not amount to a breach of the principle of sovereign equality of States, nor does it lead to undue interference in the internal affairs of the State where the crime has been perpetrated⁹⁴. International crimes are not domestic matters; as regards the prosecution of international crimes, the limits international law sets on the expansion of national criminal jurisdiction, particularly the prohibition on interference, are not affected⁹⁵. Thus, the principle of universal jurisdiction applies to crimes under international law.⁹⁶

Universal jurisdiction transcends national sovereignty⁹⁷. The rationale behind the exercise of such jurisdiction is: (1) no other state can exercise jurisdiction on the basis of the traditional doctrines; (2) no other state has a direct interest; and (3) there is an interest of the international community to enforce⁹⁸. Thus, states exercise universal jurisdiction not only as national jurisdiction, but also as a surrogate for the international community⁹⁹. In other words, a state exercising universal jurisdiction carries out an *actio popularis* against persons who are *hostis humani generis*.¹⁰⁰

Lord Phillips, in the Pinochet case, held that:

“The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail”.¹⁰¹

⁹³Cassese, ICL2008, op-cit, p.308

⁹⁴Cassese, International Law, op-cit, p.452, [Sovereign equality means that States enjoy an equal juridical status under general international law, In: Steinberger, op-cit, p.411]

⁹⁵Werle, ICL2005, op-cit, p.59

⁹⁶Ibid

⁹⁷Bassiouni, Universal Jurisdiction, op-cit, p.162

⁹⁸Ibid

⁹⁹Ibid

¹⁰⁰For a discussion of the circumstances under which a state may proceed *actio popularis* as a result of a breach of *obligatio erga omnes*, see Roman Boed, The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Right Violation, 33 Cornell Int'l L. J. 297, 299-301 (2000). See also Maurizio Ragazzi, The Concept of International Obligations *Erga Omnes* (1997); Ander de Hoogh, Obligations *Erga Omnes* and International Crimes (1996); cf. Barcelona Traction, Light and Power Co., Ltd. (Bleg. V. Spain), 1970 ICJ 3, 32 (Feb.5), In: Ibid

¹⁰¹Judgment November 1998, (House of Lords), 37 ILM 1998, at 289 per Lord Phillips, In: Sands Philippe, International Law Transformed? From Pinochet to Congo...? 16 LJIL 2003, p.46

Under the interpretation of the German Penal Code that the German Supreme Court (*Bundesgerichtshof*) propounded, the universality principle should also apply in Germany, at least whenever the obligation to prosecute is provided for in an international treaty binding upon Germany.¹⁰²

The German legislature reinforced that the trial of core crimes committed abroad by a foreigner is not at variance with the principle of non-intervention and that no link to Germany is required under §1 VStGB¹⁰³. The nature and severity of the crimes themselves form a sufficient linkage to allow the application of national criminal law¹⁰⁴. The point of view of national sovereignty, which in its interpretation as a principle of non-intervention sets limits to the state's power to regulate extraterritoriality matters, has no traction here.¹⁰⁵

Therefore, non-intervention in the internal affairs of other states cannot bar the exercise of universal jurisdiction, at least under conventional international law.

Notwithstanding the above, in practice respect to the aspects of sovereignty (namely the principles of non-intervention and sovereign equality of States) requires that we must limit exercise of universal jurisdiction through complementary and immunity principles. So we will discuss exercise of universal jurisdiction as a last resort (A.3), and will consider it in relation to principles of immunity, especially for the benefit of Heads of State (C.3.2), this respecting sovereignty as much as possible.

¹⁰²Cassese, International Law, op-cit, p.452, [In the context of international treaties, such a clause is superfluous, §6(9)StGB, for as soon as the duty to prosecute is assumed under a treaty, it is a matter of national law. In: Meyer, op-cit, p.115]

¹⁰³Handl Elisabeth, Introductory Note to the German Act to Introduce the Code of Crimes against International Law, 42 ILM 2003, p.996

¹⁰⁴Jessberger Florian, Universality, Complementarity, and the Duty to Prosecute Crimes Under International Law in Germany, In: International Prosecution of Human Rights Crimes, W. Kaleck, M. Ratner, T. Singelstein, and P. Weiss(eds.),2007, p.215[hereinafter, Jessberger, Complementarity]

¹⁰⁵Ibid

A.3: Universality and Complementarity:

Subsidiarity or complementarity principle implies that States only apply their laws to a foreign situation which another State with presumably the stronger nexus to that situation fails to adequately deal with.¹⁰⁶

As the Institute of International Law, declared it:

Article 3: The exercise of universal jurisdiction shall be subject to the following provisions: 3(c): Any state having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the state where the crime was committed or the state of nationality of the person concerned whether it is prepared to prosecute that person, unless these states are manifestly unwilling or unable to do so. 3(d) Any state having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a state having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such state is clearly able and willing to prosecute the alleged offender.¹⁰⁷

In my opinion, universality in relation with complementarity has two sides in practice. On the one hand: ‘Crimes under international law are typically state sponsored crimes, and thus the state of commission or the home country of the perpetrators and victims is, as a rule, itself involved in the crime, or at least not willing or able to punish those responsible’.¹⁰⁸ Thus we must exercise universal jurisdiction for fighting against international impunity.

On the other hand, as stated by Professor Cassese about complementarity: ‘perhaps a principled motivation, the intent to respect state sovereignty as much as possible’.¹⁰⁹ Thus, if we don’t consider it, this negates the principle of non-intervention in the internal affairs of another state.

¹⁰⁶Ryngaert, op-cit, p.186

¹⁰⁷The Institute of International Law, Krakow Session, 2005

¹⁰⁸Jessberger, Complementarity, op-cit, pp.220-221

¹⁰⁹ Cassese, ICL2008, op-cit, p.343, [The Rome Statute views the International Criminal Court as an emergency court, prepared to intervene only when, but whenever the state primarily responsible for prosecution is not able or willing to genuinely investigate and prosecute. This idea is expressed in the so-called complementarity principle, given form in article 17, Jessberger, Complementarity, op-cit, p.220].

Therefore, the Prosecutor has to balance between the two aforementioned sides and realities of the case. This point perhaps was one of the reasons of the discretionary prosecution exercised by the German Federal Prosecutor.

§ 153f of the Code of Criminal Procedure, added upon adoption of the VStGB, regulates the prosecutor's option to refuse to prosecute a crime under international law committed abroad¹¹⁰. If there is a domestic connection to the crime, there is a duty to investigate and prosecute on the part of the prosecutor, even if the crime was committed abroad¹¹¹. However, if there is no domestic connection to the crime, investigation and prosecution are discretionary.¹¹²

The German Federal Prosecutor's Office interprets its jurisdiction under § 153f StPO and §1 VStGB, to be subsidiary in regard to crimes committed abroad, and believes it should not supplant jurisdictions with primary authority.¹¹³

It seems to me that the German legislature read together the universality and complementary principles. This combination is consistent with international (criminal) law demands; exercise of universal jurisdiction for fighting against impunity on one side, and respect state sovereignty as much as possible on the other side.

110. § 153f reads as follow:

(1)...the public prosecution office may dispense with prosecuting an offence punishable pursuant to Section 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If...the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a State on whose territory the offence was committed or whose national was harmed by the office.

(2)...the public prosecution office may dispense with prosecuting an offence punishable pursuant to Sections 6 to 14 of the Code of Crimes against International Law, in particular if

1. there is no suspicion of a German having committed such offence,

2. such offence was not committed against a German,

3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated and

4. The offence is being prosecuted before an international court or by a State on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the office.

The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and is intended.

(3)... In: Jessberger, Complementarity, op-cit, p.216

111 Under the law, such a domestic connection exists, e.g., if the suspect is a German national; if he or she is a foreigner, but present in Germany, even if only temporarily; or if he or she can be expected to enter the country. In: Ibid

112 Ibid, (Discretion of the Federal Prosecutor, in Karlsruhe, to prosecute or not)

113 Thus, it maintains that universal jurisdiction should only be exercised if and to the extent that other states, especially those which are closer to the site of the crime or to the alleged perpetrators, are unwilling or unable to investigate and prosecute the crimes themselves. In: Werle Gerhard, Principles of International Criminal Law, Second edition, 2009, p.135, [hereinafter, Werle, ICL2009]

A.4: Universality and the ICC:

The Rome statute is neutral on the exercise of universal jurisdiction, although it does not of course prohibit the use of universal jurisdiction¹¹⁴. The ICC Statute purposely leaves open the question whether third states are obligated to prosecute international crimes under the principle of universal jurisdiction.¹¹⁵

The ICC will only be able to exercise jurisdiction on the basis of the territoriality principle and the active personality principle; this is likely to leave a large gap that can only be filled through the exercise of universal jurisdiction by domestic courts.¹¹⁶

Universal jurisdiction is not contrary to the principle of complementarity in the Rome Statute of the ICC¹¹⁷. Thus there will always be a need for states to investigate and prosecute core crimes¹¹⁸. Especially in the case of sham trials, there will still be a need for third states to investigate and prosecute.¹¹⁹

Unlike domestic courts the ICC will not have universal jurisdiction itself¹²⁰. The German Proposal was based on the international law principle of universal jurisdiction; in a discussion paper submitted to the preparatory committee, Germany explained its rationale as follows- unfortunately, the German proposal was rejected.

“Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, crimes against humanity or war crimes each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial State, territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice...There is no reason why the ICC -established on the basis of a Treaty

114Schabas William A, *The International Criminal Court A Commentary on the Rome Statute*, 2010, p.47

115Werle, ICL2005, op-cit, p.64

116Kamminga, op-cit, p.950, [Since the ICC statute does not provide for universal jurisdiction, unless referred to by the Security Council, In: Bassiouni, ICL2008, V.I, p.56]

117Bassiouni M Cherif, *Universal Jurisdiction unrevisited: The International Court of Justice Decision in Case Concerning The Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 12 *Palestine Y. B. Int'l L.* (2002-03), pp.40-41 [hereinafter Bassiouni, *Universal Jurisdiction Unrevisited*]

118Ibid, p.41

119Ibid

120Kamminga, op-cit, p.950

concluded by the largest possible number of states- should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the State Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes”.¹²¹

Since referrals to the ICC are made by a state party, or by a non-party state, it is difficult to argue that the ICC’s jurisdiction flows from the theory of universal jurisdiction¹²². However, ‘referrals’ by the Security Council for the crimes within the jurisdiction of the Court constitute universal jurisdiction because they can transcend the territoriality of a state party.¹²³

A.5: Universality and Impunity:

Universal jurisdiction has become the preferred technique by those seeking to prevent impunity for international crimes¹²⁴. Arguably, the primary reason for permitting universal jurisdiction is that persons who commit such international crimes are often connected to the state concerned and might escape justice if only their home state had jurisdiction.¹²⁵

The combat against international crimes in the world is accomplished through national courts prosecuting public official for their crimes. If Heads of State are not tried through national courts or criminal international tribunals, this is called impunity¹²⁶. The key rationale for the exercise of universal jurisdiction is an end to impunity.

¹²¹See UN Doc. A/AC.249/1998/DP.2(23 March 1998), in: Hans-Peter Kaul, Preconditions to the Exercise of Jurisdiction, In: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), The Rome Statute of the International Criminal Court, Vole. I, 2002, p.597

¹²²Bassiouni, Universal Jurisdiction, op-cit, p.168

¹²³Such a provision could be interpreted as allowing the Security Council to refer a ‘situation’ to the ICC, even when it applies to crimes occurring outside the territory of a state party and involving the responsibility of nationals from non-parties. In: Ibid

¹²⁴Ibid, p.153

¹²⁵Akande Dapo and Shah Sangeeta, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, 21 EJIL 2010, p.846

¹²⁶Azmayesh, op-cit, p.18

Crimes against humanity will only be deterred when their perpetrators, i.e. the political leaders, field commanders or soldiers and policemen, are given pause by the prospect that they will hence-forth have no hiding place: that legal nemesis may some day, somewhere, overtake them.¹²⁷

Many states provided for universal jurisdiction of national courts over international crimes, taking account of the fact that domestic prosecution on the basis of universal jurisdiction is a major tool in the fight against impunity.¹²⁸

The concept of universal jurisdiction for crimes against humanity is the solution that international law offers to the spectacle of impunity for tyrants and torturers who cover themselves with domestic immunities and amnesties and pardons¹²⁹. They can still hide, but in a world where jurisdiction over their crimes is universal, they cannot run¹³⁰. However, the principle of universal jurisdiction is the only way to ensure that there will be no safe haven for suspects: either you extradite or you punish.¹³¹

The unrestricted applicability of universal jurisdiction raises the possibility of decentralized prosecution of international crimes by third states; this would create a comprehensive network of jurisdiction claims for international crimes and markedly improve the chances of ending widespread impunity for international crimes.¹³²

The policy-based assumptions and goals of those who promote universal jurisdiction are that a broader jurisdiction mechanism can prevent, deter, punish, provide accountability, and reduce impunity, and also enhance the prospects of justice and peace.¹³³

¹²⁷Robertson, op-cit, pp.219-220

¹²⁸Jessberger Florian, National Legislation on International Crimes, In: The Oxford Companion to International Criminal Justice, op-cit, p.429 [hereinafter, Jessberger, National Legislation]

¹²⁹Robertson, op-cit, p.222

¹³⁰Ibid

¹³¹Ibid, p.223

¹³²Werle, ICL2005, op-cit, p.61

¹³³Bassiouni M, The History of Universal Jurisdiction and Its Place in International Law In: Macedo Stephen universal jurisdiction 2004, p.62

Exercise of universal jurisdiction may have a positive impact on the willingness of the territorial state to bring proceedings against gross human rights offenders¹³⁴. The authorities there may be shamed into action by exercise of universal jurisdiction in another state, as is illustrated by the apparently positive impact of the detention of General Pinochet in the United Kingdom on proceedings against the General in Chile.¹³⁵

A.6: Universality and *Jus Cogens*:

An independent theory of universal jurisdiction exists with respect to jus cogens international crimes¹³⁶. *Jus cogens* norms enjoy the highest status in the international legal order; they automatically prevail and invalidate all other rules of international law, including rules concerning Head of State immunity.¹³⁷

The implication of recognizing certain international crimes as part of jus cogens carries the duty to prosecute or extradite; the non-applicability of statutes of limitation for such crimes; and universality of jurisdiction over such crimes, irrespective of where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war)¹³⁸. Above all, the characterization of certain crimes as jus cogens places upon states an obligation *erga omnes* not to grant impunity to the violators of such crimes.¹³⁹

¹³⁴Kamminga, op-cit-p.944,passim

¹³⁵Ibid,

¹³⁶Bassiouni, Universal Jurisdiction, op-cit, p.167

¹³⁷Danilenko Gennady M, ICC Statute and Third States, In: A. Cassese, P. Gaeta, R. W. D. Jones(eds.)The Rome Statute of the International Criminal Court, 2002, Vole II, p.1887, [Dr Orakhelashvili has written widely that international law immunities are not available in judicial proceedings for violations of jus cogens norms. However, our own views reject the idea that international law immunities are in conflict with jus cogens norms and we show how such a perceived conflict is false, In: Dapo Akande and Shah Sangeeta, Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili, 22 EJIL 2011, pp.857-858, passim]

¹³⁸Bassiouni, ICL2008, V.I, op-cit, p.173

¹³⁹Ibid

Positive ICL does not contain such an explicit norm that characterizes a certain crime as part of *jus cogens*, and the practice of states does not conform to the scholarly writings that espouse the views expressed above.¹⁴⁰

In any event, the argument that immunity may not be accorded for acts in violation of *jus cogens* has been rejected by the ICJ, the European Court of Human Rights,¹⁴¹ and most national courts that have considered the issue.¹⁴²

In Arrest warrant, the ICJ held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf¹⁴³. It follows that such a prohibition does not automatically override all other rules of international law.¹⁴⁴

Since in international criminal law nowadays there are no recognized consequences for *jus cogens* of international crimes, for exercising universal jurisdiction we have to consider its conditions and its obstacles, in the next parts.

¹⁴⁰Ibid, p.174

¹⁴¹Al-Adsani v. United Kingdom, 2001-XI Eur.Ct.H.R., 123 ILR 24, §61, in which the Court held, by 9 to 8: Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In: Akande Dapo, International Law Immunities and the International Criminal Court, 98 AJIL 2004, p. 414, [hereinafter, Akande, Immunities and ICC]

¹⁴²Distomo Massacre Case, No. BGH-112R245/98 (Greek Citizens v. FRG) (Fed. Sup. Ct. June 26, 2003) (FRG), translated in 42 ILM 1030, 1033-34 (2003); Germany v. Margellos, No. 6/17-9-2002 (Spec. Sup. Ct. Sept. 17, 2002) (Greece); Al-Adsani v. Kuwait, 107 ILR 536 (C.A. 1996) (Eng.); Smith v. Libya, 101 F.3d 239 (2d Cir. 1996); Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994), 103 ILR 594; Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984); Sampson v. Federal Republic of Germany, 975 F.Supp. 1108 (N.D. Ill. 1997); Bouzari v. Iran, 124 ILR 427, 2002 Ont. Sup. C. J.LEXIS 701 (Ont. Sup. Ct.). In: Ibid

¹⁴³ICJ, Judgment 14 February 2002, §§ 58-78, In: ICJ's judgment dated 3 February 2012, Germany v. Italy case, § 95 (see, in the last judgment, about State immunity and *jus cogens*, §§ 72, 73, and 76, available at www.icj-cij.org)

¹⁴⁴Judgment of House of Lords, 14 June 2006, Jones v. Saudi Arabia, Lord Bingham of Cornhill, 129 ILR pp. 726-727

B. Conditions of Exercising Universality:

B.1: Access to Accused:

Under the classical understanding of universal jurisdiction, which is in fact informed by the principle of ‘aut dedere aut judicare’, states only exercise universal jurisdiction over offenders present in their territory, the question arises whether states could also exercise universal jurisdiction over offenders who are not (yet) present in their territory (i.e. in absentia)¹⁴⁵. Or plus present, there must be some other linkage between the defendant and forum state such as residence or employee?

B-1.1: Presence of Accused:

Under the narrow notion, only the State where the accused is in custody may prosecute him or her (the so-called forum deprehensionis or jurisdiction of the place where the accused is apprehended)¹⁴⁶. Thus, the presence of the accused on the territory is a condition for the exercise of jurisdiction.¹⁴⁷

Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law, provided the person is present before such judicial body¹⁴⁸. Apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting state or on board a vessel flying its flag or an aircraft which is registered under its law, or other lawful forms of control over the alleged offender.¹⁴⁹

Plainly, the conditional universality principle may be tainted by a serious limitation; when applied to a former Head of State or government or senior member

¹⁴⁵Ryngaert, op-cit, p.119passim

¹⁴⁶Cassese, ICL2008, op-cit, p.338, margin no.4, (Judge Prof. Cassese, divided it to two versions; 1-The narrow notion (conditional universal jurisdiction); 2- The broad notion of universality ‘absolute universal jurisdiction’).

¹⁴⁷Ibid

¹⁴⁸From Principle 1 (2) The Princeton Principles on Universal Jurisdiction

¹⁴⁹Principle 3(b)Resolution Krakow session -2005 Institute of International law

of cabinet or diplomat, the principle may result in these persons never being brought to trial if they are prudent enough to avoid travelling to a country where they could become amenable to judicial process¹⁵⁰. It would, however, appear that the need to forestall possible abuses should make this eventuality acceptable, however seriously it may run counter to the fundamental imperatives of international justice.¹⁵¹

Many states have also limited the competence of their courts to try defendants on the basis of universal jurisdiction *ratione personae* to persons that happen to be found within their jurisdiction¹⁵². With regard to the offense of torture, states parties to the UN Convention against Torture may conceivably base such an interpretation on article 7(2) of the Convention¹⁵³. However, such a restriction is incompatible with the grave breaches provisions of the Geneva Conventions that require states parties to search for perpetrators and bring them before their own courts wherever they are.¹⁵⁴

B-1.2: Universal Jurisdiction (in absentia):

Universal jurisdiction in absentia is controversial, and the doctrine is often reluctant to endorse it¹⁵⁵. Because universal jurisdiction in absentia may reach any one anywhere, it has been argued that it creates ‘judicial chaos’ and that it violates the classical principle of non-intervention in the internal affairs of another state.¹⁵⁶

Proponents of universal jurisdiction in absentia emphasize the important role which it could play in the fight against international impunity¹⁵⁷. The exercise of universal jurisdiction in absentia, if limited to investigative acts, need therefore not

¹⁵⁰Cassese, ICL2003, op-cit, p.454

¹⁵¹Ibid

¹⁵²Kamminga, op-cit, p.953

¹⁵³Ibid

¹⁵⁴Geneva Convention I, Art.49, Geneva Convention II, Art.50 Geneva Convention III, Art.129, Geneva Convention IV, Art.146, In: Ibid, pp.953-954

¹⁵⁵Ryngaert, op-cit, p.120

¹⁵⁶Ibid, p.121

¹⁵⁷Ibid, p.122

interfere in the domestic affairs of a foreign state any more than the exercise of universal jurisdiction does.¹⁵⁸

This principle is laid down in such national legislation as that of Spain and Belgium.¹⁵⁹ Under § 153 f (1) of the German Code of Criminal Procedure, German prosecutors and courts could exercise universal jurisdiction in absentia, if the presence of the presumed offender can be anticipated.¹⁶⁰

ICJ's Judges Higgins, Kooijmans, and Buergenthal maintain that international customary law, in addition to authorizing universal jurisdiction properly so called over piracy, does not prohibit universal jurisdiction (in absentia) for other offences, subject to a set of conditions they carefully set out¹⁶¹. The view set out by these three Judges, means that absolute universal jurisdiction is legally admissible under international law¹⁶². However, in the arrest warrant case, the ICJ didn't accept the joint separate opinion's of these three judges.

Alternatively, one may, as Cassese has proposed, limit the exercise of universal jurisdiction in absentia to low-key perpetrators, and abolish it for high-ranking officials, since the former class of offenders may presumably have less legitimate international reputational concerns¹⁶³. The International Law Institute claims,

158Ibid, p123, [However, as many legal systems do not permit trials in absentia, the presence of the accused on the territory is then a condition for the initiation of trial proceedings. Clearly, this conception of universality allows national authorities to commence criminal investigations of persons suspected of serious international crimes, and gather evidence that about these alleged crimes, as soon as such authorities are seized with information concerning an alleged criminal offence. They may thus exercise criminal jurisdiction over such persons, without requiring that the person first be present, even temporarily, in the country. In: Cassese, ICL2008, op-cit, p.338, margin no. 4]

159Cassese, ICL2003, op-cit, p.287, [In Spain, the new universal jurisdiction law took effect in November 2009; under article 23(4), Spanish courts cannot assert universal jurisdiction unless the accused is on Spanish territory, or there is another relevant link between Spain and the case, In: Langer Maximo, The Diplomacy of Universal Jurisdiction: The Political Branches and The Translational Prosecution of International Crimes, 105 AJIL2011, p.40], (In Belgium, under a Law of 1993 there was a pure universal jurisdiction, but this Law replaced by 2003 Law, that don't allow for universal jurisdiction in absentia. See more information in this Chapter under the part of 'Belgium Legislation')

160 Ryngaert, op-cit, p.125, margin no.212

161 Cassese Antonio, When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 EJIL 2002, p.856 [hereinafter Cassese, When may Senior] [These conditions are as follows: (i) the State intending to prosecute a person must first 'offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned'; (ii) the charges may only be laid by a prosecutor or investigating judge who is fully independent of the government; (iii) the prosecution must be initiated at the request of the persons concerned, for instance at the behest of the victims or their relatives; (iv) criminal jurisdiction is exercised over offences that are regarded by the international community as the most heinous crimes; (v) jurisdiction is not exercised as long as the prospective accused is a foreign minister (Head of State, or diplomatic agent) in office; after he leaves office, it may be exercised over private acts., In: Cassese, ICL2003, op-cit, p.294, margin no.33]

162Ibid, p.859

163A Cassese, The Twists and Turns of Universal Jurisdiction: foreword(2006)4 JCIJ 559, In: Ryngaert, op-cit, p.125

however, to restrain the exercise of universal jurisdiction by default, in cases of international crimes, except for acts of investigation and demand of extradition.¹⁶⁴

B-1.3: Legitimizing Link:

Under StGB, apart from the presence of the accused in German territory, there is a need for a ‘Legitimizing link’, in order to respect the principle of non-intervention.

In Case of genocide, the German Federal Supreme Court recalled that:

‘German criminal law is applicable pursuant to § 6, Paragraph 1, to an act of genocide committed abroad independently of the law of the territorial State (principle of so-called universal jurisdiction)’. The Court added, however, that ‘a condition precedent is that international law does not prohibit such action;’ it is only, moreover, where there exists in the case in question a ‘link’ legitimizing prosecution in Germany “that it is possible to apply German criminal law to the conduct of a foreigner abroad. In the absence of such a link with the Forum State, prosecution would violate the principle of non-interference, under which every State is required to respect the sovereignty of other States”.¹⁶⁵

The applicability of the principle of universal jurisdiction under §6(1) StGB was restricted when the Supreme Court, in a highly controversial decision, demanded the presence of an unwritten element of the crime, a ‘special legitimizing link’.¹⁶⁶ In the unambiguous words of §6 StGB, the crimes listed in §6 are subject to universal jurisdiction, regardless of the nationality of the perpetrator, the law of the place of the crime, or the place the crime was committed¹⁶⁷. Nevertheless, as an unwritten condition, the court developed the requirement of a ‘legitimizing domestic link’

¹⁶⁴Warsaw Session, Resolution of 26 August 2005, §3(b) (2005), In: David Eric, The Belgian Experience, In: Bassiouni, M. Cherif, International Criminal Law, Third Edition, 2008, Vole. III, p.371

¹⁶⁵Bundesgerichtshof, 13 February 1994, 1BGs 100.94, in Neue Zeitschrift für Strafrecht 1994, pp.232-233. Similarly, Dusseldorf Oberlandesgericht, 26 September 1997, Bundesgerichtshof, 30 April 1999, Jorgic; Dusseldorf Oberlandesgericht, 29 November 1999, Bundesgerichtshof, 21 May 2001, Sokolovic, (In that case, the Federal Court held that there was such a link by reason of the fact that the accused had been voluntarily residing for some months in Germany, that he had established his centre of interests there and that he had been arrested on German territory), In: Separate Opinion of President Guillaume, Judgment 14 February 2002, 41 ILM 2002, p.561

¹⁶⁶Kaleck Wolfgang, German International Criminal Law in Practice: From Leipzig to Karlsruhe, In: International Prosecution of Human Rights Crimes, op-cit, p.99

¹⁶⁷Ibid

whereby prosecution must have a direct domestic relationship in order to justify German jurisdiction.¹⁶⁸

On 21 February 2001, the Federal High Court, in contrast to its former jurisprudence commented that such an additional link could at least not be demanded when German courts based their jurisdiction on §6(9) StGB.¹⁶⁹ The Court pointed out that it could hardly be regarded as a violation of the principle of non-intervention when German courts prosecuted perpetrators in compliance with binding treaty obligations.

Under §1 of the Code of Crimes against International Law (VStGB), clearly mentioned that:

This act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.¹⁷⁰

With these plain words, the legislature unmistakably rejected the law as heretofore applied by the Federal Supreme Court.¹⁷¹

The only 'link' necessary for the applicability of German criminal law is the crime itself, which affects the international community as a whole¹⁷². Thus the (German) Federal Supreme Court's [*Bundesgerichtshof*] different opinion on universal jurisdiction under former § 6(1) StGB is irrelevant to the applicability of VStGB.¹⁷³

It seems to me that when German courts prosecuted perpetrators under conventional international law, pursuant to last aforementioned decision of Federal Supreme Court, there is no need to legitimizing link. But when German courts prosecuted under customary international law with reference to the VStGB, as

¹⁶⁸ In a 2001 judgment, the Supreme Court found that the perpetrator's permanent residency in Germany formed a direct link to domestic prosecution, but leaned towards no longer requiring any 'legitimizing link in individual cases going beyond the wording of § 6 of the Criminal Code', at least for § 6(9), In: Ibid

¹⁶⁹ Geneuss Julia, Sokolovic, In: The Oxford Companion to International Criminal Justice, op-cit, p.929

¹⁷⁰ Werle Gerhard and Jessberger Florian, International Criminal Justice is coming Home: The New German Code of Crimes against International Law, 13CLForum 2002,p.214

¹⁷¹ Jessberger, Complementarity, op-cit, p.215

¹⁷² Werle, ICL2005, op-cit, p.88

¹⁷³ Ibid

correctly was written by Kaleck ‘Because of the entry into force of the Code of Crimes against International Law and §153f of the Code of Criminal Procedure, this problem became less serious or shifted from the justification of German criminal authority to the determination of prosecutorial discretion’.¹⁷⁴

As a result, in fact exercise of universal jurisdiction under customary international law by German courts needs for respecting the principle of non-intervention pursuant to §153f of the Code of Criminal Procedure, just via determination of the Federal Prosecutor in Karlsruhe.

B.2: Ne bis in idem:

In exercise of subsidiary universal jurisdiction, the problem of concurrent jurisdiction will not always materialize. But if there is concurrent jurisdiction, every state has to consider the principle that is known in civil law as ‘ne bis in idem’ and known in common law as ‘Double Jeopardy’.

Ne bis in idem (literally ‘not twice in the same’) means that an accused cannot be tried twice for the same facts, in an international context ‘ne bis in idem’ refers to recognition of foreign criminal judgments.¹⁷⁵

In Germany, ‘ne bis in idem’ is laid down in Article 103(3) of the federal constitution, but a foreign judgment is no bar to a subsequent prosecution in Germany¹⁷⁶. In Article 14(7) of the International Covenant on Civil and Political Rights ‘ne bis in idem’ is mentioned as an obstacle for retrying.

A partial solution to the prevention of conflicts of jurisdiction is to be found in articles 54-58 of the Schengen Convention¹⁷⁷. Pursuant to article 54 of the Convention, the basic principle in the matter is that a person whose trial has been

¹⁷⁴Kaleck, op-cit, p.99, margin no.42, (see more information, under part A.3 in this section).

¹⁷⁵Reydams, op-cit, p.84

¹⁷⁶Ibid, p.146

¹⁷⁷Swart Bert, The European Union and the Schengen Agreement, In: Bassiouni, ICL2008, V.II, op-cit, p.260

finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced, or can no longer be enforced under the laws of the sentencing Contracting Party.¹⁷⁸

No person may be tried twice for the same crime, by national or international courts (whether the first trial was conducted before a national or an international court).¹⁷⁹

B.3: Domestic Legislations:

The inquiry into universal criminal jurisdiction and its application must be made by reference to : (1) national legislation to determine whether it exists in most national legal systems representing the families of the world's major criminal justice systems; and (2) conventional international criminal law to determine the existence of international legal norms that provide for the application of universal jurisdiction by national criminal justice systems and by internationally established adjudicating bodies.¹⁸⁰

Professor Bassiouni writes that: to the knowledge of this writer, no state practice presently exists whereby states have resorted to universal jurisdiction without the existence of national legislation, even when international treaties provide for such a jurisdiction basis¹⁸¹. This is particularly true for international criminal law which often requires the enactment of ad hoc criminal rules¹⁸². This is not only because courts are reluctant to meddle in the internal affairs of another state, but also

¹⁷⁸Ibid

¹⁷⁹However, this principle does not apply when in the first trial: (i) the person was prosecuted and punished for the same fact or conduct, but the crime was characterized as an 'ordinary crime' (e.g. murder) instead of an international crime (e.g. genocide) with a view to deliberately avoiding the stigma and implications of international crimes or (ii) the court did not fully comply with the fundamental safeguards of a fair trial, or did not act independently or impartially; or (iii) the court in fact conducted a sham trial, for the purpose of shielding the accused from international criminal responsibility; or (iv) the prosecution or the court did not act with the diligence required by international standards. In: Cassese, ICL2003, op-cit, p.321

¹⁸⁰Bassiouni, Universal Jurisdiction, op-cit, pp.167-168

¹⁸¹Ibid, p.168

¹⁸²Bianchi Andrea, Immunity versus Human Rights: The Pinochet Case, 10 EJIL 1999, pp.253-254

because they do not want to come into conflict with the maxim *nulla poena sine lege*.¹⁸³

In many instances, despite the genuine interest to secure prosecution of international criminals, the existing law or legal system in the state concerned may be too inadequate or antiquated to lead to successful prosecution.¹⁸⁴

With the adoption of the ICC Statute, a new phase of extended incorporation of international crimes into national legal systems began; several states have taken the ratification and implementation of the Statute as an opportunity to review their criminal legislation with a view to covering international crimes.¹⁸⁵

B.4: Specialized Problems:

“Investigating and prosecuting crimes on the basis of universal jurisdiction requires special skills, both in terms of knowing how to investigate crimes committed abroad and in terms of the specialized knowledge of international criminal law that is needed. It therefore makes sense to establish specialized units for this purpose, as an expression of the political will to combat gross human rights offenses wherever they occur”.¹⁸⁶

The authorities of the territorial state can be expected to be reluctant to render assistance, even when they are obligated to do so, for the simple reason that they may bear co-responsibility for the offenses; in some cases, they may strongly object and actively try to frustrate investigations.¹⁸⁷

Another problem is that witnesses often have to be traced in distant states; even when they can be found they may be reluctant to testify for fear of reprisals against

¹⁸³Kamminga, op-cit, p.952, [Article 7(2) of the European Human Rights Convention, reflecting the principle of *nulla poena sine lege* provides, ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed’. In: Kaleck, op-cit, p.96]

¹⁸⁴Kittichaisaree, op-cit, p.42

¹⁸⁵Jessberger, National Legislation, op-cit, p.428

¹⁸⁶Kamminga, op-cit, p.954

¹⁸⁷Ibid, p.959

themselves or their families; furthermore, numerous documents will need to be translated.¹⁸⁸

In recognition of these problems , the UN Declaration on the Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity specifically provides that states shall co-operate with each other in the collection of information and evidence which would help to bring to trial persons indicted for war crimes and crimes against humanity.¹⁸⁹

B.5: Objections to Universality:

Certain dangers, however, must not be ignored: for one, opening national legal systems to intervention from third states brings with it a significant potential for abuse, for another, worldwide authority to prosecute will necessary lead to a large number of competing prosecution claims.¹⁹⁰

Criminal law scholar Rainer Keller sees a fundamental danger of political selectivity in the use of universal jurisdiction and ‘an element of arbitrariness that calls the admissibility of universal jurisdiction into question’, if ‘members of powerful states are systematically exempted from assignments of blame’.¹⁹¹ Thus he would prefer to limit its application generally to those present in the country, and also considers it inadmissible without a domestic link if ‘the officials using universal jurisdiction’ are not guaranteed ‘complete independence from instructions and monitoring on the part of the respective national executive’.¹⁹²

¹⁸⁸Ibid

¹⁸⁹UN Declaration on the Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity. G.A.Res.3074(XXVIII)adopted 3 Dec 1973,reprinted in 13 ILM 230(1974), In: Ibid

¹⁹⁰Werle, ICL2005, op-cit, p.61

¹⁹¹Keller Rainer, Goldammer's Archiv für Strafrecht 2006, pp.30 et seq. In: Kaleck, op-cit, p.111

¹⁹²Ibid

States exercising jurisdiction on this basis may be accused of jurisdictional imperialism because universal jurisdiction is only likely to be exercised in powerful states with regard to crimes committed in less powerful states.¹⁹³

There are, nevertheless, inherent risks to the fairness of proceedings far removed from the site of the crime and against a defendant who may not understand the language and the culture in which he is being brought to justice¹⁹⁴. It should therefore be stressed that like any defendant in criminal proceedings, the defendant being tried on the basis of universal jurisdiction is fully entitled to fair treatment in accordance with applicable international human rights standards; all semblance of unfairness should be avoided¹⁹⁵. To underscore the point, treaties providing for universal jurisdiction tend to contain specific safeguards guaranteeing the right to a fair trial of persons being brought to justice on this basis.¹⁹⁶

¹⁹³The large majority of universal jurisdiction cases have been conducted in OECD states with respect to crimes committed outside these states, In: Kamminga, op-cit, p.963

¹⁹⁴Ibid

¹⁹⁵Ibid

¹⁹⁶Geneva Convention I,Art.49, Geneva Convention II, Art 50 Geneva Convention III, Art 129, Geneva Convention IV, Art 146, and Convention against torture, Art 8
In: Ibid,

C- Obstacles of Exercising Universality:

In this part we will consider the major possible obstacles to national foreign courts for prosecuting crimes under international law, which include amnesties, statutes of limitations and especially immunity of Heads of States. However, in the Princeton Principles, all of them are rejected as a bar for exercising universal jurisdiction, but in practice and in theory, there are other realities.¹⁹⁷

C.1: National Amnesty before Foreign Courts:

The first question is whether domestic amnesties have effect in front of national foreign courts, where the State is seeking to exercise universal jurisdiction. In other words: Which amnesties are valid under international criminal law?

In general, States have granted amnesties in situations of internal conflict involving mass violations of human rights¹⁹⁸. Some national systems permit amnesty as a means to promote national unity and reconciliation after long turbulent years of human rights abuse by those in power.¹⁹⁹

National amnesties may once have been a matter essentially for the sovereign state; however, with the extension of international human rights and criminal law into domestic affairs, they now fall squarely within the remit of international criminal jurisdiction.²⁰⁰

¹⁹⁷The Princeton Principles of Universal Jurisdiction; Principle 5- Immunities: With respect to serious crimes under international law as specified in Principle 2(1), 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 nor mitigate punishment. Principle 6- Statutes of limitations or other forms of prescription shall not apply to serious crimes under international law as specified in Principle 2(1). Principle 7 (1): Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in principle 2(1). Principle 7(2): The exercise of universal jurisdiction with respect to serious crimes under international law as specified in principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state.(Pursuant to Principle 2(1), serious crimes under international law include: Piracy, Slavery, War Crimes, Crimes against Peace, Crimes against Humanity, genocide, and torture).

¹⁹⁸See, e.g., Douglass Cassel, Lessons from the America: Guidelines for International Response to Amnesties for Atrocities, 59 Law & Contemp (1996), at 197-198, In: Boed Roman, The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations, 33 Cornell L.L.J. 2000, p.299

¹⁹⁹Kittichaisaree, op-cit, p.42

²⁰⁰Gavron Jessica, Amnesties in the light of Developments in International Law and the Establishment of the International Criminal Court, 51 ICLQ 2002, p.116

From a legal viewpoint, one may nevertheless note that international rules often oblige states to refrain from granting amnesty for international crimes²⁰¹. As international crimes constitute attacks on universal values, no single State should arrogate to itself the right to decide to cancel such crimes, or to set aside their legal consequences.²⁰²

The scope of the duty to prosecute has great practical significance, especially because the duty to prosecute implies a prohibition on amnesty²⁰³. No clear position on this has yet emerged in international (criminal) law; it is certain, at least, that an across-the-board exemption from criminal responsibility is unacceptable, to the extent that international law creates a duty to prosecute and punish²⁰⁴. This means that general amnesties for crimes under international law are impermissible under customary international law²⁰⁵. As a result, an amnesty in contravention of international law does not prevent prosecution by third states.²⁰⁶

On the other hand, international (criminal) law cannot completely block an amnesty that is necessary to restore peace²⁰⁷. Authors of the Chicago Principles on Post-Conflict Justice pointed out that:

‘States shall not grant blanket amnesty to absolve individuals of responsibility for genocide, serious war crimes, or crimes against humanity’ and “States that provide amnesty or other mechanisms to reduce individual legal responsibility for past crimes shall do so in consideration of international law. States should ensure that amnesty policies are linked to specific mechanisms of accountability to discourage impunity and support the goals of post-conflict justice”.²⁰⁸

Not only does the political and military context of amnesties vary, but amnesties themselves are not uniform in nature, the amnesty laws passed in Chile and South

201Cassese, ICL2003, op-cit, p.313

202Ibid, p.315

203Werle, ICL2005, op-cit, p.65 (A State’s grant of an amnesty would be contrary to its duty to prosecute, and the amnesty would not be recognized on the international plane. Thus, any State could proceed against an alleged perpetrator of genocide despite a domestic amnesty. In: Boed, op-cit, p.325)

204Werle, Ibid

205Ibid

206Ibid, pp.65-66

207Ibid, p.66

208From Principle 1.8, In: M. C. Bassiouni(ed.) The Chicago Principles on Post-Conflict Justice, In: The Pursuit of International Criminal Justice A World Study on Conflicts, Victimization, and Post-Conflict Justice, 2010, Vole I, p.49

Africa, for example, are at opposing ends of the spectrum²⁰⁹. The law in Chile constitutes a blanket amnesty, absolution by the offender on himself; the international community has shown its disregard for the legitimacy of the amnesty²¹⁰. The South Africa system of amnesty would present the court with a very different proposition to that of Chile, this amnesty is granted only in direct exchange for disclosure and admission by the individual perpetrator of the crimes he has committed.²¹¹

Amnesties often act as a bar to national prosecutions; however, amnesty is not a bar to international courts²¹². The Appeals Chamber of the Special Court of Sierra Leone held in its decision on an amnesty agreement between the Government and rebel groups (the Lome Amnesty Agreement) that the amnesty agreement created rights and obligations regulated by the laws of Sierra Leone, but it was not binding on an international court such as the Special Court.²¹³

The relationship between prosecution, on the one hand and amnesties and truth commissions, on the other, is not addressed in the ICC statute; whether a domestic amnesty stands in the way of a case's admissibility before the ICC is in dispute²¹⁴. One must correctly make a distinction here: a general amnesty for crimes under international law does not affect the admissibility of a case before the ICC²¹⁵. In all other cases, especially a nation's assignment of the task of 'dealing with history' to a truth commission, the admissibility of a case to the ICC must be considered on a case-by-case basis.²¹⁶

Where there has been international involvement and where there are verifiably legitimate political considerations, such an amnesty will be respected by the

²⁰⁹Gavron, op-cit, p.112

²¹⁰Ibid

²¹¹Ibid, p.115

²¹²Winter Renate (Judge and President of the Special Court for Sierra Leone) In: Bassiouni, The Pursuit of International Criminal Justice, op-cit, p.156, passim

²¹³Ibid

²¹⁴Werle, ICL2005, op-cit, p.66

²¹⁵see Article 17(1)(b), 2(a), In: Ibid

²¹⁶Ibid

international community²¹⁷. However, where an amnesty is without these factors and is clearly in violation of international law, it is not likely to carry weight beyond its own jurisdiction.²¹⁸

As correctly Professor Oeter stated: all of circumstances must be considered by Public Prosecutor in any State that wants to exercise universal jurisdiction, on a case by case basis.

C.2: Statutes of Limitation:

Many states lay down rules providing that after the elapse of a certain number of years (normally, 10 or 20) no prosecution may any longer be initiated with regard to some major categories of crimes such as murder, robbery, etc²¹⁹. Some States also add provisions whereby, if a final sentence pronounced for a crime has not been served after a certain number of years, it is no longer applicable.²²⁰

In common law countries, where there is no general rule on statutory limitation but there may be specific rules concerning specific crimes, no statutory limitation is provided for such serious offences as international crimes.²²¹

Some national and international courts have ruled out the applicability of statutes of limitation for international crimes²²². In France the Court of Cassation held in 1985 that the inapplicability of statutes of limitation to crimes against humanity, laid down in French law, derives from principles recognized by all civilized nations.²²³

²¹⁷Gavron, op-cit, p.116

²¹⁸Ibid

²¹⁹Cassese, ICL2003, op-cit, p.316

²²⁰For instance, in France, under Article 7 of the Code of Criminal Procedure, the right to prosecute a crime is forfeited within 10 years of the perpetration of the crime, whereas, pursuant to Article 132-2 of the Criminal Code, a penalty is no longer applicable 20 years after the issuance of a final sentence; similar provisions may be found in the codes of such European countries as Austria, Germany, Switzerland, Portugal, and Denmark, In: Ibid

²²¹Ibid, p.317

²²² Ibid, p.318

²²³Ibid

Article 29 of the ICC Statute establishes that crimes under international law, as the most serious international crimes, are not subject to statutes of limitations²²⁴. It has not been conclusively determined whether and to what extent the inapplicability of statutes of limitations to crimes under international law has become part of customary international law.²²⁵

The better view is that no customary rule endowed with a far-reaching content has yet evolved on this matter, in other words, no rule has come into being prohibiting the application of statutes of limitations to all international crimes.²²⁶

In some countries, there are special rules for international crimes. In Germany, § 5 of the VStGB follows article 29 of the ICC Statute by providing that genocide, crimes against humanity and war crimes are not subject to statutory limitation²²⁷. In France, the statute of limitation for war crimes is that provided for in general criminal rules (20 years); for crimes against humanity, a law of 26 December 1964 provides that there may be no statute of limitation.²²⁸

International treaties provide for the inapplicability of statutes of limitations, but states have heretofore been reluctant to adopt them.²²⁹

C.3: Official Immunity²³⁰:

One of the possible obstacles to prosecution for international crimes may be constituted by rules intended to protect the person accused by granting him immunity from prosecution.²³¹

²²⁴There are no models for this in the Nuremberg Charter or the Statute of the Yugoslavia and Rwanda Tribunals. During the negotiation in Rome, the inapplicability of statutes of limitations to war crimes was the most controversial point. In: Werle, ICL2005, op-cit, p.184

²²⁵Ibid, pp. 184-185

²²⁶Cassese, ICL2003, op-cit, p.319

²²⁷Werle and Jessberger, op-cit, p.199, (murder is not considered subject to statutes of limitation, and for less serious crimes, the general rules of prescription in accordance with § 78 to 78(c) StGB apply).

²²⁸Cassese, ICL 2003, op-cit, p.317, passim

²²⁹See UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 16 November 1968, reprinted in 8 ILM (1969), p.68; it has so far been ratified by only 43 states; die European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes of 25 January 1974, ETS No.82, has been signed by only four states and ratified only by the Netherlands and Romania. In: Werle, ICL2005, op-cit, p.185

²³⁰The issue of sovereign immunity encompasses two distinct types of immunity : (1) immunity of the state itself-sovereign immunity, and (2) immunity of the state's agents-official immunity, In: Engle Eric, private law remedies for extraterritorial human rights violations, 2006, p.22

Immunity means a procedural bar to the exercise of jurisdiction by a State; this exception of the exercise of jurisdiction can be applied in the domestic field, and it can also be applied internationally so that we come in the field of international law.²³²

“In international law, certain official acts and certain officials are granted immunity before foreign courts, especially foreign criminal courts. This immunity is particularly relevant to international criminal law because of the typical level of state involvement in crimes under international law”.²³³ A high degree of immunity could ultimately protect the most powerful authors of crimes under international law.²³⁴

“Immunity under international law is based on two fundamental concepts. First, the principle of the sovereign equality of all states dictates that no state sit in judgment over another (*par in parem non habet iudicium*). Second, a minimum amount of transborder movement and action is required for the effective functioning of interstate relations”.²³⁵

C-3.1: Immunity *Ratione Personae*:

International law confers on certain state officials immunities that attach to the office or status of the official, described as ‘personal immunity’ or ‘immunity *ratione personae*’.²³⁶ It has long been clear that under customary international law the Head of State and diplomats accredited to a foreign state possess such immunities from the jurisdiction of foreign states²³⁷. Also, under conventional international law similar immunities are conferred to a limited group of state officials.

²³¹Cassese, ICL2008, op-cit, p.302

²³²Hafner Gerhard, Current Developments Regarding the Immunity of State Officials from Foreign Jurisdiction, 2009, p.3, (Immunity of the state itself and immunity in domestic field are extra-subject from this dissertation.)

²³³See, e.g., A. Cassese, 13 EJIL(2002), p.853 at p.873; H. –H. Jescheck, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht (1952), p.164; see also P. Gaeta, in A. Cassese, P. Gaeta and J.R.W.D. Jones(eds.), The Rome Statute of the International Criminal Court, Vol.1(2002), pp.975et seq.; C. Kress, Goldammer’s Archiv für Strafrecht (2003), p.25 at pp.30, 31, with additional citations, In: Werle, ICL2009, op-cit, p.235

²³⁴Werle, Ibid

²³⁵See, A. Cassese, International Criminal Law (2008), p.303, In: Ibid

²³⁶Akande and Shah, op-cit, p.818,passim

²³⁷Ibid

The Vienna Convention on the Law of Diplomatic Relations and the Vienna Convention on the Law of Consular Relations both provide for complete immunity of accredited diplomats, their spouses, and members of their families and household personnel²³⁸. Under the provision of the two conventions, a host country to which a diplomat is formally accredited can neither prosecute nor extradite that person, irrespective of how minor or how serious a crime he may have committed.²³⁹

Personal immunities (i) relate to procedural law, that is, they render the state official immune from civil or criminal jurisdiction (a procedural defence) (ii) cover official or private acts carried out by the state agent while in office, as well as private or official acts performed prior to taking office ;in other words, they assure total inviolability; (iii) are intended to protect only some categories of state officials, namely diplomatic agents: Heads of State, heads of government, foreign ministers (under the doctrine set out by the International Court of Justice in its judgment in the Case Concerning the Arrest Warrant of 11 April 2000, at Para 51-5); (iv) come to an end after cessation of the official functions of the state agent; (v) may not be *erga omnes*²⁴⁰. Immunity *ratione personae* attaches to the office and not to any particular conduct of the office holder.²⁴¹

“International law grants immunity *ratione personae* to a limited group of state officials whose freedom of action in international intercourse it especially important to the functioning of their state. These include heads of state²⁴² and diplomats²⁴³, as well as heads of government and foreign ministers”.²⁴⁴

238 Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, In: Bassiouni, ICL 2008, V.I. op-cit, p. 54

239 Embassies and Consular officers are also immune from the exercise of national jurisdiction by the host country under both the Vienna Convention of Diplomatic Immunity and the Vienna Convention on Consular Immunity, In: Ibid

240 Cassese, ICL 2008, op-cit, p. 304

241 Newdigate Saville (Lord in UK House of Lords) Judgment 24 March 1999, 38 ILM 1999, p. 642

242 For thorough discussion, see C. Tangermann, Die völkerrechtliche Immunität von Staatsoberhäuptern (2002), pp. 104 et seq. In: Werle, ICL 2009, op-cit, p. 236

243 See Vienna Convention on Diplomatic Relations of 1961, 500 UNTS (1961), p. 95, especially Arts. 31 and 39, and Vienna Convention on Consular Relations of 1963, 596 UNTS (1963), Arts. 41, 43, p. 261, Other high representatives of a state can be exempted from the host states' jurisdiction for the period of an official visit abroad, but no general immunity exists for them, In: Werle, Ibid

244 See DR Congo v. Belgium, ICJ, Judgment of 14 February 2002, § 51, 53 et seq., In: Ibid, [We have found no basis for the argument that ministers of foreign affairs are entitled to the same immunities as Heads of State, In: Joint Separate Opinion Of Judges Higgins, Kooijmans and Buergenthal, From § 81, op-cit, p. 590].

“The second type of immunity *ratione personae* applies only to those abroad on special mission (and therefore in the host state with its consent) and only for the duration of such mission. This special mission immunity is also applicable in cases concerning international crimes”.²⁴⁵

Under articles 29 and 31 of the UN Convention on Special Missions 1969 the person of any official abroad on a special mission on behalf of his or her state is inviolable, with the result that he or she may not be arrested or detained.²⁴⁶

C-3.2: Legal Position of Heads of State or Government:

A Head of State’s immunity is enjoyed in recognition of his very special status as holder of his State’s highest office²⁴⁷. **A Head of State’s entitlement to protection is in part a matter of ensuring respect for the Head of State’s dignity, in part a matter of acknowledging his role as the representative par excellence of his State, and in part a matter of enabling him to carry out his official functions in the State which he is visiting.**²⁴⁸

A Head of State is accorded immunity *ratione personae* not only because of the functions he performs, but also because of what he symbolizes: the sovereign state²⁴⁹.

The exercise of jurisdiction is an element of sovereignty and subjecting one sovereign to another would amount to a reduction of the sovereignty of the former²⁵⁰.

Immunities are conferred to respect the sovereign equality of States.²⁵¹

²⁴⁵Dapo Akande and Shah Sangeeta, Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili, 22 EJIL 2011, pp.857-858, [hereinafter, Akande and Shah, Rejoinder]

²⁴⁶Although the Convention on Special Missions is in force, only a small number of states have become party to it (38 at the time of writing); the question arises whether the immunity provisions in that Convention represent rules of customary international law. The customary international law basis of special missions immunity was accepted by the Criminal Chamber of the German Federal Supreme Court in the Tabatabai Case, where it stated: “irrespective of the [UN Special Missions Convention], there is a customary rule of international law based on State practice and *opinio juris* which makes it possible for an ad hoc envoy, who has been charged with a special political mission by the sending State, to be granted immunity by individual agreement with the host State for that mission and its associated status, and therefore for such envoys to be placed on a par with the members of the permanent missions of State protected by international treaty law”. In: Akande and Shah, op-cit, pp.821 to 823, passim

²⁴⁷Watts, Sir Arthur, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, 247 Recueil des Cours, Vole. III, 1994, p.53

²⁴⁸Ibid, p.49 [Personal immunity is predicated on the need to avoid a foreign state either infringing sovereign prerogatives of states or interfering with the official functions of a state agent under the pretext of dealing with an exclusively private act (ne impediatur legatio, i.e. the immunities are granted to avoid obstacles to the discharge of diplomatic functions), In: Cassese, ICL2008, op-cit, p.303]

²⁴⁹Akande and Shah, op-cit, p.824

Central to the legal position of Heads of State is their immunity from suit²⁵². The law in this area has its roots in conceptions of the nature of the State and of its ruler which prevailed in former times, and originally the predominant consideration was probably that one sovereign monarch could not be subject to the jurisdiction of another sovereign monarch, since they were of equal standing with each other: *par in parem non habet imperium*.²⁵³

The principle of non-intervention constitutes a further justification for the absolute immunity from criminal jurisdiction for Heads of State²⁵⁴. To arrest and detain the leader of a country is effectively to change the government of that state; this would be a particularly extreme form of interference with the autonomy and independence of that foreign state.²⁵⁵

It is well established that, put broadly, a Head of State enjoys a wide immunity from the criminal, civil and administrative jurisdiction of other States²⁵⁶. In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity.²⁵⁷

The distinction between the Head of State and the head of government does not, of course, necessarily reflect the realities of power within the State, which are distinct from the formal constitutional arrangements²⁵⁸. In many states it is the Head of

250Hafner, op-cit, p.3

251The Institute of International Law, Napoli Session, 2009, Article II (Principles) 1. Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.

252Watts, op-cit, p.52

253Ibid, (This Latin Rule means: an equal have no power over an equal)

254The principle(of non-intervention) is the corollary of the principle of sovereign equality of states, which is the basis for the immunity of states from the jurisdiction of other states (*par in parem non habet imperium*), In: Akande and Shah, op-cit, p.824

255The notion of independence means that a state has exclusive jurisdiction to appoint its own government and that other states are not empowered to intervene in this matter, In: Ibid

256Watts, op-cit, p.53

257The Institute of International Law, Session of Vancouver, 2001, Article2, (The Head of Government of a foreign State enjoys the same inviolability, and immunity from jurisdiction recognized, in this Resolution, to the Head of the State, In: Article 15(1) of the Session of Vancouver).

258Watts, op-cit, p.98

Government who is the effective leader of the country²⁵⁹. Thus to arrest and detain him or her is as damaging to the autonomy of the state as is the case with Heads of State.²⁶⁰

C-3.3: Universality and Immunity *Ratione Personae*:

“The 1948 genocide Convention in article 4, the 1973 Apartheid Convention in article 3, and the 1984 Torture Convention in articles 4 and 12, removed head of state criminal prosecution, presumably irrespective of whether prosecution is before a national or international judicial body. The language employed by these provisions does not, however, explicitly state that the removal of substantive immunity for these crimes also removes temporal immunity. The ICJ’s 2002 decision in *Congo v. Belgium*, discussed below, recognizes the existence of temporal immunity for incumbent officials”.²⁶¹

The parties of the Arrest warrant case had raised legal tension between exercise of absolute universal jurisdiction (i.e. in absentia) and personal immunities. The Court left a future possibility of allowing Belgium, or another state, to exercise universal jurisdiction for serious international crimes, once the temporal immunity has expired.²⁶²

According to the ICJ:

1-International law certainly permits universal jurisdiction where the accused be present in the territory of the Forum State and he or she does not possess immunity *ratione personae*, thus (personal) immunity from (universal) jurisdiction, recognized by the Court.

259H. Fox, *The Law of State Immunity* 2nd edn, (2008), at 670 (n.16) notes that in 1978 there were ‘68 States whose Heads were also Heads of Government’, In: Akande and Shah, op-cit, p.825

260Ibid

261Bassiouni, ICL2008, V.I, op-cit, p.53 (also, judge Prof. Cassese ‘after mentioned Genocide and Torture Conventions’ concluded that: ‘Certainly, there is still resistance to this trend favorable to lifting personal immunities in the case of international crimes’. In: Cassese, ICL2008, op-cit, p.311)

262Bassiouni, ICL2008, V.I, op-cit, p.56

2-The Court logically inferred from the rationale behind the rules on personal immunities of such senior state officials as Heads of State or government (plus foreign ministers and diplomatic agents), that these immunities must perforce prevent any prejudice to the 'effective performance' of their functions.²⁶³

3-Certain incumbent state officials being protect by broad personal immunity, it did not distinguish between official acts and private acts, or prior to office or during it, or whether the visit to a foreign country was official or private. Clearly, not only the arrest and prosecution of such a state agent while on a private visit abroad, but also the mere issuing of an arrest warrant, may seriously hamper or jeopardize the conduct of international affairs of the state for which that person acts.²⁶⁴

4-Diplomatic and other forms of international immunities are binding upon states and prevent them from exercising their national criminal jurisdiction over such persons while incumbents, thus recognizing temporal diplomatic and head of state immunity.²⁶⁵

5-The ICJ decided that state practice and the rules that remove immunities before international institutions, do not allow it to conclude that immunity exists in customary international law, but is eliminated in regard to national courts.²⁶⁶

Finally, as was written by Professor Werle: 'The personal immunity enjoyed by heads of state and government, foreign ministers, and diplomats only stands in the way of prosecution for crimes under international law for the duration of their tenure in office'.²⁶⁷ Sources of *ratione personae* are as follow:

²⁶³They therefore bar any possible interference with the official activity of such officials, In: Cassese ICL2008, pp.309-310 (see more information about the judgment under 'Belgium legislation' in this Chapter)

²⁶⁴Cassese, ICL2008, op-cit, p.310

²⁶⁵Bassiouni, Universal Jurisdiction Unrevisited, op-cit, p.35

²⁶⁶Judgement 14 February 2002, §58, op-cit, p.551

²⁶⁷Werle, ICL2009, op-cit, p.239, passim

On February 14, 2002, the ICJ rendered its decision, holding that an incumbent foreign minister benefits from the customary and conventional international law immunity afforded diplomats.²⁶⁸

The principle that immunity *ratione personae* subsists even when it is alleged that the senior serving official has committed an international crime has been applied in recent years by several national courts²⁶⁹. Judicial opinion and state practice²⁷⁰ on this point are unanimous and no case can be found in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime.²⁷¹

According to the above sources, personal immunity of Heads of State and of other high ranking officials in regard to foreign national courts is absolute immunity and without any form of exception even for committing international crimes.

²⁶⁸Bassiouni, ICL2008, V.I, op-cit, p.60, [This international customary rule applies unless the states concerned are bound by specific (customary or treaty) rules providing for such prosecution, in: Reydam Luc, Sharon and Others, In: The Oxford Companion to International Criminal Justice, op-cit, p.919]

²⁶⁹See Ghaddafi case, No.1414, 125ILR456, Castro case, No.1999/2723, Order (Audiencia nacional Mar.4,1999)(Spain); Sharon case, No. P.02.1139.F, 42ILM596(2003); Pinochet (No.3),[1999] House of Lords; Jiang Zemin, 282 F.Supp.2d 875(N.D.11.2003)(civil proceedings against Chinese president Jiang Zemin alleging torture, genocide, and other human rights violations dismissed on grounds of immunity);Mugabe,169F.Supp.2d259(S.D.N.Y.2001)(civil proceedings against Zimbabwean president Robert Mugabe alleging torture dismissed on grounds of immunity). In January and February 2004, British district judges rejected, on grounds of immunity, applications for warrants for the arrest of Mugabe, the head of state of Zimbabwe, and General Shaul Mofaz, the Israeli minister of defense, regarding allegations of torture and war crimes, respectively Application for Arrest Warrant Against General Shaul Mofaz(Bow St.Mag.Ct.Feb.12,2004), 53Int'L&Comp.L.Q.769,771, In: Akande, Immunities and ICC, op-cit, p.411, (see Head of State Immunity for Former Chinese President Jiang Zemin, In: Contemporary Practice of the United States, 97 AJIL 2003, pp.974-977)

²⁷⁰In 2002 the United States government issued a suggestion of immunity in a case brought against the then president of China alleging torture, genocide, and other human rights violations. See Plaintiffs A, B, C, D, E, F v. Jiang Zemin, 282 F.Supp.2d875 (N.D.11.2003); Sean D. Muephy, Contemporary Practice of the United States, 97AJIL974-77(2003). In August 2003, Saied Baghban, an Iranian diplomat accused of having been involved in the bombing of a Jewish center in Argentina was briefly detained in Belgium but then released on grounds of diplomatic immunity. Richard Beeston, Iran Threatens to Hit Back over Diplomat's Arrest, Times(London),Aug.28,2003,at 17.Similarly, despite accusations that the Israeli ambassador to Denmark was complicit in torture while he was head of Shin Bet, the Israeli Intelligence Service, Denmark has maintained that he is entitled to diplomatic immunity from Danish criminal jurisdiction. Andrew Osborn, Danish Protests Greet Israeli Enjoy, GUARDIAN, Aug.16, 2001, at 13.Likewise, the authorities of the United Kingdom took the view that a serving Israeli defense minister was entitled to immunity from arrest despite the allegation that he had been responsible for war crimes in the West Bank. Chris McGreal, Sharon's Ally Safe from Arrest in Britain, GUARDIAN, Feb.11,2004,at19, In:Akande,Ibid

²⁷¹United States v. Noriega,117F.3d 1206(11th Cir.1997), is the only case that can be construed as denying immunity to a head of state. However, immunity was not accorded in this case on the ground that the U.S. government had never recognized General Noriega (the de facto ruler of Panama) as head of state, In: Akande, Ibid, [See United States v. Noriega, Case No.88-0079-CR, United States District Court for the Southern District of Florida, In: Bassiouni, M Cherif, Crimes against Humanity in International Criminal Law, 1992, p.466, margin no.238] [The US relied in that case on the tenuous proposition that it had not recognized Manuel Noriega as the official head of state of Panama, In: Bassiouni, ICL2008, V. I, op-cit, p.59]

C-3.4: Incumbent Certain Officials enjoy two Immunities:

“The international immunity regime applies to heads of state²⁷², diplomats, and officials on state missions. With respect to all such offices, a distinction is made between incumbent public officials and former public officials. The former benefits from certain substantive and temporal immunities, while the latter benefit only from substantive immunities for lawful acts of state”.²⁷³

Certain incumbent state officials such as Heads of State enjoy two kinds of immunities in front of foreign national courts. They enjoy personal immunity for guaranteeing the effective performance of their functions, for acts either official or private only during the office; it operates as a procedural defense. And functional immunity for official acts, that they perform on behalf of the State; it operates even after cease of office as a substantive defense.

For official acts, as with ‘simple’ officials, immunity *ratione materiae* continues to apply, with no temporal limits²⁷⁴. Consequently, immunity *ratione materiae* constitute a legal ground for not initiating domestic proceedings against serving State officials and former officials with respect to acts performed in their official capacity²⁷⁵. Here functional and personal immunity overlap.²⁷⁶

272Le Chef D’Etat Et Le Droit International (SFDI2002); J.Brohmer, State Immunity and The Violations of Human Rights(1997); Jean Salmon, Manuel De Droit Diplomatique 559 et seq.(1994); Oppenheim’s International Law 1036 et seq.(R. Jennings & A. Watts eds., 9th ed.1992); Charles Rousseau, Droit International Public 123 et seq. (1980).For early writings on the position of immunity of heads of state see Emmerich De Vattel, Le Droit Des Gens, OU Principes De La Loi Naturelle Appliquee A La Conduite Et Aux Affaires Des Nations Et Des Souverains 289(1773). See also Marc Henzelin, L’Immunit   penal des chefs d’Etat en matiere financiere: Vers une exception pour les actes de pillage de ressources et de corruption?,in 12 Revue Suisse De Droit International Et De Droit Europeen 179(2002); Mary Margarete Penrose, It’s Good to be the King!: Prosecuting Heads of State and Former Heads of State Under International Law,39 Colum. J. Transnat’l L.193-220(2000);Jill M. Sears, Confronting the ‘Culture of Impunity’, Immunity of Heads of State from Nuremberg to Ex Parte Pinochet, 42 German Y.B. Int’l L.125(1999);A. Bianchi, Immunity Versus Human Rights : The Pinochet Case, 10 Eur. J. Int’l L.249(1999); Ved. P. Nanda, Human Rights and Sovereign and Individual Immunity(Sovereign Immunity, Act of State Immunity and Diplomatic Immunity): Some Reflections, ILSA J.Int’l& Comp.L.467(1999); Arthur Watts, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, 247 Recueil Des Cours De L’Academie De La Haye(RCADI)9(1994). In: Bassiouni, ICL2008, V.I, op-cit, p.51

273Ibid

274See Vienna Convention on Diplomatic Relations of 1961, 500 UNTS(1961),p.95,Art.39(2), and Vienna Convention on Consular Relations of 1963, 596UNTS(1963), p.261,Art.53(4), In: Werle, ICL2009, op-cit, p.236

275Kleffner Jann K, Complementarity in the Rome Statute and National Criminal Jurisdictions, 2008,p.304

276Werle, ICL2009, op-cit, p.236

C-3.5: Immunity *Ratione Materiae*:

Every state official who has acted on behalf of the State in the exercise of his or her functions is immune from the jurisdiction of other states. Such acts are imputable only to the state and immunity *ratione materiae* is a mechanism for diverting responsibility to the state²⁷⁷. This kind of immunity is called ‘*ratione materiae*’ or ‘functional immunity’.

The functional immunities apply, on the strength of the so-called ‘Act of State doctrine’, to all state agents discharging their official duties²⁷⁸. “In principle, an individual performing acts on behalf of a sovereign state may not be called to account for any violations of international law he may have committed while acting in an official function. Only the state may be held responsible at the international level”.²⁷⁹

The consequence is that a public official cannot be held accountable for acts performed in the exercise of an official capacity, as these are to be referred to the state itself; an application of this principle to diplomatic agents can be found in article 39(2) of the Vienna Convention of 1961.²⁸⁰

“There are two related policies underlying the conferment of immunity *ratione materiae*. First rationale was cogently expressed by the Appeals Chamber of the ICTY in *Prosecutor v. Blaskic*:

[State] officials are mere instruments of a state and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributed to them personally but to the State on whose behalf they act:

²⁷⁷Akande and Shah, op-cit, p.826

²⁷⁸Cassese, ICL2008, op-cit, p.302

²⁷⁹Ibid

²⁸⁰The rule establishes that ‘when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or an expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist’, in: Zappala Salvatore, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation, 12 EJIL 2001, pp.595-596

they enjoy so-called ‘functional immunity’. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since”.²⁸¹

Secondly, it prevents national courts from indirectly exercising control over acts of foreign states through proceedings against foreign officials.²⁸²

Organic or functional immunities: (i) relate to substantive law, that is, amount to a substantive defence, (although the state agent is not exonerated from compliance with either international law or the substantive law of the foreign country-if he breaches national or international law, this violation is not legally imputable to him but to his state);(ii) cover official acts of any de jure or de facto state agent; (iii) do not cease at the end of the discharge of official functions by the state agent(the reason being that the act is legally attributed to the state, hence any legal liability for it may only be incurred by the state); (iv) are *erga omnes*, that is, may be invoked towards any other state²⁸³. Immunity *ratione materiae* attaches to acts performed by State officials in their official capacity.²⁸⁴

C-3.6: Universality and Immunity *Ratione Materiae*:

International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law; I do not believe that state immunity *ratione materiae* can coexist with them.²⁸⁵

In the Pinochet case, the ruling of House of Lords recognized that the grant of immunity to a former head of state would be incompatible with the objectives of the

281Prosecutor v. Blaskic (Objection to the Issue of Subpoena duces Tecum) IT-95-14-AR108(1997), 110 ILR(1997) 607, at 707, §38, In: Akande and Shah, op-cit, pp.826-827, passim

282Ibid, p.840

283Cassese, ICL 2008, op-cit, pp.303-304

284Kleffner, op-cit, p.303

285R v. Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (HL(E))[2000] I AC 61(Judgment November 1998); also reported as R v. Bartle and the Commissioner of Police for the Metropolis and Others Ex p. Pinochet, 37 ILM 1998, (House of Lords), at 289 per Lord Philips, In: Sands, op-cit, p.46

Torture Convention, and that a proper interpretation of the Convention required a rejection of immunity.²⁸⁶

Since the Torture Convention limits the offence of torture to acts committed in an official capacity, extra-territorial prosecution can occur only in cases where immunity *ratione materiae* would ordinarily be applicable²⁸⁷. As was stated by most of the judges in that case, a grant of immunity *ratione materiae* would have been inconsistent with those provisions of the Torture Convention according universal jurisdiction for torture.²⁸⁸

Similarly, the crime of enforced disappearance as defined by article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance can be perpetrated only by ‘agents of the State’ or ‘persons or groups of persons acting with the authorization, support or acquiescence of the State’.²⁸⁹ Once again, it would defeat the purpose of this treaty regime if immunities were allowed to bar prosecutions of individuals in the courts of third states.²⁹⁰

In Summary, where extra-territorial jurisdiction exists in respect of an international crime and the rule providing for jurisdiction expressly contemplates prosecution of crimes committed in an official capacity, immunity *ratione materiae* cannot logically co-exist with such a conferment of jurisdiction.²⁹¹

The above logical ground must consider with the ICJ judgment in the arrest warrant case, where the Court held that:

“It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various

²⁸⁶Sands, Ibid, passim, (See more details about the Pinochet Case, in section 2 of Second Chapter of this dissertation)

²⁸⁷Akande and Shah, op-cit, p.842, (It should be note that, for torture acting in an official capacity under the ICC Statute, is not necessary)

²⁸⁸See Pinochet(No.3), [1999]2All ER97, at114, 169-170,178-179,190(per Lords Browne-Wilkinson, Saville, Millett, Phillips) In: Ibid, p.841

²⁸⁹International Convention for the Protection of All Persons from Enforced Disappearance(2006), GA Res61/177,20 Dec.2006,A/RES/61/177.See Anderson, ‘How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearances Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance’ 7 Melbourne J Int’l L(2006)245, at275-277, In: Ibid, pp.842-843

²⁹⁰Ibid, p.843

²⁹¹Ibid, [The rule conferring extra-territorial jurisdiction displaces the immunity rule because both ask the domestic court to act in opposite ways and we say the latter in time rule should prevail, In: Akande and Shah, Rejoinder, op-cit, p.861]

international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions”.²⁹²

It is not clear why the Court needed to go this far, particularly without making it clear that it was here only concerned with immunities of serving foreign ministers²⁹³.

As drafted the effect of the passage takes one beyond the case in hand: it is not hard to imagine the way in which the sentence will be used to counter the logic of the argument underpinning one of the principal strands supporting the House of Lords’ conclusion that Senator Pinochet was not entitled to claim immunity (on the grounds that such immunity -for a former head of state- was inconsistent with the 1984 Convention)²⁹⁴. Whatever view one takes on that reasoning, the Court may or may not have intended to depart from that approach(it is unclear).²⁹⁵

Adopting this narrow perspective, the Court does not need to look at instruments giving effect to the principle of international accountability for war crimes and crimes against humanity.²⁹⁶

C-3.7: Immunity *Ratione Materiae* and International Crimes:

The ICJ’s judgment in the obiter dictum, deals with immunity *ratione materiae*. It held that:

“Accordingly, the immunities enjoyed under international law...do not represent a bar to criminal prosecution in certain circumstances...Thirdly, after a person ceases to hold the office of Minister for

292Judgment of 14 February 2002, op-cit, §59, p.551, [Here, the Court specified in general terms that treaty-based jurisdiction does not displace immunities, In: Orakhelashvili Alexander, Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah, 22 EJIL 2011, p.853]

293Sands, op-cit, p.49

294Ibid. p.50, [in opposite view: ‘It is generally correct to say that jurisdiction does not imply an absence of immunity- indeed, immunity is generally speaking an exception to an otherwise applicable jurisdiction. However, it must be remembered that the Court was considering the immunity *ratione personae* available to serving senior state officials. The position with regard to immunity *ratione materiae* is different’ In: Akande and Shah, op-cit, p.841]

295Sands, Ibid

296Dissenting Opinion of Judge Van den Wyngaert, §42, In: 41 ILM 2002, p. 634

Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity”.²⁹⁷

“Judge Van den Wyngaert found it extremely regrettable that the ICJ did not, like the House of Lords in the Pinochet case, qualify its statement. It could, and indeed should, have added that war crimes and crimes against humanity can never fall into this category”.²⁹⁸

“Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a state and as part of a state policy. They cannot, from that perspective, be anything other than ‘official’ acts”.²⁹⁹

According to perspective of Professor Cassese, “First, the Court wrongly resorted, in the context of alleged international crimes, to the distinction between acts performed ‘in a private capacity’ and ‘official acts’, a distinction that, within this context, proves ambiguous and indeed untenable. Second, the Court failed to apply, or at least to refer to, the customary rule lifting functional immunities for international crimes allegedly committed by state agents”.³⁰⁰

“Customary international law allows for an exception to the rule of *ratione materiae* immunity in the context of international crimes. According to these commentators, national case law and other elements of international practice clearly

297Judgment of 14 February 2002, from §61, op-cit, pp.551-552[The Court took the view that international crimes committed by state officials are official acts and thus protected by functional immunity in proceedings before foreign national courts even when the official has left office. Alternatively, it might be suggested that international crimes are to be regarded as private acts, thus fall outside the scope of immunity *ratione materiae*. A third way of interpreting the Court’s obiter dictum is that the list of (in§61) is non-exhaustive and does not preclude the possibility that there is a rule removing immunity *ratione materiae* in relation to prosecutions for acts amounting to international crimes, in: Akande, Dapo, Arrest Warrant Case, In: The Oxford Companion to International Criminal Justice, op-cit, p.586]

298Bassiouni, Universal Jurisdiction Unrevisited, op-cit, p.42, [This dictum could therefore weaken or seriously dilute the practical importance of the landmark decision of the House of Lords in Pinochet and its enormous effects in the struggle against impunity, In: Gaeta Paola, Ratione Materiae Immunities of Former Heads of State and International Crimes: The Hissen Habre Case, 1 JICJ 2003, p.192] [The ruling of the House of Lords, underscored the point that the commission of an international crime can never be characterized as an official function, In: Sands, op-cit, pp.46 and50]

299Opinion of ad hoc judge Van den Wyngaert, In: Bassiouni, Ibid, pp.42-43

300Cassese, When may Senior, op-cit, p.867, (See criticism about this part of the judgment, S. Wirth, Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium Case; M. Spinedi, State Responsibility v. Individual Responsibility for International Crimes: Tertium non Datur, all articles in: 13 EJIL 2002, p.853 to 899, also F. Sands, International Law Transformed? From Pinochet to Congo...? In: 16 LJIL2003, pp.50 to 52)

show that this exception is firmly established in customary international law and applies to *any state official and state representative*, including former heads of state and government and members of the cabinet. As a result, customary international law would permit foreign states to derogate from the rule on *ratione materiae* immunity for acts amounting to international crimes. It would also allow them to exercise jurisdiction over the state agent who performed the act in this capacity, even without the consent of the state he had represented”.³⁰¹

“It seems indisputable that by now an international general rule has evolved on the matter. Initially this rule only applied to war crimes and covered any member of the military of belligerent states, whatever their rank and position”.³⁰² The present state of customary and conventional international law removes international immunities for certain international crimes, such as: crimes against peace, genocide, crimes against humanity, war crimes, and torture.³⁰³

National case law proves the existence of such a rule³⁰⁴. There have been a significant number of national prosecutions of foreign state officials for international crimes.³⁰⁵

This, for example, happened in Eichmann, where the accused raised the question of ‘Act of state’, the court explicitly held that state agents acting in their official capacity may not be immune from criminal liability if they commit international crimes.³⁰⁶

301The obiter dictum of the Court only concerns former high-ranking state representatives, but does not apply to lower-ranking state agents and military officers, In: Gaeta Paola, Immunities and Genocide, In: The UN Genocide Convention, p. Gaeta,(ed.), 2009, pp.325-326, [hereinafter, Gaeta, Immunities and Genocide]

302Article 7 of the Nuremberg Charter has also come to acquire the status of a customary international rule. In addition, important national Military Manuals, for instance those issued in 1956 in the USA and in 1958 (and then in 2004) in the UK, expressly provide that the fact that a person who has committed an international crime was acting as a government official (and not only as a serviceman) does not constitute an available defence. In: Cassese, ICL2008, op-cit, pp.305-306

303Bassiouni, ICL2008, V. I, op-cit, p.61

304Cassese, ICL2008, op-cit, p.305

305See Cassese, When May Senior State Officials be tried for International Crimes? Some Comments on the Congo v. Belgium Case.13 EJIL 2002,853, at 870-871, referring to cases in which Israeli, French, Italian, Dutch, British, US, Polish, Spanish, and Mexican courts have entertained proceedings against foreign state officials (particularly foreign military officers)in respect of war crimes, crimes against humanity, and genocide; Cryer et al., An Introduction to International Criminal Law and Procedure(2nd edn,2010), at ch.4.In: Akande and Shah, op-cit, p.839

306Cassese, ICL2008,op-cit, pp.305-306

In Article 27 of the Rome Statute, paragraph 1 is derived from texts in the Nuremberg Charter, the Genocide Convention, and the Statutes of the ad hoc tribunals, denies a defence of official capacity.³⁰⁷

In my opinion, for reasons that were mentioned in two above parts (C.3.6 and C.3.7), it was correctly written by Professor Werle:

“In the case of crimes under international law, immunity *ratione materiae* is inapplicable not only to trials before international courts,³⁰⁸ but also vis-à-vis state judiciaries. This development gained significant momentum as a result of the decisions of the British House of Lords in the Pinochet Case”.³⁰⁹

As a result, in relation between universal jurisdiction and two kinds of immunities, it must be said that: solely personal immunity operates as a procedural defense in front of foreign national courts, even for crimes under international law; namely, only serving Heads of State or Government, as well as incumbent diplomats and foreign ministers enjoy temporal immunity before foreign national courts. After the period of office, all of them become punishable for committing such crimes, even if they have acted in official capacity on behalf of the State.

In other words: “Therefore serving state officials not entitled to immunity *ratione personae* and former state officials who are present on the territory of the forum state may be arrested and prosecuted for such (international) crimes”.³¹⁰

³⁰⁷Schabas, op-cit, p.446

³⁰⁸Thus the irrelevance of functional immunity already arises from the fact that genuine supra-national jurisdiction per definitionem supersedes state governments and penal authority; see G. Dahm, Delbrück and R. Wolfrum, *Volkerrecht*, Vol. I/3, 2nd edn. (2002), p.1018. To the extent that inter-national jurisdiction is treaty-based, such as in the case of the International Criminal Court, the treaty parties have partially given up state immunity; thus this does not stand in the way of prosecution before the ICC. For immunities before the international Tribunals, see D. Akande, 98 AJIL (2004), p.407 at pp. 415 et seq. In: Werle, ICL2005, op-cit, p.175

³⁰⁹Werle, *Ibid*, pp.175-176, [No substantive immunity exists for certain international crimes, whether before international or national judicial organs, In: Bassiouni, ICL2008, V. I, op-cit, p.61]

³¹⁰Akande and Shah, op-cit, p.849

D. Some Crimes within Universal Jurisdiction:

International criminal law evidences the existence of 28 crime categories³¹¹. These 28 categories are evidenced by 281 conventions concluded between 1815 and 2003.³¹² Explicit or implicit recognition of the theory of universal jurisdiction in conventional international law has been limited to certain international crimes.³¹³

A crime can become subject to universal jurisdiction through the development of customary international law, as evidenced by domestic legislation, international agreements, and the commentary of international law scholars.³¹⁴

The validity of the principle of universal jurisdiction under customary international law is generally acknowledged for genocide, war crimes in international armed conflict, and crimes against humanity, and is also accepted in regard to crimes in civil wars.³¹⁵

Since customary international law allows for exercising universal jurisdiction over above international crimes, consequently exercise of universality among non-States parties to the relevant Conventions, is also valid.

D.1: Piracy:

Piracy, for the purposes of international law, is essentially any illegal act of violence or depredation which is committed for private ends on the high seas or without the territorial control of any state³¹⁶. Piracy is deemed the basis of universal criminal jurisdiction for *jus cogens* international crimes.³¹⁷

311Bassiouni, Universal Jurisdiction, op-cit, p.169

312Bassiouni, The History of Universal Jurisdiction, op-cit, p.46

313Bassiouni, Universal Jurisdiction, op-cit, p.167

314RESTATEMENT(Third)of the foreign relations law of the UNITED STATES, § 404 cmt.a(1987),In: Geraghty, op-cit, p.380

315Here, doubts arise from the fact that the Geneva Conventions explicitly provide for universal jurisdiction only for war crimes in international armed conflict, In: Werle, ICL2009, op-cit, p.67 [There is the restrictive view 'The conditional universal jurisdiction is accepted, at the level of customary international law, with regard to piracy' In: Cassese, ICL2008, op-cit, p.338, margin no.4]

316Art 15 of the 1958 Convention on the High Seas, Art 101 of the 1982 Convention on the Law of the Sea In: Wallace Rebecca M. M, International Law, Fifth edition, 2005, p.122

317Bassiouni, Universal Jurisdiction, op-cit, p.169, passim

Hugo deGroot (Grotius), in 1624 concluded with respect to piracy that those who committed such crimes should be tried or punished, *aut dedere aut punire*³¹⁸. The problem of piracy on the high seas or outside the territory of any State was resolved by giving any State the right to board a ship on reasonable suspicion of piracy, and to arrest the ship and try and punish the pirates.³¹⁹

Traditionally, customary international law did, however, recognize one case of universal jurisdiction, that of piracy³²⁰. In the 20th century, article 19 of the Geneva Convention on the High Seas of 29 April 1958 and article 105 of the Montego Bay Convention of 10 December 1982, have provided:

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the property, subject to the rights of third states acting in good faith”.

Thus, under these conventions, universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory.³²¹

Of decisive importance is that this jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all³²². Thus, universal jurisdiction for the crime of piracy is firmly established in positive international law.³²³

318See Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*: Classics of International Law (Francis W. Kelsey trans., 1925), Professor Bassiouni in 1973 changed the maxim to *aut dedere aut judicare*, In: Bassiouni, ICL2008, V.I, op-cit, p.130

319 Universal jurisdiction over human rights offences (such as genocide) would not be limited to situations in which they are committed in areas outside the territory of any State, In: Oxman, op-cit, p.281

320Separate Opinion of President Guillaume, op-cit, p.559

321Ibid

322Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, op-cit, p.587

323Bassiouni, Universal Jurisdiction, op-cit, p.172

D.2: Genocide:

The term ‘genocide’ was coined by Polish lawyer Raphael Lemkin during World War II to describe the crimes committed against the Jews by the Nazis³²⁴. In Resolution 96(1) of 11 December 1946, the UN General Assembly for the first time defined the crime of genocide and determined it to be a crime under international law.³²⁵

Article II of the (1948) Convention on the Prevention and Punishment of the Crime of Genocide, marked the first time the crime was formulated in an international legal instrument³²⁶. Today, the substance of article II is part of customary international law and *jus cogens*.³²⁷

In addition to this conventional foundation, the prohibition of the crime of genocide is also part of customary international law³²⁸. It has been argued, however, that while the Convention provides for territoriality-based prosecution, it does not preclude the possible exercise of extraterritorial jurisdiction over the crime of genocide.³²⁹

Kenneth Randall observed that the Genocide Convention’s requirement that States prosecute alleged perpetrators of genocide on the basis of territorial jurisdiction did not deprive them of their preexisting customary right to exercise universal jurisdiction over genocide.³³⁰

³²⁴Lemkin r., Axis Rule in occupied Europe (1973), p.79 In: Werle, ICL2005, op-cit p. 190

³²⁵UN DOC:A /RES/1/96(1946), In: Ibid

³²⁶Ibid, p.191

³²⁷See ICJ, Advisory Opinion of 28 May 1951 (Reservation to the Convention on the Prevention and Punishment of Genocide), ICJ Rep. 1951, p.23; A. Cassese, International Criminal Law(2003), pp.96,98 In: Ibid

³²⁸See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ, 15,23 (May28)(The principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation); see also Statute of the International Tribunal, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, para 45 at 12; Restatement(Third), op-cit, §702(listing the prohibition of genocide at customary law); Lauri Hannikainen, Peremptory Norms(Jus Cogens) In International Law 282-83(1988), at 458-66; Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations 65 n.2(1992)at 73(Evidence of opinio juris and general State practice supports the conclusion that the rule against genocide is part of international customary law, and perhaps of jus cogens); Theodor Meron, International Criminalization of Internal Atrocities, 89AMJ.Int’l L(1995), at 558(Genocide is a crime under both customary law and a treaty), In: Boed , op-cit, p.309

³²⁹Boed, Ibid

³³⁰Kenneth C. Randall, Universal Jurisdiction under International Law, 66 Tex. L. Rev.(1988), at 836, In: Ibid, p.310

Scholars have persuasively argued that genocide, as part of *jus cogens*, already is subject to universal jurisdiction³³¹. Commentators argue consistently that customary international law has recognized universality of jurisdiction for genocide even though there is no state practice to support that argument³³². As Professor Meron states, ‘It is increasingly recognized by leading commentators that the crime of genocide (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be cause for prosecution by any state’.³³³

The fact that the Genocide Convention explicitly grants jurisdiction to prosecute genocide only to ‘a competent tribunal of the State in the territory of which the act was committed’ or ‘such international penal tribunal [to be created] as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’ is not an obstacle to the customary-law application of the principle to genocide.³³⁴

The first convictions handed down by German courts for the crime of genocide, §220a StGB, occurred in the course of the Yugoslavia trials³³⁵. In this case, the Constitutional Court determined that, “As the most serious violation of human rights,...genocide is the classic case for application of universal jurisdiction,...the function of which is to make possible the most complete possible prosecution of crimes against particularly important legal values of the international community”.³³⁶

Whether a third state also has a customary law duty to prosecute for genocide and crimes against humanity remains in dispute.³³⁷

331For citations to genocide as *jus cogens*, see Jordan J. Paust, Congress and Genocide: They're Not Going To Get Away With It, 11 Mich. J. Int'l L. 10, n.1(1989). See also Restatement (Third) of Foreign Relations Law §404(Tentative Draft No.6,1985). In: Lippman Matthew, Genocide, In: Bassiouni, ICL2008, V.I, op-cit, p.419

332Bassiouni, Universal Jurisdiction, op-cit, p.178

333Theodor Meron, International Criminalization of Internal Atrocities, 89 AJIL 1995, In: Ibid

334Bosnia and Herzegovina v. Yugoslavia, ICJ, judgment of 11 July 1996 (Application of the Convention on the Prevention and Punishment of the Crime of Genocide), ICJ Rep.1996,p.595, §31, In: Werle, ICL2005, op-cit, p.60, margin no.332

335Kaleck, op-cit, p.99

336The sentencing of Nikola Jorgic, a Bosnian Serb, to life imprisonment on eleven counts of genocide by the Dusseldorf Court of Appeals on September 26, 1997, was affirmed by the Federal Supreme Court (April30, 1999) and later by the Constitutional Court (Decision of December 12, 2000) Juristen-Zeitung 2001, pp.975 et seq. In: Ibid, pp.99-100

337Werle, ICL2005, op-cit, p.64

D.3: Crimes against Humanity:

The term was first used in 1915, in relation to the mass killing of Armenians by Turkish forces, the British, French, and Russian governments issued a declaration calling these acts ‘crimes...against humanity and civilization’.³³⁸

For crimes against humanity, the threat to peace, security and well-being of the world consists in the systematic or widespread attack on the fundamental human rights of a civilian population.³³⁹

“Crimes against humanity were first explicitly formulated as a category of crimes in article 6(c) of the Nuremberg Charter. The Charter defined as crimes: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”.³⁴⁰

Like the Nuremberg Principles generally, criminal liability for crimes against humanity under customary international law has since been frequently affirmed and acknowledged³⁴¹. The understanding that universal jurisdiction extends over crimes against humanity seems well-established in doctrine and State practice.³⁴²

No international convention, apart from the Rome Convention of 17 July 1998, deals with the prosecution of such crimes³⁴³. It is also important to note that there is

³³⁸Akande and Shah, op-cit, p.845

³³⁹On the interests protected by international criminal law, see marginal nos.77 et seq. In: Werle, ICL2005, op-cit, p.220

³⁴⁰Ibid, p.216

³⁴¹Ibid, p.218

³⁴²As for doctrine, the following authorities, among others, indicate that States have universal jurisdiction over crimes against humanity: Restatement (Third), op-cit, §404 reporters note 1; Rosalyn Higgins, Problems and Process: International Law and How we Use it 57(1994), at 61, Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy 141(1997), at 143(Crimes against humanity today are subject to universal jurisdiction); M. Cherif Bassiouni, Crimes against Humanity, The Need for a Specialized Convention, 31 Colum. J. Transnat'l L.(1994), at 481(The duty to prosecute or extradite for 'crimes against humanity' is found upon the concept that such offenses are international crimes over which there exists universal jurisdiction); Lori Fisler Damrosch, Enforcing International Law Through Non-Forcible Measures, 269 Recueil Des Cours 9,(1997) at 218 ('Crimes against Humanity assuredly entail universal jurisdiction...') L. C. Green, Low-Intensity Conflict and the Law, 3 ILSA J. Int'l L& Comp. L.(1997)at 516,519('Since virtually all the breaches committed during [non-international conflicts] amount to crimes against humanity...,there is sufficient evidence to support the contention that all such offenses are subject to universal jurisdiction, so that offenders may be tried by any country in which they may be found'); Theodor Meron, International Criminalization of Internet Atrocities, 89 AM.J. Int'l L.(1995) ('It is now widely accepted that crimes against humanity are subject to universal jurisdiction. '); Diane F. Orentlicher, International Criminal Law and the Cambodian killing Fields, 3 ILSA J. Int'l L& Comp. L.(1997) at 705; Kenneth C. Randall, Universal Jurisdiction under International Law, 66 Tex. L.Rev(1998) at 800; Steven R. Ratner, The Schizophrenias of International Criminal Law, 33 Tex. Int'l L.J.237,235(1998), In: Boed, op-cit, p.305

³⁴³Separate Opinion of President Guillaume, op-cit, p.563

no specialized convention for ‘crimes against humanity’.³⁴⁴ As a result, one cannot say that there is conventional law providing for universal jurisdiction for ‘crimes against humanity’.³⁴⁵

The first extraterritorial prosecution for crimes against humanity-the Israeli prosecution of Adolf Eichmann-was for crimes against humanity committed during World War II by a government official.³⁴⁶

A few States have adopted national legislation allowing domestic prosecution of ‘crimes against humanity’ even when committed outside the State’s territory and even when committed by or against non-nationals.³⁴⁷

As a *jus cogens* international crime, ‘crimes against humanity’ are presumed to carry the obligation to prosecute or extradite, and to allow States to rely on universality for prosecution, punishment, and extradition.³⁴⁸

D.4: War Crimes:

The term ‘war crimes’ is used in various and sometimes contradictory ways³⁴⁹. Some see war crimes very generally, as criminal conduct committed in the course of war or other armed conflict³⁵⁰. Others apply the term to all violations of international humanitarian law, regardless of whether they are criminal.³⁵¹

344Bassiouni, Universal Jurisdiction, op-cit, p.177

345The writing of scholars essentially drives that proposition. In: Ibid

346The grounds on which the Israeli Supreme Court upheld Eichmann’s conviction suggests that the basis for the prosecution was universal jurisdiction: ‘the peculiarly universal character of these crimes [against humanity] vests in every State the authority to try and punish anyone who participated in their commission’: Attorney General of Israel v. Eichmann, 36 ILR(1962)5, at 287. In: Akande and Shah, op-cit, p.845

347Bassiouni, Universal Jurisdiction, op-cit, p.177

348Ibid

349Werle, ICL2005, op-cit, p.269

350Ibid

351United States Army Military Manual, The Law of Land Warfare (1956), Section 449, FM 27-10; reprinted in H. S. Levie, Terrorism in war (1993), p.2. See also J. S. Pictet (ed.) Geneva Convention I, Commentary (1957), pp.351 et seq. In: Ibid

Here, it is based on a more narrow definition: ‘A war crime is a violation of a rule of international humanitarian law that creates direct criminal responsibility under international law’.³⁵²

The violations of the Geneva Conventions and the so-called ‘Laws and Customs of War’ constitute war crimes and are *jus cogens* international crimes³⁵³. In Article 6(b) of the Nuremberg charter, the basis for the Nuremberg war crimes trials, the International Military Tribunal was granted jurisdiction over ‘violations of the laws and customs of war’.³⁵⁴

Customary international law as reflected in the practice of states does not, warrant the conclusion that universal jurisdiction has been applied in national prosecutions³⁵⁵. The recognition of universal jurisdiction for war crimes is essentially driven by academics and experts writing, which extend the universal reach of war crimes to the universality of jurisdiction over such crimes.³⁵⁶

War crimes under conventional international law will be considered in the next part (E.2).

D.5: Occurrence of General Crimes at High Seas:

The high seas constitute all parts of the sea that are not included in the territorial sea or in the internal waters of a State.³⁵⁷ This definition has had to be modified with the advent of the Exclusive Economic Zone (EEZ) and the recognition of archipelagic waters³⁵⁸. Waters not included in the EEZ, the archipelagic waters of an archipelagic State, the territorial waters or internal waters of a State, constitutes the high seas.³⁵⁹

³⁵²Werle, Ibid

³⁵³Bassiouni, Universal Jurisdiction, op-cit, p.175

³⁵⁴Werle, ICL2005, op-cit, p.279

³⁵⁵Bassiouni, Universal Jurisdiction, op-cit, p.176

³⁵⁶Ibid

³⁵⁷Art.1 of the 1958 Geneva Convention on the High Seas, in:Wallace,op-cit,p.161

³⁵⁸Ibid

³⁵⁹Ibid

The basic rule of the international law of the sea is that the national flag of a recognized state is a matter of extensive protection by that state³⁶⁰. In times of peace, this general principle forbids any interference with ships of another nationality upon the high seas.³⁶¹

All states of the world were empowered to search for and arrest pirates on the high seas; they were also empowered to bring them to trial, regardless of the nationality of the victims and of whether the proceeding state had been directly damaged by piracy.³⁶²

According to the StGB:

§4: German criminal law shall apply regardless of the law applicable in the locality where the act was committed, to acts committed on a ship or an aircraft entitled to fly the Federal flag or the national insignia of the Federal Republic of Germany.

§7(1): German criminal law shall apply to offences committed abroad against a German,...or if that locality is not subject to any criminal law jurisdiction.

(2) German criminal law shall apply to other offences committed abroad,...or if that locality is not subject to any criminal law jurisdiction, and if the offender: 1.was German at the time of the offence or becomes German after the commission; or 2.was a foreigner at the time of the offence, is discovered in Germany and, although the Extradition Act would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible.³⁶³

According to above sections, it seems that, about general offenses committed on the high seas, Germany has jurisdiction on grounds of active nationality, passive nationality, and the vicarious administration of justice. The last jurisdiction is provided for only in the event that a foreigner against foreigner commits the crime in the high seas, and the offender is apprehended in the German territory and in

360Sundberg Jacob W. F. The Crime of Piracy, in: Bassiouni, ICL2008, V.I, op-cit, p.808

361In times of war, every belligerent warship has the right of visit and search, In: Ibid

362Cassese, ICL2008, op-cit, p.28

363Bohlander, op-cit, pp.35,38

practice he or she is not extradited. In those cases, the German authority has jurisdiction by implication, in reliance on universal jurisdiction.³⁶⁴

Other cases for exercise of universal jurisdiction on the high seas:

1. According to active or passive nationality³⁶⁵ principle, about offences committed at high seas and space, can recognize the state's jurisdiction, however, that state is not able or not willing to exercise jurisdiction.

2. If the accused or victim's ship is lacking a flag.

³⁶⁴This conclusion, consistent with conclusion of Prof. Bassiouni about article 7.1 of the Torture Convention, In: Bassiouni, Universal Jurisdiction, op-cit, p.180.

³⁶⁵In the famous Lotus case, France had opposed the exercise of the passive nationality principle by Turkey for a common crime committed on the high seas, but the PICJ found exercise of jurisdiction by Turkey was possible.

E: Universal Jurisdiction by Treaty:

Individuals are also subject to international criminal responsibility by virtue of conventional international law, and that is mainly accomplished by placing duties upon states who become parties thereto, and who are thereby obligated to prosecute or extradite³⁶⁶. States practice evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, except when it arises out of specific treaty obligations.³⁶⁷

Various elements of customary international criminal law were being adopted into international treaty law; of particular importance were the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and the four Geneva Conventions of 12 August 1949, including the two Additional Protocols of 8 June 1977.³⁶⁸

Customary international law today recognizes that the state (of commission) in which a crime under international law is committed has a duty to prosecute; this duty also exists under treaty law for genocide and war crimes in international armed conflicts.³⁶⁹

The difference between the 1948 Genocide Convention and the 1949 Geneva Convention is that in the latter there is no geographic limitation: the obligation to prosecute is not limited to acts which occur within the territory of the state required to prosecute³⁷⁰. So if a person commits a grave violation of the 1949 Convention -for example willful killing or torture of a civilian- in France and is then discovered to be in the Netherlands by the relevant authorities, he or she must be ‘searched for’ and

366Bassiouni, ICL2008, V.I, op-cit, p.42

367Ibid, p.174

368Werle, ICL2005, op-cit, p.14

369Ibid,p.62

370Sands, op-cit, pp.43-44

brought before the Dutch courts or handed over to another concerned party, for example France.³⁷¹

E.1: The UN Genocide Convention:

The UN Genocide Convention of 1948 has been more than 130 contracting parties.

Pursuant to article III of the Convention that defines genocide as:

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such

(a)killing members of the group

(b)causing serious bodily or mental harm to members of the group

(c)Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

(d)Imposing measures intended to prevent births within the group

(e)forcibly transferring children of the group to another group”.

The Article 6 of the ICC Statute repeats it.

Under discussion, whether or not the Convention obliges contracting States for exercise of universal jurisdiction against nationals of other contracting States?

The preparatory works of the Genocide Convention indicate that the main scenario the drafters had in mind was one of genocide committed with the support and ‘complicity’ of the authorities of one state, on its territory and against its own population.³⁷²

In this respect, article VI of the Convention provides:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

³⁷¹Ibid, p.44

³⁷²Gaeta, Immunities and Genocide, op-cit , p.320

“There have been a very few number of genocide cases tried before national courts on the basis of the territoriality principle -with the major exception of Rwanda. This shows that the territoriality principle is probably not the adequate jurisdictional basis in the case of genocide, because it is generally committed with the complicity of the state itself”.³⁷³

As for universal jurisdiction, some delegations had firmly opposed the adoption of the universality principle in the Genocide Convention also because they considered it inconceivable that a ‘third’ state could bring to trial a state agent of another state³⁷⁴. The ad hoc Committee rejected the principle of universal jurisdiction in the Secretary General’s draft.³⁷⁵

There has been, however, since 1948, an evolution towards recognition under customary international law of the right of states to exercise universal jurisdiction over genocide³⁷⁶. This can be illustrated in at least three ways: (i) many states have incorporated universal jurisdiction over genocide in their legislation ;(ii) although states are somewhat reluctant to prosecute and punish genocide suspects on the mere basis of universal jurisdiction, there have been some prosecutions;(iii)universal jurisdiction over genocide has been recognized by international bodies and tribunals.³⁷⁷

The Special Rapporteur, in 1978, supported universal jurisdiction as an antidote to the failure to create an international criminal court³⁷⁸. In recent years it has been suggested in the literature that article VI does not prevent a State from exercising

³⁷³It is only when there is a change of regime, like in Rwanda, that prosecutions actually do take place. In: Thalmann Vanessa, National Criminal Jurisdiction over Genocide, In: The UN Genocide Convention, op-cit, p.258

³⁷⁴Gaeta, Immunities and Genocide, op-cit, p.319

³⁷⁵UN Secretary-General, Draft Convention on the Crime of Genocide, U. N. Doc. E/447(1947), art. VII, at 8, In: Lippman, op-cit, p.415

³⁷⁶Thalmann, op-cit, p.258

³⁷⁷Ibid

³⁷⁸Study of the Question of the Prevention and Punishment of the Crime of Genocide, U. N. ESCOR,31st Sess, 120, U.N. Doc. E/CN.4/Sub.2/416(1978), at 51, In: Lippmann, op-cit, p.419

universal jurisdiction in a genocide case³⁷⁹. The ICJ has made clear that obligations under the Convention apply also to genocide committed extra-territoriality.³⁸⁰

Article VI of the Genocide Convention also predicted jurisdiction by an international penal tribunal. The drafters of the Convention prospected the creation of an international tribunal which could both monitor the exercise of jurisdiction by national tribunals and fill the role of prosecuting this crime in case of impunity gaps.³⁸¹

“It is clear from the plain meaning and language of this provision that jurisdiction is territorial and that only if an ‘international penal tribunal’ is established and only if state parties to the Genocide Convention are also state-parties to the convention establishing an ‘international penal tribunal’ can the later court have universal jurisdiction. However, such universal jurisdiction will be dependent upon the statute of that ‘international penal tribunal’, if or when established”.³⁸²

The ICJ in the case concerning the application of the Genocide Convention, for answering to questions: does the ICTY constitute an ‘international penal tribunal’ within the meaning of article VI? And must the Respondent be regarded as having ‘accepted the jurisdiction’ of the tribunal within the meaning of that provision? held that:

“The notion of an ‘international penal tribunal’ within the meaning of article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of Genocide or any of the other acts enumerated in article III.

³⁷⁹See, more generally, Restatement(Third) of the Foreign Relations Law of the United States(1987), §404, In: Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, op-cit, p.580

³⁸⁰The Court notes that the obligation each State...has to prevent and to punish the crime of genocide is not territorially limited by the Convention: Application of Genocide Convention, Preliminary Objections (Bosnia and Herzegovina v. Yugoslavia) [1996] ICJ Rep594, at §31. In: Akande and Shah, op-cit, p.846

³⁸¹Zappala Salvatore, International Criminal Jurisdiction Over Genocide, In: The UN Genocide Convention, op-cit, p.276

³⁸²All three Statutes (the ICTY, ICTR, and ICC) contain a provision making genocide a crime within the jurisdiction of the court. But that, in itself, does not give these tribunals universal jurisdiction. In: Bassiouni, Universal Jurisdiction, op-cit, p.177[Of particular importance were the trial of John Paul Akayesu, in which an international court for the first time found a defendant guilty of genocide, and the conviction of Rwanda’s former Prime Minister, Jean Kambanda, In: Werle, ICL2005, op-cit, p.73]

The Respondent has fully co-operated with the ICTY, in particular by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory”.³⁸³

The purposive interpretation adopted by the ICJ certainly has the merit of bringing new life to an otherwise empty provision which had remained dead for half a century.³⁸⁴

Therefore, according to the Court, every Contracting Party is under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention.

E.2: Four Geneva Conventions:

The laws of war crimes protect fundamental individual rights in armed conflict; this is particularly clear in the grave breaches provisions of the Geneva Conventions³⁸⁵. ‘Grave breaches’ are serious war crimes that are subject to the universal jurisdiction of all States³⁸⁶. The international nature of the armed conflict is a prerequisite for the applicability of grave breaches of the Geneva Conventions of 1949.³⁸⁷

The ‘grave breaches’ provisions of the Geneva Conventions obligate every state party to prosecute certain serious violations; the relevant acts include killing, serious bodily injury or unlawful confinement if committed against ‘protected persons’.³⁸⁸

383Judgment of 26 February 2007, ICJ, *Bosnia Herzegovina v. Serbia & Montenegro*, §§ 444-445 and §448, In: 46 ILM 2007, pp.298-299

384Zappala, *International Criminal Jurisdiction Over Genocide*, op-cit, pp.276-277

385Werle, ICL2005, op-cit, p.285, (Geneva Convention I protects the sick and wounded in armed forces in wartime Geneva Convention II regulates the protection of the sick and wounded in warfare at sea, Geneva Convention III regulates the status and protection of prisoners of war, Geneva Convention IV for the first time comprehensively codified the protection of civilians in wartime. Additional Protocol I regulates the protection of persons in international armed conflict. Additional Protocol II expands the provisions of common article 3 of the Geneva Conventions of 1949 and establishes comprehensive regulations for non-international armed conflicts, In: Werle, pp.272-273). (With respect to the four Geneva Conventions of 1949, the ‘grave breaches’ are contained in articles 50, 51, 130, and 147, respectively. with respect to Protocol I, ‘grave breaches’ are contained in article 85, In: Bassiouni, *Universal Jurisdiction*, op-cit, p.175)

386Kittichaisaree, op-cit, 138

387Tadic Jurisdiction Decision, §§79-84; Celebici, §§201-2. However, Trial Chamber II quater of the ICTY in Celebici alluded to the possibility of the customary law having developed the provisions of the four Geneva Conventions since 1949 by extending their customary scope to cover internal armed conflicts as well (Celebici, §202), In: Ibid

388These protected persons generally include only foreign nationals, In: Werle, ICL2005, op-cit, p.62

There are, however, no provisions in these Conventions that specifically refer to universal jurisdiction; one can assume that the penal duty to enforce includes implicitly the right of the State Parties to exercise universal jurisdiction under their national laws.³⁸⁹

The Geneva conventions contain no direct reference to universal jurisdiction; nevertheless, this obligation (paragraph 2 from Article 49) is implied in the *aut dedere aut iudicare* obligation.³⁹⁰

Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, provide:

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

The principle of universal jurisdiction gives only the authority to prosecute³⁹¹. A far broader duty to prosecute crimes under international law committed outside a state’s own territory by foreign nationals (so-called mandatory universal jurisdiction) has so far been universally recognized only for war crimes in international armed conflicts³⁹². The Geneva Conventions form the basis for this customary law principle; they provide that the contracting states must either prosecute ‘grave breaches’ themselves, regardless of where, by whom, or against whom they are committed, or ‘hand such persons over for trial to another High Contracting Party concerned’.³⁹³ This rule aims at the most complete possible prosecution of serious violations; any

³⁸⁹Bassiouni, *Universal Jurisdiction*, op-cit, p.175

³⁹⁰Zahar Alexander and Sluiter Goran, *International Criminal Law*, 2008, p.498

³⁹¹Werle, *ICL2005*, op-cit, p.63

³⁹²Ibid

³⁹³Geneva Convention IV, Art.146.see G. Dahm, J. Delbruck and R. Wolfrum, *Volkerrecht*, Vol. I/3, 2nd ed.(2002), p.1008, In: Ibid

custodial state is obligated to try perpetrators itself or hand them over to a state that is willing to prosecute (*aut dedere aut judicare*).³⁹⁴

This jurisdiction was first provided for in the Geneva Conventions of 1949 with regard to grave breaches of the conventions; it was then extended by Additional Protocol I to breaches of such a protocol³⁹⁵. As is commonly known, the jurisdiction provided by the Conventions is universal in that those suspected of being responsible for grave breaches come under the criminal jurisdiction of all states parties, regardless of their nationality or the *locus commissi delicti*.³⁹⁶

There is nothing in the Law of Armed Conflict that prohibits national criminal jurisdiction from applying the theory of universality with respect to war crimes³⁹⁷. It can even be argued that the general obligations to enforce, which include the specific obligations to prevent and repress ‘grave breaches’ of the 1949 Geneva Conventions and Protocol I, allow states to expand their jurisdiction to include the theory of universality.³⁹⁸

E.3: Torture:

In contrast to crimes under international law, other international crimes may be classified as treaty-based crimes³⁹⁹. These include, for example, crimes against air traffic and maritime navigation, certain forms of narcotics crimes, acts of terrorism, counterfeiting, and torture.⁴⁰⁰

³⁹⁴Werle, *Ibid*

³⁹⁵Cassese, *The Rational for International Criminal Justice*, op-cit, p.125

³⁹⁶Cassese Antonio, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EJIL 1998, p. 3

³⁹⁷Bassiouni, *Universal Jurisdiction*, op-cit, p.176

³⁹⁸*Ibid*

³⁹⁹Werle, ICL2005, op-cit, p.37, [Crimes under international law differ from other international crimes in that they are directly punishable under international law. In contrast, the basis for prosecution and punishment of other international crimes is not international law, in particular international agreements, merely obligate states to declare certain offences criminal, In: Werle, pp.36-37]

⁴⁰⁰*Ibid*

Torture was established as an international crime in conventional international law in 1984 in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁰¹

Article 5, Paragraph 2 of the Convention against Torture provides for the exercise of universal jurisdiction: States Parties are obliged to prosecute crimes of torture even when the crime has no direct link to the state.⁴⁰²

Article 5 of the Convention, states:

1...

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

The premise of the enforcement scheme in this Convention is the concept *aut dedere aut judicare*⁴⁰³. Throughout the Convention there are several references to the jurisdiction of the enforcing state, and article 7.1 of the Convention states:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

But article 7.1 is more a reflection of *aut dedere aut judicare* than it is of universal jurisdiction⁴⁰⁴. It establishes the duty to extradite, and only in the event that a person

⁴⁰¹Bassiouni, *Universal Jurisdiction*, op-cit, p.179, ("The torture define as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or covering him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions", General Assembly Resolution 39/46 of December 10, 1984).

⁴⁰²Sulzer Jeanne, *Implementing the Principle of Universal Jurisdiction in France*, In: *International Prosecution of Human Rights Crimes*, op-cit, p.126

⁴⁰³See M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite in International Law* 3-69(1995). In: Bassiouni, *Universal Jurisdiction*, op-cit, p.180

⁴⁰⁴Bassiouni, *Ibid*

is not extradited is a state obligated to prosecute, by implication, in reliance on universal jurisdiction.⁴⁰⁵

Accordingly, under the Convention, a State party may exercise universal jurisdiction over torture, at least as far as other States parties to the Convention are concerned⁴⁰⁶. As the Restatement (Third) recognized, however, universal jurisdiction founded upon ‘punish or extradite’ provisions of treaties is ‘effective only among the parties, unless customary law comes to accept these offences as subject to universal jurisdiction’, and the Restatement (Third) did not list torture among the offenses subject to universal jurisdiction as a matter of customary law⁴⁰⁷. Consequently, exercise of universal jurisdiction over torture by a State not party to the Convention or against the interests of a State not party to the Convention would have uncertain validity.⁴⁰⁸

405Ibid

406For example, the U.S. implementing legislation for the Convention provides for extraterritorial jurisdiction where ‘(1) the alleged offender is a national of the United States; or(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or the alleged offender’ 18 U.S.C.2340 A(1999) While this discussion focused on the Convention against Torture, any binding aut dedere aut judicare provision of a treaty prohibiting torture would produce the same result. Without identifying all treaties that may authorize the exercise of universal jurisdiction over torture, it suffices for present purposes to established the effects of the aut dedere aut judicare provision of one relevant treaty and note that the same analysis would apply to any identical provision, In: Boed, op-cit, p.312

407Restatement (Third), op-cit, §404 & cmt.a, In: Ibid

408 Although, some commentators suggest that customary law permits all states to exercise universal jurisdiction over torture, In: Ibid, pp.312-313, (States not parties to the Convention against Torture and entitled, but not obliged, to exercise universal jurisdiction in respect of torture on the basis of customary international law. The ICTY has pointed out that the entitlement of every state to investigate, prosecute, and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction, is one of the consequences of the jus cogens character bestowed by the international community on the prohibition of torture. In: Kamminga, op-cit, p.949).[also, Lord Wilkinson, in the Pinochet Case, held that: The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed; international law provides that offences jus cogens may be punished by any state because the offenders are ‘common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution’, Judgment 24 March 1999, In: 38 ILM ,1999, p.589]

Section 2: Belgium Legislation:

Introduction: The popular Belgian law in relation with universal jurisdiction was enacted in 1993 and amended in 1999. This law and its amendment were designed to bring Belgium into compliance with its obligations under the Geneva Conventions of August 12, 1949 and the Additional Protocols of June 8, 1977 and to integrate genocide and crimes against humanity, as part of its national criminal jurisdiction.⁴⁰⁹

Belgium had offered universal jurisdiction in absentia without regard to the nationality of the victim or criminal, perhaps the most wide ranging exercise of jurisdiction over human rights in the world, certainly in Europe until 2003.⁴¹⁰

However, the ICJ in *Congo v. Belgium* determined that one case prosecuted under this statute was a violation of the principle of immunity of acting ranking ministers and could not proceed; this fact, and enormous U.S pressure, caused Belgium to modify its wide ranging law on universal jurisdiction in 2003.⁴¹¹

The experience of the Belgian universal jurisdiction law is particularly illustrative; whereas the first Belgian universal jurisdiction law (1993, expanded in 1999) specifically precluded sovereign immunity as a defense, the 2003 version of the law that superseded earlier versions reinserted an immunity defense⁴¹². The 2003 law also introduced a Belgian residency requirement in order for jurisdiction to be exercised against a defendant.⁴¹³

⁴⁰⁹David , *The Belgian Experience*, op-cit, p.359

⁴¹⁰Engel, op-cit, p.160

⁴¹¹Florian Hausweisner, *Belgium's controversial War Crimes Law Amended*, 19 Int'L Enforcement L.Rep.449(November, 2003) In: Engle, op-cit, p.160

⁴¹²Drumbl, op-cit, pp.238-239

⁴¹³ With these amendments, the truly universal jurisdiction scope of the statute became 'eviscerated' in: M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003) at 78, n.80. In: *Ibid*, p. 239[Proceedings continued against Hissen Habre, former dictator of Chad and an allegedly notorious human rights abuser. This litigation remained permissible under a 'grandfather clause' in the 2003 statute that allowed cases to proceed if plaintiffs were Belgian citizens or resident at the time of the filing of the complaint and if an investigation had already been initiated. In: *Ibid*, pp.241-242].

A: The Law of 16 June 1993

Belgian jurisdiction rules are scattered throughout the penal code, the code of penal procedure and special statutes⁴¹⁴. In 1993 the Belgian legislature adopted the Act concerning the Punishment of Grave Breaches of the Geneva Conventions of 1949 and Protocols I and II of 1977, in order to implement the Conventions and additional protocols. This Statute lists twenty acts that constitute grave breaches of the Conventions and Protocols and declares them crimes under international law.⁴¹⁵

The first universal jurisdiction laws that Belgium applied were based on the principle *aut dedere aut judicare* represented in certain international conventions⁴¹⁶. One of the notable innovations of the law of 16 June 1993 was the extension of its application to non-international armed conflicts as defined in Protocol II.⁴¹⁷

B: Amendment 1999:

The law of 10 February 1999 concerning the Punishment of Serious Violation of International Humanitarian Law, sometimes referred as Belgium's Genocide Act. It allows Belgian courts to prosecute persons for genocide, war crimes and crimes against humanity on the basis of the principle of universal jurisdiction *in absentia*.⁴¹⁸

Article 5(3) of the 1999 Law was the main reason for the Democratic Republic of the Congo to initiate a case before the ICJ⁴¹⁹. This article provided that:

Article 5(3): The immunity attributed to the official capacity of a person, does not prevent the application of the present Act.⁴²⁰

⁴¹⁴Reydams, op-cit, p.102

⁴¹⁵Ibid, p.106

⁴¹⁶David, op-cit, p.359

⁴¹⁷Winants Alain, The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction, 16 LJIL 2003, p.493

⁴¹⁸Smis Stefaan and Borghst Kim Van der, Introductory Note to Belgium's Amendment to the Law of June 16, 1993 (As Amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law, 42 ILM 2003, p.742

⁴¹⁹Ibid

⁴²⁰Belgium, Act of 10 February 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law, In: 38 ILM 1999, p.924

The Belgian law, however, rejected not only the substantive immunity but also the procedural immunity⁴²¹. When the Belgian Law of 1999, enacting Article 5(3), came into force, it was considered that this provision reflected ‘an existing rule of international humanitarian law’, and reference was made to various provisions of international law, such as Article 27 of the Rome Statute for an International Court.⁴²²

The Belgian Law of 1993, as amended in 1999, contains several rules derogating from common penal and penal procedural law, such as the inapplicability of any statute of limitations or amnesties, the exclusion of any ground of exoneration of responsibility or excuse, the rejection of immunity attached to an official position, and the rule of universal jurisdiction.⁴²³

The 1993/1999 law foresees, in article 7, that Belgium can exercise universal jurisdiction concerning IHL crimes, a universal jurisdiction by default or in absentia of ‘absolute’ universal justice⁴²⁴. This article states that:

Article.7: The Belgian courts shall have jurisdiction to deal with breaches provided in the present Act, irrespective of where such breaches have been committed.⁴²⁵

C: Formation of Various Files:

The issue is an important one as many claims brought under the Belgian Law related to Heads of State, Heads of Governments and other high officials; it included the Cuban President Fidel Castro, the Ivory Coast President Laurent Gbagbo, the Iraqi President Saddam Hussein, the Rwandan President Paul Kagame, the Mauritanian President Maaouya Ould Sid' Ahmed Taya and the Israeli Prime

⁴²¹Smis and Borghet, op-cit, p.742

⁴²²Winants, op-cit, p.496

⁴²³Ibid, p.493

⁴²⁴David, op-cit, p.371

⁴²⁵Belgium, Act of 10 February 1999, op-cit, p.924

Minister Ariel Sharon⁴²⁶. The case before the ICJ was brought in response to a warrant issued by the Belgian Government for the arrest of Mr. Abdulaye Yerodia Ndombasi.⁴²⁷

On 8 June 2001, a court in Brussels condemned four Rwandans to prison terms for crimes committed in Rwanda in 1994, by reference to the 1993 Law, in June 2001 two complaints were filed against Ariel Sharon in Brussels, on 23 June, the Public Prosecutor's Office in Brussels declared the second complaint for acts of genocide and crimes against humanity allegedly committed in the Sabra and Shatila camps, to be receivable.⁴²⁸

In March and June 2003, complaints were brought against US political and military leaders for their role in the 1991 and 2003 Iraq and Afghanistan Wars, including President Georg W. Bush, Defense Secretary Donald Rumsfeld, Secretary of State Colin Powell, General Tommy Franks and the British Prime Minister Tony Blair⁴²⁹. There were also investigations of a number of companies; one high profile example is the investigation against the multinational oil giant Total-Elf Aquitaine, in relation with allegations of slave-labor in Myanmar(Burma).⁴³⁰

D: Case of Yerodia:

On 17 October 2000 the Congo filed in the Registry of the Court an application instituting proceedings against Belgium in respect of a dispute concerning an 'international arrest warrant',⁴³¹ by a Belgian investigation judge.⁴³²

⁴²⁶None of these claims have thus far led to indictments, they were all instituted through the procedure of the partie civil not by a Belgian Prosecutor, Smis and Borghet, op-cit, p.743

⁴²⁷Ibid

⁴²⁸Beigbeder, op-cit, p.54

⁴²⁹Ibid

⁴³⁰Kemp Gerhard, Individual Criminal Liability for the International Crime of Aggression, 2010,p.166

⁴³¹This 'an international arrest warrant in absentia' was issued on 11 April 2000 against the Abdulaye Yerodia Ndombasi, for grave breaches of the Geneva Conventions of 1949 and for crimes against humanity allegedly perpetrated before he took office (He was accused of having made various speeches inciting racial hatred during the month of August 1998) the arrest warrant was circulated internationally through Interpol. At the time when arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

⁴³²Judgment of 14 February 2002, op-cit, §1,p.538

The Congo relied in its application on two separate legal grounds:

First, it claimed that ‘the universal jurisdiction that the Belgian State attributes to itself under article 7 of the Law in question’ constituted a

“[V]iolation of the principle that a State may not exercise its authority on the territory of another State and the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, Paragraph 1, of the Charter of the United Nations”.

Secondly, it claimed that:

“[T]he non-recognition, on the basis of article 5... of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office constituted a violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations”.⁴³³

However, in its submission in its Memorial, and in its final submission at the close of the oral proceedings, the Congo invokes only the latter ground⁴³⁴. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability and to immunity from criminal process being ‘absolute or complete’, that is to say, they are subject to no exception.⁴³⁵

D.1: Belgium’s Argument:

The major reasons of Belgium were as follow:

The court will now address Belgium’s argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity... Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals’ state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the Pinochet and Gaddafi cases respectively, in

⁴³³Ibid, from §17,p.542

⁴³⁴Ibid, from §45,p.548

⁴³⁵Ibid, from §47,p.548

which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law.⁴³⁶

For considering Belgium's argument, the ICJ stated as below:

The Court has carefully examined State practice, including national Legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. 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.⁴³⁷

The ICJ examined the non-immunity provisions of the Nuremberg Charter, and the Statutes of the ICTY, ICTR and ICC, and found that these (rules) did not suggest any exception in customary international law in regard to national courts.⁴³⁸

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.⁴³⁹

D.2: The ICJ's Judgment in relation to Universality:

The Court; by ten votes to six,

Finds that the Kingdom of Belgium must by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.⁴⁴⁰

The court did, however, address one of the consequences of Belgium's universal jurisdiction law of 1993 by ordering it to nullify the international effect to its arrest warrant⁴⁴¹. But it did so without addressing the predicate issue of universal jurisdiction⁴⁴². In failing to address the dispute from a more principled perspective,

⁴³⁶Ibid, from §56,p.550

⁴³⁷Ibid, First paragraph of §58, p.551

⁴³⁸Cryer Robert, Friman Hakan, Robinson Darryl, Wilmsburts Elizabeth, An Introduction to International Criminal Law,2007,p.436

⁴³⁹Judgment 14 February 2002, op-cit, §58, p.551

⁴⁴⁰Ibid, from §78,p.557

⁴⁴¹Bassiouni, Universal Jurisdiction Unrevisited, op-cit, p.35

⁴⁴²Ibid

Judge Van den Wyngaert regards the ICJ as having missed an excellent opportunity to contribute to the development of modern international criminal law.⁴⁴³

The unarticulated premise of this case is a world order consideration, upon which an unbridled or unregulated application of universal jurisdiction would negatively impact⁴⁴⁴. But surely the Court could have recognized the validity, if not the binding obligation, to enforce certain international crimes through universal jurisdiction and established guidelines or parameters for its application to avoid disruption of world orders.⁴⁴⁵

All judges agree on the validity of universal jurisdiction when the perpetrator is found on the territory of the prosecuting state⁴⁴⁶. Insofar as states would want to rely on universal jurisdiction to prosecute crimes under international law, the debate was certainly not terminated by the judgment.⁴⁴⁷

D.3: The Judgment, Immunities and Impunity:

The Court logically inferred from the rationale behind the rules on personal immunities of such senior state officials as Heads of State or government (plus foreign ministers and diplomatic agents), that these immunities must perforce prevent any prejudice to the ‘effective performance’ of their functions⁴⁴⁸. The ICJ clearly stated that foreign ministers enjoy, while in office, absolute immunity from foreign criminal jurisdiction: the fight against impunity for the most serious international crimes must be balanced against the stability of international relations that personal immunities aim at preserving.⁴⁴⁹

The Court, by thirteen votes to three,

443Ibid, p.41.[The instant case presented a novel question of universal jurisdiction, which neither the PCIJ (the Permanent Court of International Justice) nor the ICJ had previously addressed, In: Ibid, p.29]

444Ibid, p.35

445Ibid

446Winants, op-cit, p.500

447Kemp, op-cit, p.174

448Cassese, ICL2008,op-cit, pp.309-310

449Frulli Micaela, Immunities of Persons from Jurisdiction, In: The Oxford Companion to International Criminal Justice, op-cit, p.369

Finds that the issue against Mr. Abdulaye Yerodia Ndobasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.⁴⁵⁰

The Court considered the general immunity of foreign ministers under customary international law, even for a criminal allegation concerning a war crime or a crime against humanity⁴⁵¹. These immunities cover all acts performed by the State official, whether or not performed during or prior to assumption of his official function, within or outside the territory of the relevant foreign State.⁴⁵²

This judgment remains the most authoritative contemporary pronouncement on the scope of immunity *ratione personae* in national courts in matters of alleged serious international crimes.⁴⁵³

The Court emphasized, however, that the immunity from jurisdiction does not mean impunity. The Court held that:

Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.⁴⁵⁴

In the opinion of the ICJ this does not mean that immunity leads to impunity, since the court enumerates four cases where persons protected by immunity under customary international law can be prosecuted: (i) in their own country;(ii) in other

450Judgment 14 February 2002, op-cit, from §78, p.557

451 §§51-55, In: Sands, op-cit, p.48, passim

452Gaeta Paola, Official Capacity and Immunities, In: The Rome Statute of the International Criminal Court, op-cit, p.976

453Drumbl, op-cit, p.239

454Judgment of 14 February 2002, from §60, op-cit, p.551, [The granting of immunity is not a statement that an act is lawful. Rather, it is a declaration by the judicial authority concerned that it is not the appropriate forum for pronouncing on the legality or illegality of the act, Akande and Shah, Rejoinder, op-cit, p.860]

states, if the state they represent waives immunity;(iii) after they cease holding office (except for official acts); and (iv) before an international court.⁴⁵⁵

The third example of the Court is related to immunity *ratione materiae*, as aforementioned discussed (part C.3.7 of the first section); the ICJ's view in this regard has been the subject of widespread criticism. As correctly stated by professor Sands, 'Broad presumptions in favor of immunities -as reflected in the ICJ's recent decision- can only lead to a diminished role for national courts, a watered-down system of international criminal justice, and greater impunity'.⁴⁵⁶

As a result, in attention to end to international impunity as a core goal's exercise of universal jurisdiction, I must say that: solely personal immunity operates as a procedural defense in front of foreign national courts, even for crimes under international law. After the period of office, all State officials are punishable for committing such crimes, even if they have acted in official capacity on behalf of the State.

E. Belgium Supreme Court and Amendments of Law:

Belgium's Court of Cassation, in 12 February 2003, regarding the appeals of the decision concerning the prosecution of defendant Ariel Sharon, held that:

“Whereas, it appears from the finding of the decision that the civil parties initiated the action against the defendant for genocide, crimes against humanity and war crimes, while at the time they initiated the action the defendant held the office of Prime Minister of a foreign State, a function he still held when the contested ruling was issued;

Whereas customary international law opposes the idea that heads of State and heads of government may be the subject of prosecutions before criminal tribunals in a foreign State, in the absence of contrary provisions of international law obliging the States concerned;

⁴⁵⁵Winant, op-cit, pp.497-498,[It should be note that, in this context, Cassese points to the press release by the President of the Court, Guillaume, in which he states that this passage in the judgment should only be understood 'by way of example' see ICJ, Press Statement of Judge Gilbert Guillaume, 14 February 2002, In: Werle, ICL2005, op-cit, p.176, margin no.486].

⁴⁵⁶Sands, op-cit, p.53

Whereas, indeed, article IV of the Convention on the Prevention and Punishment of the Crime of Genocide provides that persons who have committed acts rendered criminal by the Convention shall be punished regardless of their official capacity:

That, nevertheless, article VI of that same Convention only provides for prosecution of such persons either before appropriate tribunals in the State or in whose territory the act was committed or before the International Criminal Court;

That it follows from the combination of these two provisions that immunity from jurisdiction is excluded in the case of prosecution before courts identified in article VI cited above but that immunity is not excluded if the accused is brought before the courts of a third State claiming jurisdiction that international law does not provide;

Whereas, moreover, article 27.2 of the Rome Statute of the International Criminal Court provided that immunities which may attach by reason of the official capacity of a person, in accordance with domestic law or international law, do not prevent the aforementioned court from exercising jurisdiction over such person;

That this provision does not impair the principle of customary international criminal law relative to jurisdictional immunity when the person who is protected is prosecuted, as in this case, before national courts of a state which asserts universal jurisdiction in the absence of the accused;

Whereas, finally, the Geneva Conventions of August 12, 1949 as well as the Additional Protocol I and II to these Conventions contain no provision that would prevent the defendant from invoking jurisdictional immunity before Belgian courts;

Whereas, without a doubt, under the terms of article 5.3, of the law of June 16, 1993, concerning the punishment of grave violations of international humanitarian law, immunity attaching to a person's official status does not prevent the application of the above-mentioned law;

Whereas, nonetheless, this rule of domestic law would contravene the principle of customary international criminal law on jurisdictional immunity if it were to be interpreted as having as its purpose to set aside the immunity sanctioned by such principle; that this domestic law cannot have such a purpose, but rather must be understood only as preventing the official capacity of a person from absolving the person from criminal responsibility for crimes enumerated by this law;

Whereas the ruling holds that these actions are not admissible;

That means, by virtue of the reasoning substituted by this Court for that which the petitioners appeal, the criminal action brought against the defendant for acts of genocide, crimes against humanity and war crimes is in effect inadmissible”.⁴⁵⁷

Above-decision was, in practice, the first amendment to the law of 1993/1999 Belgium. This verdict was the start of domestic amendments for reducing the exclusive position of Belgium, as the world’s capital for universal jurisdiction.

The Law of 1993/1999 was amended by a law of 23 April 2003 in relation to immunity and creates a mechanism for filtering cases that did not constitute a minimum link with Belgium.

According to the law of April 2003, Article 5(3) of the law was modified by the following provision:

‘International immunity derived from a person’s official capacity does not prevent the application of the present law except under those limits established under international law’.⁴⁵⁸

The provision is made conditional upon the limits set by international law⁴⁵⁹. The law in its current form thus respects the observations of the ICJ that international law has firmly established that diplomatic and consular agents, certain high-ranking state officials such as Heads of State, Heads of Government and Ministers of Foreign Affairs enjoy both civil and criminal immunities from jurisdiction in other States.⁴⁶⁰

Also according to this amendment, article 7 of the law of 1993/1999 was replaced as following:

“Belgium courts shall have jurisdiction over the violations provided by the present law, independent of where they have been committed and even if the alleged offender is not located within Belgium. The criminal action will nonetheless be subject to the request of the federal prosecutor if:

⁴⁵⁷Abbas Hijazi and others V. Sharon and others, Belgium, Court of Cassation, 12 February 2003, English translation of the decision, In: 42 ILM 2003, pp.599-600

⁴⁵⁸Belgium, Amendment 23 April 2003, In: 42 ILM 2003, p.755

⁴⁵⁹Smis and Borght, op-cit, p.743

⁴⁶⁰Ibid

1. The violation was not committed on Belgian territory 2. The alleged offender is not Belgian 3. The alleged offender is not located within Belgian territory 4. The victim is not Belgian or has not resided in Belgium for at least three years”.⁴⁶¹

On August 5, 2003, the Belgian legislature completely reviewed the 1993/1999/2003 law by eliminating it as a stand-alone law and integrated it into in the penal code and in the code of criminal procedure.⁴⁶²

In accordance with article 1bis, paragraph1, of the Belgium’s Code of Criminal Procedure:

In accordance with international law, there shall be no prosecution with regard to:

- Heads of State, heads of government, and ministers of foreign affairs, during their terms of office, and any other person whose immunity is recognized by international law;

- Persons who have immunity, full or partial, based on a treaty by which Belgium is bound.⁴⁶³

In accordance with article 12bis of Belgium’s Code of Criminal Procedure maintenance the principal of universal jurisdiction in Belgian law, but it is a jurisdiction limited to what conventional and customary international law, that is to say a ‘universal jurisdiction called territorial’, sine it requires that the prosecuted person be in Belgian territory.⁴⁶⁴

By limiting the exercise of universal jurisdiction to the case where the presumed perpetrator of a crime of international law is located in Belgium, one does not , however, exclude the right of the public prosecutor to open an investigation against the perpetrator even if he or she is not located in Belgium, in exactly the same manner as these investigations can be opened by the public prosecutor regarding a extraterritorial offenses for which the perpetrator is not located in Belgium.⁴⁶⁵

⁴⁶¹Amendment 23 April 2003, op-cit, p.755

⁴⁶²David, op-cit, p.367

⁴⁶³Law on grave breaches of international humanitarian law, 5 August 2003, In: 42 ILM 2003, p.1265

⁴⁶⁴Bush (Ct. Cass) (Belgium), Journal Des Tribunaux, Sept.24, 2003, at 639 (Conclusions of Attorney General J. Spreutels), In: David ,op-cit, p.376

⁴⁶⁵L. Zegveld, The Bouterse Case, 32 Neth. Y. B. Int’l L.97,108(2001), at 112; Institute of International Law, Warsaw session, Res. of Aug.26, 2005, §3(b) (2005); Code of Criminal Instruction, art.28bis, combined with art.24.In: David, Ibid

Belgium has gone from employing an absolute universal jurisdiction to a universal jurisdiction limited only to the demands of international law⁴⁶⁶. In addition to the strict provisions on extraterritorial jurisdiction, the new position in Belgian law is that only the Federal Prosecutor has the competency to initiate a prosecution for war crimes, crimes against humanity and genocide, committed abroad.⁴⁶⁷

The new law has also reduced the victims' ability to obtain direct access to the court-unless the accused is Belgian or has his primary residence in Belgium, the decision whether or not to proceed with any complaint now rests entirely with the federal prosecutor, complaints will have to show a direct link between themselves and the alleged crimes; however the federal prosecutor may initiate proceedings relating to a case that has no link with Belgium if so required by an international treaty or customary law.⁴⁶⁸

Where the crimes took place outside Belgium and the accused are not Belgian, the government may refer cases to the ICC or to the courts of a country that accepts the ICC jurisdiction, or even to a country that has not accepted this jurisdiction, provided it has a fair judicial and democratic system.⁴⁶⁹

⁴⁶⁶Ibid, p.381

⁴⁶⁷Smis and Borght, op-cit, p.745

⁴⁶⁸Beigbeder, op-cit, p.54

⁴⁶⁹Ibid, pp. 54-55

Section 3: Germany Legislation:

Introduction:

The statutory jurisdiction provided for by France, Germany and Netherlands; refer for their jurisdictional basis to the jurisdictional provisions in those international treaties to which the legislation was intended to give effect⁴⁷⁰. All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially.⁴⁷¹

German criminal code (StGB) is applicable to acts committed within the country and extra-territorial offences and other situations; the universality principle can be found in StGB § 6 and §7(2)(2), and in the Code of Crimes against International Law (VStGB).⁴⁷²

Germany's positive attitude towards international criminal justice is mirrored by its efforts to implement the ICC Statute⁴⁷³. Ratification of the Statute took place on 11 December 2000, after the International Criminal Court (Ratification) Act had created the prerequisites for the ICC Statute to take effect in Germany.⁴⁷⁴

A change to article 16(2) of the Basic Law [*Grundgesetz*, GG], the German constitution, ensured that Germany may surrender German citizens to the International Criminal Court.⁴⁷⁵

Through VStGB, in view of the principle of complementarity, "Germany itself will always be in a position to prosecute crimes that fall within the jurisdiction of the ICC,

⁴⁷⁰Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, op-cit, p.579

⁴⁷¹Ibid

⁴⁷²Reydams, op-cit, p.141

⁴⁷³See F. Jarasch & C. Kress, The Rome Statute and the German Legal Order, in The Rome Statute and Domestic Legal Orders I (C. Kress & F. Lattanzi, eds., 2000) at p.91, In: Werle and Jessberger, op-cit, p.197

⁴⁷⁴See Federal Gazette II (2000), In: Ibid, pp.197-198

⁴⁷⁵See Federal Gazette I (2000), at 163 In: Werle, ICL2005, op-cit, p.82, [Article 16(2) as amended in 2000: 'No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the EU or to an international court, provided that the rule of law is observed', in: Roth Robert, The Extradition of Genocidaires, In: The UN Genocide Convention, op-cit, p.291, margin no.72]

in order to prevent German nationals to be prosecuted by the International Criminal Court”.⁴⁷⁶

A: Strafgesetzbuch, StGB:

German substantive criminal law (StGB) has enjoyed wide popularity in many countries of the so-called civil law tradition, most notably in the Hispanic World⁴⁷⁷. German doctrine unanimously considers §6 StGB to be an expression of the Universality Principle (*Weltrechtsprinzip*).⁴⁷⁸

§ 6: Offences committed abroad against internationally protected legal interests:

German criminal law shall further apply, regardless of the law of the locality where they are committed, to the following offences committed abroad:

1: Genocide (repealed and transfer to §6 VStGB)

2: Offences involving nuclear energy, explosives and radiation under §307⁴⁷⁹ and §308⁴⁸⁰ (1) to (4), §309(2)⁴⁸¹ and §310⁴⁸²;

3: Attacks on air and maritime traffic (§316 c);

4: Human trafficking for the purpose of sexual exploitation, for the purpose of work exploitation and assisting human trafficking (§232⁴⁸³ to §233a⁴⁸⁴);

5: Unlawful drug dealing;

6: Distribution of pornography under §184a⁴⁸⁵ and §184b⁴⁸⁶ (1) to (3) also in conjunction with §184c⁴⁸⁷ (1) to (3) in connection with §184d⁴⁸⁸, first sentence;

7: Counterfeiting money and securities (§146, §151 and §152) credit cards etc and blank eurocheque forms (§152b (1) to (4)) as well as the relevant preparatory acts (§149, §151, §152 and §152b (5));

⁴⁷⁶Werle and Jessberger, op-cit, p.199

⁴⁷⁷The Criminal Code of the German Reich in its original form of 1871 was to a large extent based on the 1851 Prussian Criminal Code, but has since been amended numerous times, this Code adopted in its most recent amended form of December 2007, In: Bohlander, op-cit, p.8, [The first German Penal Code was the Bavarian Penal Code of 1751, In: Ryngaert, op-cit, p.51]

⁴⁷⁸Reydams, op-cit, p.142

⁴⁷⁹§307 is about causing a nuclear explosion

⁴⁸⁰§308 is about causing an explosion

⁴⁸¹§ 309 is about Misuse of ionizing radiation

⁴⁸²§310 is about acts preparatory to causing an explosion or radiation offence

⁴⁸³§232 is about Human trafficking for the purpose of sexual exploitation

⁴⁸⁴§233a, is about Assisting in human trafficking

⁴⁸⁵§184a is about Distribution of pornography depicting violence or sodomy

⁴⁸⁶§184b is about Distribution acquisition and possession of child pornography

⁴⁸⁷§184c is about Distribution of pornographic performances by broadcasting media services or telecommunications service.

⁴⁸⁸§184d is about unlawful prostitution

8. Subsidy fraud (§264);

9: Offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad;⁴⁸⁹

Under §6 StGB, the principle of universal jurisdiction applied only to the crime of genocide and to grave breaches of the Geneva Conventions of 1949 and their Additional Protocols.⁴⁹⁰

According to §6(1) and §220a⁴⁹¹ StGB which has been transferred into VStGB in 2002, German criminal law applies to acts of genocide committed outside Germany, regardless of the law of the place of their commission and including acts committed by foreigner against foreigner. Besides §6(1), German jurisdiction was based on §6(9) and §7(2)(2) StGB, providing for jurisdiction over acts which, on the basis of an international agreement binding on Germany, shall also be prosecuted if they are committed abroad, and over acts punishable under the law of the place of their commission and committed by a foreigner, who is found to be in Germany and is not extradited, respectively.⁴⁹²

The universality principle applies to certain acts that endanger the legal interests of the international community of States; it differs from the representation principle codified in StGB §7(2)(2) in that it does not require double criminality and non-extradition.⁴⁹³

§ 7: Offences committed abroad-other cases

1: German criminal law shall apply to offences committed abroad against a German, if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal jurisdiction.

⁴⁸⁹Bohlander, op-cit, pp.37-38

⁴⁹⁰Werle and Jessberger, op-cit, p.199

⁴⁹¹§220a which has been adopted as §6 VStGB in 2002, followed word by word the definition of genocide in article II of the Genocide Convention, in: Jessberger Florian, Jorgic: The German Proceedings, In: The Oxford Companion to International Criminal Justice, op-cit, p.738[hereinafter, Jessberger, German Proceedings]

⁴⁹²Ibid, [Of all states, Germany has so far been the most active in exercising universal jurisdiction respect of gross human rights offences, under §6(9) StGB, In: Kamminga, op-cit, p.969]

⁴⁹³Reydams, op-cit, p.154

2: German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender:

1: Was German at the time of the offence or became German after the commission; or

2: was a foreigner at the time of the offence is discovered in Germany and, although the Extradition Act would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible.⁴⁹⁴

According to a commentator “StGB §7(2)(2) is a subsidiary basis for jurisdiction. Only if all other provisions are inapplicable can a prosecution be based on it and three conditions must then be fulfilled. First, the act must be ‘punishable’ under the law of the territorial state. This means that there must be a similar criminal norm at the time of commission, that prosecution is not barred by a statute of limitations, and that no final decision has been rendered. Second, the suspect must be ‘found in Germany’, i.e. voluntarily present. Third, he is not extradited because a request for extradition is not made or is rejected, or because extradition is for whatever reason not feasible”.⁴⁹⁵

On the basis of the April 10, 1995, Law on Cooperation with the International Criminal Tribunal for former Yugoslavia, German prosecutors worked closely with the ICTY.

The German criminal justice system had an opportunity to demonstrate its new determination to contribute to the enforcement of international criminal law in connection with the prosecution of crimes under international law committed on the territory of former Yugoslavia⁴⁹⁶. Between 1996 and 2001, the German judiciary complied with some 500 requests for judicial assistance from the Yugoslavia Tribunal; in the same period, over 100 investigations were initiated in Germany in

⁴⁹⁴Bohlander, op-cit, p.38

⁴⁹⁵Reydams, op-cit, pp. 143-144

⁴⁹⁶Werle, ICL2005, op-cit, p.82

connection with the events in former Yugoslavia, several convictions were obtained, including some for genocide.⁴⁹⁷

B: Volkerstrafgesetzbuch, VStGB:

The ICC Statute and the Code of Crimes against International Law (VStGB) are closely related; the VStGB transfers the substantive criminal law prescriptions of the ICC Statute into German law⁴⁹⁸. The VStGB achieves a fine-tuned balance between the substantive of international criminal law and the requirements of the German criminal justice system.⁴⁹⁹

The VStGB has been viewed by the German federal government, legal scholars, and human rights organizations as a model criminal code for national prosecution of international human rights violations in the era of the ICC⁵⁰⁰. In the explanatory memorandum of the law, one of its purposes is formulated as ‘promoting international humanitarian law and contributing to its spread by creating an appropriate set of national rules’.⁵⁰¹

The VStGB shows that the Federal Republic of Germany has finally accepted the legacy of Nuremberg⁵⁰². In fact, it is impressive testimony of the changed German attitude towards international criminal justice: approval and commitment instead of scepticism and resistance; more than fifty years after the Nuremberg trials, international criminal justice has come home to Germany.⁵⁰³

Before 30 June 2002 (enter into force of the VStGB):

⁴⁹⁷Ibid

⁴⁹⁸Werle and Jessberger, op-cit, p.192

⁴⁹⁹Ibid, p.210

⁵⁰⁰Kaleck, op-cit, p.93

⁵⁰¹Bundestags-Drucksache 14/8524, p.12. In: Ibid

⁵⁰²Werle and Jessberger, op-cit, p.214

⁵⁰³Ibid

1. The new German commitment to international criminal law and justice was not reflected in the substantive criminal law.⁵⁰⁴

2. German criminal law did not contain substantive law provisions criminalizing war crimes or crimes against humanity, those crimes could only be prosecuted and punished as ordinary crimes under the German Criminal Code such as murder or manslaughter.⁵⁰⁵

3. The principle of universal jurisdiction doesn't apply to the crimes against humanity.

The crime of aggression was not included in the VStGB⁵⁰⁶. Article 1 of the Act to introduce a Code of Crimes against International Law of 26 June 2002 contains itself 14 sections⁵⁰⁷. The remaining articles of the Act contain, inter alia, amendment to the Criminal Code and the Code of Criminal Procedure.⁵⁰⁸

§1 VStGB establishes the principle of universal jurisdiction for genocide, crimes against humanity and war crimes in its 'purest' form⁵⁰⁹. Thus German criminal law is always applicable to crimes under international law, regardless of where, by whom or against whom these acts were committed.⁵¹⁰

§1 VStGB, provides that:

'This act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany'.

⁵⁰⁴Ibid, p.198

⁵⁰⁵Handl, op-cit, p.995, (The crime of genocide, transfer from German criminal law to this law)

⁵⁰⁶However, §80 of the StGB, criminalizes preparation of aggressive war. § 80 does not regulate a crime under international law, but contains a so-called state protection offense that protects the Federal Republic's peaceful relations with other nations and its internal security, In: Werle, ICL2005, op-cit, p.87, [The reason for not mentioned in the VStGB, is the fear that any national definition of this crime would endanger the reaching of a consensus as regards an internationally accepted definition, In: Werle and Jessberger, op-cit, p.201, margin no.47]

⁵⁰⁷Article 1 includes 14 Sections(§1: Scope of application, §2: Application of the general law, §3: Acting upon orders, §4: Responsibility of military commanders and other superiors, § 5: Non-applicability of statute of limitations, §6: Genocide, §7: Crimes against humanity, §8: War crimes against persons, §9: War crimes against property and other rights, § 10: War crimes against humanitarian operations and emblems, § 11,War crimes consisting in the use of prohibited methods of warfare, §12: War crimes consisting in employment of prohibited means of warfare, §.13: Violation of the duty of supervision, § 14: Omission to report a crime)

⁵⁰⁸Article 2 is about Amendment to the Criminal Code, Article 3 is about Amendment to the Code of Criminal Procedure, Article 4 is about Amendment to the Courts Constitutional Act, Article 5 is about Amendment to the Act Amending the Introductory Act to the Courts Constitution Act, Article 6 is about Amendment to the Act on State security files of the former German Democratic Republic, Article 7 is about Repeal of a continuing provision of the Criminal Code of the German Democratic Republic, and Article 8 is about Entry into force.

⁵⁰⁹Werle and Jessberger, op-cit, p.213

⁵¹⁰ Werle, ICL2009, op-cit, p.133

This broad notion of universal jurisdiction finds support in customary international law that, while not uncontroversial, is sustainable⁵¹¹. Crimes under international law are of interest to everyone, not just the state of commission or the perpetrator's home country; the nature and severity of the crimes themselves form a sufficient linkage to allow the application of national criminal law.⁵¹²

Since Belgium wants to operate absolute universal jurisdiction without attention to the complementarity and immunity principles, as necessary items for respecting to Sovereignty as much as possible had unsuccessful experience and remains its will for fighting against impunity as a dream. Germany learns from this point, thus, it considered exercise of universal jurisdiction consistent to demands of international law. Indeed, 'it is clear that every State may only act within the limits permitted by international law'.⁵¹³

The pure universal jurisdiction provided for in §1 VStGB is flanked by a novel procedural rule: §153f of the Code of Criminal Procedure [*Strafprozessordnung*, StPO].⁵¹⁴

To prevent unbridled prosecution, § 153f was added to the Code of Criminal Procedure, providing the Federal Prosecutor's office in Karlsruhe (which has sole jurisdiction) with rules regarding which cases require an investigation to be opened or closed and what standards to use in deciding.⁵¹⁵

It seemed to me that pursuant to §153f StPO, German law creates a distinction between duty for exercising universal jurisdiction and right of Germany for exercise of universal jurisdiction.

“§153f StPO provides for a duty of investigation and prosecution even for international crimes committed abroad. This can be dismissed only if there is no

⁵¹¹See, e.g., I. Brownlie, *Principles of Public International Law* (2003), pp.303 et seq.; G. Werle, *Principles of International Criminal Law* (2005), pp.58 et seq.; for a critical view see C. Tomuschat, in G. Werle (ed.), *Justice in Transition*(2006), p.231 et seq. In: Jessberger, *Complementarity*, op-cit, p.215

⁵¹²Jessberger, *Ibid*

⁵¹³ICJ, Judgment of 26 February 2007, §430, op-cit, p.295

⁵¹⁴Werle, *ICL*2009,op-cit, p.133

⁵¹⁵Kaleck, op-cit, pp.102-103

domestic connection to the act or if superordinate jurisdiction, such as the International Criminal Court, comes into play”.⁵¹⁶

Germany seems to allow for absolute universal jurisdiction (i.e. in absentia); however, the prosecuting authorities have considerable discretion not to prosecute when the accused is not present on German territory.⁵¹⁷

Where a crime under the VStGB has been committed abroad by a non-German national against a non-German national and where the suspect is neither present on German territory nor expected to enter German territory, the prosecutor has full discretion whether to prosecute or not.⁵¹⁸

C: Case Study:

Jorgic: C.1:

According to the findings of the Higher Regional Court of Dusseldorf, Jorgic, a Bosnian Serb, was the leader of a paramilitary group in the Doboj region in Northern Bosnia which was involved in ethnic cleansing campaigns against the Muslim population in 1992.⁵¹⁹

The Court convicted Jorgic for genocide in 11 cases as well as for murder, dangerous assault and unlawful deprivation of personal freedom amounting to grave breaches of Geneva Convention IV⁵²⁰. He was sentenced to life imprisonment.

Jorgic appealed the judgment claiming, inter alia, a lack of jurisdiction of German courts and a violation of the *nullum crimen sine lege* principle; the Federal High Court changed the verdict from 11 into one count of genocide but upheld the

⁵¹⁶For a critical view of the conformity of Section 1 of the Code of Crimes against International Law with international law, see C. Tomuschat, in: G. Werle (ed.), *Justice in Transition* (2006), p.157 at p.165, In: Werle, ICL2009, op-cit, pp.133-134

⁵¹⁷Zahar and Sluiter, op-cit, p.501, (Since a conviction in absentia, is impossible in Germany, thus German Federal Prosecutor without presence of the accused merely can allow criminal investigations and collect evidence against persons suspected of crimes fall within the VStGB).

⁵¹⁸Werle and Jessberger, op-cit, p.213

⁵¹⁹Higher Court of Dusseldorf (2StE 8/96), 26 September 1997, In: Jessberger, *German Proceedings*, op-cit, p.737

⁵²⁰Ibid

conviction⁵²¹. In 2000, the Federal Constitutional Court rejected Jorgic's constitutional appeal against the judgment.⁵²²

In 2001, Jorgic filed an individual application before the European Court on Human Rights; on 12 July 2007 the Court held unanimously that there had been no violation of the Convention.⁵²³

The present case is of particular significance ; not only was Jorgic the first person convicted of genocide by a German court, but it provided German courts with an opportunity to address in depth core issues of ICL: the scope of and the preconditions for the exercise of universal jurisdiction and the element of the crime of genocide⁵²⁴. To date, the decision of the Federal High Court is the leading case on the prosecution of genocide under the universality principle of jurisdiction in Germany.⁵²⁵

“In the view of the Federal High Court, beyond the wording of §6(1) StGB, two extra requirements must be present for courts to exercise universal jurisdiction under §6: (i) the exercise of jurisdiction must not be prohibited by international law. While article 6 of the Genocide Convention does not establish an obligation on part of the states parties to exercise universal jurisdiction over acts of genocide, the corresponding authority of every state is left untouched. Likewise, the Constitutional Court stated that customary international law does not prohibit the exercise of universal jurisdiction over acts of genocide, considering that prohibition of genocide is part of *jus cogens*”.⁵²⁶

(ii) In the Court's view, prosecution in the absence of a genuine link would constitute a violation of the principle of non-intervention under international law⁵²⁷.

⁵²¹Ibid

⁵²²Ibid

⁵²³Ibid, p.738

⁵²⁴Ibid

⁵²⁵Ibid

⁵²⁶Ibid

⁵²⁷Ibid

But the Court abandoned its position in subsequent decisions (in the case of Sokolovic), at least under §6(9) StGB. The Supreme Court held that:

“The Court however inclines, in any case under StGB § 6(9), not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction... Indeed, when, by virtue of an obligation laid down in an international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention”.⁵²⁸

C.2: Cases in accordance with VStGB:

According to information given by the Federal Prosecutor⁵²⁹, the decisions to decline to open formal investigations were based either on lack of sufficient evidence to proceed, as required by §170(2) StPO, the suspects’ legal immunity⁵³⁰ or §153 f StPO.⁵³¹

C-2.1: Complaint against Donald Rumsfeld:

A criminal complaint filed by a US civil rights group, the Center for Constitutional rights, and four Iraqi citizens before the Federal Prosecutor in Karlsruhe⁵³². The petitioners based their complaint on the findings of official US investigative commissioners; the 180-page complaint explains exhaustively why the acts described in the reports constitute war crimes, especially the war crime of torture, under relevant provisions of international law and German criminal law.⁵³³

⁵²⁸ Judgment of 21 February 2001, 3 StR 372/00, at 19-20, In: Cassese, ICL2003, p.289, margin no.23 (see more information about Legitimizing link, in the first section of this Chapter in part B-1.3).

⁵²⁹ See BT-Drs.16/11479, p.6, In: Werle, ICL2009, op-cit, p.135

⁵³⁰ See (German) Judicative Act [Gerichtsverfassungsgesetz], §18-20, Bundesgesetzblatt (1975) I, p.1077, In: Ibid, (These sections are about immunity under Vienna Conventions of 1961 and 1964, respectively, for diplomatic and consular representatives). [On November 2003, complaint have been filed, against former President of China Jiang Zemin, for alleged genocide, crimes against humanity, and torture; On June 24, 2005, the federal prosecutor dismissed the complaint, arguing, inter alia, that Jiang had immunity under international law as a former head of state, in: Hummel Kaleck, Rechtsanwalt, Einstellung Strafverfahren gegen chinesische Regierung, at <http://www.diefirma.net/index.php?id=84>, 174,0,0,1,0, In: Langer Maximo, The Diplomacy of Universal Jurisdiction: The Political Branches and The Translational Prosecution of International Crimes, 105 AJIL 2011, p.14]

⁵³¹ Werle, Ibid

⁵³² Jessberger, Complementarity, op-cit, p.213, passim

⁵³³ Ibid

The Federal Prosecutor (*Generalbundesanwalt*, or GBA) attached to the Federal Supreme Court refused on February 10, 2005, to open an investigation of war crimes against US Secretary of Defense Donald H. Rumsfeld and nine other suspects under the VStGB for the abuse of prisoners in Abu Ghraib prison in Iraq between 2003 and 2004.⁵³⁴

The Prosecutor found the requirements of §153f StPO to be present and exercised his discretion by refusing to prosecute the crimes in the complaint⁵³⁵. His arguments may be summarized as follow: The purpose of §153f is to ensure that crimes committed abroad with no connection to Germany can only be prosecuted by German authorities if a jurisdiction with precedence either cannot or will not ensure prosecution of the crime⁵³⁶. The prosecutor derived from the Rome Statute the idea that exercise of criminal jurisdiction on the basis of universal jurisdiction is only permissible as a backup mechanism, where the primary jurisdiction is unable or unwilling.⁵³⁷

Dismissal of the complaint was affirmed by the Stuttgart Higher Regional Court on 13 September 2005, finding that the Federal Prosecutor is not required to prosecute this case⁵³⁸. In the court's view, when the VStGB was introduced, the legislature purposely refrained from establishing a process in the law for court review of the Federal Prosecutor's decisions.⁵³⁹

Substantively, the decision has been criticized in the literature primarily on the grounds that a duty to prosecute exists under §153f(1) sentence 1 StPO, because the majority of the suspects were found in Germany, especially the soldiers stationed

534Kaleck, op-cit, pp.103-104, [Also on 16 November 2007, the Paris District Prosecutor dismissed the complaint, finding that Rumsfeld(former US Secretary of Defense) enjoyed immunity from prosecution about alleged commit torture under the Torture Convention. On 27 February 2008, the Public Prosecutor affirmed the dismissal, citing the same immunity grounds, In: Gallagher Katherine, Proceeding against Donald Rumsfeld, In: The Oxford Companion to International Criminal Justice, op-cit, pp.890-891]

535 An English translation of the prosecutor's decision is available at <http://www.ccr-ny.org>. In: Jessberger, Complementarity, op-cit, p.217

536Ibid

537Ibid

538Gallagher, op-cit, p.890

539Kaleck, op-cit, p.104

there, and therefore conditions for the exercise of broad discretion on the part of the Federal Prosecutor were not present.⁵⁴⁰

C-2.2: Complaint against former Uzbek Minister:

On December 12, 2005, a criminal complaint was lodged with the Federal Prosecutor in Karlsruhe against Uzbek Minister of the Interior Zakir Almatov and eleven other leading members of Uzbek security forces.⁵⁴¹

The complaints alleged torture and crimes under VStGB, murder and manslaughter under StGB.⁵⁴² A complaint against him was presented by eight Uzbek victims (assisted by Amnesty International and Human Rights Watch) for acts committed in Uzbekistan by police and security forces under the authority of the suspect since the mid-1990s.⁵⁴³

In a decision on March 30, 2006, the Federal Prosecutor refrained from initiating a case against Almatov et al, under §153f StPO, and for incidents occurring before June 30, 2002, under § 153c StPO.⁵⁴⁴

The prosecutor added that German officials would be unable to determine whether ‘one can assume tolerance or promotion of systematic torture by the Uzbek government that would justify prosecution under §7 VStGB’, thus the strong suspicion necessary to issue an arrest warrant was not present.⁵⁴⁵

Furthermore, a ‘significant loss of evidence resulting from the failure of German investigative authorities to act’ was not to be feared, since many facts have already been comprehensively documented by non-governmental organizations and the United Nations...The view that a German investigation must document according to procedural standards and systematically

⁵⁴⁰See, e.g., M. Kurth, *Zeitschrift für international Strafrechtsdogmatik*2006, p.84; T. Singelstein and P. Stolle, *Zeitschrift für international Strafrechtsdogmatik*2006, pp.118; A. Frischer-Lescano, *International Legal Materials*2006, p.115, In: *Ibid*, p.105

⁵⁴¹*Ibid*, p.109

⁵⁴²*Ibid*

⁵⁴³Zappala Salvatore, *The German Federal Prosecution's Decision not to Prosecute a Former Uzbek Minister, Missed Opportunity or Prosecutorial Wisdom?* In: 4 *JICJ* 2006, p.602

⁵⁴⁴Kaleck, *op-cit*, p.109

⁵⁴⁵*Ibid*

evaluate evidence existing worldwide, based on an unlimited principle of universal jurisdiction (§1 VStGB), is a mistake. It would lead to purely symbolic prosecutions. These were not wanted by the legislature, even for crimes under international law, especially since it would lead to long-term commitment of the prosecution's already limited personnel and financial resources, to the detriment of other prosecutions that hold greater promise of success.⁵⁴⁶

Under this restrictive interpretation, the VStGB can apparently only be applied in the rare cases in which perpetrators who enjoy no immunity in the broadest sense spend enough time in Germany for investigations to be carried out without the perpetrators' knowledge that can lead to results justifying strong suspicion.⁵⁴⁷

As a result, there is the ideal and exclusive law in Germany for ending to international impunity of crimes under international law. But in above cases:

Since no national court establish until now, in Iraq or United States, for those crimes against Donald Rumsfeld, in attention that his residence in Germany in times of complaint was anticipated.

Also, "one of the complainants' important arguments for prosecution of the former Uzbek minister by German prosecutors is the obvious lack of punishment in Uzbekistan itself for torture and systematic violence against the civilian population".⁵⁴⁸

We reach again to this core sentence that: "Crimes under international law are typically state sponsored crimes, and thus the state of commission or the home country of the perpetrators and victims is, as a rule, itself involved in the crime, or at least not willing or able to punish those responsible".⁵⁴⁹ Thus enforcement of universality and complementarity in practice and toward end to impunity is very controversial.

⁵⁴⁶Ibid, Kaleck in this article concluded that :There thus seems to be a gap between the ideal and the reality of international criminal law in Germany, Ibid, p.93

⁵⁴⁷Ibid, p.110

⁵⁴⁸Ibid

⁵⁴⁹Jessberger, Complementarity, op-cit, pp.220-221

Section 4: French Legislation:

Introduction:

Although French law has incorporated universal jurisdiction based on treaty obligations, in respect of certain offenses, universal jurisdiction based on customary international law has not been established.⁵⁵⁰

The Code de Procedure Penal, lists a number of international conventions allowing France to exercise extraterritorial jurisdiction simply because the person is in France.⁵⁵¹

The French legislature adopted a new criminal code in 1992 that includes definition of genocide and some other crimes against humanity. Following the adoption of the 1992 law, in recent years, several interesting cases brought before French courts demonstrated the jurisdictional challenges facing the exercise of universal jurisdiction over international crimes by France⁵⁵². In particular, limitations regarding presence of the accused on French territory as well as recognition of immunities reflect France's seeming reluctance to extend its judicial control in such cases despite its desire to prosecute grave human rights abuses and violations of international humanitarian law.⁵⁵³

A: French Code of Criminal Procedure:

The French code of criminal procedure provides for universal jurisdiction, if it is required by treaty and the treaty is integrated in French law.⁵⁵⁴

Article 689 of the French Code of Criminal Procedure, defines the mechanism of universal jurisdiction before French courts in the following terms:

⁵⁵⁰As a result, universal jurisdiction cannot generally be exercised in French courts over certain jus cogens crimes, including crimes against humanity and crimes of genocide. A limited exception is provided for the exercise of universal jurisdiction in relation to international crimes committed in Yugoslavia and Rwanda, in: Sulzer Jeanne, Implementing the Principle of Universal Jurisdiction in France, In: International Prosecution of Human Rights Crimes, op-cit, p.125

⁵⁵¹The Genocide Convention is not included in the list, In: Thalmann, op-cit, p.245

⁵⁵²Nadya Sadat Leila, The French Experience, In: Bassiouni, ICL2008, V. III, op-cit, p.352

⁵⁵³Ibid

⁵⁵⁴Bernaz Nadia and Prouveze Remy, International and Domestic Prosecutions, In: The Pursuit of International Criminal Justice, op-cit, p.392

“perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of book I of the Criminal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offence”.⁵⁵⁵

According to article 55 of the French Constitution of 1958, which confirms the superiority of treaties duly ratified and approved over national law, international conventions should be applied in French law.⁵⁵⁶

To prosecute crimes under article 689 of the Criminal Procedure Code or crimes committed in the former Yugoslavia and Rwanda, evidence indicating that the alleged perpetrator is present within French territory must be present prior to the opening of a criminal investigation.⁵⁵⁷

Article 689-1 of the Code of Criminal Procedure provides that persons guilty of committing any of the offences under the international conventions listed in the subsequent paragraphs(689-2 to 689-10), can be prosecuted and tried by French courts, whatever their nationality, if they are present in France.⁵⁵⁸

Article 689(1): In accordance with the international Conventions quoted in the following articles, a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts. The provisions of the present article apply to attempts to commit these offences, in every case where attempt is punishable.

The combined provisions of articles 689-1 and 689-2 provide that a person guilty of committing torture [as defined in article 1 of Convention against Torture]outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts.⁵⁵⁹

⁵⁵⁵The translations of the French Criminal Code and Code of Criminal Procedure are taken from the official site of the French government, Legifrance, available at <http://www.legi-france.gouv.fr/html/codestradsuits/liste.htm>. In: Sulzer, op-cit, p.125

⁵⁵⁶However, in the case of Geneva Conventions and grave breaches, this position has never been accepted by French courts. The Court of appeal found that the Geneva Conventions were not directly applicable in national law and that no implementing legislation had been introduced, In: Sulzer, op-cit, pp.127-128

⁵⁵⁷Nadya Sadat, op-cit, p.352

⁵⁵⁸Sulzer, op-cit, p.125

⁵⁵⁹Sulzer, op-cit, p.127, [On November 1998, the prosecutor received a complaint for crimes of torture against DRC president Laurent-Desire Kabila, who was then visiting France; the prosecutor dismissed the complaint, arguing, inter alia, that it was unclear that the Convention Against Torture could be applied against current

Article 689(2): For the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10th December 1984, any person guilty of torture in the sense of article 1 of the Convention may be prosecuted and tried in accordance with the provisions of article 689-1.

According to the Javor case, the Torture Convention had been incorporated into French Law and was referred to in article 689-2 of the French Code of Criminal Procedure; it could therefore provide a basis for universal jurisdiction, but only where the accused is found on French territory.⁵⁶⁰

Until the introduction of article 689-11 of the Code of Criminal Procedure on 9 August 2010, torture was the only core international crime subject to universal jurisdiction⁵⁶¹. The article 689-11 includes a very narrow universal jurisdiction provision regarding to genocide, crimes against humanity, and war crimes.⁵⁶²

B: French Penal Code of 1992:

In France, before the 1990s, the penal code allowed prosecution against these atrocities only if they were committed during World War II.⁵⁶³

The crime genocide, other crimes against humanity, ‘aggravated’ war crimes and participation in groups or conspiracy in order to prepare such crimes, were included in the French Penal Code of 22 July 1992, entered into force on 1 March 1994.⁵⁶⁴

Article 211-1 of French Code of 1992 provides:

heads of state, In: Langer Maximo, The Diplomacy of Universal Jurisdiction: The Political Branches and The Translational Prosecution of International Crimes, 105 AJIL2011, p.24]

⁵⁶⁰Stern Brigitte, universal jurisdiction over Crimes against Humanity under French Law-grave breaches of the Geneva Conventions of 1949-genocide, torture, human rights violations in Bosnia and Rwanda, 93AJIL 1999, p.527

⁵⁶¹In addition, in implementation of UN Security Council resolutions, French courts may prosecute genocide, crimes against humanity, and war crimes under the jurisdiction of the ICTY and the ICTR, In: Langer Maximo, The Diplomacy of Universal Jurisdiction: The Political Branches and The Translational Prosecution of International Crimes, 105 AJIL2011, p. 19

⁵⁶²Article 689-11 establish four limitations to the exercise of universal jurisdiction by French courts; First, the alleged perpetrator must become a resident of France after the crime, Second, the crimes have to be established by the state where they took place (the double-criminality requirement) or the state in question must be a party to the ICC Statute, Third, only the prosecutor –not the victim or NGOs as civil parties- may launch formal criminal proceedings, Fourth, the prosecutor may initiate such proceedings only if no other international or national jurisdiction requests the rendition or extradition of the alleged offender, In: Ibid, p.25

⁵⁶³Bernaz and Prouveze, op-cit, p.392

⁵⁶⁴Crimes against humanity are treated as common crimes in accordance with French Law or if an international convention gives jurisdiction to French Courts, In: Beigbeder, op-cit, p.60

Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group:

- wilful attack on life;
- serious attack on psychological or physical integrity;
- subjection to living conditions likely to entail the partial or total destruction of that group;
- measures aimed at preventing births;
- enforced child transfers.

Genocide is punished by criminal imprisonment for life.

Article 212-1 of French Code of 1992 states:

Deportation, enslavement or the massive and systematic practice of summary executions, abduction of persons followed by their disappearance, of torture or inhuman acts, inspired by political, philosophical, racial or religious motives, and organized in pursuit of a concerted plan against a section of a civil population are punished by criminal imprisonment for life.

C- Case Study:

C.1: The Javor Case:

In the Javor case, certain Bosnian victims (Elvir Javor and four other Bosnian citizens) of the policy of ‘ethnic cleansing’ that took place in Bosnia and Herzegovina, who were refugees in France, tried to rely on the universal jurisdiction of the French courts in order to file a criminal complaint with an investigating magistrate against their Serb torturers.⁵⁶⁵

In support of their argument for universal jurisdiction, the victims invoked various international instruments⁵⁶⁶. Judge Getti accepted the 1949 Geneva Conventions and the Torture Convention as authorizing the French courts to decide this case involving foreign plaintiffs for acts committed abroad by foreign defendants⁵⁶⁷. Judge Getti

⁵⁶⁵Stern, op-cit, p.525

⁵⁶⁶Ibid, p.526

⁵⁶⁷Ibid, p.527

essentially adopted a broad interpretation of the scope of judicial powers that implied universal jurisdiction so as to permit preliminary acts of inquiry⁵⁶⁸ even without prior confirmation of the presence of the accused on French territory.⁵⁶⁹

On appeal, the Paris Court of Appeals dismissed the order of the Investigating Judge to the extent that it concerned the affirmation of French jurisdiction⁵⁷⁰. It held that, as far as the Torture Convention was concerned, Article 689(2) of the French Code of Criminal Procedure(which provides that persons accused of torture may be prosecuted in France under the conditions set out in article 689(1), namely if they are in France) required the presence of the accused on French territory whether or not the crime had been committed abroad and whatever the nationality of the offender or the victim.⁵⁷¹

As for the 1949 Geneva Conventions criminal provisions on universal jurisdiction, according to the court those provisions imposed obligations on states and were not directly applicable within the French legal system; the court held that “these provisions are too general in nature of function directly as rules on extraterritorial jurisdiction in criminal law; such rules ought necessarily to be worded in an accurate and detailed manner”, hence, Article 689 could not apply.⁵⁷²

“The Court of Cassation, to which appeal had been made, held instead that the facts complained of fell under the provisions of the French law of 2 January 1995 on the implementation of the ICTY Statute. Under articles 1 and 2 of this law, French courts could institute proceedings in France against persons accused of war crimes, crimes against humanity or genocide in the former Yugoslavia only if these persons

⁵⁶⁸Preliminary acts including identification of the suspect and determination of the appropriate charges so that an alleged perpetrator could be arrested if present in France or extradited to face charges. In: Nadya Sadat, op-cit, p.353

⁵⁶⁹See Antonio Cassese, International Criminal Law 288(2003) In: Ibid

⁵⁷⁰Cassese Antonio, Javor and Others, In: The Oxford Companion to International Criminal Justice, op-cit, p.732

⁵⁷¹Ibid

⁵⁷²Ibid

were in France, whereas the presence in France of the alleged victims was not sufficient”.⁵⁷³

C.2: The Gaddafi Case:

Another limitation placed upon France’s exercise of universal jurisdiction results from France’s adherence to immunity for persons acting in official capacity, as illustrated in the Gaddafi affair.⁵⁷⁴

On 19 September 1989, a bomb exploded on board a French passenger aircraft, blowing up the airplane over Chad and killing 171 people of 18 nationalities, including more than 50 French⁵⁷⁵. The French NGO ‘SOS Attentats’ and relatives of some of the victims filed a criminal complaint for acts of terrorism against Gaddafi (the leader of the Libyan state) alleging his implication in the attack.⁵⁷⁶

The Court of Appeals (of Paris) held that the crime alleged here, terrorism, was not covered by head of state immunity, reasoning that numerous international conventions (which France has ratified) had all rejected jurisdictional immunity for the most serious crimes (crimes against humanity, genocide, apartheid, and war crimes) thus, reflecting the international community’s willingness to prosecute serious crimes, including those committed by a head of state⁵⁷⁷. The court found that as the acts alleged in this case rose to the level of an international crime and could not in any event be considered to fall within the official duties of a head of state, immunity did not apply, and Gaddafi could be prosecuted.⁵⁷⁸

Disregarding to rejecting the reasoning of the Court of Appeals, the Court of Cassation vacated and reversed, finding that there were no grounds to conduct an

⁵⁷³Ibid

⁵⁷⁴Nadya Sadat, op-cit, p.356, [In the Gaddafi case the Court of Appeal relied on passive personality and not on universal jurisdiction (in the Court of Cassation it was immunity that assumed central importance), In: Joint Separate Opinion Of Judges Higgins, Kooijmans and Buergenthal, op-cit, from §22, p.580]

⁵⁷⁵Acquaviva Guido, Gaddafi, In: The Oxford Companion to International Criminal Justice, op-cit, p.687

⁵⁷⁶Ibid

⁵⁷⁷Gaddafi, d’appel[CA][regional court of appeal]Paris, Oct.20,2000, available at <https://www.asser.nl>. In: Nadya Sadat, op-cit, pp.356-357

⁵⁷⁸Ibid, p.357

investigation and no grounds for a remand⁵⁷⁹. The French Supreme Court held that (absent any contrary international provision binding on the parties, i.e. the two states involved) international customary law prohibits the exercise of criminal jurisdiction over foreign Heads of State in office.⁵⁸⁰

“In the case at issue, assuming that aircraft bombing is an international crime, the Court should have concluded that Colonel Ghaddafi was not entitled to functional immunity, because of the existence of an exception to jurisdictional immunity for crimes under international customary law. On the other hand, as de facto Head of State in office he should have been recognized as having personal immunity”.⁵⁸¹

“The Cour de Cassation held that Gaddafi was entitled to immunity because ‘under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State’. This quotation would be used by Belgium in *Congo v. Belgium* to argue that the French court explicitly recognized exceptions to the principle of temporal immunity when it stated that an act of terrorism did not fit within one of the exceptions”.⁵⁸²

In contrast, according to the Congo (in the Arrest warrant case), the French Court of Cassation affirming that “international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State”.⁵⁸³

The ICJ, disagreed with the Belgium argument, and held that:

⁵⁷⁹Cass. crim., Mar. 13, 2001, Bull. Crim., No.3 In: Nadya Sadat, op-cit, p.357

⁵⁸⁰Arret of the Cour de Cassation, 13 March 2001, No.1414, at 2 In: Zappala, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation, op-cit, p.597

⁵⁸¹Such a conclusion would not have been consequences. It might have allowed French courts to uphold jurisdiction, on the one hand, on civil suits by the families of victims (under article 1382 of the Civil Code, in co-ordination with articles 3 and 4 of the French Code of Criminal Procedure) and, on the other, on in absentia criminal proceedings (permitted under French law, Cf. articles 1(2), 2, 2-1 to 2-19, 3 and 4 of the French Code of Criminal Procedure), In: Ibid, p.612

⁵⁸²Judgment of 14 February 2002, §56, In: Bassiouni, M Cherif, Crimes against Humanity, Historical Evolution and Contemporary Application, 2011, pp.640-641

⁵⁸³Judgment of 14 February 2002, from §57, op-cit, p.551

“[I]t has 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”.⁵⁸⁴

It seems to me that, in view of the ICJ, the judgment of French Court of Cassation recognized under customary international law, absolute immunity of incumbent Heads of State without any form of exception, before foreign national courts, even for alleged commitment of international crimes.

⁵⁸⁴Ibid, from §58, p.551

Chapter Two:

**Evaluation of Encounter of International Law with
the Subject and Predicting Punishment of Heads of State:**

Section 1: Establishment of International and Internationalized Criminal Tribunals:

The idea of setting up an international criminal court goes back to the aftermath of the First World War⁵⁸⁵. The primary support for the establishment of international justice mechanism was the need for an ‘international sanction’ to ‘international crimes’.⁵⁸⁶

The jurisdiction of an international judicial body is dependent on its constitutive instrument⁵⁸⁷. This is natural, given that international tribunals do not possess territory, cannot confer nationality or residency rights and do not have national security interest.⁵⁸⁸

The jurisdiction of international criminal tribunals, in first, second, and third generation were different. Their jurisdiction arises, alone or mixed, from delegation of criminal jurisdiction by States, or was based on the consent of the state of nationality, or exercise of universal jurisdiction by the Security Council under Chapter VII of the UN Charter.

“Another seminal difference between common jurisdiction and the jurisdiction of international tribunals is that their mandate may authorize them to disregard fundamental principles of international law, which domestic courts and legislatures cannot. This is certainly true in respect of Head of State immunity”.⁵⁸⁹

In 1919, an attempt was made to lay down and implement the doctrine of criminal responsibility of senior State officials⁵⁹⁰. The United States delegates argued that a

⁵⁸⁵Cassese Antonio, International Criminal Law, 2008, p.317[hereinafter Cassese, ICL2008]

⁵⁸⁶Winter Renate(Judge and President of the Special Court for Sierra Leone),In: Bassiouni, M. Cherif(ed.), The Pursuit of International Criminal Justice: A World study on Conflicts, Victimization, and Post-Conflict Justice,2010, Vole I, p.155,passim

⁵⁸⁷Bantekas Ilias, International Criminal Law, 2010, p.133

⁵⁸⁸Ibid, p.352

⁵⁸⁹Ibid

⁵⁹⁰Gaeta Paola, Official Capacity and Immunities, in: A. Cassese, P. Gaeta and J.R.W. Jones (eds), The Rome Statute of the International Criminal Court, Vol. I(2002), p.979

Head of State is only responsible to his own country⁵⁹¹. However, the Peace Conference at Versailles reached to another result. The first provision criminalizing international action against Head of State was agreed in the Versailles Treaty. The provision on criminal prosecution against the German Emperor never became really operational. The Article 227 as an incomplete precedent nevertheless was the cornerstone of the principle of Head of State responsibility.⁵⁹²

The concept of individual criminal responsibility for crimes under international law, irrelevant of any official capacity even as Head of State, established by the Nuremberg Charter, was confirmed unanimously by the UN General Assembly resolution 95(I). Consequently, from December 1946, the idea that a Head of State is only responsible to his own country officially changed to a new rule that the official capacity of Head of State shall not be considered as freeing a perpetrator from responsibility under international law.

International criminal prosecution of a Head of State, irrelevant of official capacity, was repeated in the Tokyo Charter, then in the ICTY and in the ICTR Statutes. The tribunals created under these documents rejected this plea as a defence.

Through ad hoc international tribunals that were established by the UN Security Council, the international community for the first time effectively prosecuted senior State officials, namely Jean Kambanda, the Rwandan's former Prime minister, and Slobodan Milosevic, the Serb former Head of State.

⁵⁹¹ Alebeek Rosanne Van, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, 2008, p.206 [After the First World War the Allied Powers established a Commission of Fifteen to study the possibility of prosecution and punishment of war criminals. The Commission reported to the Versailles Peace Conference that 'all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution'. March 29, 1919, reprinted in 14 AJIL 1920, 95, In: Alebeek, Ibid, p.205] [At Versailles, in 1919, "The American representatives are unable to agree with this conclusion (that 'all persons belonging to enemy countries, however high their rank...are liable to criminal prosecution')...insofar as it subjects Chiefs of States to a degree of responsibility hitherto unknown to...international law, for which no precedents are to be found in the modern practice of nations", In: Minear Richard H, *Victors' Justice, The Tokyo War Crimes Trial*, 1971, p.46],

⁵⁹² Bassiouni M Chaerif, *International Criminal Justice in Historical Perspective: The Tension between States' Interests and the Pursuit of International Justice*, In: *The Oxford Companion to International Criminal Justice*, 2009, p.132, passim

It is widely acknowledged that certain state officials such as an incumbent Head of State or Government enjoys concurrently functional and personal immunities under international law. In this Chapter, I will focus to such immunities, not only to jurisdictional immunity vis-à-vis international criminal tribunals, but also to immunity from arrest and detention.

A. Nuremberg and Tokyo Charters:

Introduction:

In the summer of 1945, the Big Four (the United Kingdom, France, the United States, and the Soviet Union) convened the London Conference to decide by what means the world was to punish the high-ranking Nazi war criminals⁵⁹³. On 26 July 1945, two weeks before the conclusion of the London Conference, the ‘Big four’ issued the Potsdam Declaration announcing their intention to prosecute leading Japanese officials.⁵⁹⁴

“It is easy to see why the Allies wished to established individual responsibility for acts of government. Only by doing so could they hope to prosecute the wartime leaders of Germany and Japan”.⁵⁹⁵

Individuals are being brought to the bar of justice for the first time in history to answer personally for offenses that they have committed while acting in official capacities as chiefs of state; we freely concede that these trials are in that sense without precedent⁵⁹⁶. Nuremberg focused on individual criminal responsibility for conduct that was the product of state policy.⁵⁹⁷

“The IMTs were important in many respects. For the first time non-national, or multi-national, institutions were established for the purpose of prosecuting and punishing crimes having an international dimension and scope. While until that time only servicemen and minor officers had been prosecuted, now for the first time military leaders as well as high-ranking politicians and other civilians were brought to trial”.⁵⁹⁸

⁵⁹³In addition, in occupied Germany, the four major Allies, pursuant to Control Council Law no.10, prosecuted through their own courts sitting in Germany, in their respective zones of occupation, the same crimes committed by lower-ranking defendants, In: Cassese, ICL2008,op-cit, p.321

⁵⁹⁴Ibid, pp.321-322

⁵⁹⁵Miner Richard H, Victors’ Justice, The Tokyo War Crimes Trial, 1971, p.43

⁵⁹⁶Keenan said, In: Ibid, pp.44-45

⁵⁹⁷Bassiouni, M. Cherif, International Criminal Law,1999, Vole. III,p.210, passim

⁵⁹⁸Cassese, ICL2008, op-cit, p.323

The prosecution of individuals for crimes under international law in the past-Second World War international criminal tribunals at Nuremberg and Tokyo can be seen as the confirmation of the *separateness* of international criminal law from classic (public) international law⁵⁹⁹. Individuals are the subjects of international criminal law, and individuals can be held liable for crimes under international law.⁶⁰⁰

The provisions of the Statutes of the IMT at Nuremberg and the IMTFE embodied norms of customary international law (the Nuremberg principles)⁶⁰¹. Treaties and other instruments establishing international tribunals are important sources of international criminal law in addition to custom.⁶⁰²

By and large, the Tokyo Charter was modeled on the Nuremberg Charter⁶⁰³. The most obvious difference between the IMT at Nuremberg and the Tokyo Tribunal is the fact that the Tokyo Tribunal was established *unilaterally* by the American Supreme Commander of the Allied Powers in the Pacific, the Charter of the Tribunal was furthermore not the result of international conferences, but was drafted largely by American officials.⁶⁰⁴

⁵⁹⁹Kriangsak Kittichaisaree International Criminal Law (2001) Oxford University Press, Oxford, 9. Lyal Sunga wrote that the term international criminal law 'is accurate only if used in any one of three senses: 1) to refer to the accumulation of international legal norms on individual criminal responsibility (without implying that they form a coherent system); 2) to refer to international criminal law as an incipient field of international law currently in a stage of emergence (without implying that it already exists as a relatively self-sufficient or autonomous system); or 3) to refer to the decision, law and procedure of a permanent international criminal court'. See Lyal Sunga The emerging system of International Criminal Law –Developments in Codification and Implementation (1997) Kluwer Law International, The Hague, 7. It is submitted that international criminal law has (especially after the adoption of the Rome Statute of the ICC in 1998) indeed emerged as a separate system in all three respects as identified by Sunga. In: Kemp Gerhard, Individual Criminal Liability for the International Crime of Aggression, 2010, p.11

⁶⁰⁰Kemp, Ibid

⁶⁰¹The Yugoslavia Tribunal cites to the IMT Charter and the Tokyo Charter as 'relevant practice', see Prosecutor v. Tadic, ICTY (Appeals Chamber), judgment of 15 July 1999, § 288 et seq. In the opinion of the Tribunal, the Statute of the IMT and CCL NO.10 are 'treaty provisions which are at the very origin of the customary process', see Prosecutor v. Tadic, ICTY (Appeals Chamber), judgment of 15 July 1999, §290, In: Werle Gerhard, Principles of International Criminal Law, 2005, pp.50-51, [hereinafter, Werle, ICL2005]

⁶⁰²Cassese Antonio, Acquaviva Guido, Fan Mary, and Whiting Alex, International Criminal Law, Cases and Commentary, 2011, p.26

⁶⁰³Cassese, ICL2008, op-cit, p.322

⁶⁰⁴Kemp, op-cit, p.95

A.1: Reflection of Punishment for Heads of State in Nuremberg Charter:

The trial of the major Nazi war criminals (in all twenty –four leaders were indicted) started on 20 November 1945 and lasted till 1 October 1946 in the Palace of Justice at Nuremberg⁶⁰⁵. By the Charter, constitution, jurisdiction and functions of the Tribunal were defined.⁶⁰⁶

In the wake of the Nuremberg Trials it became accepted that national courts may exercise criminal jurisdiction over crimes against international law under the principle of universal jurisdiction -hence regardless of the *locus delicti* and the nationality of the victim and the suspect.⁶⁰⁷

Some have argued that the Nuremberg Tribunal was a collective exercise of universal jurisdiction by a treaty-based international court and constitutes a precedent for the ICC.⁶⁰⁸ However, others have argued that the Allied States that established the Tribunal were exercising sovereign powers in Germany at the relevant time and that the Nuremberg Tribunal was thus based on the consent of the state of nationality.⁶⁰⁹

⁶⁰⁵Ibid, p.89

⁶⁰⁶International military tribunal(Nuremberg), Judgment and Sentences, 41 AJIL 1947, p.172, passim[hereinafter Nuremberg's Judgment]

⁶⁰⁷from the text of Nuremberg Judgment, 'together what any one of them might have done singly' some argued that this meant the Tribunal based its jurisdiction on the universality principle, in: International Military Tribunal(Nuremberg), Judgment and Sentences,41 AJIL1947, p.216, In: Alebeek, op-cit, p.210

⁶⁰⁸Scharf M, The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. position, 64 Law & Contemporary Problems (2001) 103-106; Danilenko M, ICC Statute and Third States, in: A. Cassese, P. Gaeta, and J. Jones, The Rome Statute of the International Criminal Court: A Commentary, Vole. II (Oxford: Oxford University Press, 2002)1881-1882;Paust J, The Reach of ICC Jurisdiction Over Non-Signatory Nationals, 11 Vanderbilt Journal of Transnational Law (2000)3-5. Also arguing that the Nuremberg Tribunal was based on universal jurisdiction are Schwelb E, Crimes against Humanity, 23 BYIL (1946)178,208; Woetzel R. K, The Nuremberg Trials in International Law (New York: Prager,1962) at 87-89; Randall K, Universal Jurisdiction under International Law, 66 Texas Law Review (1988)804-806, In: Akande Dapo, The Jurisdiction of the International Criminal Court over Nationals of non-Parties: Legal Basis and Limits, 1 JICJ 2003, p.627

⁶⁰⁹Morris M, High Crimes and Misconceptions: The ICC and Non-Party States, Law & Contemporary Problems (2001) 37-42, see also the works cited at Woetzel, Ibid, 78 at note 62, and Kelsen H, The Legal Status of Germany According to the Declaration of Berlin, 39 AJIL (1945) 518, In: Akande, Ibid

At the London Conference the French delegate argued that individuals could not be held responsible for acts of state⁶¹⁰. International law is concerned only with the actions of states, and therefore cannot punish individuals, or (alternatively) cannot punish them for carrying out the orders of a sovereign state⁶¹¹. Already in 1943 the Allied Powers had stated their intent to bring the Nazi war criminals to justice after the war.⁶¹²

The idea that a whole state should be ‘punished’ collectively for the policies and decisions of individuals (and without also punishing the responsible individuals who have made crucial policy decisions) seemed to be misdirected⁶¹³. The Nuremberg Tribunal rejected the doctrine of State sovereignty in favor of that of individual criminal responsibility⁶¹⁴. The judgment expressed that:

“It is important to remember that article 227 of the Treaty of Versailles provided for the constitution of a special Tribunal, composed of representatives of five of the Allied and Associated Powers which had been belligerents in the first World War opposed to Germany, to try the former German Emperor ‘for a supreme offence against international morality and the sanctity of treaties’. ...In article 228 of the Treaty, the German Government expressly recognized the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war”.⁶¹⁵

“It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, 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

⁶¹⁰Said he: ‘It may be a crime to launch a war of aggression on the part of a state that does so, but does not imply the commission of criminal acts by individual people who have launched a war...’ To this the British delegate countered: ‘Don’t you imply that the people who have actually been personally responsible for launching the war have committed a crime?’ But the French delegate held this ground: ‘We think that would be morally and politically desirable but that it is not international law’, London Conference, p.297, In: Minear, op-cit, p.43

⁶¹¹Robertson Geoffrey, Crimes Against Humanity, The Struggle for Global Justice, 1999,p.205, passim

⁶¹²The Moscow Declaration signed by Roosevelt, Stalin, and Churchill on 1 November 1943, Declaration of German Atrocities, 1 November 1943, reprinted in (1944 Supplement) 38 AJIL 3, 7-8, In: Alebeek, op-cit, p.207

⁶¹³Kemp, op-cit, p.76

⁶¹⁴Kittichaisaree Kriangsak, International Criminal Law, 2001, p.18

⁶¹⁵Nuremberg’s Judgment, op-cit, p.220, (Article 227 provided for the punishment of the German Emperor(Wilhelm II)for ‘the supreme offence against international morality and the sanctity of treaties’, in any case, the Netherlands, where the German Emperor had taken refuge, refused to extradite him, chiefly because the crimes of which he was accused were not contemplated in the Dutch Constitution)

sovereignty of the State. In the opinion of the Tribunal, both these submission must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized... 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 enforced”.⁶¹⁶

The charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of state, these twin principles working together have hitherto resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind⁶¹⁷. In accordance with Article 7 of the Charter:

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.

Article 7 of the Charter eliminated the ‘Act of State’ defense where a Head of State and others can claim that their conduct was inherent to national sovereignty and thus not questionable by others.⁶¹⁸

Article 7 expressly rejected the ‘sovereign immunity’ principle which the Americans had at Versailles insisted must protect military and political leaders⁶¹⁹. It was on this basis that Jackson blew away the dust of sovereignty in his prosecution opening, rejecting the notion that individual leaders could escape responsibility by arguing that they were merely agents of an immune state⁶²⁰. In his Report he declared that: “Nor should such a defence be recognized as the obstacle 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 the 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

⁶¹⁶Nuremberg’s Judgment, Ibid

⁶¹⁷Robertson, op-cit, p.205

⁶¹⁸Bernaz Nadia and Prouveze Remy, International and domestic Prosecutions, In: Bassiouni, The Pursuit of International Criminal Justice, op-cit , p.204, [hereinafter, Bernaz and Prouveze]

⁶¹⁹Robertson, op-cit, p.204

⁶²⁰ Ibid, p.205

power is the greatest, we stand on the principle of responsible government declared some three centuries ago to King James by Lord Justice Coke, who proclaimed that even a king is still ‘under God and the law’.”⁶²¹

The Nuremberg Tribunal explicitly established the irrelevance of functional immunity:

“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. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings...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 law”.”⁶²²

The significance of this ruling is that it provides an authoritative basis for holding individuals at all levels, whether footsoldiers or leaders, liable for crimes against humanity⁶²³. The Principle of individual responsibility for crimes against international law and the principle of irrelevance of official capacity for the establishment of such responsibility was first confirmed in 1946 in a unanimously adopted resolution of the General Assembly ‘affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal and Judgment of the Tribunal’.⁶²⁴

In 1950, the UN General Assembly adopted the ‘Principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal’.⁶²⁵ **Principle III states: ‘The Fact that a person who committed an act which**

⁶²¹In Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, London 1945, US Department of State, 1949, at47 In: Cassese Antonio, When may Senior State Official be Tried for International Crimes? Some Comments on the Congo V. Belgium Case, 13 EJIL(2002), P.873, margin no.72, [hereinafter, Cassese, When may Senior]

⁶²²IMT, judgment of 1 October 1946, In: The Trial of German Major War Criminals, Proceedings of the IMT Sitting at Nuremberg, Germany, Part22(1950), p.447 In: Werle, ICL2009, op-cit, pp.237-238

⁶²³Robertson, op-cit, pp.205-206

⁶²⁴UN GA Resolution 95(1), 11 December 1946, UN Doc A/64/Add 1(1946),Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, In: Alebeek, op-cit, p.209

⁶²⁵Resolution 177(II) of General Assembly of the United Nations, 21 November 1947, the General Assembly by this resolution directed the International Law Commission to ‘formulate the principles of international

constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law’.

Another confirmation of this rule can be found in the adoption by the International Law Commission of the (1954 and 1996) Draft Code of Crimes against the Peace and Security of Mankind, which includes a provision on the irrelevance of official functions.⁶²⁶

: A.2: Tokyo Charter

The atrocities committed during World War II were not confined to Europe, but also played out in the Pacific⁶²⁷. The Tokyo Tribunal followed the reasoning of the Nuremberg Tribunal in applying its own Charter, proclaimed in January 1946 and modeled on the Nuremberg Charter.⁶²⁸

Contrary to the Nuremberg Tribunal, no criminal organizations were indicated or prosecuted by the IMTFE and only individuals were tried⁶²⁹. The IMTFE actually influenced greatly the growth of international justice, as it provided an example of the improper steps to follow in attempting to provide a fair and effective international criminal justice system.⁶³⁰

Japanese war crimes suspects were classified as A, B, C suspects, the ‘A’ suspects were charged with crimes against peace⁶³¹. The Tokyo Tribunal prosecuted only the

law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal’. 12 December 1950 the GA accepted this formulation. In: SCSL, Decision 31 May 2004, §47

⁶²⁶Zappala Salvatore, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation, 12 EJIL 2001, p.602, [Art.1 of the 1954 draft, YBILC 1954 ii (part two); Art.7 of the 1996 draft, YBILC 1996 ii (part2), In: Alebeek, op-cit, p.209, margin no.47]

⁶²⁷Bernaz and Prouveze, op-cit, p.277

⁶²⁸Kittichaisaree, op-cit, p.19

⁶²⁹Bernaz and Prouveze, op-cit, p.279

⁶³⁰Antonio Cassese, From Nuremberg to Rome: IMT to the ICC In: A Commentary, A. Cassese, P. Gaeta & J. R.W.D Jones (eds.),2002, In: Ibid, p.283

⁶³¹Kittichaisaree, op-cit, p.19, [Crimes against humanity were also included in article 5(c) of the Tokyo Charter, in contrast to the Nuremberg trial; however, no one was convicted of crimes against humanity in Tokyo, In: Werle,ICL2005, op-cit, p.217]

‘A’ suspects, comprising former Prime Minister Hideki Tajo and twenty-four other perpetrators.⁶³²

There had been seven challenges to the tribunal’s jurisdiction⁶³³. The Tribunal including had challenge of jurisdiction for crimes against peace, related to the questions of legality and individual responsibility under international law.

In their original draft opinion Lord Patrick (UK), Judge MacDougall (Canada), and Judge Northcroft (New Zealand) took the Nuremberg view that the principles of legality were ‘rules of policy or law susceptible of variation or modification according to the circumstances within the limits of justice’.⁶³⁴ Although they held that it was unnecessary to respond to the ex post facto argument since aggressive war was, in their view, already a crime at the relevant time, the majority in their judgment endorsed the Nuremberg IMT’s position on *nullum crimen*⁶³⁵. Justice Pal of India disagreed with the Tribunal’s conclusion that waging a war of aggression was a crime at the time of commission.⁶³⁶

Takayanagi called the concept of individual responsibility for crimes against peace ‘perfectly revolutionary’.⁶³⁷ Alone among the justices, Justice Pal held that individuals were not liable to prosecution for acts of state⁶³⁸. The majority judgment found that individuals could be held responsible for acts of state; as the only support of its finding, the judgment offered a quotation from the Nuremberg judgment.⁶³⁹

⁶³²Kittichaisaree, Ibid

⁶³³Minear, op-cit, pp.26-27

⁶³⁴Jurisdiction: Opinion of Members for the United Kingdom, Canada and New Zealand, no date, Papers of William Flood Webb, Series 1, Wallet 6 of 17, 3DRL/2481, Australian War Memorial, In: Boister Neil, and Cryer Robert, The Tokyo International Military Tribunal: A Reappraisal, 2008, p.138

⁶³⁵Ibid

⁶³⁶‘Prisoners of war, so long as they remain so, are under the protection of international law. No national state, neither the victor nor the vanquished, can make any ex post facto law affecting their liability for past acts, particularly when they are placed on trial before an international tribunal’. In: Cassese, Acquaviva, Fan, and Whiting, op-cit, pp.59-60

⁶³⁷Espionage, piracy, and the like are exceptions to the ‘general rule of the immunity of individuals’. This immunity is both a legal principle and a practical necessity of statecraft. Lawyer Takayanga, In: Minear, op-cit, p.45

⁶³⁸Ibid

⁶³⁹Ibid, p.46

Like the Nuremberg Charter, the defense of official position and superior order were rejected within the IMTFE and could not exonerate an accused of his responsibility⁶⁴⁰. Article 6 of the Charter of the IMTFE contained a similar provision regarding the official position of an accused (but without the specific reference to being Head of State)⁶⁴¹. In accordance with the article 6 of the Charter:

“Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires”.

As correctly stated a commentator, ‘Article 6 did not refer specifically to the position of the Head of State, probably because of the political decision not to try the Japanese Emperor Hirohito’.⁶⁴²

“The status of Emperor Hirohito was a major recurring problem for Joseph Keenan (chief prosecutor) and his staff. One question was asked over and over again: Would the emperor be indicted? The question of Hirohito’s responsibility and culpability had always been included in the Allies’ consideration of what to do about Japanese war crimes”.⁶⁴³

The initial list of war criminals was headed by the emperor, and Great Britain and the Soviet Union (and Australia, China, and New Zealand) urged his prosecution⁶⁴⁴. Canberra citing Justice Jackson’s words at Nuremberg: ‘Any head of state who launches aggressive war is personally guilty as a war criminal’.⁶⁴⁵ However,

⁶⁴⁰Bernaz and Prouveze, op-cit, p.278

⁶⁴¹See Ann. Digest, 15 (1948), at p.358. The absence of a reference to the Head of State reflects the decision taken not to indict Emperor Hirohito of Japan, In: Watts, Sir Arthur, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, 247 Recueil des Cours, Vole. III (1994), p.83

⁶⁴²O. Triffterer, Article 27, in O. Triffterer (ed.), Commentary on the Rome Statute (1999) 501, at 503, in: Gaeta Paola, Official Capacity and Immunities, In: The Rome Statute of the International Criminal Court: A Commentary, A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.), 2002, Vole I, p.981, margin no.18

⁶⁴³Brackman Arnold C, The Other Nuremberg, The Untold Story of the Tokyo War Crimes Trials, 1989, p.85

⁶⁴⁴Miner, op-cit, p.111

⁶⁴⁵Brackman, op-cit, p.86

the assessment of the American Supreme Commander of the Allied Powers in the Pacific changed all view.

Wrote MacArthur: “Realizing the tragic consequences that would follow from such an unjust action, I had stoutly resisted such efforts. When Washington seemed to be veering toward the British point of view, I had advised that I would need at least one million reinforcements should such action be taken. I believed that if the emperor was indicted, and perhaps hanged, as a war criminal, military government would have to be instituted throughout all Japan, and guerrilla warfare would probably break out. The emperor’s name had then been stricken from the list”.⁶⁴⁶

While the Australians and Soviets had been eager to see the emperor in the dock, the Americans were inclined against making any moves against the Head of State most Japanese considered to be divine⁶⁴⁷. MacArthur’s assessment shattered Canberra, Washington, and London, and abruptly ended any official consideration of whether or not to indict Hirohito.⁶⁴⁸

The decision not to try him was taken by a majority of the prosecutors acting on the instructions of their governments⁶⁴⁹. In April 1946, the Far Eastern Commission supported the decision not to try the emperor⁶⁵⁰. Indeed, according to associates on Keenan’s staff, MacArthur told the chief Allied prosecutor that the emperor was not only off limits as a defendant, but also as a witness at the trial.⁶⁵¹

On judgment, Judge Bernard was highly critical of the failure to indict the emperor, which he considered to be a serious defect that nullified the trial⁶⁵². He opined ‘The Japanese declaration of war in December 1941 had a principal author

⁶⁴⁶Douglas MacArthur, *Reminiscences* (New York: McGraw-Hill, 1964), pp.287-288, In: Minear, op-cit, pp.111-112

⁶⁴⁷Brackman, op-cit, p.85

⁶⁴⁸Ibid, p.87

⁶⁴⁹Extract from periodical Report no 6 of the UK Liaison Minister in Japan, §137, June 1946, File no EA106/3/22, Part 3, Archives New Zealand, In: : Boister and Cryer , op-cit, p.65

⁶⁵⁰Department of State Bulletin, 22.554:244(Feb.13,1950); Activities of the Far Eastern Commission, Feb. 26, 1946 to July 10, 1947, Report by the Secretary General(Washington: U.S. Government Printing Office, 1947), Appendix 39, p.98, In: Minear, op-cit, p.112

⁶⁵¹Brackman, op-cit, p.87

⁶⁵²Boister and Cryer, op-cit, p.68

who escaped all prosecution and of whom in any case the present defendants could only be considered as accomplices'.⁶⁵³

In President Webb's view, Hirohito was a criminal leader who was 'granted immunity' from prosecution⁶⁵⁴. Justice Webb continued: 'His immunity was, no doubt, decided upon in the best interests of all the Allied Powers'.⁶⁵⁵

Despite the fact that the war was launched in the name of the emperor⁶⁵⁶, it seemed to me that grant of immunity for Hirohito's emperor, as a defendant (also as a witness) clearly determined the rationale of personal immunity of Head of State for avoid disruption of order.

Another relevant case was against Hiroshi Oshima. The defence of diplomatic immunity was raised before the Tokyo Tribunal by Oshima, Japan's first Military Attache and subsequently Ambassador to Germany, in relation to his activities in Germany during his diplomatic posting there.⁶⁵⁷

The Tribunal rejected this defence in the following words:

'Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which the Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction'.⁶⁵⁸

⁶⁵³ Minear, op-cit, p.117, [By immunizing the Emperor, the Tokyo Trial obscured Japanese war responsibility in a rather distorted way. The result is that responsibility for the Pacific War came to rest with 'every body and nobody', In: Futamura Madoka, War Crimes Tribunals and Transitional Justice, The Tokyo Trial and the Nuremberg Legacy, 2008, p.121]

⁶⁵⁴ Brackman Arnorld, The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials (New York: William Morrow, 1987), 387, In: Boister and Cryer, op-cit, p.68

⁶⁵⁵ Minear, op-cit, p.116

⁶⁵⁶ Brackman, op-cit, p.442, [Strictly legally, Emperor Hirohito could have been tried and convicted, because under the Constitution of Japan, he did have the power to make war and stop it, In: Minear, op-cit, p.113]

⁶⁵⁷ Kittichaisaree, op-cit, p.259

⁶⁵⁸ B. V. A. Roling and C. F. Ruter(eds.), The Tokyo Judgment: The International Military Tribunal for the Far East, 29 April 1946-12 November 1948, i(APV-University Press Amsterdam BV, 1997), 456, In: Ibid, pp.259-260

B. Punishment of Heads of State in the ICTY and the ICTR Statutes, the relevant Cases:

Introduction: The UN Security Council set up ad hoc Tribunals pursuant to its power to decide on measures necessary to maintain or restore international peace and security: in 1993 the International Criminal Tribunal for the former Yugoslavia (ICTY), and in 1994 the International Criminal Tribunal for Rwanda (ICTR).⁶⁵⁹

The Security Council stated in numerous resolutions that those who ‘commit, order or have ordered the commission of such violations will be held individually responsible in respect of such acts’.⁶⁶⁰ Decades of de facto impunity for human rights abuses and atrocities began to come to an end in May 1993, with the establishment of the ICTY⁶⁶¹. The creation of the ICTY represented an important innovation.⁶⁶²

The functioning of the ICTR, like the ICTY, has underscored the need for a fruitful interplay between the principles of primacy, concurrence and cooperation in the exercise of jurisdiction over international crimes in order to more effectively deal with impunity.⁶⁶³

The first defendant of the ICTY argued that the creation of the Tribunal was illegal, in that the Charter of the UN did not grant the Security Council the authority to create such a body⁶⁶⁴. Despite recognition of the authority of the Security Council

⁶⁵⁹Cassese, ICL2008, op-cit, p.325

⁶⁶⁰See report of the Secretary-General pursuant to §2 of the SC resolution 808, UN. DOC. S/25704 (3May 1993), §10, In: Haye Eve La, War Crimes in International Armed Conflicts, 2010, p.134

⁶⁶¹Schabas William A, The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone, 2006, p.73

⁶⁶²Ibid, p.48

⁶⁶³Jallow Hassan H.E, (Prosecutor of the ICTR), In: The Pursuit of International Criminal Justice, op-cit, p.151

⁶⁶⁴Tadic’s legal team said that an international tribunal could only be created by treaty, or in the alternative, by amendment of the Charter of the UN, In: Schabas, The UN International Criminal Tribunals, op-cit, p.49

to establish international tribunals, the judgments have nevertheless drawn attention to the importance of consent by the States concerned.⁶⁶⁵

The ICTY Appeals Chamber noted that the Republic of Bosnia and Herzegovina had not only not contested the jurisdiction of the Tribunal but had actually approved of it and offered its cooperation⁶⁶⁶. Similarly, the ICTR Trial Chamber remarked upon the fact that ‘the establishment of the ICTR was called for by the Government of Rwanda itself’.⁶⁶⁷

There is also increasing evidence that national courts are relying upon the case law of the international tribunals⁶⁶⁸. After the establishment of the ad hoc Tribunals, national authorities cooperate to transfer wanted persons to the Tribunals⁶⁶⁹. Further confirmation of this authority can now be found that the Council’s authority was never questioned during the drafting of the Rome Statute (for referral and deferral to ICC).⁶⁷⁰

These two ad hoc tribunals indirectly were confirmed by the ICJ judgment concerning immunity⁶⁷¹. Referring to the Security Council’s adoption of the Statutes of the ICTY and ICTR as being no more than the embodiment of customary international law thus makes it permissible for the Security Council to establish these ad hoc tribunals.⁶⁷²

⁶⁶⁵Ibid, p.53

⁶⁶⁶Tadic(IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §56, In: Ibid

⁶⁶⁷Kanyabashi(ICTR-96-15-T), Decision on Jurisdiction, 18 June 1997, §14, In: Ibid

⁶⁶⁸Ibid, p.44

⁶⁶⁹For instance, German Parliament enacted legislation enabling cooperation with the ICTY in 1994, [Munich police arrested Dusko Tadic, Germany did not transfer the accused until the April, after the German Parliament enacted legislation, in: Second Annual Report of the ICTY, UN Doc. A/50/365-S/1995/728,annex, § 13, In: Ibid, p.384]

⁶⁷⁰Ibid, p.53, passim

⁶⁷¹Case Concerning the Arrest warrant of 11 April 2000, Judgment 14 February 2002, §61, part 4, In:41 ILM 2002, p.552

⁶⁷²Bassiouni, M Cherif, Crimes against Humanity, Historical Evolution and Contemporary Application, 2011, p.643

“Because, at the time, no international criminal law code and process existed to bring to justice those responsible for the widespread violations of international humanitarian and human rights law committed during the conflict in these countries. By creating these two tribunals as a means of restoring peace and by adopting their statutes, which contain general and abstract criminal law provisions, the Security Council filled that void”.⁶⁷³ In the twenty-first century, one must conclude that as a last resort, the establishments of these tribunals are within the authority of the Security Council under Chapter VII of the UN Charter.

B.1: The ICTY Statute:

On May 25, 1993, after two years of atrocities in the former Yugoslavia, the Statute of the International Criminal Tribunal for the former Yugoslavia was adopted by Security Council resolution 827.⁶⁷⁴

The ICTY considers itself the first truly international tribunal to be established by the UN to determine individual criminal responsibility under international humanitarian law, while the Nuremberg and Tokyo Tribunals were considered ‘multinational in nature, representing only part of the world community’.⁶⁷⁵

The primary mandate of the tribunal is trials; however, another essential means by which restoration of peace and security was to be achieved was through the re-establishment of the rule of law in the former Yugoslavia⁶⁷⁶. The ICTY is not subject to any national laws and has concurrent jurisdiction alongside, as well as primary

⁶⁷³Tsagourias Nicholas, Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity, 24 LJIL 2011, p.555

⁶⁷⁴Bernaz and Prouveze, op-cit, p.284

⁶⁷⁵Ibid, p.24

⁶⁷⁶Kwon O-Gon, (Judge and Vice President of the ICTY), In: The Pursuit of International Criminal Justice, op-cit, pp.144-145

over, national courts to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.⁶⁷⁷

The ICTY has the power to prosecute persons responsible for genocide, crimes against humanity in international and internal conflicts, grave breaches of the Geneva Convention of 1949 as well as violations of the laws of war committed in the territory of the former Yugoslavia since January 1991⁶⁷⁸. However, only they were recognized as criminal under customary international law.

The Tribunal only has jurisdiction over a listed crime [in the Statute] if that crime was recognized as such under customary international law at the time it was allegedly committed.⁶⁷⁹ Its jurisdiction is exercised irrespective of any official capacity; Article 7 (2) of the Statute of the ICTY determined 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 nor mitigate punishment”.

“Article 7 sheets home responsibility to all who ‘planned, instigated, ordered, committed or otherwise aided and abetted’ the offences. The Nuremberg precedents are repeated: there is no ‘sovereign immunity’ for Heads of State or government agents”.⁶⁸⁰

B-1.1: Case study:

Slobodan Milosevic, President of Serbia from 1989 until 1997 and President of the FRY from 1997 to 2000, was arrested in Belgrade in March 2001 and transferred to

⁶⁷⁷Kittichaisaree, op-cit, p.23

⁶⁷⁸Crimes that can be prosecuted within this statutory language are defined in article 2, which addressed grave breaches of the Geneva Conventions of August 12, 1949; Article 3, which concerned violations of the laws and customs of war; Article 4, which defined genocide; and Article 5, which addressed crimes against humanity, In: Haye, op-cit, p.134

⁶⁷⁹Mettraux Guenael, International Crimes and the ad hoc Tribunals, 2005, p.6

⁶⁸⁰Robertson, op-cit, p.277

the ICTY in June 2001.⁶⁸¹ He was charged with 66 counts in three indictments (the Kosovo, the Bosnia, and the Croatia indictments) including war crimes, crimes against humanity and genocide.⁶⁸²

At his first hearing before the ICTY, Milosevic stated that he does not accept the competence of the tribunal. He raised several points including the following issues: (i) the illegality and bias of the ICTY (ii) the ICTY's lack of jurisdiction over a former President of the FRY.

Milosevic repeated his claims also before the Hague District Court. On 3 August 2001, defence lawyers for him filed with a complaint. In particular, he requested to issue an order directed against The Netherlands for his unconditional release.⁶⁸³

In support of his claims, the plaintiff contends as follow:

“The so-called Tribunal has no basis in law and possesses no domestic legitimacy. The Security Council is not competent to establish an international tribunal, as only as a few number states are involved in it. The Tribunal has not been established by treaty. Neither the UN Charter nor international law provides any legal basis for the so-called Tribunal. Not a single rule of law exists that would entitle the Security Council to limit the sovereign rights of states. The establishment of the so-called Tribunal is a flagrant violation of the principle of the sovereign equality of all UN member states, as enshrined in article 2, paragraph 1 of the UN Charter. The Security Council has no jurisdiction over the individual citizens of states. That the so-called Tribunal can and should sit in judgment over its own lawfulness is neither credible nor acceptable.

As a former head of state, the plaintiff can claim immunity from prosecution. No conceivable rule of law can be invoked on the basis of which immunity could be declared to have lost its validity, as asserted in the Statute of the so-called Tribunal. At no time in history has immunity ever been declared null and void before. Immunity is an instrument to safeguard the sovereignty of states and

⁶⁸¹Higgins Gillian, Milosevic S. Prosecutor v. Slobodan Milosevic, In: The Oxford Companion to International Criminal Justice, op-cit, p.811

⁶⁸²On 27 November 2001, the Prosecution applied to join the three indictments on the basis that they concerned the same transaction, namely Milosevic's conduct in attempting to create a 'Great Serbia', In: Ibid

⁶⁸³Zappala Salvatore, Human Rights in International Criminal Proceedings, 2005,p.11

should therefore be respected above all else. Whatever crimes may have been committed, the plaintiff, as head of state, cannot be held to account for them”.⁶⁸⁴

In this regard the court considers as follows: “It has been established that pursuant to the Headquarters Agreement and the implementation act based on it, the Netherlands has transferred its jurisdiction to hear an application for release from detention to the Tribunal. Since article 9, paragraph 2 of the Statute provides, in respect of jurisdiction, that the Tribunal has primacy over national courts, and Article 103 of the UN Charter asserts that rules [sic] pursuant to the Charter and hence those pursuant to Security Council resolutions take precedence over all other rules, it must be concluded that the Dutch courts have no jurisdiction to decide on the plaintiff’s application for release. Everything that the plaintiff has advanced in this connection fails in this light”.⁶⁸⁵ Thus the District Court declares that he has no jurisdiction to hear the plaintiff’s claims.⁶⁸⁶

Let us return to the ICTY, for considering the effect of his former status as President of the FRY.

“The Chamber observes that this argument has not been raised explicitly by the accused. In the passage cited by the *amici curiae*, what is stated is that the International Tribunal does not have jurisdiction over the person of President Milosevic”.⁶⁸⁷

The Prosecution has argued that article 7, paragraph 2, of the Statute reflects customary international law and notes, in particular, that the ICTR convicted Jean

⁶⁸⁴Judgment in the interlocutory injunction proceedings *Slobodan Milosevic v. The Netherlands*, In: 48 NILR 2001, p.359, [He raised a number of arguments challenging the legitimacy of the Tribunal, including that the Tribunal had not been ‘established by law’ as required by article 14(I) of the International Covenant on Civil and Political Rights, In: G. Boas, and W. A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, 2003, p.196]

⁶⁸⁵*Ibid*, p.361

⁶⁸⁶*Ibid*, [Subsequently, Mr. Milosevic brought his case to the E Court HR. He complained under article 5.1 ECHR that his detention on the territory of the Netherlands, with the active connivance of the Netherlands authorities, lacked a basis in Netherlands domestic law, and that a procedure prescribed by Netherlands domestic law was not followed. In addition, he argued that the ICTY had been unlawfully established, that his transfer from FRY to The Hague was unlawful, and that he should have been granted immunity from prosecution as former Head of State. The E Court HR, however, did not pronounce on the merits of the case, it held that the complaint had not exhausted domestic remedies, such as filing an application to the Court of Appeal and subsequently to the Supreme Court on points of law, In: Zappala, *Human Rights in International Criminal Proceedings*, op-cit, p.12]

⁶⁸⁷ICTY, Trial Chamber, *Prosecutor v. Slobodan Milosevic*, Decision on Preliminary Motions 8 November 2001, §26(available at www.icty.org (last visited 08/09/2011)[hereinafter, Decision 8 November 2001]

Kambanda, the former Prime Minister of Rwanda, for his role in the genocide that occurred in that State in 1994.⁶⁸⁸

The *amici curiae* say that the accused must be understood to be denying the validity of that article⁶⁸⁹. However, the Trial Chamber relied upon below reasons and concluded that article 7(2) reflects a rule of customary international law.

“There is absolutely no basis for challenging the validity of article 7, paragraph 2, which at this time reflects a rule of customary international law. The history of this rule can be traced to the development of the doctrine of individual criminal responsibility after the Second World War, when it was incorporated in article 7 of the Nuremberg Charter and article 6 of the Tokyo Tribunal Charter. The customary character of the rule is further supported by its incorporation in a wide number of other instruments, as well as case law”.⁶⁹⁰

The Trial Chamber judges continued, with the conclusion that the ICC Statute (that attracted fairly widespread support by States), and the International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind, prepared in 1996, serve as evidence of the customary character of the rule that a Head of State cannot plead his official position as a bar to criminal liability in respect of crimes over which the International Tribunal has jurisdiction⁶⁹¹. Case law also confirms the rule in the Nuremberg Judgment⁶⁹² and more recently in the Pinochet case.⁶⁹³

⁶⁸⁸Prosecution Response to Amici, § 12 and §13, In: Ibid

⁶⁸⁹Ibid, §27

⁶⁹⁰As for instruments, the following may be mentioned: article IV of the Convention for the Prevention and the Punishment of the Crime of Genocide, Principle III of the Nuremberg Principles, article 6 of the ICTR, article 6(2), of the Statute of the Special Court for Sierra Leone, article 27 of the Rome Statute of the ICC, and article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, In: Ibid, §28-29 and 30.

⁶⁹¹Decision 8 November 2001, op-cit, §31

⁶⁹²“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...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 law”. in: Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10; see Report of the International Law Commission, commentary (3) to article 7, In: Ibid, §32

⁶⁹³The House of Lords held that Senator Pinochet was not entitled to immunity in respect of acts of torture and conspiracy to commit torture, alleged to have been committed in his capacity as a Head of State. In

In this regard, in other cases similar judgment was held; “More recently various Trial Chambers of the ICTY have held that the provision of article 7 of the Charter of the IMT at Nuremberg and article 7(2) of the Statute of the ICTY ‘reflects a rule of customary international law’.”⁶⁹⁴

It is worth noting that in *Furundzija*, the ICTY Trial Chamber II stated that article 7(2) and article 6(2), respectively, the ICTY and the ICTR Statutes ‘are indisputably declaratory of customary international law’.⁶⁹⁵

Since his national authorities were ordered to transfer Milosevic to The Hague, the problem of immunity before other States did not arise for the Dutch court. Indeed, when he was transferred to the Court, he had no status as serving Head of State. Slobodan Milosevic unsuccessfully argued abuse of process with respect to his transfer to The Hague.⁶⁹⁶

The death of the Slobodan Milosevic, in 2006, robbed the Tribunal of the possibility of completing proceedings against one of the main leaders involved in the wars of 1991-1995.⁶⁹⁷

As a final example, “Radovan Karadzic claimed a sort of immunity before the ICTY on the basis of an alleged agreement he had reached with US negotiator Richard Holbrooke during the Dayton peace in 1995. He claimed that an agreement was reached between him and US negotiator that Karadzic would not be subject to prosecution by the Tribunal. One of the questions was whether an agreement without

particular, Lord Millett stated: In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence. In: *Ibid*, §33

⁶⁹⁴See *Karadzic and others* (§24), *Furundzija* (§140), and *Slobodan Milosevic*(decision on preliminary motions) (§28), In: Cassese, ICL2008, op-cit, p.306

⁶⁹⁵*Prosecutor v. Anton Furundzija*, IT-95-17/1, Judgment of 10 Dec. 1998, at §140, In: Gaeta, *Official Capacity and Immunities*, op-cit, p.982

⁶⁹⁶The Tribunal concluded that ‘the circumstances in which the accused was arrested and transferred –by the government of the Republic of Serbia, to whom no request was made, but which is a constituent part of the Federal Republic of Yugoslavia, to whom the request for arrest and transfer was made-are not such as to constitute an egregious violation of the accused’s rights’, Decision 8 November 2001, §48, In: Schabas, *The UN International Criminal Tribunals*, op-cit, p.542

⁶⁹⁷Cryer, op-cit, p.110

explicit endorsement by the UN Security Council could provide a basis for Karadzic immunity”.⁶⁹⁸

The Trial Chamber dismissed his arguments and the Appeal Chamber recalls that: “There is no provision of the Statute which excludes any specific individual from the jurisdiction of the Tribunal. The Statute of the Tribunal can only be amended or derogated by means of UN Security Council resolution”.⁶⁹⁹

B-1.2: Assessment:

On 24 May 1999 the international tribunal issued the first arrest warrant against Milosevic when he was an incumbent Head of State, irrespective of his personal immunities. However, the Trial Chamber in its decision, on 8 November 2001 rejects his plea of immunity as a former Head of State. Thus, the tribunal didn’t discuss his personal immunities.

In the Decision on Preliminary Motions, the ICTY Trial Chamber touched on the comprehensive validity of article 7(2) without making any distinction as to its relevance to functional or personal immunities, but clearly referring to Milosevic as a former Head of State.⁷⁰⁰

Professor Bassiouni, has written: “The IMT prosecuted Admiral Erich Rader, who was appointed Germany’s named successor Chancellor (head of state) by Adolph Hitler before the latter committed suicide in Berlin. The IMT also prosecuted Fritz von Pappen, who was Germany’s Vice-Chancellor and foreign minister during the Third Reich, and Hermann Goering, Deputy Chancellor of Germany’s Third Reich. The IMTFE did not, however, prosecute Japan’s Head of State, Emperor Hirohito, but did prosecute a former head of government, cabinet officers, and

⁶⁹⁸Cassese, Acquaviva, Fan, and Whiting, op-cit, p.97

⁶⁹⁹Ibid, passim

⁷⁰⁰Frulli, op-cit, p.1127

diplomats, all of whom were convicted and sentenced”.⁷⁰¹ Thus, the precedents of the IMT and IMTFE were reaffirmed in the jurisprudence of the ICTY.⁷⁰² As a result, ‘The principle of irrelevance of official capacity is now customary international law’.⁷⁰³

B.2: The ICTR Statute:

The (new) government of Rwanda that assumed power in July 1994 made a strong initial commitment to judicial action and formally requested the UN to create a tribunal to try those responsible for the 1994 genocide⁷⁰⁴. When the Rwanda genocide ended in July 1994, at least 800,000 people had been killed alone.⁷⁰⁵

Faced with large-scale massacres of innocent people in Rwanda during 1994, the Security Council condemned: All breaches of international humanitarian law in Rwanda, particularly those perpetrated against the civilian population, and recalled that persons who instigate or participate in such acts are individually responsible and should be brought to justice.⁷⁰⁶

The Security Council adopted the Statute and judicial mechanism for the Rwanda Tribunal, after having determined that ‘this situation continues to constitute a threat to international peace and security’.⁷⁰⁷ The Security Council created the ICTR (based in Arusha, Tanzania) by resolution 955 and gave it the power to prosecute individuals who might have committed genocide, crimes against humanity or serious violations of the laws of war.

⁷⁰¹ Bassiouni, ICL2008, V.I, op-cit, p.52

⁷⁰² Ibid, p.53

⁷⁰³ Kim Young Sok, The Law of the International Criminal Court, 2007, p.163

⁷⁰⁴ Longman Timothy, Justice at the Grassroots? Gacaca trials in Rwanda, In: Transitional Justice in the Twenty-First Century, Arriaza Naomi Roth, and Mariezcurrena Javier (eds.), 2006, pp.209-210, passim

⁷⁰⁵ Byron Charles Michael Dennis, (President of the ICTR), In: The Pursuit of International Criminal Justice, op-cit, p.146

⁷⁰⁶ The SC has consistently reaffirmed this principle, see for example, UN SC resolution 935(1 July 1994), In: Haye, op-cit, p.136

⁷⁰⁷ Article 1 of the Statute of the ICTR thus declared that the ICTR ‘shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda’ and Rwanda citizens responsible for such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute, In: Cassese, ICL 2008, op-cit, p.327

Like the ICTY, the ICTR exercises jurisdiction over natural persons⁷⁰⁸. One unique characteristic of the ICTY and the ICTR is the co-existence of both the concurrent jurisdiction and primacy jurisdiction, which each of them has vis-à-vis national courts⁷⁰⁹. Both have almost identical Rules of Procedure and Evidence, unlike the Nuremberg Tribunal.⁷¹⁰

The ICTR has had to focus on those who bear the greatest responsibility for the transgressions⁷¹¹. Article 6(2) of the Statute of the ICTR determined:

“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 nor mitigate punishment”.

B-2.1: Case study:

The case of Jean Kambanda gave the ICTR the opportunity to sentence the former Prime Minister of Rwanda, a state authority, for genocide⁷¹². He is the first senior State official that effectively was prosecuted and sentenced by the truly international tribunal.

Jean Kambanda was the Prime Minister of the Interim Government of Rwanda from 8 April 1994 to 17 July 1994; he was charged for his role and participation during the mass killing of hundreds of thousands of Tutsi within Rwanda during the period he was Prime Minister.⁷¹³

⁷⁰⁸Kittichaisaree, op-cit, p.24

⁷⁰⁹Ibid, p.25

⁷¹⁰Ibid, p.26

⁷¹¹Jallow Hassan H.E, (Prosecutor of the ICTR), In: Bassiouni, The Pursuit of International Criminal Justice, op-cit, p.150

⁷¹²Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence (Sep 4, 1998) In: Bernaz and Prouveze, op-cit, p.292

⁷¹³Farrell Norman, Prosecutor v. Kambanda, In: The Oxford Companion to International Criminal Justice, op-cit, pp.745-746

On 1997, an indictment against the suspect Jean Kambanda, prepared by the office of the Prosecutor, was submitted to Judge Ostrovsky, who confirmed it⁷¹⁴. Jean Kambanda was arrested by the Kenyan authorities, on the basis of a formal request submitted to them by the Prosecutor on 9 July 1997.⁷¹⁵ On 1998, during his initial appearance before Trial Chamber, the accused pleaded guilty to the six counts contained in the indictment.⁷¹⁶

The accused confirmed that he had concluded an agreement with the Prosecutor, an agreement signed by his counsel and himself and placed under seal, in which he admitted having committed all the acts charged by the Prosecution⁷¹⁷. Jean Kambanda pleaded guilty, and of course therefore abandoned any argument based on official capacity.⁷¹⁸

The Trial Chamber accepted his guilty plea and convicted him of the six counts under both article 6(1) of the ICTY Statute, for his individual responsibility and article 6(3) for failing to prevent and punish perpetrators over whom he had superior responsibility.⁷¹⁹

Kambanda later appealed on three grounds: First, that he was denied his right to be defended by counsel of his choice; secondly that his detention was unlawful; and third that his guilty plea was invalid.⁷²⁰ According to the Appeals Chamber, ‘if the Appellant pleaded guilty instead of going to trial in the hope of receiving a lighter sentence, he cannot claim that the plea was involuntary merely because he received a

⁷¹⁴ICTR, The Prosecutor v. Jean Kambanda, Judgment and Sentence 4 Sep 1998, 37 ILM 1998,p.1414[hereinafter, ICTR’s Judgment 4 September 1998]

⁷¹⁵Ibid, p.1413

⁷¹⁶Ibid, [Following protracted negotiations during which arrangements were made for the transfer of his family to a safe haven, probably the United States, Kambanda signed a ‘plea agreement’ with the Prosecutor, In: Schabas, the UN International Criminal Tribunals, op-cit, p.425]

⁷¹⁷Judgment, Ibid

⁷¹⁸The Tribunal treated his official capacity as an aggravating factor, Judgment 4 September 1998, §44, In: Schabas, The UN International Criminal Tribunals, op-cit, p.327

⁷¹⁹Farrell, op-cit, p.746

⁷²⁰The Appeal Chamber affirmed the convictions and the sentence of life imprisonment, In: Ibid

life-term after pleading guilty to several counts of genocide and crimes against humanity'.⁷²¹

In relation to his claim for illegal detention: since he was arrested and surrendered after ceasing office and there was a waiver of immunity by his own national authorities. Kenya has not violated its obligation to respect functional immunity of him as former State official.

⁷²¹Kambanda(ICTR 97-23-A), Judgment 19 October2000, § 62-63, In: Schabas, The UN International Criminal Tribunals, op-cit, p.425

C. Punishment of serving Head of State in the SCSL:

If a particular case cannot be heard by national courts nor be taken to the ICC, one could bolster the efficiency and the capability of national courts to do justice in a fair and proper manner by putting an international component within national courts⁷²². In the long term, resorting to mixed or internationalized criminal courts and tribunals may prove to be one of the most effective societal and institutional devices of the many which are at present available to international law-makers.⁷²³

Within mixed or ‘internationalized’ courts, I select the Special Court for Sierra Leone, because it had a ruling against a Head of State of a neighboring country. Its powers limited to prosecute leaders as stated by the President of the Court, “to prosecute the so-called ‘big fishes’. The focus of the Special Court is limited to those who played a leadership role”.⁷²⁴

On June 12, 2000, President Ahmad Tejan Kabbah sent a letter to UN Secretary-General Kofi Annan to officially request the international community’s help on trying members of the RUF who committed crimes during the conflict⁷²⁵. After the breakdown of the Abidjan and then the *Lome* Peace Agreements, the Security Council determined in resolution 1315 that it was necessary to set up a Special Court.

On January 16, 2002, the UN and Sierra Leone signed an agreement creating the legal framework for the Special Court, which is based in Freetown⁷²⁶. The Special Court is the first modern international criminal tribunal located within the country

⁷²²Cassese Antonio, The Role of International Courts and Tribunals in the Fight against International Criminality, In: Internationalized Criminal Courts, Sierra Leone, East Timor, Kosovo, and Cambodia, 2004, p.13

⁷²³Ibid

⁷²⁴The Special Court is the first court at the international level in which the Statute limits prosecutions to ‘persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone law’, in: Winter Renate (President of the SCSL), The Special Court For Sierra Leone, In: The Pursuit of International Criminal Justice, op-cit, p.157

⁷²⁵Bernaz and Prouveze, op-cit, p.303

⁷²⁶The Pursuit of International Criminal Justice, op-cit, p.442

where the prosecuted crimes were committed, it is also the first such tribunal that was created by a bilateral treaty.⁷²⁷

The Special Court is a mixed tribunal exercising mixed jurisdiction; it may act both qua a domestic court of Sierra Leone when it applies Sierra Leonean criminal law to offences under that law, and as an international criminal tribunal when it applies international law to offences enumerated as punishable crimes in the Court's Statute⁷²⁸. The amnesty does not cover crimes committed under international law, but may well cover crimes committed under Sierra Leonean law.⁷²⁹

The Special Court has jurisdiction over crimes against humanity, violations of common article 3 to the Geneva Conventions and the Second Additional Protocol, as well as other serious violations of IHL, and some criminal offences under Sierra Leonean law.⁷³⁰

The Special Court will have concurrent jurisdiction with the national courts of Sierra Leone and will have primacy only over those courts⁷³¹. It has no primacy over courts or other authorities in the neighboring countries.⁷³²

The SCSL was established not by Security Council resolution, but by the agreement pursuant to a Security Council resolution. This treaty-base creation of the Special Court concurrent to its delegated powers from the Security Council may affect the rights of third States. Specifically, the problem arises with respect to the immunity of the Heads of State that are not party to the treaty.⁷³³

⁷²⁷Horovitz Sigall, Transitional criminal justice in Sierra Leone, In: Transitional Justice in the twenty-first Century, op-cit, p.43

⁷²⁸Frulli Micaela, The Special Court for Sierra Leone: Some Preliminary Comments, 11 EJIL 2000,p.859

⁷²⁹Ibid

⁷³⁰Cassese,ICL2008, op-cit, p.331

⁷³¹In other words, it asserts a limited primacy, In: Frulli, The Special Court for Sierra Leone: Some Preliminary Comments, op-cit, p.860

⁷³²Cassese, The Role of International Courts and Tribunals in the Fight against International Criminality, op-cir, p.9

⁷³³Schabas, The UN International Criminal Courts, op-cit, pp.56-57

C.1: Taylor's Case and Complaint of State of Liberia:

At the Special Court for Sierra Leone, an indictment and arrest warrant were issued for Charles Taylor while he was still Liberia's Head of State. The indictment against him contains seventeen counts for committing crimes against humanity and grave breaches of the Geneva Conventions.

At the time of his indictment (7 March 2003) and of its communication to the authorities in Ghana (4 June 2003) and of his application to annul it (23 July 2003), Mr. Taylor was an incumbent Head of State⁷³⁴. An application to quash the indictment was filed by State of Liberia⁷³⁵ and President Taylor before the Special Court. Procedurally, this case is interesting.⁷³⁶

Also by an application filed on 4 August 2003, the Republic of Liberia seeks to bring proceedings before the ICJ against Sierra Leone⁷³⁷. In its application, Liberia alleges that "The international arrest warrant...against President Charles Ghankay Taylor violates a fundamental principle of international law providing for immunity from criminal proceedings in foreign criminal jurisdictions of an incumbent Head of State as recognized by the jurisprudence of the ICJ. It further maintains that an arrest warrant of a Head of State issued by a foreign jurisdiction is also inconsistent with the internationally recognized principle that foreign judicial powers or authority

⁷³⁴SCSL-2003-01-I, the Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004, §20[available at www.sc-sl.org (last visited 02.09.2011) hereinafter, Decision 31 May 2004]

⁷³⁵Initially, the Government of Liberia was a co-applicant with Mr. Taylor. On an objection raised by Prosecutor (The Government of Liberia is not a party and all references to the Government of Liberia should be struck out), the Government was struck out as an applicant by the Trial Chamber. See Order Pursuant to Rule 72(E):Defence Motion to quash the indictment and to declare the Warrant of Arrest and all other consequential orders null and void, 19 September 2003, In: Ibid, §9and56

⁷³⁶Because the Court allows Mr. Taylor's application irrespective of his non-appearance (§ 30), and the immunity issue is qualified as one relating to jurisdiction (§32). If translated into the procedural law of the ICC, these convincing conclusions could lead to a non-state party national being able to challenge an ICC arrest warrant on the grounds of immunity *ratione personae* (see Art.19(2)(a) ICC Statute), irrespective of whether or not a state party has arrested and surrendered that pursuant to a request by the ICC, in: Kress Claus, Taylor Immunity case, In: The Oxford Companion to International Criminal Justice, op-cit, p.952

⁷³⁷In respect of a dispute concerning the indictment and international arrest warrant of 7 March 2003, issued against Charles Ghankay Taylor, President of the Republic of Liberia, by a decision of the Special Court for Sierra Leone at Freetown. In: ICJ Press Release 2003/26(5 August 2003) available at www.icj-cij.org

may not be exercised on the territory of another State. Liberia contends that the arrest warrant of Charles Ghankay Taylor violates customary international law and impugns the honour and reputation of the Presidency and its sovereignty”.⁷³⁸

State of Liberia accordingly asks the ICJ:

“(a) to declare that the issue of the indictment and the arrest warrant of 7 March 2003 and its international circulation, failed to respect the immunity from a criminal jurisdiction and the inviolability of a Head of State which an incumbent President of the Republic of Liberia enjoys under international law;

(b) to order the immediate cancellation and/or withdrawal of the indictment and the arrest warrant; and the communication thereof to all authorities to whom the indictment and the warrant was circulated”.⁷³⁹

Taylor challenged jurisdictional immunity at the time of his prosecution and argued that he benefits from absolute immunity from criminal prosecution. Here I analyze the view of parties, *amici curiae*, and the ruling of the Special Court about his alleged personal immunities.

C.2: The International Nature of the Special Court:

The defence linked the core question of immunity to the nature of the Special Court and to its lacking the powers provided for in Chapter VII of the UN Charter.⁷⁴⁰

The Applicant’s defence counsel submitted that “exceptions from diplomatic immunities can only derive from other rules of international law such as Security Council resolutions under Chapter VII of the UN Charter. The Special Court does

⁷³⁸Ibid

⁷³⁹ In the Application, Liberia also requests the Court to indicate provisional measures. However, no action will be taken in the proceedings (in particular on the request for provisional measures) unless and until Sierra Leone consents to the Court’s jurisdiction in the case. In: Ibid

⁷⁴⁰Submission of the parties, § 6-16, In: Frulli Micaela, The Question of Charles Taylor’s Immunity, 2 JICJ 2004, p.1119, [hereinafter, Frulli, Taylor’s Immunity]

not have Chapter VII powers, therefore judicial orders from the Special Court have the quality of judicial orders from a national court”.⁷⁴¹ By relying upon these grounds and pursuant to absolute immunity that is recognized by the ICJ in the arrest warrant case, he concluded that the indictment against him was invalid and its circulation to Ghana caused prejudice to his functions as Head of State.

The Prosecution argues that customary international law permits international criminal tribunals to indict acting Heads of State⁷⁴². The Special Court is an international court of the type of referred to in the Yerodia case.⁷⁴³

Professor Sands as *amicus curiae* concludes that in respect of international courts, international practice and academic commentary supports the view that jurisdiction may be exercised over a serving Head of State in respect of international crimes⁷⁴⁴. Sand emphasizes that:

In respect of Chapter VII the Special Court is in no different position from the ICC. Yet all three tribunals -the ICTY, the ICTR, and the ICC- were envisaged by the ICJ in the Yerodia case to have jurisdiction over a serving head of state...This confirms that the possession of Chapter VII powers cannot be essential for the question of immunity.⁷⁴⁵

Professor Orentlicher as *amicus curiae* pointed out that the authority of the Security Council to act on behalf of UN Member States is not confined to actions taken under Chapter VII of the UN Charter. The Security Council, she argued, has

⁷⁴¹Defence Counsel: Terence Terry, Defence Preliminary Motion, In: Decision 31 May 2004, §6

⁷⁴²Prosecution Response, In: Ibid, §9

⁷⁴³Prosecution Post-Hearing Reply, In: Ibid, §16

⁷⁴⁴Particular reference may be had to the Pinochet cases and the Yerodia case, in; Submissions of the Amici Curiae, (i) Professor Philippe Sands, In: Ibid, §17

⁷⁴⁵Alebeek, op-cit, p.288 (In the final part of §61 of the Arrest Warrant judgment, the ICJ stated that ‘an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts’ where they have jurisdiction. Examples include the ICTY, and the ICTR, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The Latter’s Statute expressly provides, in Article 27, paragraph2)

acted ‘on behalf of all Members of the UN’ when it requested the Secretary-General to negotiate the Agreement.⁷⁴⁶

‘For the purposes of the distinction between prosecutions before national and international criminal courts recognized by the ICJ and other authorities, the Special Court is an international court and may exercise jurisdiction over incumbent and former Heads of State in accordance with its Statute’.⁷⁴⁷

The Appeal judges relied upon articles 39 and 41 of the UN Charter for attempting to argue that the Special Court is an international criminal court, and lack of the so-called Chapter VII powers does not constitute a major inconvenience⁷⁴⁸ for the Special Court. They reasoned ‘The SC determined the existence of a threat to the peace under article 39 and, as a following step, decided under article 41 to conclude an agreement to establish the Special Court’.⁷⁴⁹

Interestingly, the Appeals Chamber reasoned that if articles 39 and 41 of the Charter of the UN were broad enough to allow the establishment of the ICTY and ICTR, they are also ‘wide enough to empower the Security Council to initiate, as it did by resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone’.⁷⁵⁰

The judges continued: “It is to be observed that in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the UN. The Agreement between the UN and Sierra Leone is thus an agreement between all members of the UN and Sierra Leone. This fact makes the Agreement an

⁷⁴⁶ Alebeek, Ibid, p.287

⁷⁴⁷ Submission of the amici curiae, (ii) Professor Diane Orentlicher, In: Decision 31 May 2004, op-cit, §18

⁷⁴⁸ The judges expressed that ‘A proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the Special Court’. In: Decision 31 May 2004, op-cit, §38

⁷⁴⁹ Frulli, Taylor’s Immunity, op-cit, p.1121

⁷⁵⁰ Taylor (SCSL-0301-I), Decision 31 May 2004, §37, In: Schabas, The UN International Criminal Tribunals, op-cit, p.60

expression of the will of the international community. The Special Court established in such circumstances is truly international”.⁷⁵¹

“By reaffirming in the preamble to Resolution 1315 ‘that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law’ it has been made clear that the Special Court was established to fulfil an international mandate and is part of the machinery of international justice”.⁷⁵²

After referring to the reasons reached by Professor Sands as *amicus curiae* about the Characteristics of the Special Court⁷⁵³, the Appeal judges expressed that ‘We come to the conclusion that the Special Court is an international criminal court’.⁷⁵⁴

C.3: Article 6(2) of the SCSL Statute:

It should be noted that the Appeals Chamber relied upon article 6(2) of the Statute and the ICJ judgment for rejecting President Taylor’s claim of personal immunity.

The judges pointed out ‘On a combined reading of article 1 and article 6 of the Statute of the Special Court in which it is clear that the court has competence to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law (article 1) and the official position (including as Head of State) of such persons shall not relieve them of criminal responsibility nor mitigate punishment (article 6(2))’.⁷⁵⁵

⁷⁵¹See article 24(1) UN Charter, In: Decision 31 May 2004, op-cit, §38, [According to the Appeals Chamber, ‘the establishment of the Special Court did not involve a transfer of jurisdiction of sovereignty by Sierra Leone... but the Special Court itself reflecting the interests of the international community’. in: Gbao(SCSL-04-15-AR72(E), Decision 25 May 2004, §6, In: Schabas, Ibid, p.55]

⁷⁵²Decision, Ibid, §39

⁷⁵³Professor Sands pointed out “The Special Court is established by treaty and has the characteristics associated with classical international organizations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members). The competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of ICTY, and the ICTR and the ICC, including in relation to the provisions confirming the absence of entitlement of any person to claim of immunity”. In: Ibid, §41

⁷⁵⁴Ibid, §42

⁷⁵⁵Ibid, §28

The article 6(2) will be analyzed in view of all three below discussions, two of which were considered by the *amici*, and the Appeals Chamber. However, the most important discussion for effecting against third States may be ignored.

C-3.1: The Article 6(2) and Peremptory norm:

In accordance with the Court: ‘The Special Court cannot ignore whatever the Statute directs or permits or empowers it to do so unless such provisions are void as being in conflict with a peremptory norm of general international law’.⁷⁵⁶

The Appeals Chamber fully shared the ICJ’s opinion on the need to distinguish between proceedings before foreign national courts and international criminal courts⁷⁵⁷. Following the ICJ ruling, the SCSL explained two reasons for the ICJ’s distinction;

‘A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity drives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but drive their mandate from the international community’.⁷⁵⁸

Another reason is as put by Professor Orentlicher in her *amicus* brief: States have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area.⁷⁵⁹

Appeals judges held that ‘the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court’.⁷⁶⁰

⁷⁵⁶Ibid, §43

⁷⁵⁷Incumbent high-ranking state officials may be subject to criminal proceedings before (certain) international criminal courts, but still enjoy full immunity before foreign national courts, In: Frulli, Taylor’s Immunity, op-cit, p.1122

⁷⁵⁸Decision 31 May 2004, op-cit, §51

⁷⁵⁹Ibid

⁷⁶⁰Ibid, §52

In this result, the Appeals Chamber after referring to the view of Lord Slynn of Hadley⁷⁶¹, found that ‘Article 6(2) of the Statute is not in conflict with any peremptory norm of general international law and its provisions must be given effect by this court’.⁷⁶²

C-3.2: The Article 6(2) and Personal Immunity:

The Appeal Chamber expresses that ‘the official position of the applicant as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court’.⁷⁶³ This is the first case for denying immunity of serving Head of State, explicitly by the Court.

Only Sands recognized the relevance of the question whether the Statute of the SCSL allows the exercise of jurisdiction over individuals clothed with personal immunity.⁷⁶⁴

“Sands admitted that ‘like the ICTY and ICTR, the Statute of the Special Court does not contain an equivalent provision to article 27(2) of the Rome Statute’. However, he argued that foreign heads of state are not excluded from definition of article 1.1 of the Statute and that accordingly the Statute allows the exercise of jurisdiction over them”.⁷⁶⁵

According to a commentator, “While article 1.1 may not exclude foreign heads of state, the more pertinent question is whether it suffices to include foreign heads of state. More is required to preclude the applicability of the well-established rule of personal immunity of foreign heads of state”.⁷⁶⁶ The principle of irrelevance of official capacity does not regard the rule of personal immunity.⁷⁶⁷

⁷⁶¹There is...no doubt that states have been moving towards the recognition of 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 tribunals. See *R v Bartle and the Commissioner of Police for the Metropolis and others, Ex parte Pinochet*, House of Lords, 25 November 1998, In: Ibid

⁷⁶²Ibid, §53

⁷⁶³Ibid

⁷⁶⁴Alebeek, op-cit, p.291

⁷⁶⁵Ibid, pp.291-292

⁷⁶⁶Ibid, p.292

⁷⁶⁷Ibid

“The issue of immunity from prosecution must be treated as distinct from that of the defence of official capacity. The Statutes of the three tribunals-ICTY, ICTR, and SCSL- contain no provision on the issue of Head of State immunity”.⁷⁶⁸

C-3.3: The Article 6(2) and Third States:

As a matter of treaty law, the Special Court was established by a bilateral agreement between the UN and the Government of Sierra Leone, thus article 6(2) of the agreement cannot bind third States. As has been claimed by State of Liberia ‘The Special Court cannot impose legal obligations on States that are not a party to the Agreement’.⁷⁶⁹

It is at least arguable that the treaty-based establishment of the SCSL means the rule denying immunity to a Head of State might not apply with respect to third States⁷⁷⁰. As interpreted by a commentator, the ICJ used the phrase ‘where they have jurisdiction’ for solving the problem of third States (of the Rome Statute). **“If Heads of State benefit from immunity before the courts of other States, can other States join together by treaty and create a court that denies such immunity? They would be doing jointly what they cannot do individually. Accordingly, article 6(2) of the SCSL Statute would apply to State officials of Sierra Leone but not to those of other States”.**⁷⁷¹

“The judges totally ignored the treaty nature of the SCSL and failed to deal with the consequences that it entails. More specifically, the Appeals Chamber avoided explicitly addressing the question of whether a treaty-based court may remove immunities accruing to incumbent high-ranking third states’ officials”.⁷⁷²

⁷⁶⁸Schabas, The UN International Criminal Tribunals, op-cit, p. 328,[The article 6(2), as wrote by Schabas: ‘concerns official capacity, not immunity, which was Taylor’s plea’, In: Schabas William A, The International Criminal Court, A Commentary on the Rome Statute, 2010, p.450]

⁷⁶⁹ICJ, Liberia v. Sierra Leone, 4 August 2003

⁷⁷⁰Schabas, The UN International Criminal Tribunals, op-cit, p.329

⁷⁷¹The same reasoning would apply to article 27 of the Rome Statute, which may explain why the ICJ used the Phrase ‘where they have jurisdiction’, In: Ibid, passim

⁷⁷²Frulli, Taylor’s Immunity, op-cit, p.1124

C.4: Circulation of Arrest Warrant:

The question must be raised whether circulation of the arrest warrant by the Special Court to the authorities of Ghana, where Taylor was visiting in June 2003, is within the powers of the Court or caused prejudice to his functions as Head of State.

Only Sands distinguished the two principal issues of the complaint; the immunity from the jurisdiction of national courts only limits the *enforceability* of arrest warrants of international courts against states, not the jurisdiction to issue and circulate an arrest warrant⁷⁷³. Since ‘the international circulation of the arrest warrant did not per se require Ghana to give effect to it’ Sands did not consider that the issuance and circulation of the arrest warrant violated the personal immunity of Taylor from national jurisdictions.⁷⁷⁴

The treaty-based Special Court for Sierra Leone does not have the power to issue binding orders on States, and its primacy over national jurisdictions applies only to the courts of Sierra Leone.⁷⁷⁵

As (unaccepted) suggested by the Secretary-General, ‘the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court’⁷⁷⁶. The request of the Special Court from Ghana and then Nigeria, (to arrest President Taylor) does not oblige them to cooperate with the Special Court for arrest and

⁷⁷³ Alebeek, op-cit, p.291

⁷⁷⁴ Ibid

⁷⁷⁵ Because the ICTY and ICTR are established by SC resolution pursuant to Chapter VII of the Charter of the UN, these two tribunals have been held to have the authority to issue binding orders directed against States, in: Blaskic(IT-95-14-AR108bis), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, In: Schabas, The UN International Criminal Tribunals, op-cit, p.58

⁷⁷⁶ It should further be noted that the SC has not taken up the suggestion of the Secretary-General to enhance the powers of the Court through a Chapter VII resolution. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 2 October 2000, UN Doc S/2000/915, §9-11, In: Alebeek, op-cit, pp.284-285

surrender. In the case of Ghana, its refusal to arrest Taylor in June 2003 is surely supported by international legal principles of immunity.⁷⁷⁷

In this respect, the SCSL is in the same situation with the Rome Statute; both of them were created by treaty. A commentator after he carefully examined articles 27(2) and 98(1) of the ICC, concluded that, ‘With regard to the SCSL, *mutatis mutandis*, neither Sierra Leone nor a third state could have enforced the arrest warrant concerning Taylor without a waiver from Liberia’.⁷⁷⁸

C.5: Assessment:

As the immunity is attached to the State concerned, Taylor’s personal immunity related to the State of Liberia. Liberia complained before the Special Court and also vis-a-vis the ICJ. It seems that Liberia’s right of access to justice was blocked. It was the first time that a State claimed personal immunity from jurisdiction of an international court.

I now consider personal immunity of Taylor as an incumbent Head of State at the time of his indictment (March 2003) and at the time of his arrest and surrender by Nigeria (March 2006) to the Special Court.

The conclusion of the court is questionable. The ICJ held that an incumbent foreign minister may be subject to prosecution before *certain* international criminal courts ‘where they have jurisdiction’. However, the Appeals Chamber held that an incumbent Head of State may be subject to prosecution before *all* international criminal courts ‘where provisions of their Statutes are not in conflict with any peremptory norm of general international law’.

In accordance with the Court, ‘The nature of the tribunals has *always* been a relevant consideration in the question whether there is an exception to the principle

⁷⁷⁷Schabas, The UN International Criminal Tribunals, op-cit, p.59

⁷⁷⁸Frulli, Taylor’s Immunity, op-cit, p.1129

of immunity'.⁷⁷⁹ The Court applied the principle set out by the ICJ after implicitly assuming that the expression 'certain international criminal courts, where they have jurisdiction' was equivalent to 'international tribunals' in general.⁷⁸⁰

In accordance with interpretation of Professor Bassiouni⁷⁸¹, the removal of immunity by the Special Court against Liberia as third State only arises from the Security Council resolutions under Chapter VII of the UN Charter or through consent of Liberia for waiving immunity. As pointed out by a commentator, "the statement by the ICJ must be read subject to the condition (1) that the instruments creating those tribunals expressly or implicitly remove the relevant immunity, and (2) that the state of the official concerned is bound by the instrument removing the immunity".⁷⁸²

"The Court and the *amici* rightly concluded that Chapter VII powers are irrelevant for the status of the SCSL as an international court. However, this study disagrees with the fundamental proposition underlying this conclusion that the status of international court is relevant for the question whether there is jurisdiction over persons clothed with personal immunity".⁷⁸³

In light of foregoing, an incumbent President of the State of Liberia was entitled to immunity *ratione personae*. Notwithstanding the criteria about its international

⁷⁷⁹Decision 31 May 2004, op-cit, §49, emphasis added

⁷⁸⁰Schabas, The UN International Criminal Tribunals, op-cit, pp.328-329, (Schabas concludes that the SCSL did not jurisdiction over third State officials, "article 6(2) of the SCSL Statute would apply to State officials of Sierra Leone but not to those of other States, perhaps it is significant that the ICJ did not mention the SCSL alongside its reference to 'certain international criminal courts'. The SCSL was established about a month prior to the ruling of the ICJ", p.329)

⁷⁸¹ 'The ICJ implicitly recognizing that the Security Council can establish special judicial organs that can alter the customary rules of international law on immunity, and that states can also accomplish this by treaty', In: Bassiouni M Cherif, Universal Jurisdiction Unrevisited: The ICJ Decision in Case Concerning the Arrest warrant of 11 April 2000, 12 Palestine Y. B. Int'l L (2002-2003), p.35[hereinafter, Bassiouni, Universal Jurisdiction Unrevisited]

⁷⁸²Akande Dapo, International Law Immunities and the International Criminal Court, 98AJIL 2004,p.418,[hereinafter, Akande, Immunities and ICC] [It is difficult to understand how the *amici curiae* (to the SCSL), could have reached the conclusion that a serving head of state cannot claim immunity before an international tribunal –a conclusion expressly stated to apply whether or not it was established under Chapter VII of the UN Charter, In: Akande, Ibid, p.418]

⁷⁸³Alebeek, op-cit, pp.289-290

criminal judicial body⁷⁸⁴ the only possibility for his trying, was pleaded by the Prosecutor of the SCSL ‘Customary international law permits international criminal tribunals to indict acting Heads of State’.⁷⁸⁵

As pointed out by Professor Cassese, “the judgment of the ICJ on Arrest warrant does not exclude either explicitly or implicitly that a customary rule on the matter has evolved with regard to international criminal courts and tribunals. It seems justified to hold that under customary international law personal immunities of state officials may not bar international criminal courts and tribunals from prosecuting and trying persons suspected or accused of having committed international crimes, or at any rate the criminal offences over which the relevant international court or tribunal has jurisdiction”.⁷⁸⁶

Only under this interpretation, the trial of serving Head of State of Liberia as non-State party (to the agreement) by the international court of Sierra Leone was lawful. ‘As is probably uncontroversial now, state immunities, such as Head of State immunity, are not a bar to the jurisdiction of an international court’.⁷⁸⁷

Finally, in respect of his arrest and surrender to the Court; in attention that there is no obligation under customary international law with respect to functional immunity in the case of crimes under international law. Nigeria in time when it arrested and surrendered him to the Court (2006), has not violated functional immunity of former Head of State of Liberia.

⁷⁸⁴The Taylor Decision in general and the amici curiae briefs are of particular interest, bearing in mind that the SCSL is a hybrid criminal judicial body, In: Damgaard Ciara, Individual Criminal Responsibility for Core International Crimes, 2008, p.278

⁷⁸⁵Prosecutor, response, In: Decision 31 May 2004, op-cit, §9

⁷⁸⁶Cassese, ICL2008, op-cit, pp.311-312

⁷⁸⁷Winter, op-cit, p.157

Section 2: Special Cases for Extradition of Heads of State:

Immunity *ratione materiae* as ‘subject-matter immunity’⁷⁸⁸ for commitment of international crimes will be analyzed. In this section I will focus particularly on two special extraditions in inter-states cooperation regime, cases against Pinochet, and Habre.

The Pinochet ‘precedent’ has propelled movement towards the end of impunity both at the national level and at the international level⁷⁸⁹. Its precedent was followed by the prosecution of former Head of State of Chad, Hissen Habre, as Pinochet of Africa.

In the Pinochet case, the majority judgments recognized the legitimate role which national courts are to play in the prosecution of international crimes⁷⁹⁰. For practical, logistical and policy reasons, it is clear that much of the success of the movement against impunity for international crimes depends upon the application of international criminal law in domestic courts.⁷⁹¹

National criminal jurisdictions can function as ‘organs of the international community’, and as important role-players in the ‘domestic legal order in which they operate’.⁷⁹²

⁷⁸⁸ Millett, (Lord in UK House of Lords), Judgment 24 March 1999, 38 ILM 1999, p.644

⁷⁸⁹ Kittichaisaree, op-cit, p.60

⁷⁹⁰ Sands Philippe, International Law Transformed? From Pinochet to Congo...? 16 LJIL2003, p.46

⁷⁹¹ Kemp, op-cit, p.127

⁷⁹² Jann Kleffner(complementarity in the Rome Statute,29-30)In: Ibid,p.130

A. Augusto Pinochet:

Introduction:

“On September 11, 1973, armed forces led by the Chilean army commander, General Augusto Pinochet, attacked the presidential palace, La Moneda, and overthrew the constitutionally elected popular Unity Government of President Salvador Allende. Soon after taking power, the regime took control over civilian activities and detained 45000 people for interrogation due to their political beliefs. The Pinochet regime also engaged in massive human rights violations against ‘enemies of the State’.”⁷⁹³

Augusto Pinochet was former Head of State of Chile from 1973 to 11 March 1990. In 1990, Pinochet agreed to step down from power and allowed democratic elections; in return, the Chilean government granted him complete amnesty for his past crimes and made him a senator for life.⁷⁹⁴

As is well known, this case concerns an attempt by the Government of Spain to extradite Senator Pinochet from United Kingdom to stand trial in Spain for crimes committed (primarily in Chile) during the period when Senator Pinochet was Head of State in Chile.⁷⁹⁵

Spain claimed jurisdiction over cases involving torture and genocide that occurred during Pinochet’s regime⁷⁹⁶. **Spain based its jurisdiction on a combination of the international law concept of universal jurisdiction and domestic law on the regulation of extraterritorial jurisdiction.**⁷⁹⁷

As has been written by a commentator, “The Pinochet case is important because Pinochet is alleged to be one of the most notorious human rights violators, whose actions have injured the interests of numerous nations. For example, on 11 November

⁷⁹³Bernaz and Prouveze, op-cit, p.365

⁷⁹⁴Ibid, p.366

⁷⁹⁵Wilkinson Brown,(Lord in UK House of Lords),Judgment24 March 1999, 38 ILM(1999), p.582

⁷⁹⁶Bernaz and Prouveze, op-cit, p.367, (In final judgment, only the alleged acts of torture constituted as extradition crimes).

⁷⁹⁷Ibid, (the existence of Spanish victims, under the passive personality principle)

1998, Switzerland demanded Pinochet's extradition to face charges concerning the disappearance of a dual Swiss-Chilean national in 1979. On 12 November 1998, France, which had denied Pinochet a visa to visit Paris before his trip to London in October, requested that Pinochet be extradited from the UK to stand trial for the disappearance of several French nationals in Chile during Pinochet's rule. In the UK, Belgium, Italy, and Sweden, Chilean exiles have filed charges against Pinochet for crimes against humanity, including widespread murder, kidnapping, and torture. In Germany, Chilean exiles who have become German nationals have brought charges of murder, torture, and kidnapping against Pinochet. The German Justice Minister said she would support an extradition request if there is evidence of injury suffered by German citizens".⁷⁹⁸

On 16 October 1998, an international warrant for the arrest of Senator Pinochet was issued in Spain; on the same day, a magistrate in London issued a provisional warrant under section 8 of the Extradition Act 1989, and he was arrested in a London hospital on 17 October 1998.⁷⁹⁹

Senator Pinochet argues that a UK court has no jurisdiction over a former Head of State of a foreign country in relation to any act done in the exercise of sovereign power. I will analyse the case under the last judgment (Pinochet, No.3)⁸⁰⁰. The core question in the Pinochet case was the scope of the immunity enjoyed by a former head of State for acts committed when he was still head of State.⁸⁰¹

⁷⁹⁸Kittichaisaree, op-cit, pp.57-58

⁷⁹⁹Wilkinson Brown, (Lord in UK House of Lords), Judgment 24 March 1999, 38 ILM(1999), p.583, (Extradition is the formal name given to a process whereby one sovereign state, 'the requesting state' asks another sovereign state, 'the requested state', to return to the requesting state someone present in the requested state, in this case, applicable law are the Extradition Act 1989, and the European Convention on Extradition and the State Immunity Act 1978)

⁸⁰⁰Pinochet No.1 is judgment of Divisional Court, 28 October 1998. Pinochet No.2 is the first judgment of House of Lords, 15 January 1999. Pinochet No.3 is the last judgment of House of Lords, on 24 March 1999, all these judgments, in ILR, Vol.119, pp.1-248

⁸⁰¹Kittichaisaree, op-cit, p.58

A.1: Immunity and Vienna Convention:

The Diplomatic Privileges Act 1964 gives effect to the 1961 Vienna Convention on Diplomatic Relations in English law⁸⁰². Article 39(2) of the Convention provides that:

“When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or an expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist”.⁸⁰³

In accordance with Lord Craighead: “The last sentence of article 39(2), dealing with the residual immunity of the former diplomat *ratione materiae*. It protects all acts which the head of state has performed in the exercise of the functions of government. There are only two exceptions to this approach which customary international law has recognized. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit. The second relates to acts the prohibition of which has acquired the status under international law of *jus cogens*”.⁸⁰⁴

According to article 39(2) Lord Wilkinson concluded that: “at common law, the position of the former ambassador and the former head of state appear to be much the same: both enjoy immunity for acts done in performance of their respective

⁸⁰² Alebeek, op-cit, p.225

⁸⁰³ [In case of the former Syrian ambassador to the German Democratic Republic was alleged to have failed to prevent a terrorist group from removing a bag of explosives from the Syrian Embassy, and a few hours later the explosives were used in an attack which left one person dead and more than 20 persons seriously injured. Following German unification and the demise of the German Democratic Republic in 1990 a District Court in Berlin issued an arrest warrant against the former ambassador for complicity in murder and the causing of an explosion. The Provincial Court quashed the warrant but the Court of Appeal overruled the decision of the Provincial Court and restored the validity of the warrant, holding that ‘The complainant was held to have contributed to the attack by omission’. The former ambassador then lodged a constitutional complaint claiming that he was entitled to diplomatic immunity. The Constitutional Court rejected the complaint. When it stated ‘The complainant acted in the exercise of his official functions as a member of the mission, within the meaning of article 39(2)(2) of the VCDR, because he is charged with an omission that lay within the sphere of his responsibility as ambassador, and which is to that extent attributable to the sending state’. Therefore I consider that the passage in the judgment relied on by counsel does not give support to the argument that acts of torture, although criminal, can be regarded as functions of a head of state, In: Hutton(Lord in UK House of Lords) Judgment 24 March 1999, 38 ILM 1999, pp.632-634]

⁸⁰⁴ Hope of Craighead (Lord in UK House of Lords) Judgment 24 March 1999, 38 ILM 1999, pp.621-622, passim

functions whilst in office. Accordingly, Senator Pinochet as former Head of State enjoys immunity *ratione materiae* in relation to acts done by him as Head of State as part of his official functions as Head of State’.⁸⁰⁵

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory⁸⁰⁶. Since the ‘acts of the defendant were the acts of the Government of Chile’ they were ‘not properly subject to adjudication in the Courts of UK’.

This leads to the further conclusion that a former head of state continues to enjoy immunity in respect of acts committed ‘in the exercise of his functions’ as head of state, wherever those acts occurred⁸⁰⁷. Article 39(2) of the 1961 Vienna Convention on Diplomatic Relations reflects the rule of functional immunity under international law.⁸⁰⁸

Pursuant to majority of Law Lords, Senator Pinochet was as far as charges of murder and conspiracy to murder were concerned entitled to immunity *ratione materiae*⁸⁰⁹. However, his charges of torture and conspiracy to torture, were considered under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

⁸⁰⁵ Lord Wilkinson, op-cit, pp.592-593, [The ‘Act of State’ doctrine, not unknown in civil law countries, has mainly developed in common law jurisdictions, In: Bianchi Andrea, Immunity versus Human Rights: The Pinochet Case, 10 EJIL 1999, p.267]

⁸⁰⁵ Lord Millett, op-cit, p.645

⁸⁰⁶ The 1897 decision of the US Supreme Court in *Underhill v Hernandez*, this decision can in fact be seen as an early precedent for the rule of functional immunity of state officials, In: Alebeek, op-cit, p.82

⁸⁰⁷ *Worth Matravers Phillips* (Lord in UK House of Lords) Judgment 24 March 1999, 38 ILM (1999), p.662

⁸⁰⁸ Alebeek, op-cit, p.225

⁸⁰⁹ see Lord Wilkinson, p.595; Lord Craighead, p.627; Lord Hutton, p.641; Lord Saville, p.642; Lord Millett, p.652; and Lord Phillips at p.663, all In 38 ILM 1999

A.2: Torture Convention and ‘Act of State’:

The first question on the Convention is to decide whether acts done by a head of state are done by a ‘public official or a person acting in an official capacity’ within the meaning of article 1.⁸¹⁰

Torture within the meaning of the Convention can only be committed by ‘a public official or other person acting in an official capacity’ but these words include a head of state⁸¹¹. In other words, ‘all defendants under the Convention are state officials’.⁸¹²

A head of state, if not assumed as a public official, at least clearly will be ‘acting in an official capacity’. It would be a strange result if the provisions of the Convention could not be applied to heads of state who, because they themselves inflicted torture or had instigated the carrying out of acts of torture by their officials, were the persons primarily responsible for the perpetration of these acts⁸¹³. In the case of torture (not as a war crime or a crime against humanity), the ‘instigation or consent or acquiescence of a public official or other person acting in an official capacity’ is one of the objective requirements of the crime’.⁸¹⁴

Contrary to foreign sovereign immunity, act of state is a domestic law doctrine of judicial self-restraint whereby domestic courts will abstain from passing judgment over the acts of a foreign sovereign done in its own territory⁸¹⁵. As I understand the difference between them, state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.⁸¹⁶

⁸¹⁰ Lord Wilkinson, op-cit, p.590

⁸¹¹ Ibid, p.591

⁸¹² Ibid, p.594

⁸¹³ Lord Craighead, op-cit, p.624

⁸¹⁴ Alebeek, op-cit, p.146

⁸¹⁵ Bianchi Andrea, Immunity versus Human Rights: The Pinochet Case, 10 EJIL 1999, p.266

⁸¹⁶ Lord Millett, op-cit, p.645

“The Law Lords in the majority held that any plea based on act of state would be defeated by the parliamentary intent. By enacting legislation implementing both the Convention against Torture and the Convention on the Taking of Hostages, the British Parliament had clearly intended that UK courts could take up jurisdiction over foreign governmental acts”.⁸¹⁷

Lord Saville held that any plea based on act of state or non-justiciability must fail because the parties to the Torture Convention, which expressly prohibits torture by state officials, have accepted that foreign domestic courts may exercise jurisdiction over the acts of their organs in violation of the Convention⁸¹⁸. Lord Hutton -and maybe Lord Millett- saw an exception to the rule of act of state immunity to apply in criminal proceedings regarding crimes against international law.⁸¹⁹

It seemed to me that, in present case, for acts done before ratification of the Torture Convention by UK parliament, the act of state doctrine prohibits the UK courts for exercising its jurisdiction against State foreign torturer. As correctly pointed out by Professor Bassiouni, ‘the 1984 Torture Convention provided for the obligation to prosecute or extradite persons accused of such a crime and that the obligations of the said Convention had become part of UK law’.⁸²⁰

A.3: Torture Convention and Immunity *Ratione Materiae*:

The resulting question is whether or not international law grants immunity *ratione materiae* in relation to the international crime of torture. It can only be committed by individuals acting in an official capacity, so qualify under the rule of functional immunity?

⁸¹⁷Bianchi, op-cit, p.269

⁸¹⁸Lord Millett, in turn, by holding that the immunity *ratione materiae* denied to Pinochet for the acts in question is almost indistinguishable from the act of state doctrine, indirectly agreed that the doctrine was of no avail in the case at hand, In: Ibid

⁸¹⁹Alebeek, op-cit, p.297

⁸²⁰ Bassiouni, ICL2008, V.I, op-cit, p.57

In the extradition process, the court had to take into consideration that both Spain and United Kingdom as the requesting and the requested States, plus Chile had ratified the Torture Convention. The Law Lords in their final decision in the House of Lords, in majority have considered the immunity *ratione materiae* under terms of the Convention. The rationale for the judgment in Pinochet was based upon the specific language of the 1984 UN Convention against Torture.⁸²¹

Only Lord Goff of Chieveley held that General Pinochet enjoyed immunity; he maintained that nothing in the Torture Convention could be construed as an express waiver of state immunity, nor could such a waiver be reasonably implied.⁸²²

Lords Brown- Wilkinson and Saville only based the denial of immunity on the specific terms of the Torture Convention⁸²³. Lord Wilkinson, the presiding Law Lord, after stating that the prohibition of torture became ‘a fully constituted international crime’ only by the adoption of the Torture Convention, held that the ‘notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention’.⁸²⁴

On a similar line of reasoning, Lord Hope of Craighead held that Chile had lost its right to object to the extraterritorial jurisdiction of the UK upon its ratification of the Convention, which would prevent the parties from invoking immunity *ratione materiae* ‘in the event of allegations of systematic or widespread torture’.⁸²⁵

Lord Saville held that: Since 8 December 1988 Chile, Spain and this country have all been parties to the Torture Convention, are in agreement with each other

⁸²¹ICJ, Germany v. Italy, Judgment 3.2.2012, §87

⁸²²Bianchi, op-cit, p.244

⁸²³Alebeek, op-cit, p.297

⁸²⁴Bianchi, op-cit, p.245

⁸²⁵ Bianchi, Ibid, pp.245-246, (Lord Millett held that: State immunity is not a personal right; it is an attribute of the sovereignty of the state. The immunity which is in question in the present case, therefore, belongs to the Republic of Chile, not to Senator Pinochet).

that the immunity *ratione materiae* of their former heads of state cannot be claimed in cases of alleged official torture.⁸²⁶

Lord Phillips of Worth Matravers held that, “The only conduct covered by the torture Convention is conduct which would be subject to immunity *ratione materiae*, if such immunity were applicable. The Convention is thus, incompatible with the applicability of immunity *ratione materiae*”.⁸²⁷

Therefore, according to opinions of Lord Hope and Lord Phillips: “The Torture Convention played a crucial role in the denial of immunity. They consider national courts to have extraterritorial jurisdiction over crimes against international law only if the relevant states have concluded a convention to that effect. The non-immunity hence takes effect only upon the ratification of a convention that allows the exercise of universal jurisdiction”.⁸²⁸

According to Lord Millett, “If the allegations against him are true, he deliberately employed torture as an instrument of State policy. There were not private acts; they were official and governmental or sovereign acts by any standard”.⁸²⁹ He concluded: “The definition of torture, in the Convention, is entirely inconsistent with the existence of a plea of immunity *ratione materiae*. The offence can be committed *only* by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence”.⁸³⁰

In my opinion, since immunity *ratione materiae* covers every state official, lower or higher, for acts done in exercise of official functions on behalf of the State, it covers

⁸²⁶Newdigate Saville(Lord in UK House of Lords)Judgment 24 March 1999, 38 ILM(1999), p.643, passim

⁸²⁷LordWorth Matravers, op-cit, p.661

⁸²⁸Alebeek, op-cit, p.237

⁸²⁹Millett(Lord in UK House of Lords)Judgment 24March 1999, 38 ILM(1999),p.645

⁸³⁰Ibid, p.651

all defendants (state torturer) as defined in the torture Convention. Thus, according to wills and agreement of State parties to the torture Convention, for punishing all state torturers rely to immunity *ratione materiae* is impossible. In sum functional immunity was implicitly waived by State parties to the Torture Convention.

Pinochet no 3 is a weak precedent for functional immunity decisions in future cases regarding allegations of crimes against international law because of the reliance on the act of state immunity rule and the terms of the Torture Convention.⁸³¹

However, the most important result of the case, for future cases, will be considered in below.

A.4: International Crimes and Immunity *Ratione Materiae*:

Another important finding to be derived from the House of Lords decisions is a distinction that can be aptly drawn at international law between the wrongful acts of state organs and acts which for their gravity can be regarded as crimes of international law⁸³². Different consequences would be attached to the latter under international law, particularly as regards the permissibility of the exercise of extraterritorial jurisdiction over them and the inapplicability of immunity *ratione materiae* before international tribunals and, under certain circumstances, before foreign municipal courts.⁸³³

The majority of the Law Lords acknowledged the non-derogable character of the rules of international law proscribing torture and crimes against humanity, but eventually failed to draw the inevitable conclusion that no immunity can be granted to their violators⁸³⁴. Only three lords agreed unequivocally that there is no immunity

⁸³¹Alebeek, op-cit, pp.297-298

⁸³²Bianchi, op-cit, p.248

⁸³³Ibid

⁸³⁴Bianchi, op-cit, p.277

from criminal jurisdiction for crimes against international law⁸³⁵. But two of them - Lord Hope and Lord Philips⁸³⁶ - relied on the Torture Convention to establish the universal jurisdiction that makes this rule applicable to cases before national courts as well.⁸³⁷

Only Lord Hutton can be said to have recognized the absence of functional immunity from the jurisdiction of national courts in respect of all crimes against international law.⁸³⁸

Lord Hutton considered that the alleged acts of torture do not qualify for protection under the rule of functional immunity, “The alleged acts of torture by Senator Pinochet were carried out under colour of his position as Head of State, but they cannot be regarded as functions of a Head of State under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime”.⁸³⁹ Customary international law considerations alone must therefore have been sufficient for Lord Hutton to deny immunity for the torture allegations.⁸⁴⁰

The ruling of the House of Lords underscored the point that the commission of an international crime can never be characterized as an official function⁸⁴¹. The House of Lords judgment in Pinochet provided progressive new perspectives on the scope of

⁸³⁵ Alebeek, op-cit, p.226

⁸³⁶ According to Lord Philips the rule of functional immunity did not apply to crimes committed outside the territory of the forum state at all and he considered therefore that the establishment of universal jurisdiction through the Torture Convention was not limited by the rule of functional immunity, In: Ibid, p.297

[According to him, “International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity *ratione materiae* can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity”. In: Lord Phillips of Worth Matravers, op-cit, p.661]

⁸³⁷ Alebeek, op-cit, p.226

⁸³⁸ Ibid, [Bianchi pointed out that: Only Lord Phillip went a step further in saying that no rule of international law requires that immunity be granted to individuals who have committed crimes of international law, In: Bianchi, op-cit, p.249]

⁸³⁹ Pinochet no3, 165, In: Alebeek, Ibid, p.236

⁸⁴⁰ Ibid

⁸⁴¹ Sands, op-cit, p.46

immunity *ratione materiae*; it is submitted that in light of the Pinochet judgment (and developments in international criminal law in general) immunity *ratione materiae* cannot be applied when an individual (for instance a former head of state) is charged with serious crimes under international law.⁸⁴²

“This notion is based on the premise that international law provides that individual criminal liability always attaches to certain grave acts. These acts, even if accomplished by state officials, cannot be attributed solely to states. In short, there is a fundamental inconsistency between the rule providing for individual criminal responsibility and the rule on functional immunity of state officials, which aims at absolving state officials from personal liability by attributing their acts to their respective states”.⁸⁴³

The judgment of the House of Lords opens the door to the use of one national court to prosecute an individual -even a former Head of State- for acts occurring in another state.⁸⁴⁴

The principle of ‘irrelevance of official capacity’ (that was established by Nuremberg judgment), through the Pinochet case was developed further in relation to foreign national courts. As correctly was written by Professor Werle:

“In the case of crimes under international law, immunity *ratione materiae* is inapplicable not only to trials before international courts,⁸⁴⁵ but also vis-à-vis state

⁸⁴²Kemp, op-cit, p.180,[ICJ’s dictum on *ratione materiae*(in the arrest warrant case)could therefore weaken or seriously dilute the practical importance of the landmark decision of the House of Lords in Pinochet and its enormous effects in the struggle against impunity, In: Gaeta Paola, *Ratione Materiae Immunities of Former Head of State and International Crimes*, The Hissen Habre case, 1 JICJ 2003, p.192]

⁸⁴³This assumption was nonetheless challenged by the ICJ in Arrest Warrant ;the Court asserted that the irrelevance of official capacity is provided for only in conventional texts or in the statutes of international criminal tribunals, thus implying that national courts should respect the functional immunity accruing to state officials accused of the most serious international crimes, In: Frulli, Taylor’s Immunity, op-cit, pp.1126-1127

⁸⁴⁴Sands, op-cit, p.47

⁸⁴⁵ See DR Congo v. Belgium, ICJ, Judgment of 14 February 2002, §61.Thus the irrelevance of functional immunity already arises from the fact that genuine supra-national jurisdiction *per definitionem* supersedes state governments and penal authority; see G. Dahm, J. Delbruck and R. Wolfrum, *Völkerrecht*, Vol. I/3, 2nd edn. (2002), p.1018; P. Robinson and G. Ghahraman, 6 JICJ 2008, p.981 at p.985. To the extent that international jurisdiction is treaty- based, such as in the case of the International Criminal Court, the parties to the treaty have partially given up state immunity; thus this does not stand in the way of prosecution before

judiciaries. This, too, is today anchored in customary international law. This development gained significant momentum as a result of the decisions of the British House of Lords in the Pinochet Case’’.⁸⁴⁶

It is submitted that the Pinochet rule on state immunity is not only a manifestation of state practice and *opinio juris* but is also in accordance with the hierarchy of values of the international community.⁸⁴⁷

The Pinochet Case was momentous because -for the first time- sovereign immunity was not allowed to become sovereign impunity⁸⁴⁸. The decision to remove Pinochet’s immunity in England provided a precedent for limiting claims of immunity by former Heads of State and opened the way for future prosecutions.⁸⁴⁹

The House construed English statutes in the light of developments of international human rights law and international criminal law to draw the line against giving impunity to even a former Head of State who committed international crimes while still in office.⁸⁵⁰

the ICC. For immunities before the international Tribunals, see D. Akande, 98 AJIL 2004, p.407 at pp. 415 et seq. In: Werle, ICL2009, op-cit, p.238

⁸⁴⁶During a visit to London in 1998, Augusto Pinochet was arrested on the basis of a Spanish arrest warrant and later a deportation request. On final appeal, the Law Lords found that Pinochet was not protected by immunity from arrest and deportation, see *In re Augusto Pinochet Ugarte*, High Court of Justice, judgment of 28 October 1998, 38 ILM (1999), pp.68 et seq.; *Regina v. Bartle and Evans, ex parte Pinochet*, House of Lords, judgment of 25 November 1998, 37 ILM (1998), pp.1302 et seq.; judgment of 24 March 1999, 38 ILM (1999), pp.581 et seq. For details, see A. Bianchi, 10 EJIL 1999, pp.239 et seq.; M. Byers, 10 Duke Journal of Comparative and International Law (2002), pp.415 et seq.; M. Ruffert, 48 NILR (2001), p.171 at pp.178 et seq.; P. Sands, 16 LJIL (2003), p.37 at pp. 45 et seq.; J. M. Sears, 42 German Yearbook of International Law (1999), pp.125 et seq. In: Werle, *Ibid*

⁸⁴⁷Wirth Steffen, Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v. Belgium* Case, 13 EJIL 2002, p.888

⁸⁴⁸Robertson, op-cit, p.347

⁸⁴⁹Diana Woodhouse, The Extradition of Pinochet: A Calendar of Events, in *The Pinochet Case* 1,1 (Madeline Davis ed., 2006) In: Bernaz and Prouveze, op-cit, p.368

⁸⁵⁰Kittichaisaree, op-cit, p.59, [The principle of non-immunity applies to violations of human rights and the laws of war and genocide, to violations of the prohibitions against apartheid and denials of self-determination, and, more specifically, to international terrorism, in: Paust J Jordan, Federal Jurisdiction Over Extraterritorial Acts, In: International Criminal Law, Cases and Materials, 1996, p.108]

B. Hissene Habre:

Introduction:

This case highlights the difficulties in the prosecution of a foreign criminal before national courts, especially when that criminal is a former Head of State accused of international crimes.⁸⁵¹

Habre ruled Chad from 1982 to 1990, as President of Chad, then fled to Senegal. In Senegal he was charged on torture (that was committed in Chad), under the 1984 UN Convention against Torture, which Senegal had ratified in 1986.

On 3 February 2000, the Dakar Regional Court indicted former Chadian President Hissen Habre on torture charges and placed him under house arrest⁸⁵². An appeal court nevertheless ruled, on July 4, 2000, that Senegalese courts had no competence to prosecute crimes that were not committed in Senegal.⁸⁵³

The Supreme Court of Senegal held, on legal grounds (which may seem specious) that the Senegalese courts had no jurisdiction, not even under the Torture Convention⁸⁵⁴. On one hand, ‘Considering the fact that the Convention against Torture is not self-executing and commands its signatories to take all necessary measures to implement the convention in national law, the court affirmed that Senegal should have reformed its national law to introduce universal jurisdiction provisions to give competence to Senegalese tribunals’.⁸⁵⁵ On other hand, ‘Since the indictment was based on Senegalese law, which did not give competence to Senegalese tribunals to prosecute acts prohibited by the Convention against Torture, Senegalese tribunals could not prosecute Habre’.⁸⁵⁶

⁸⁵¹ Bernaz and Prouveze, op-cit, p.376

⁸⁵² Kamminga Menno. T , Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, HRQ23(2001), p.971

⁸⁵³ Arriaza and Mariezcurrena, op-cit, pp.287-288

⁸⁵⁴ Cassese Antonio, The Role of International Courts and Tribunals in the Fight against International Criminality, op-cit, p.11

⁸⁵⁵ Bernaz and Prouveze, op-cit, p.371

⁸⁵⁶ Ibid

Many human rights NGOs reacted to the judgment of the Dakar Court of Appeal and the circumstances surrounding it⁸⁵⁷. The victims appealed to the Senegalese *Cour de Cassation* arguing that, under article 7 of the Convention against Torture, each signatory state has the obligation to bring to trial, or to extradite, anyone present in its territory suspected of having committed acts of torture, regardless of their nationality or the country in which the crimes were committed.⁸⁵⁸

The *Cour de Cassation* did not accept those arguments, and upheld the ruling on March 20, 2001, saying that “no procedural law gives the Senegalese courts universal jurisdiction to prosecute and to try accused (torturers) who are found on Senegalese territory when the acts were committed outside of Senegal by foreigners; the presence of Hissen Habre in Senegal cannot in and of itself be ground for the prosecution against him”.⁸⁵⁹ Yet by its decision, which is not subject to appeal, the Court of Cassation put an end to any possibility of prosecuting Hissen Habre in Senegal.⁸⁶⁰

The decision of UN Committee on Convention against Torture of May 2006 stated that Senegal’s conduct was in violation of articles 5(2) and 7 of the Convention against Torture.⁸⁶¹

Another group of victims (among whom three had obtained Belgian nationality) lodged a complaint before Belgian tribunals against Habre⁸⁶². As the proceedings before the Belgian tribunal continued, Chadian authorities cooperated with the

⁸⁵⁷Ibid

⁸⁵⁸Ibid, p.372

⁸⁵⁹Brody Reed, The prosecution of Hissen Habre: International accountability, national impunity, In: Arriaza and Mariezcurrena, op-cit, p.288

⁸⁶⁰Progress Report of the Commission on the Hissen Habre Case, 27 June 2011, §16 [printed from, www.hrw.org, last visited, 15.12.2011]

⁸⁶¹Ibid, §31 [In accordance with article 5(2), of the Convention, the State party is obliged to adopt the necessary measures, including legislative measures to establish its jurisdiction over the acts referred to in present communication. Under article 7, the State party must prosecute or extradite]

⁸⁶²The exclusive law for prosecuting crimes of international law which grant universal jurisdiction to Belgian courts repealed in 2003. It did not affect the Habre case because the complainants were Belgian nationals; therefore, Belgium could exercise jurisdiction based on the passive personality principle, and the fact that investigations had already begun, Bernaz and Prouveze, op-cit, p.373

Belgian Judge Fransen, who adjudicated the case, when he went to Chad to investigate and to question victims and witnesses.⁸⁶³

Finally after four years of investigation, Judge Fransen issued an arrest warrant for Habre on September 19, 2005.⁸⁶⁴ The same day, Belgium forwarded an extradition request to the Senegalese authorities in order to try the former Chadian dictator⁸⁶⁵. Once again the Senegalese Court rejected this request.

The UN Committee considers that, by refusing to comply with the extradition request, the State party has again failed to perform its obligation under article 7 of the Convention⁸⁶⁶. It is a violation of international law to shelter a person who has committed torture or other crimes against humanity, without prosecution or extraditing him.⁸⁶⁷

On 18 November 2010, the Court of Justice of the Economic Community of West African States in its judgment decided that Senegal should implement the African Union mandate ‘within the strict framework of a special or ad hoc procedure of an international character’.⁸⁶⁸ After having suspended its negotiations by the Head of the delegation of Senegal, all legal options unsuccessfully were continued for trying him, within the framework of ‘priority for an African Solution’:

- “1) Establishment of Extraordinary Chambers in the Competent Court of Chad;
- 2) Establishment of Extraordinary Chambers in any other African Country which is a State party to the UN Convention against Torture willing to try Hissen Habre;
- 3) Extradition to Belgium (It should be noted that Belgium started proceedings against Senegal before the ICJ)

⁸⁶³Ibid, pp.373-374

⁸⁶⁴Ibid, p.374

⁸⁶⁵Ibid

⁸⁶⁶Progress Report of the Commission on the Hissen Habre Case, 27 June 2011, op-cit, §16

⁸⁶⁷Spokesman for the UN High Commissioner for Human Rights: Rupert Colville, Geneva 12 July 2011, [printed from, www.ohchr.org, last visited, 15.12.2011]

⁸⁶⁸Judgment ECW/CCJ/JUD/06/10 of the Court of Justice, In: Progress Report of the Commission on the Hissen Habre Case, 27 June 2011, op-cit, §13

4) Trial in Senegal for its legal responsibility under international law”.⁸⁶⁹

This case, teaches us the importance of the principle of the vicarious administration of justice that is codified in §7(2)(2) of StGB. If it was within the obligation of States parties to the Torture Convention, this principle could solve the matter. At least in the year 2011 Senegal wanted to extradite Habre to Chad, but it was not feasible⁸⁷⁰. This principle is the practical measure for enforcement of postulate, *aut dedere aut judicare*.

B.1: Waiver of Immunity:

Chad’s minister of justice, in a 7 October 2002 letter to Daniel Fransen, the Belgian judge, wrote that the former dictator ‘may not claim any immunity from the Chadian authorities’.⁸⁷¹

I now try to consider the effect of official waiver of immunity by Chadian authorities, for prosecuting him in Belgium courts. Unlike the Pinochet case, his immunity *ratione materiae* remains unaffected under the Torture Convention because the time of ratification by Chad (in 1995) was some years after Habre ceased the office. Did he enjoy *ratione materiae* for official acts done in his duration as Head of State?

It is questionable whether such renunciation was really required by international law or whether current international law provides instead for a derogation from the rules on *ratione materiae* immunities whenever a former Head of State faces charges of international crimes.⁸⁷²

⁸⁶⁹Ibid, §21

⁸⁷⁰Since the trial of Habre should proceed in accordance with international fair trial standards, his extradition to Chad is not feasible. See more information about the principle of vicarious administration of justice, in Chapter 1, Section 1 of this dissertation.

⁸⁷¹The text of the letter was made public, further to the authorization of the Chad's Minister of Justice, by Human Rights Watch and is available on its website, at the following address: <http://www.hrw.org/homepage>, In: Gaeta Paola, *Ratione Materiae Immunities of Former Head of State and International Crimes*, The Hissen Habre case, 1 JICJ 2003, p.186 [hereinafter, Gaeta, Immunity of Habre]

⁸⁷²Ibid, p.188

In view of §61 of the ICJ's judgment⁸⁷³, relying upon both below reasons, such waiver by his own national State is effective. The ICJ held that the immunities enjoyed under international law do not represent a bar to criminal prosecution including when the State -which a foreign minister represents or *has represented*- decides to waive that immunity. The ICJ divided between official acts and private acts. In particular, the Court decided that for acts accomplished during the period of office; there is an accountability to foreign national courts only with respect to the acts performed in a private capacity.⁸⁷⁴

The first above founding of the ICJ was correct. Immunities of officials are rights belonging to the state of the official⁸⁷⁵. As was stated by Lord Millett, 'State immunity is not a personal right; it is an attribute of the sovereignty of the State'.⁸⁷⁶ Since immunity *ratione materiae* is a rule under international law and the subject of international law are the States; certainly, this immunity belongs to Chad, not to Habre.

However, the ICJ's judgment for dividing between 'official and private' acts is questionable⁸⁷⁷. It has raised criticism among scholars who argue that national case law and other instances of international practice clearly show that customary international law allows for an exception to the rule of *ratione materiae* immunity in the context of international crimes that applies to any State organ including former high-ranking State officials such as former Heads of State and Government.⁸⁷⁸

⁸⁷³ ICJ, Judgment of 14 February 2002, §61, In: 41 ILM 2002, pp.551-552

⁸⁷⁴ Gaeta, Immunity of Habre, op-cit, p.189

⁸⁷⁵ Akande Dapo, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities, 7 JICJ2009, p.339[hereinafter, Akande, Al Bshir's Immunities]

⁸⁷⁶ House of Lords, UK, Judgment of 24 March 1999, 38 ILM 1999, p.644

⁸⁷⁷ See details in part C-3.7, from section 1 of the first Chapter of this dissertation.

⁸⁷⁸ Gaeta, Immunity of Habre, op-cit, p.189, passim

As a result, customary international law would permit foreign States to exercise jurisdiction over the State official who performed those acts in his or her official capacity, even without the consent of the State he or she represented.⁸⁷⁹

At this stage of development of international criminal law one must conclude that functional immunity cannot be granted to state officials that have committed crimes under international law.⁸⁸⁰

⁸⁷⁹Ibid, p.189, passim

⁸⁸⁰Zappala, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? Op-cit, p.611

Section 3: Reflection of Punishment for serving Heads of State in the ICC, Articles and Cases:

Introduction:

Until the ICC Statute entered into force, international treaties were of lesser important for international criminal law⁸⁸¹. Today, the ICC Statute, a multilateral international treaty, is the main source of international criminal law⁸⁸². International criminal law deals with the darkest side of humanity.⁸⁸³

“The ICC Statute largely confirms and codifies the criminal law that exists under customary international law. But the Statute also to some extent goes beyond simply reflecting and systematizing customary law, and thus makes its own independent contribution to the development of international criminal law”.⁸⁸⁴

The first President of the ICC has described the adoption of the Rome Statute of the ICC in 1998 as ‘a major step in a longstanding effort to establish a permanent forum of international criminal justice’.⁸⁸⁵ It is undeniable that something was achieved in 1998 that had proved elusive in 1919 at Versailles, throughout the existence of the League of Nations, and even after the Second World War-that is, agreement within the international community on the establishment of an international criminal court⁸⁸⁶. The creation of the ad hoc international criminal

⁸⁸¹Werle, ICL2005, op-cit, p.45

⁸⁸²Ibid, [The ICC Statute is the core document of international criminal law today, In: Ibid, p.24]

⁸⁸³International criminal law is a branch of law that more than any other is about human folly, human wickedness, and human aggressiveness, In: Cassese, The Role of Internationalized Courts and Tribunals in the Fight against International Criminality, op-cit, p.13

⁸⁸⁴See also R. S. Clark, in M. Politi and G. Nesi (eds.), The Rome Statute of the International Criminal Court (2001), p.75 at p.79, In: Werle, ICL2005, op-cit, p.49

⁸⁸⁵Philippe Kirsch ‘Introduction’ in Herman von Hebel, Johan Lammers & Jolien Schukking(eds)Reflections on the International Criminal Court-Essays in Honour of Adriaan Bos(1999)TMC Asser Press, The Hague. In: Kemp, op-cit, p.190

⁸⁸⁶Adriaan Bos ‘The International Criminal Court: A perspective’ in Roy Lee (ed.) The International Criminal Court – The making of the Rome Statute (1999) Kluwer Law International, The Hague464. In: Kemp, Ibid, p.191

tribunals no doubt added to the momentum of the process that led to the adoption of the Rome Statute.⁸⁸⁷

The third generation of the international criminal court was created by treaty. In the ICC Statute states expressed its will for removing functional and personal immunities of a Head of State vis-a-vis the Court. However, similar to the SCSL, immunity of serving Head of State of non-States parties remains controversial. This situation will be more complex, when it is referred to the ICC by the UN Security Council, because one must analyze the treaty-base creation under power of Chapter VII of the UN Charter.

⁸⁸⁷Kemp, Ibid, p.194

A: Articles of the Rome Statute:

Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibilities⁸⁸⁸. The ICC, like its earlier models at Nuremberg, The Hague, and Arusha, seems targeted at the major criminals responsible for large-scale atrocities.⁸⁸⁹

At the moment, by ratification, acceptance, approval or accession of the Rome Statute, more than 120 States are in agreement together to end impunity of their officials.

The analyses whether immunities have no effect any more vis-à-vis the ICC must begin by examining the text of the Rome Statute. Two provisions of the Statute have responded particularly to questions of immunity: article 27(both paragraphs) and article 98(1).

A.1: Article 27(1) under conventional international law:

The ICC Statute takes a *categorical* position in article 27 and removes substantive and temporal immunity⁸⁹⁰. The article 27(1) as removal of substantive immunity provides that:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

⁸⁸⁸Cassese, When May Senior, op-cit, p.862

⁸⁸⁹Schabas William A, The International Criminal Court A Commentary on the Rome Statute, 2010, p.422, [hereinafter, Schabas, ICC Statute]

⁸⁹⁰Bassiouni, ICL2008,Vole.I, op-cit, p.53, emphasis added, [Thus, in principle the ICC can issue an arrest warrant against any high-ranking official, In: El-Masri Samar, The Legality of the International Criminal Court's decision against Omar Al-Bashir of Sudan, 66 IL 2010/11, p.383]

It begins by affirming that the Rome Statute applies ‘equally to all persons’.⁸⁹¹ Similarly, Muslim jurists have unanimously held the view that the head of state and government officials are accountable for their conduct like everyone else.⁸⁹²

Since functional immunity has been removed as a substantive defense, it does not divert the responsibility from State official to his or her State. Thus, in this provision like previous international criminal courts, is expressed the term ‘responsibility’.⁸⁹³

Article 27(1) does not define a defence, rather, it excludes one. It rejects the plea of official functions as a Head of State and listing (though not exclusively⁸⁹⁴) some other high ranking state officials. The principle also applies to all ‘officials’, including those who hold *de facto* authority.⁸⁹⁵

This provision clearly excludes the availability of the doctrine of *ratione materiae* immunities for official acts in the case of crimes within the jurisdiction of the Court⁸⁹⁶. It clearly refers to immunities *ratione materiae*, regardless of whether they are provided for in international or in national law.⁸⁹⁷

There is no doubt that article 27(1) as a waiver removes any plea of immunity *ratione materiae* from relevant officials of States parties to the Rome Statute. What about functional immunities of state agents of non-States parties?

In the field of international legislation, pursuant to the traditional doctrine ‘The State cannot be bound by any treaty to which it is not a party or to which it has not

⁸⁹¹‘equally to all persons’, that recalls the opening sentence of article 14 of the International Covenant on Civil and Political Rights, which is a fair trial provision: ‘All persons shall be equal before the courts and tribunals’, In: Schabas, ICC Statute, op-cit, p.448

⁸⁹²Badar Mohamed Elewa, Islamic Law(Shari’a) and the Jurisdiction of the International Criminal Court, 24 LJIL 2011, pp.430-431, (In accordance with Article 107 of the Constitution of Iran, The leader is equal to all other citizens in the eyes of law)

⁸⁹³In the Nuremberg and Tokyo Charters (articles 7 and 6, respectively), also in the ICTY and the ICTR Statutes (articles 7.2 and 6.2, respectively), expressed the term ‘responsibility’ like article 27(1) of the Rome Statute. In contrast, only in article 27(2) of the ICC Statute used the term ‘shall not bar’ because the personal immunity operates as a procedural defense

⁸⁹⁴See D. Akande, 98 AJIL(2004),p.407 at pp.419 et seq.; O. Triffterer, in O. Triffterer(ed.), Commentary on the Rome Statute of the International Criminal Court, 2nd edn. (2008), Art.27, marginal nos.16 et seq.; In: Werle, ICL2009, op-cit, p.238

⁸⁹⁵Karadzic et al. (s.IT-95-5-R61 & IT-95-18-R61), Deferral, 16 May 1995, In: Schabas, ICC Statute, op-cit, p.448

⁸⁹⁶Gaeta, Immunity of Habre, op-cit, p.193

⁸⁹⁷Gaeta, Official Capacity and Immunities, op-cit, p.978

given its free consent'.⁸⁹⁸ Thus, the answer certainly depends on whether article 27(1), reflects a rule of customary international law, because 'the norms possess customary law character, represent general international law and apply even to non-state parties'.⁸⁹⁹

A.2: Article 27(1) under customary international law:

First of all, I must consider the subject in view of the ICJ:

The ICJ held that, "The Court has also examined the rules concerning the immunity or *criminal responsibility of persons having an official capacity* contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art.7; Charter of the International Military Tribunal of Tokyo, Art.6; Statute of the International Criminal Tribunal for the Former Yugoslavia, Art.7, para.2; Statute of the International Criminal Tribunal for Rwanda, Art.6,para.2; *Statute of the International Criminal Court, Art.27*). It finds that these rules likewise do not enable it to conclude that any such *exception* exist in *customary international law* in regard to national courts".⁹⁰⁰

Cassese has held that the ICJ here states that the principle of irrelevance of official capacity only applies to international criminal tribunals and that 'no such an *exception* exists in *customary international law* in regard to national courts'.⁹⁰¹

Customary international law provides that heads of states and other public officials who are no longer in office cannot benefit from substantive immunities for acts that are violative of international criminal law.⁹⁰²

In accordance with Professor Werle: "The fact that a perpetrator acts in his or her official capacity does not affect his or her responsibilities under international

⁸⁹⁸Castro Rial J. M, States, Sovereign Equality, In: Encyclopedia of Public International Law, Elsevier Science Publishers B.V, 1987,passim, p.479, (In accordance with articles 34 and 35 of the Vienna Convention on the Law of Treaties, these provisions cannot create obligation for third States, unless by their direct consent)

⁸⁹⁹Werle,ICL2005, op-cit, p.50

⁹⁰⁰ICJ, Judgment 14 February 2002,§58, op-cit, p.551, emphasis added

⁹⁰¹A Cassese(2002)865, In: Alebeek, op-cit, p.242, emphasis added

⁹⁰²Though it is not clear as to which of the 28 categories of international crimes are included in this exception, In: Bassiouni, ICL2008, Vole. I, op-cit, p.61

criminal law. Immunity *ratione materiae* thus does not affect the commission of crimes under international law. This view of immunity under international law is recognized in customary international law”.⁹⁰³

In view of the foregoing, article 27(1) reflects a rule of customary international law. Thus, immunity *ratione materiae* cannot shield state officials of non-States parties to the Rome Statute.

A.3: Article 27(2) with conventional nature:

Perhaps as a result of doubts as to whether article 27(1) completely removes the possibility of reliance on immunities in proceedings before the ICC, article 27(2) contains an explicit denial of international and national law immunities⁹⁰⁴. It provides:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The second paragraph of article 27 concerns the immunities that exist by virtue of customary international law, and that protect Heads of States, and that extend to other senior officials such as foreign ministers⁹⁰⁵. Article 27(2) refers to immunities

⁹⁰³See Prosecutor v. Blaskic, ICTY (Appeal Chamber), decision of 29 October 1997, §41, “The general rule under discussion [that the individual organ may not be held accountable for acts or transactions performed in its official capacity] is well established in international law...The few exceptions ...arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity”, Prosecutor v. Furundzija, ICTY (Trial Chamber), judgment of 10 December 1998, §140; A. Cassese, International Criminal Law, 2nd edn. (2008), p.305; H. Fox, in L. C. Vohrah et al. (eds.), Man’s Inhumanity to Man (2003), p.297 at p.300; O. Triffterer, in O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, 2nd edn. (2008), Art.27 marginal no.12. In part, the irrelevance of functional immunity is justified by the fact that international crimes are always ‘private’ acts; thus, there is from the start no place for a presumption of functional immunity. In this spirit, see, e.g., DR Congo v. Belgium, ICJ, judgment of 14 February 2002, separate opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Rep.2002, p.3, §85, and separate opinion of Judge van den Wyngaert, §36. For a rightly very skeptical view, see A. Cassese, 13 EJIL (2002), p.853 at pp.866 et seq. The fact, above all, that it declares the most serious crimes of international concern to be private matters militates against this view, In: Werle, ICL2009, op-cit, p.237

⁹⁰⁴Akande, Immunities and ICC, op-cit, p.420

⁹⁰⁵Schabas, ICC Statute, op-cit, p.449

*ratione personae*⁹⁰⁶. It has no counterpart in the Nuremberg or Tokyo Tribunal agreements or in the ICTY and ICTR Statutes.⁹⁰⁷

Article 27(2) conclusively establishes that state officials are subject to prosecution by the ICC and that provision constitutes a waiver by States parties of any immunity that their officials would otherwise possess vis-à-vis the ICC⁹⁰⁸. This provision clearly defines jurisdiction of the Court that I call ‘jurisdiction over immunity from jurisdiction’.

Since States parties are bound by provisions of the Rome Statute, as a multilateral treaty, without any doubt article 27(2) removes immunity *ratione personae* from relevant officials of States parties. Is this waiver of immunity applicable among States parties, for proceedings vis-à-vis the ICC? In this respect, I try to consider this article and article 98(1) of the Rome Statute, together.

A.4: Articles 27(2) and 98(1) with conventional nature:

First of all, I try to create a question: in accordance with article 27(2), personal immunities (whether under national or international law) shall not bar the Court from exercising its jurisdiction. Pursuant to article 98(1), the Court must first obtain the cooperation of third States for the waiver of ‘which immunity’?

“Article 27 confirms the historic evolution towards the non-applicability of immunities for persons holding certain official positions with respect to certain international crimes. However, article 98 subordinates the ICC’s exercise of jurisdiction to other international obligations”.⁹⁰⁹

⁹⁰⁶Gaeta, Official Capacity and Immunities, op-cit, p.978

⁹⁰⁷Akande, Immunities and ICC, op-cit, p.420

⁹⁰⁸Ibid

⁹⁰⁹Bassiouni, ICL2008, V.I, op-cit, p.60 and margin no.126

On one hand, the Court has no independent powers of arrest and must rely on national authorities⁹¹⁰ for arrest and surrender wanted persons to the Court. On the other hand, “All States participating in the negotiations in Rome had concerns about conflicts with existing international obligations. There are provisions within Part 9, including article 98 which address that concern”.⁹¹¹

“The solution achieved was to place an obligation on the Court not to put a State in the position of having to violate its international obligations with respect to immunities. Thus, the Court is obliged to seek cooperation from the third State, before pursuing the request”.⁹¹²

Consequently, immunity that has been mentioned by the article 98(1) becomes important in practice. This provision provides that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third States for the waiver of the immunity.

“The true scope of article 27(2) can only be appreciated if one reads it in conjunction with article 98(1), which is the only other provision of the ICC Statute expressly making reference to personal immunities under international law. Article 98(1) is part and parcel of the set of rules governing cooperation of contracting states with the ICC. It bars the Court from proceeding with requests for surrender or assistance whenever the requested state, in order to execute such requests, would be required to breach its international undertakings in the area of immunities, including personal immunities vis-à-vis a third state”.⁹¹³

⁹¹⁰ Akande, Al Bshir’s Immunities, op-cit, p.338, passim

⁹¹¹ Prost Kimberly and Schlunck Angelika, In: O. Triffterre, (ed.), Commentary on the Rome Statute of the International Criminal Court, 1999, p.1131

⁹¹² Ibid, passim

⁹¹³ As a matter of fact, Article 98(1) makes reference to ‘diplomatic immunities’, a term which is however in many respects equivalent to that of ‘personal immunities’, In: Gaeta Paola, Immunities and Genocide, In: The UN Genocide Convention, P Gaeta(ed.), 2009, p.331

Therefore, under article 98(1), the ICC may not proceed with a request for surrender which would require a State party to act contrary to its international obligations in regard to *personal immunities* of a person of a third State.

The words ‘third State’ in article 98(1) returns to ‘which state’. The view that it is not apply to officials of States parties has been confirmed in attention to text of the Rome Statute, also from ratifications of some ICC parties.

States parties waived personal immunities not only vis-à-vis the ICC, but also vis-à-vis the States parties to the ICC, as far as cooperation with the Court is concerned⁹¹⁴. As held by the Pre-Trial Chamber of the ICC, ‘acceptance of article 27(2) of the Statute, implies waiver of immunities for the purposes of article 98(1) of the Statute with respect to proceedings conducted by the Court’.⁹¹⁵

In attention to the text of these two articles, as correctly has been concluded by below commentators, States parties have accepted removal of *personal immunity under international law* by article 27(2), thus they cannot benefit from such immunity under article 98(1).

A State party whose national was sought on the territory of another State party could not rely upon article 98(1) as an obstacle to arrest and surrender, because in accordance with article 27(2) it would not be in a position to invoke State or diplomatic immunity under international law.⁹¹⁶

In the relationship between the requested (contracting) state and other contracting states, such a waiver is not necessary, since contracting states have accepted the provision embodied in article 27, according to which no international

⁹¹⁴Frulli, Taylor’s Immunity, op-cit, p.1129, [see the opposite view, according to Claus Kress and Kimberly Prost, it applies to any State other than the requested State (either party or non-party State). They base this on the use of the expression ‘State not party to the treaty’ in other provisions of Part 9 when the intent is to refer to non-party States, in: Claus Kress and Kimberly Prost, ‘Article 98’, in Triffterer, Commentary, p.1606, In: Schabas, ICC Statute, op-cit, p.1041]

⁹¹⁵ICC, PTC I, ICC-02/05-01/09-139, Decision 12 December 2011, Decision on the failure by the Republic of Malawi, §18, printed from www.icc-cpi.int (last visited, 13.12.2011)[hereinafter, Decision 12.12.2011]

⁹¹⁶Schabas, ICC Statute, op-cit, p.1040

immunity can bar the exercise of the court's jurisdiction (including the issuance of warrants of arrest against persons enjoying international immunities).⁹¹⁷

In sum, State parties have agreed for removing their personal immunities under international law. They would not be in a position to rely on such immunities among themselves for proceedings before the ICC. Thus, certainly the words 'third State' in article 98(1) does not refer to States parties.

Therefore, State parties are in agreement with each other for exercising ICC's jurisdiction and execute the Court's request for arrest and surrender of their Heads of State, because 'The ICC Statute contains a derogation from the international system of personal immunities for charges of international crimes'.⁹¹⁸ Does this widespread derogation by States parties, create obligations for non-States parties?

Despite the ICC's jurisdiction over immunity from jurisdiction, article 98(1) of the Statute bars⁹¹⁹ the Court. A problem of coordination between article 98(1) and article 27(2) therefore arises, but this problem can easily be solved if one construes the words 'third State' in article 98(1) as referring to 'non-contracting states'.⁹²⁰

As has been explained regarding the last provision, "Part 9 of the Statute imposes an obligation on parties to cooperate with requests from the ICC for the arrest and surrender of persons on their territory. However, States parties would breach their international obligations to nonparties if they arrested and surrendered to the ICC an official of a nonparty who is entitled to immunity from arrest and prosecution. In these circumstances, article 98(1), by directing the Court not to proceed with a request for arrest, ensures that ICC parties will not be placed in the

⁹¹⁷Gaeta, Immunities and Genocide, op-cit, p.331

⁹¹⁸Ibid

⁹¹⁹[The Court is *barred* from requiring a state to arrest and surrender a foreign diplomat of a state not party to the Statute, In: Wirth Steffen, Immunities, Related Problems, and article 98 of the Rome Statute, 12 CLF 2001, p.454],[Article 98 may in practice and contrary to the wording of article 27, 'bar the Court from exercising its jurisdiction over such a person', in: Triffterer Otto, In: Commentary on the Rome Statute of the International Criminal Court, op-cit, p.513]

⁹²⁰Under this interpretation, a waiver of immunity is a necessary condition to the execution of arrest warrants or transfers only in those cases where the requested (contracting) state is internationally obliged to respect the immunities of states *not party* to the Statute, In: Gaeta, Immunities and Genocide, op-cit, p.331

position of facing competing legal obligations to the ICC and other states. Thus, the Court itself is prevented by international law from taking steps that would amount to a violation of those immunities’.⁹²¹ Article 98(1) is practically important for states that are not party to the ICC Statute because it prevents parties from arresting and surrendering officials or diplomats of non-parties to the ICC, where those official or diplomats have immunity in international law.⁹²²

The PTC notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State.⁹²³

The tension can easily be solved and meaning given to both provisions by making a distinction between immunities accruing to non-parties to the ICC Statute and those accruing to ICC parties.⁹²⁴

This distinction between the position of parties and non-parties is supported by the national legislation of some ICC parties.⁹²⁵ For example, under section 23(1) of the United Kingdom’s International Criminal Court Act of 2001, ‘any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute’ does not prevent his or her arrest in Britain or surrender to the Court. However, where the state or diplomatic immunity attaches by reason of a connection to a non-state party, section 23(2) in effect provides that proceedings for

⁹²¹In particular, the ICC would be prevented from even issuing an arrest warrant under article 58 of the Statute, In: Akande, Immunities and ICC, op-cit, p.421, [It should be realized that article 98 should not only secure the obligations of state parties to non-state parties, it should secure the obligation of the Court *itself* towards non-state parties, In: Alebeek, op-cit, p.281]

⁹²²Akande Dapo, The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, 1 JICJ 2003, p.640, (Since the ICC has jurisdiction over nationals of non-parties for committing crimes in the territory of a State party, also for the situation refer by the UN Security Council to the Court, article 98(1) has practical importance for non-States parties)

⁹²³Pre-Trial Chamber I, Decision 12.12.2011, op-cit, §37

⁹²⁴Akande, Al Bashir’s Immunities, op-cit, p.339

⁹²⁵ Art.6, Swiss Federal Law on Cooperation with the International Criminal Court (2001) which permits arrest despite any question of immunity but provides the Swiss Federal Council shall decide on ‘question of immunity relating to article 98 in conjunction with article 27 of the Statute which arise in the course of execution of the request’, In: Ibid

arrest and surrender may continue only where the non-state party has waived immunity.⁹²⁶

Canada, which has legislation that provides that no immunity shall bar execution of a request for arrest by the ICC⁹²⁷, has also taken the view that article 98 should be interpreted as requiring the Court not to issue requests for surrender where this would require violation of immunities of non-parties.⁹²⁸

As a result, under conventional international law: on one hand, ‘States parties waived personal immunities not only vis-à-vis the ICC, but also vis-à-vis the States parties to the ICC’.⁹²⁹ On the other hand, ‘The immunity of officials of nonparties applies not only in relation to States parties, but also in relation to the ICC itself’.⁹³⁰

‘When requests for cooperation involve the question of personal immunities of officials of a State not party to the Statute, the Court may not make requests for cooperation entailing, for the requested State, a violation of international rules on personal immunities to the detriment of a State not party to the Statute’.⁹³¹

⁹²⁶Virtually identical provisions and languages are used in the relevant legislation of Malta and Ireland. International Criminal Court Act 2001, c.17, §23(1), (2); International Criminal Court Act, 2002, c.453(Malta) (inserting a new Art.26S into the Extradition Act, c.276, whose §(1) and § (2) are identical to §23(1) and (2) of the UK Act); International Criminal Court Bill, 2003, No. 36, §60(1) Ireland, to the same effect, In: Akande, Immunities and ICC, op-cit, p.422

⁹²⁷Extradition Act 1999, section 6.1, In: Ibid

⁹²⁸See the joint paper circulated by delegates from Canada and the United Kingdom at the July-August 1999 session of the ICC Preparatory Commission, quoted by B. Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law(Oxford: OUP, 2003), 144. In: Ibid

⁹²⁹Frulli, Taylor’s Immunity, op-cit, p.1129

⁹³⁰Akande, Immunities and ICC, op-cit, p.421, [The limited application to nationals of State parties indicates an understanding that article 27(2) does not apply to nationals of non-States parties. Because this immunity exists by virtue of customary international law, States can abandon the immunity that they themselves possess under international law, but they cannot by treaty deprive it from third States, that have not renounced such immunity, Schabas, ICC Statute, op-cit, pp.450 and452]

⁹³¹Gaeta, Official Capacity and Immunities, op-cit, p.1000, passim

A.5: Article 27(2) as a rule of customary international law:

Any alteration of international law by treaty has legal validity only for the signatory powers and those only who later on accede expressly or submit to it tacitly through custom.⁹³²

The question thus arises whether or not customary international law recognizes jurisdiction irrespective of personal immunities before international criminal tribunals. Does article 27(2) codify a new rule of customary international law? According to the perspective of famous professors the following should be considered:

Professor Werle has written: “The effect of immunity on trials falls away completely in the case of prosecution by an international court. This is now underscored in article 27(2) of the ICC Statute for prosecution of crimes under international law by the ICC. There is good reason also to presume a *corresponding*⁹³³ rule of customary international law⁹³⁴. The exclusion of immunity in customary

⁹³² Oppenheim L. International law A Treaties, Vole 1, Eighth Edition, 1955, pp.263-264, [The sources of international law include treaties and customary international law. While treaties bind only those who are signatories, customary international law arises out of the general practice of states, Canada, (Ontario Supreme Court), Bouzari v. Iran, §58, 124 ILR, p.442]

⁹³³ Professor Werle, explicitly recognized removal of immunity *ratione materiae* under customary international law, however, in regard to immunity *ratione personae* has written, ‘There is good reason also to presume a *corresponding* rule of customary international law’. From this point can conclude that, in view of him, removal of personal immunity is gradually *leading towards the formation of a rule* which universally recognized as part of customary international law.

⁹³⁴ The question is disputed in the literature, see P. Gaeta, in A. Cassese, P. Gaeta and J. R. W. D. Jones(eds.), The Rome Statute of the International Criminal Court, Vol.1(2002),p.975 at pp.988, 995,1000, which sees no basis in customary law, but calls *de lege ferenda* for a presumption that immunity can be overcome at least if ‘it appears to be legally impossible or most unlikely for the alleged perpetrator to ever be brought to justice’; P. Sands, 16 LJIL(2003), p.37 at p. 38; R. Uerpman Wittzack, 44 Archiv des Völkerrechts (2006), p.33 at pp.38 et seq. See also Prosecutor v. Milosevic, ICTY (Trial Chamber), decision of 8 November 2001, §26 et seq., 33. Before the ICC Statute went into force, the irrelevance of procedural immunity was inferred as a corollary to the exclusion of substantive immunity: “The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this consideration to avoid the consequences of this responsibility.” See 1996 Draft Code, commentary on Art.7, In: Werle,ICL2009, op-cit, p.239

international law will henceforth be significant primarily in regard to the possible trial of top representatives of non-party states by the ICC”.⁹³⁵

It has been argued that article 27(2) codifies an existing principle of customary international law⁹³⁶, that the ICJ in the Arrest warrant case recognized it⁹³⁷. In accordance with Professor Cassese ‘It seems justified to hold that under customary international law personal immunities of state officials may not bar international criminal courts and tribunals from prosecuting and trying persons suspected or accused of having committed international crimes, or at any rate the criminal offences over which the relevant international court or tribunal has jurisdiction’.⁹³⁸

The formal absence of immunities in extant international courts and tribunals, along with the widespread ratification of the Rome Statute, might, as Bassiouni posits, have elevated the inapplicability of immunities in international courts that prosecute international crimes to the level of customary international law.⁹³⁹

Immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War I, and international prosecutions against Head of State have gained widespread recognition as accepted practice⁹⁴⁰.

Assessment: In particular, as the ICJ made clear in the North Sea Continental Shelf cases, the existence of a rule of customary international law requires that there

⁹³⁵ See Prosecutor v. Al-Bashir, ICC (Pre-Trial Chamber), decision of 4 March 2009, §40 et seq. In: Werle, Ibid, p.240,

⁹³⁶ Gaeta, Immunity from Arrest, op-cit, pp.324-325

⁹³⁷ Azmayesh Seyed Ali, notes from International Criminal Law Course, 2011

⁹³⁸ Cassese, ICL2008, op-cit, p.312, [The rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecution to unduly impede or limit a foreign state’s ability to engage in international action. Cassese emphasized that this danger does not arise with international courts, which are ‘totally independent of states and subject to strict rules of impartiality’, In: Cassese, Ibid][However, as is well known, the American representatives, in connection with their concerns about the jurisdiction of the Court and the potential for politicized prosecution, had concluded agreements with 99 countries to protect against the possibility of transfer or surrender of United States persons to the Court, UN Doc. S/PV.5158,p.4, In: Schabas, ICC Statute, op-cit, p.1044]

⁹³⁹ Drumbl Mark A, Immunities and Exceptions, In: Bassiouni M Cherif, International Criminal Law, Vole II, 3rd edition, 2008, p.238,[It can be assumed that if number of state-parties reaches two-thirds of the U.N. member-states, it would become a new customary international legal principle that no immunities, substantive or temporal, apply to the crimes within the Court’s jurisdiction In: Bassiouni, ICL2008, Vole. I, p.61, margin no.127]

⁹⁴⁰ Decision 12.12.2011, op-cit, §38 and §39,passim

be 'a settled practice' together with *opinio juris*.⁹⁴¹ Moreover, as the ICJ has also observed, “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”.⁹⁴²

Therefore, in determining whether there is a rule of customary international law, one must consider whether there is a widespread and consistent state practice and whether states accept that they have a legal obligation to follow that practice.⁹⁴³

In attention to lack of state practice in form of judgment of national courts vis-à-vis serving high ranking foreign State officials, with reference to *opinio juris* and national legislation, in particular number of States that now were ratified the Rome Statute, it seemed to me that in no far future, top representatives of non-States parties lost their personal immunities under customary international law. Consequently, trial of such representatives, irrelevant of personal immunity, even for commitment of crimes (within the jurisdiction of the ICC), in territory of States parties, and in the case referral by the Security Council, will be possible.

⁹⁴¹North Sea Continental Shelf cases(Germany/Denmark; Germany/ Netherlands), Judgment, I. C. J. Reports, 1969, p.44, §77, In: ICJ, Decision 3 February 2012, Germany v. Italy, §55

⁹⁴²ICJ, Case concerning the Continental Shelf, Libya/Malta (1985) §27, In: Ibid

⁹⁴³Oppenheim’s International Law (9th ed.), vol.1(New York: Longman) at 902-3, In: Ontario Supreme Court, Bouzari v. Iran, §58, 124 ILR, p.442

B: Cases:

There are three cases, for exercising the ICC's jurisdiction against Heads of State, Laurent Gbagbo, Omar Al Bashir, and Muammar Gaddafi. All of them are exercised against non-States parties. However, the source of exercise of jurisdiction was different.

Cote d'Ivoire, as accepting State, without ratifying or acceding to the Rome Statute, had accepted the jurisdiction of the ICC on 18 April 2003,⁹⁴⁴ by issue the declaration under article 12(3) of the Statute.

Cote d'Ivoire, Uganda, and Palestine have all made declarations in accordance with article 12(3).⁹⁴⁵ This provision provides that:

Article 12(3): If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Sudan and Libya, as non-States parties, saw their situation by the UN Security Council referred to the ICC's Prosecutor. The relationship between the Security Council and the ICC is reflected in article 13(b) of the Rome Statute:

Article 13: The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(b): A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;

If situations in which it 'appears' that such crimes have been committed are referred to the Prosecutor by the UN Security Council under Chapter VII of the UN

⁹⁴⁴On both 14 December 2010 and 3 May 2011, the Presidency of Cote d'Ivoire confirmed the country's acceptance of this jurisdiction.

⁹⁴⁵Schabas, ICC Statute, op-cit, p.289

Charter, the Court has jurisdiction over the crimes regardless of the place of commission or the nationality of the perpetrator.⁹⁴⁶

Under this scenario, the nationals of any UN member States may be prosecuted by the ICC even if the State on the territory of which the conduct in question occurred or the State of which the person accused is a national are not parties to the Statute and have not made a declaration in accordance with article 12(3).⁹⁴⁷

Let us consider these cases, separately, for analyzing the immunity question:

B.1: Laurent Gbagbo:

He was President of Cote d'Ivoire, from 2000 until his arrest in April 2011. Following the 2010 Presidential election, Gbagbo challenged the vote count, alleged fraud, and refused to stand down.

"In UN Security Council resolution 1975, instead of referring the situation in Cote d'Ivoire to the ICC, the Council merely noted that if Cote d'Ivoire -which is not a party to the Rome Statute-, were to file a declaration accepting ICC's authority to exercise jurisdiction with respect to these events, the door to prosecutions could be open. In May, Ouattara affirmed his government's acceptance of the Court's jurisdiction".⁹⁴⁸

On June 2011, the Prosecutor filed his request for authorization of an investigation into the situation in the Republic of Cote d'Ivoire in relation to post-election violence.

⁹⁴⁶See ICC Statute, Art.13(b). For the legal nature of the ICC, see S. R. Luder, 84 International Review of the Red Cross(2002), pp.79 et seq., and K. S. Gallant, 16 LJIL(2003), pp.553 et seq. In: Werle, ICL2005, op-cit, p.70

⁹⁴⁷A state which is not a party to the Statute may recognize the court's jurisdiction over a specific crime or situation by making a declaration pursuant to article 12(3). Bourgon Stephane, Jurisdiction Ratione Temporis, In: The Rome Statute of the International Criminal Court, Vole I, op-cit, pp.552-553

⁹⁴⁸Mohamed Saira, Introductory Note to UN Security Council Resolution 1975 on Cote d'Ivoire, In:50 ILM 2011, p.504

After permit of the Pre- Trial Chamber III, for opening an investigation, on October 2011, the Prosecutor filed an application for the issuance of a warrant of arrest for him on four counts of crimes against humanity.

The Chamber finds that there are reasonable grounds to believe that Mr. Gbagbo bears individual criminal responsibility. Thus, on 23 November 2011, he issued and circulated an arrest warrant against him. He was the first Head of State to be taken into the Court's custody.

In attention to consent of his national State to jurisdiction of the ICC, on 2003, it was confirmed, on December 2010 and May 2011, by the new President. Practically, his transfer to the Court by his national authorities waived his immunity, unless his challenge was correct about the Presidential election. If so, I must consider jurisdiction of the ICC and personal immunity of him as serving Head of State, under the terms and conditions of article 12(3), and particularly its effect over the immunity.

B.2: Security Council's Referrals:

Darfur: "The Sudan situation has been on the international agenda at least since late 2003. In mid-2004, the humanitarian crisis in Darfur was expressly linked to international peace and security, in Security Council resolution 1556. This paved the way for the Security Council, after a report on the best way forward from the Commission of Inquiry, in resolution 1593, to decide that the situation in Darfur ought to be referred to the ICC".⁹⁴⁹

Three years after the Security Council requested the ICC's Prosecutor to investigate in Darfur, the Prosecutor has concluded that there are reasonable

⁹⁴⁹Cryer Robert, The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision, 7 JICJ 2009, pp.283-284

grounds to believe that Omar Hassan Ahmad Al Bashir bears criminal responsibility in relation to genocide, crimes against humanity and war crimes.

On 4 March 2009, Pre-Trial Chamber I of the ICC issued a first warrant for the arrest of the President of Sudan and some high-ranking leaders of Sudan. The crime of genocide is not included in the warrant issued for the arrest of Al Bashir. After the appeal of the Prosecutor, the Appeal Chamber issued the second warrant of arrest for him about genocide charge on 12 July 2010.

The ICC requested some States to bring him to trial. However, these did not execute the request, even some ICC parties within the African continent.

Libya: The new referral by the Security Council was resolution 1970, on 26 February 2011, to refer the situation in the Libya to the Prosecutor of the ICC. This situation was referred to the ICC only one day after the Human Rights Council resolution⁹⁵⁰ to the matter had been passed. The Prosecutor opened an investigation on 3 March 2011.

Muammar Gaddafi, Head of State of Libya, was alleged with crimes against humanity over the civilian population of Libya and of use of force against them. On 27 June 2011, the PTC issued the Arrest warrant against him. The ICC requested again some States to bring him to justice. But death of him ended the proceeding.

B-2.1: Pre-Trial's Decision:

The PTC held for both cases under the same prescription. It held that “the current position as Head of a state which is not a party to the Statute has no effect on the Court’s jurisdiction. The Chamber reaches this conclusion on the basis of the four following considerations”.⁹⁵¹

⁹⁵⁰ The Human Rights Council resolution A/ HRC/S-15/2 of 25 February 2011

⁹⁵¹ §41 and §42 of Decision 4 March 2009, In: Decision 12.12.2011, op-cit, §2, [The Chamber also notes that, consistent with its findings in the Al Bashir Case, the official position of an individual, whether he or she is a

First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which ‘must not go unpunished’.⁹⁵²

The Chamber made reference to putting an end to impunity; clearly, the pursuance of this goal, whatever its importance and legitimacy, does not per se constitute the legal basis which can entitle the ICC to disregard the immunities of incumbent heads of state or of any other person protected by immunities under customary international law.⁹⁵³

“Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute provide for the following core principles: (i) This Statute shall apply equally to all persons without any distinction based on official capacity;(ii) [...] official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence; and (iii) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.⁹⁵⁴

Article 27(2), as necessary under international criminal law, must be interpreted in conjunction with article 98(1), as necessary condition under international law, because the treaty cannot create obligations for non-States parties. The second reason of the Chamber, noticed that article 27, particularly, paragraph 2, codifies a rule of customary international law.

“Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided

national of a State party or of a State which is not party to the Statute, has no effect on the Court’s jurisdiction , PTC I, Decision 27 June 2011, In: Documents on Libya, 50 ILM 2011, p.844]

⁹⁵²§42 of Decision 4 March 2009, (It is important to note that, the ICJ in the Arrest warrant case for concluding that, immunity does not mean impunity held four exceptions)

⁹⁵³Gaeta, Immunity from Arrest, op-cit, p.323

⁹⁵⁴§43 of Decision 4 March 2009

in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute”.⁹⁵⁵

The message is that even if general public international law provides for Head of State immunity, it is not formally contemplated by article 27 and therefore cannot be invoked in proceedings before the Court⁹⁵⁶. The hidden assumption is that on the issue of immunities the Chamber did not need to rely upon rules of customary international law or rules derived from one of the other sources listed in article 21 of the Statute⁹⁵⁷. In accordance with the article 21(1) of the Statute:

Applicable law; The Court shall apply : (a) In the first place, this Statute, Elements of crimes and its Rules of Procedure and Evidence ;(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law.

“Clearly, the Court will have to give pride of place to the Statute, as is provided in article 21. At the same time, there is no doubt in some grey areas where the Statute is not explicit or does not regulate matters, that general international law will be relied upon by the Court. But it remains true that the restriction attitude taken at Rome in many provisions of substantive criminal law might have adverse consequences on general international law”.⁹⁵⁸

According to the Court, the Rome Statute governs superiority of the Court including article 27(2) that explicit that personal immunities shall not bar the Court from exercising its jurisdiction.

“Fourth, as the Chamber has recently highlighted in its 5 February 2009 ‘Decision on Application under Rule 103’, by referring the situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the situation, as

⁹⁵⁵Ibid, §44

⁹⁵⁶Schabas, ICC Statute, op-cit, p.451, [The third reason (of the PTC) is more compelling: a reference to article 21 of the Statute, and the observation that unless there is a lacuna in the Statute the Court is not to apply other sources of law, In: Schabas, Ibid)

⁹⁵⁷Gaeta, Immunity from Arrest, op-cit, p.324

⁹⁵⁸Cassese Antonio, The Statute of the International Criminal Court: Some Preliminary Reflections, 10 EJIL 1999, pp.157-158 passim

well as any prosecution arising there from, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole”.⁹⁵⁹

The most important among the Chamber reasons was that: The Security Council referred the situation to the Court that its Statute governs superiority over other principles and rules of international law. Moreover, since the jurisdiction and functioning of the Court must take place in accordance with the Statute, a decision to confer jurisdiction is a decision to confer it in accordance with the Statute⁹⁶⁰. However, the issue at stake is whether, by way of a Security Council referral, the rules contained in the Statute could be applied to states not parties to it.⁹⁶¹

In first view one must say: The Chamber might have considered article 34 of the Vienna Convention on the Law of Treaties⁹⁶². Solely article 27(2) is a provision in the treaty-base of court and does not apply against Heads of State of non-States parties. However, applying this distinction, with respect to universal jurisdiction of the ICC (via Security Council’s referral under Chapter VII of the UN Charter), is complicated.

According to a commentator, “The Statute, including article 27, must be regarded as binding on Sudan. The Security Council’s decision to confer jurisdiction on the ICC, being (implicitly) a decision to confer jurisdiction in accordance with the Statute, must be taken to include every provision of the Statute that defines how the exercise of jurisdiction is to take place. The fact that Sudan is bound by article 25 of the UN Charter and implicitly by Security Council resolution 1593 to accept the decisions of the ICC puts Sudan in an analogous position to a party to the Statute. The only difference is that Sudan’s obligations to accept the provisions of the Statute

⁹⁵⁹ §45 of Decision 4 March 2009

⁹⁶⁰ Akande, Al Bashir’s immunities, op-cit, p.341

⁹⁶¹ Gaeta, Immunity from Arrest, op-cit, p.324

⁹⁶² Article 34 of the Vienna Convention on the Law of Treaties: ‘A treaty does not create either obligations or rights for a third State without its consent’

are derived not from the Statute directly, but from a UN Security Council resolution and the Charter”.⁹⁶³

In contrary, pointed out by another commentator, “Nonetheless, a referral by the Security Council is simply a mechanism envisaged in the Statute to trigger the jurisdiction of the ICC: it does not and cannot turn a state non-party to the Statute into a state party, and it has not turned Sudan into a state party to the Statute. This very simple fact was implicitly recognized by the Chamber itself, where it stated that ‘the current position of Al Bashir as a Head of State which is not party to the Statute’ does not bar the exercise of the jurisdiction of the Court in the present case”.⁹⁶⁴

According to perspective of Professor Bassiouni, “Referring to the Security Council’s adoption of the Statutes of the ICTY and ICTR as being no more than the embodiment of customary international law thus makes it permissible for the Security Council to establish these ad hoc tribunals, as this is not explicitly contained in the UN Charter as part of the Security Council’s prerogatives. The referral by the Security Council of the Sudan situation to the ICC should, on the basis of these precedents, be subject to the limitations of customary international law. In other words, if any portion of the Rome Statute does not conform to customary international law, it would not be applicable to a non-State party. In this case, President Al Bashir would have temporal immunity so long as he was the head of state of the Sudan. Consequently, he could not be prosecuted while in office, but only after”.⁹⁶⁵

⁹⁶³ Akande, Al Bashir’s immunities, op-cit, p.342, [The case was referred to the ICC by a UN security council resolution under chapter VII, making the non-membership of Sudan irrelevant, El-Masri, op-cit, p.383]

⁹⁶⁴ Nevertheless, I do agree with the ICC in substance, and I submit that article 27(2), also applies to nationals of states not parties to the ICC Statute for the very reason that this provision merely restates an existing principle of customary international law, In: Gaeta, Immunity from Arrest, op-cit, p.324

⁹⁶⁵ This of course differs from what would apply to a sitting head of state under article 27 of the Rome Statute because the narrowing of the temporal immunity is based on the treaty and not on customary international law, In: Bassiouni, Crimes Against Humanity, Historical Evolution and Contemporary Application, op-cit, p.643, [Despite several international instruments that remove the immunity of a Head of State, it is to this writer’s dismay that there is no practice to support it, even though there have been many appropriate situations in which to do so’. In: Bassiouni, M Cherif, Crimes against Humanity in International Criminal Law, 1992, p.467]

B-2.2: Assessment under the Arrest warrant case:

Customary international law provided immunity for certain state officials, such as an incumbent foreign minister (and a fortiori for serving Heads of State) with regard to national courts, whether or not it represents a bar before international criminal courts.

The ICJ held that: “[a]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in article 27, paragraph 2, that ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person’.”⁹⁶⁶

There are some different perspectives about this text of the Judgment. Also, there are some criticisms to it. Here I will analyze both of them, with the solution at the end.

At least, as pointed out by a commentator: ‘The statement by the ICJ must be read subject to the condition (1) that the instruments creating those tribunals expressly or implicitly remove the relevant immunity, and (2) that the state of the official concerned is bound by the instrument removing the immunity’.⁹⁶⁷ Likewise, according to Professor Bassiouni: The ICJ found that temporal immunity exists for incumbents who are entitled to international immunities, unless a derogation thereto exists under conventional international law as in the case of the ICC’s article 27.⁹⁶⁸

⁹⁶⁶Judgment 14 February 2002, §61, part 4, op-cit, p.552

⁹⁶⁷Akande, Immunities and ICC, op-cit, p.418

⁹⁶⁸Bassiouni, ICL2008, Vole. I, op-cit, p.60 [The ICJ implicitly recognizing that States can alter the customary rules by treaty, In: Bassiouni, Universal Jurisdiction Unrevisited, op-cit, p.35]

At last, in accordance with Professor Cassese: The ICJ uses the phrase (where they have jurisdiction), to held, ‘the non-invocability of personal immunity before international courts was admissible to the extent that the relevant court or tribunal had jurisdiction over the international crime with which the state official at stake was charged’.⁹⁶⁹ However, “if Heads of State benefit from immunity before the courts of other States, can other States join together by treaty and create a court that denies such immunity? They would be doing jointly what they cannot do individually”.⁹⁷⁰

The ICJ did not analyze the issue further; it therefore left a few questions unanswered⁹⁷¹. In addition, the ICJ did not specify the exact scope of the asserted non-application of personal immunities before international criminal courts and tribunals.⁹⁷²

First of all, for answering to above criticisms, I need to determine the actual subject of the case:

In accordance with the Court “The Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium’s claim to exercise a *universal jurisdiction* and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground. In the present case, and in view of the final form of the Congo’s submissions, the Court will address *first the*

⁹⁶⁹Cassese, ICL2008, op-cit, pp.311-312 [The ICC or the ad hoc tribunals are entitled to prosecute even persons protected by immunity *ratione personae*, however, article 27 of the Rome Statute is not applicable to Heads of State and other high-ranking state officials of non-states parties which enjoy immunity *ratione personae*, In: Wirth, op-cit, pp.888-889]

⁹⁷⁰Schabas, The UN International Criminal Tribunals, op-cit, p.329[Schabas conclude that the ICJ used the phrase ‘where they have jurisdiction’ for excluding third states, In: Schabas, Ibid]

⁹⁷¹First, it did not specify what is an international criminal court or tribunal and on what grounds personal immunities would not apply before competent international criminal courts and tribunals. Is it because these bodies are international in nature? Or rather because the statutes of these courts and tribunals contain a provision which derogate from the rules of customary international law on immunities? And what are the features that distinguish an international criminal court from a domestic one?, In: Gaeta, Immunity from Arrest, op-cit, p.319

⁹⁷²In particular, it did not distinguish between the power of an international criminal court to issue an arrest warrant, and the obligations (if any) of states to disregard the customary rules of international law on immunity, in order to comply with a request for arrest and surrender issued by such a court or tribunal, In: Ibid

question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000".⁹⁷³

As correctly has been stated by some ICJ's judges: 'The Court is asked to pronounce on the issue of universal jurisdiction only in so far as it relates to the question of the immunity of the Foreign Minister'.⁹⁷⁴

The questions originally raised -namely, whether a State has extraterritorial jurisdiction over crimes constituting serious violations of humanitarian law wherever committed and by whomever (in other words, the question of *universal jurisdiction*) and whether a Foreign Minister is exempt from *such* jurisdiction(in other words, the question of diplomatic immunity)- were transmuted into questions of the 'issue and international circulation' of an arrest warrant against a Foreign Minister and the immunities of an incumbent Foreign Minister.⁹⁷⁵

As a result, actual subject-matter before the Court was immunity where there is universal jurisdiction and the Court *assumed the universal jurisdiction* in its judgment; universal jurisdiction and immunity were inextricably linked.

As correctly was stated by Professor Bassiouni, 'the Court established guidelines or parameters for exercise of universal jurisdiction'⁹⁷⁶ the ICJ articulated concerning article 27(2) that personal immunities do not represent a bar to criminal prosecution where the ICC has universal jurisdiction. In the same subject (immunity where there is universal jurisdiction or at least it is assumed) the ICJ mentioned the exception, namely before certain international criminal courts.

The ICJ explicitly declared that *under the subject* of the Arrest warrant case, before the ICTY, the ICTR, and the ICC, personal immunities shall not bar these international criminal courts from exercising universal jurisdiction.

⁹⁷³ICJ's Judgment of 14 February 2002, supra note 16, §45 and §46, p.548, emphasis added

⁹⁷⁴Separate Opinion of Judge Koroma, 41 ILM 2002, §4, p.574

⁹⁷⁵Dissenting Opinion of Judge Oda, 41 ILM 2002, §9, p.567, emphasis added

⁹⁷⁶Bassiouni, Universal Jurisdiction Unrevisited, op-cit, p.35

Therefore, in accordance with the ICJ's judgment: the customary international law immunity of incumbent Heads of State bar foreign national courts from exercising *universal jurisdiction*, but it shall not bar certain international criminal courts from exercising *such* jurisdiction.

Let us return to the ICC that issued the Arrest warrant against Heads of State of Sudan and Libya. The ICC has been granted true universal jurisdiction covering the whole world only when a situation in which a crime appears to have been committed is referred to the ICC by the Security Council acting under Chapter VII of the UN Charter.⁹⁷⁷

Referrals by the Security Council for the crimes within the jurisdiction of the Court constitute universal jurisdiction because they can transcend the territoriality of a state party.⁹⁷⁸

The state exercising universal jurisdiction is in effect acting on behalf of the international community as a whole⁹⁷⁹. When the Security Council exercises its powers under Chapter VII of the UN Charter, it is exercising powers delegated to it by the member states collectively.⁹⁸⁰

The same principle permitting individual states to prosecute individuals for international crimes, on the basis of universal jurisdiction and without the consent of the state of nationality, permits the Security Council for collective exercise of universal jurisdiction. It would be paradoxical if every state can exercise universal jurisdiction on behalf of the international community as a whole, but the Security

⁹⁷⁷Danilenkot, ICC Statute and Third States, op-cit, p.1877

⁹⁷⁸Bassiouni M. Cherif, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, In: Bassiouni, ICL2008, Vole II, op-cit, p.168

⁹⁷⁹A. Cassese, International Criminal Law(Oxford: Oxford University Press, 2003), 284-285; B. Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford: Oxford University Press, 2003)108-109, In: Akande, The Jurisdiction of the ICC over Nationals of Non-parties, op-cit,p.626

⁹⁸⁰D. Sarooshi, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers(Oxford: Oxford University Press, 2000), 25-32, In: Akande, Ibid, p.628

Council cannot exercise universal jurisdiction officially⁹⁸¹ on behalf of the UN Member States.

It seemed to me, that the ICC certainly has universal jurisdiction in present cases. This reasoning is an answer to the possible question that the ICC Statute is a treaty and cannot create a new jurisdiction against non-States parties. In other words, under the Security Council's referral, the source of obligation against non-State party arises from the UN Charter, not from the Rome Statute.

Thus, in accordance with the ICJ and the ICC, there is no personal immunity for serving Heads of State of non-States parties before the ICC, when the Court exercise universal jurisdiction.

B-2.3: Circulation of Arrest Warrants:

After passing from the bridges of jurisdiction and immunity over non-States parties, since international criminal courts do not have enforcement power⁹⁸², the problem of personal immunities arises when the ICC requested from States to arrest and surrender a serving Head of State of a non-State party to the Court.

The request of the Court, on 6 March 2009 and on 21 July 2010, to all States parties to the Rome Statute, for the arrest and surrender of President Al Bashir, without first obtaining a waiver from the State of Sudan, raises severe criticisms.

“The PTC's decision did not consider whether immunity is to be respected at the national level. This is a regrettable and an amazing oversight by the Chamber. It is amazing because there is a provision in the Court's Statute that addresses this question. It is regrettable that the PTC chose to ignore article 98 in its analysis because the PTC proceeded to make a request for arrest and surrender in circumstances where immunity is in issue. The PTC is under an obligation to satisfy

⁹⁸¹See Article 24 Paragraph 1 of the UN Charter

⁹⁸²Gaeta, Immunity from Arrest, op-cit, p.325

itself that it would not be requiring those states to act inconsistently with their international obligations relating to immunity”.⁹⁸³

“The incumbent Head of State of Sudan, President Al Bashir, enjoys personal immunities under international law vis-à-vis other states, including States parties to the ICC Statute. The ICC has not obtained from the Government of Sudan any waiver of the immunities of President Al Bashir; hence, it is not empowered by the Statute to proceed with a request for surrender. The steps taken by the ICC in this respect are *ultra vires* and at odds with article 98(1). Therefore, States parties to the Statute are not obliged to execute the ICC request for surrender of President Al Bashir, and can lawfully decide not to comply with it”.⁹⁸⁴

The various African Union resolutions were requiring its members not to cooperate with the Court regarding the warrant of arrest against Omar Al Bashir⁹⁸⁵. The sole legal justification of the African Union is by reference to ‘the provisions of article 98 of the Rome Statute of the ICC relating to immunities’.⁹⁸⁶

It seemed to me that rely upon below reasons, the implied waiver of immunity, by the Security Council’s referral or by the Genocide Convention, cannot derogate from the express duty of the Court under article 98(1) of the Rome Statute.

⁹⁸³Akande, Al- Bashir’s Immunities, op-cit, p.337

⁹⁸⁴Gaeta, Immunity from Arrest, op-cit, p.329,[Finally, I will argue that any state other than Sudan that enforces the warrant against Al Bashir would violate international rules recognizing the immunity from arrest for incumbent Heads of State, In: Gaeta, Ibid, p.316]

⁹⁸⁵African Union, Assembly, ‘Decision on the Meeting of African States Parties to the Rome Statute of the ICC, Doc. Assembly/AU/13(XIII)’ 3July 2009, Assembly/AU/Dec.245(XIII) Rev.1(3 July 2009 AU Decision) §10; African Union, Assembly, ‘Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the ICC, Doc. Assembly/AU/10(XV), 27 July 2010, Assembly /AU/Dec.296(XV), §§5-6; African Union, Assembly, ‘Decision on the Implementation of the Decisions on the ICC, Doc.EX.CL/639(XVIII), 30-31 January 2011, Assembly/AU/Dec.334(XVI), §5; African Union, Assembly, Decision on the Implementation of the Assembly Decisions on the ICC-Doc.EX.CL/670(XIX), 30 June-1 July 2011, Assembly/AU/Dec.336(XVII) (30 June-1 July 2011 AU Decision), §5, In: Decision 12.12.2011, op-cit, §15

⁹⁸⁶3July 2009, AU Decision, §10; 30 June-1July 2011 AU Decision, §5, In: Ibid

In respect of article 98(1) one must say; ‘The argument of implied removal of immunity falters on the fact that as a general rule, the Security Council cannot alter the provisions of the Rome Statute when it makes a referral’.⁹⁸⁷

There is genocide charge for President Al Bashir in the second arrest warrant. Here I try to consider the effect of the ratification of the Genocide Convention by State of Sudan, on 2003.

There are some obstacles for removing personal immunities of him. The main obstacle is that there is nothing in the Convention for removing personal immunities of Heads of State. Under discussion, article IV of the Convention states that:

‘Persons committing genocide or any of the other acts enumerated in article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals’.

In particular the choice of the wording ‘constitutionally responsible rulers’ instead of ‘head of state’ in the list of punishable persons, make it clear that the drafters did not include in the list of punishable persons, monarchs and other heads of state having merely, or mainly, a ceremonial function.⁹⁸⁸

The term ‘constitutionally responsible rulers’ was substituted for ‘heads of State’ in order to meet the Swedish objection that the Monarch, as Head of State, may not be brought before domestic or foreign courts⁹⁸⁹. The debate clarified that article IV imposes criminal liability on government ministers and officials with the exception of those constitutional monarchs and Heads of State who enjoy constitutional immunity.⁹⁹⁰

⁹⁸⁷Schabas, ICC Statute, op-cit, p.452

⁹⁸⁸Gaeta, Immunities and Genocide, op-cit, p.320

⁹⁸⁹See 3 GAOR, 93d mtg., at 317(1948)(Mr. Petren, Swed.) In: Lippman Matthew, Genocide, In: Bassiouni, ICL2008,V.I, op-cit, p.414

⁹⁹⁰See 3 GAOR, 95th mtg., at 342 (MR. Fitzmaurice, UK), In: Ibid

Therefore, ‘In this particular, nothing in the Genocide Convention allows for a derogation from the system of personal and diplomatic immunities, and the preparatory works clearly endorse such a conclusion’.⁹⁹¹

B-2.4: Malawi Case

There is a case, particularly between Sudan and Malawi, whether Malawi as the requested State party is obliged to arrest and surrender President Al Bashir, during his visit to Malawi.

Elsewhere⁹⁹², I explain the subject in regard to the SCSL in case of request from State of Ghana for arrest and surrender of President Taylor. Here I try to explain the subject in regard to the ICC.

In this respect, the Republic of Malawi submitted the following observation:

“The Ministry [of Foreign Affairs] wishes to state that in view of the fact that his Excellency Al Bashir is a sitting Head of State, Malawi accorded him all the immunities and privileges guaranteed to every visited Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.

The Ministry further wishes to state that Sudan, of which his Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and in the considered opinion of the Malawi authorities, article 27 of the Statute which, inter-alia, waives the immunity of the Heads of State and Government, is not applicable.

The Ministry also wishes to inform the esteemed Registry of the Court of the ICC that Malawi, as a member of the African Union, fully aligns itself with the position adopted by the African Union with respect to the indictment of sitting Heads of State and Government of countries that are not parties to the Rome Statute’.⁹⁹³

⁹⁹¹Gaeta, Immunities and Genocide, op-cit, pp.321-322, (See, opposite view, Akande, Al Bashir’s Immunity, op-cit, p.350, and El-Masri, op-cit, p.387)

In my opinion, there is also second obstacle for removing personal immunities of President of Sudan, as State party to the Genocide Convention. In accordance with the last part of the article VI of the Convention, express that ‘with respect to those Contracting Parties which shall have accepted jurisdiction of the international penal tribunal’, with respect to the present case, namely, the ICC. The obstacle of non-State party to the ICC, again arise.

⁹⁹²In this Chapter, Under Part ‘C.4’ of the First Section

⁹⁹³Decision, 12.12.2011, op-cit, §8

The Chamber rejects the argument presented by Malawi, with respect to States not parties to the Statute. The Chamber, held that:

“All the States ratified this Statute and/or entrusted this Court with exercising ‘its jurisdiction over persons for the most serious crimes of international concern’. It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified”.⁹⁹⁴

In my opinion, the PTC again relies upon the impunity purposes of the Statute that he had emphasized in his decision of 4 March 2009. It is very clear, however, that the impunity purpose of the Statute cannot justify the neglect of the duty of the Court, pursuant to article 98(1).

The PTC recognized failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Al Bashir. The Court ordered for cooperation of States parties, in such situations, and finds that:

“Customary international law creates an exception to head of State immunity when international courts seek a head of State’s arrest for the commission of international crimes. There is no conflict between Malawi’s obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply”.⁹⁹⁵

The text of article 98(1) determined that such customary international rule, as claimed by the PTC, had not been created until 1998, when the Rome Statute was finalized. Indeed, there is no state practice for surrendering incumbent Heads of State by another State to an international criminal court or tribunal.

⁹⁹⁴Ibid, §41, (The PTC issued the same decision for failure of Chad, for not arrest and surrender President Al Bashir, during his visit to Chad)

⁹⁹⁵Decision, 12.12.2011, op-cit, §43

As rightly has been concluded by Professor Oeter, the founding of the Court is very questionable. In accordance to his perspective, it remains challenging to prove the formation of a specific rule of customary international law from state practice.

There is some serious doubt whether the reasoning of the PTC is really founded under customary international law. Thus, the immunity of serving Heads of State of non-States parties remains applicable before all other states.

It seemed to me, under the UN Charter, that on one hand, the State of Sudan as Member State is obliged to accept the referral and consequently, the jurisdiction of the ICC. On the other hand, the State of Sudan as UN Member State has right for benefiting from the UN Charter.

The Organization and its Members, in pursuit of the purpose stated in Article 1, including maintenance of international peace and security, shall act in accordance with principles that are expressed under Article 2 of the UN Charter. As a first principle ‘the Organization is based on the principle of the sovereign equality of its Members’.

The principle of state immunity derives from the equality of sovereign states⁹⁹⁶. The principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order⁹⁹⁷. Thus, the sovereign equality of states prevents UN Member States from prosecuting a Head of State of another UN Member State.

Therefore, Sudan is obliged to accept (indirectly) jurisdiction of the multilateral treaty court⁹⁹⁸. In contrast, Sudan is rights for benefiting from consequences of the sovereign equality of States, applies to all UN Member States. This right is referred to

⁹⁹⁶SCSL, Decision 31 May 2004, op-cit, §51[According to the SCSL, in the Taylor case, the rules on personal immunities aim at protecting the sovereign equality of states, In: Gaeta, Immunity from Arrest, op-cit, p.321][The SCSL also reasoned that the principle of the sovereign equality of states, which underlines head of state immunity before national courts, is irrelevant in respect of international tribunals and that such a position does not offend any peremptory norm of general international law (§§52-53), In: Kress Claus, Taylor Immunity case, op-cit, p.951]

⁹⁹⁷ICJ, Judgment 3 February 2012, Germany v. Italy, §57

⁹⁹⁸It is an example of the classic maxim *par in parem non habet imperium*

in article 98(1) of the Rome Statute, by calling upon parties to respect personal immunities of non-States parties to the Rome Statute.

It is crucial to determine whether the exceptions contained in treaty-based Statutes allow states, in their reciprocal relations, to refrain from respecting personal immunities in order to enforce an international criminal tribunal's order⁹⁹⁹. Thus, the immunity from the jurisdiction of national courts limits the *enforceability* of arrest warrants of the ICC.¹⁰⁰⁰

⁹⁹⁹Frulli, Taylor's Immunity, op-cit, pp.1128-1129

¹⁰⁰⁰Unless by obtain waiver of immunity from the State concerned. States parties to the Rome Statute agreed with such waiver by article 27(2)

Conclusion:

The Thesis contains a fundamental question;

How can balance ‘end impunity’ of Heads of State (for acts that are violation of international criminal law) with their international immunities?

I started with jurisdiction of national criminal courts. The territorial principle is the famous basis ground for exercise of jurisdiction, even for prosecution of crimes under international law.

In attention that Crimes under international law are often State crimes, the international community cannot left prosecution of such crimes only to territorial state itself. Thus, other national courts, mixed, or international criminal tribunals, must fill the gap of impunity of state officials through exercise of extraterritorial jurisdiction, in major via universal jurisdiction.

Any State has authority to bring to trial alleged commitment of crimes under international law, even for crimes committed abroad by foreigner against foreigner. Solely necessary link is the nature of the crime as concern of international community as a whole. Some crimes within the universality were considered as follow:

- a) - Crimes against humanity under customary international law.**
- b) - Piracy, genocide and war crimes under customary and conventional international law.**
- c) - Torture under conventional international law.**

It seemed to me that exercise of universal jurisdiction under customary international law has two consequences:

1-As was written by Professor Werle : These crimes are ‘crimes under international law’ that involve direct individual criminal responsibility under international law¹⁰⁰¹.

2-Exercise of universality among non-States parties of the relevant conventions is also valid.

Two aspects of Sovereignty, when exercise universal jurisdiction, are very important. Since crimes under international law are not domestic matters and for human rights’ reasons, in theory exercise of universal jurisdiction transcends the principle of non-intervention. However, in practice, must limit exercise of universal jurisdiction through the complementarity principle, as stated Professor Cassese ‘for respecting to state sovereignty as much as possible’.¹⁰⁰²

For some reasons including respect to the sovereign equality of states¹⁰⁰³, it is widely acknowledge that certain state officials such as serving Heads of State or Government enjoy concurrently two international immunities.

Immunity *ratione materiae* for acts that they perform on behalf of the State, it operates even after cease of office as a substantive defence. Consequently it diverts responsibilities of state officials for official acts to States themselves.

Also, they enjoy immunity *ratione personae* for acts either official or private, for guaranteeing the ‘effective performance’ of their functions in inter-state cooperation regime, and in international community, which operates as a procedural defence, only during the office.

The principle of individual criminal responsibility for acts of government was recognized after the two World Wars. The cornerstone of this principle was put into place by the Versailles Treaty in 1919, and it was finally established in the Nuremberg Charter.

1001Werle, ICL2005, op-cit, p.25, [Crimes under international law differ from other international crimes in that they are directly punishable under international law, In: Werle, ICL2009, op-cit, p.42]

1002There was perhaps a principled motivation, namely the intent to respect state sovereignty as much as possible, In: Cassese, ICL2008, op-cit, p.343

1003Under sovereign equality of all states, no state sit in judgment over another, particularly in the case of Head of State, based on the principle *par in parem non habet imperium*.

Individual criminal responsibility for crimes under international law, irrelevant of any official capacity, even as Head of State, was confirmed unanimously by the UN General Assembly resolution 95(I). Consequently, from December 1946, the idea that a Head of State is only responsible to his own country officially changed to a new rule that the official capacity of Head of State shall not be considered as freeing a perpetrator from responsibility under international law.

International criminal prosecution, irrelevant of official capacity was repeated in the Tokyo Charter, then in the ICTY and in the ICTR Statutes. In all related articles expressed the term responsibility, because functional immunity has been removed and it does not divert state officials' responsibilities to States themselves.

Thus, the tribunals created under these documents rejected this plea as a defence, for commitment of crimes under international law, only vis-a-vis these international criminal tribunals.

In respect of functional immunity before foreign national courts, the decision of the British House of Lords in the Pinochet Case¹⁰⁰⁴ is a leading Case. According to decision of the House of Lords, (i) both immunity *ratione materiae* and universal jurisdiction cannot logically coexist; especially they cannot collect in the one convention for state offences, like torture under the UN Torture Convention. (ii) Every former state official that has acted on behalf of the State in the exercise of his or her official functions are immune from the jurisdiction of other states, except for commitment of crimes under international law.

Through ad hoc international tribunals that were established by the UN Security Council, the international community for the first time effectively prosecuted senior State officials, namely Jean Kambanda, the Rwandan's former prime minister, and

¹⁰⁰⁴In the case of crimes under international law, immunity *ratione materiae* is inapplicable not only to trials before international courts, but also vis-à-vis state judiciaries. This, too, is today anchored in customary international law. This development gained significant momentum as a result of the decision of the British House of Lords in the Pinochet Case. In: Werle, ICL2009, op-cit, p.238, (see, particularly, parts C.3-6 & C.3-7, in First section of Chapter One of this dissertation)

Slobodan Milosevic, the Serb former Head of State¹⁰⁰⁵. Since the first one pleaded guilty, only the last one claims immunity.

Various Trial Chambers of the ICTY have held that the provisions of, respectively, article 7 of the Charter of the IMT at Nuremberg and article 7(2) of the Statute of the ICTY, ‘reflect a rule of customary international law’.¹⁰⁰⁶

Customary international law provides that Heads of State and other public officials who are no longer in office cannot benefit from substantive immunities for acts that are violative of international criminal law.¹⁰⁰⁷

After the period of office, all state officials such as Heads of State are punishable for committing crimes under international law, even if they have acted in official capacity on behalf of the State. Functional immunity as an obstacle for prosecuting such perpetrators completely falls away even against former Head of State of non-State party to the Rome Statute.

Therefore, exercise of jurisdiction by every foreign criminal courts, either national, mixed, or international courts, will play a role for filling the gap of impunity of former state officials.

However, the subject and result are very different in regard to immunity *ratione personae*, which certainly cover Heads of State or Government, diplomats, and foreign ministers. In this respect, after having considered some national legislation and the corresponding judicial practice, may say the judgment of the ICJ in the Arrest warrant case is the leading case.

Since Belgium wants to operate absolute universal jurisdiction, irrelevant of immunity *ratione personae*, had unsuccessful experience and remains its will for fighting against impunity as a dream. In this respect, the ICJ held that:

¹⁰⁰⁵ With regard to the ICTY, it was issued indictment against Milosevic, at a time when he was an incumbent Head of State. However, the Trial Chamber of the ICTY rejects his claim of immunity, as former Head of State.

¹⁰⁰⁶ See Karadzic and others (§24), Furundzija (§140), and Slobodan Milosevic (decision on preliminary motions) (§28), In: Cassese, ICL2008, op-cit, p.306

¹⁰⁰⁷No substantive immunity exists for certain international crimes, whether before international or national judicial organs, In: Bassiouni, ICL2008, V.I, op-cit, p.61

‘The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. 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’.¹⁰⁰⁸

The ICJ found that the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

On 2002, the ICJ rendered its decision, holding that an incumbent foreign minister benefit from the customary and conventional international law immunity afforded diplomats, and thus ruled against Belgium in the case.¹⁰⁰⁹

In regard to incumbent foreign ministers and a fortiori for serving Heads of State or Government personal immunities grant absolute immunity from foreign criminal prosecution without any exception, even for commitment of crimes under international law.

Germany learns from the failure of Belgium, and in the Code of Crimes against International law, accepts the pure universal jurisdiction under §1 VStGB, however, in conjunction with a procedural rule, §153f StPO. The last one limits exercise of universal jurisdiction consistent to demands of international law. It is clear that every state may only act within the limits permitted by international law.¹⁰¹⁰

Apart from the above exclusive code, Germany also has universal jurisdiction pursuant to §6(9) and §7(2)(2) StGB, as a rule for enforcing bindings of international agreement and as a practical resolution, respectively.

¹⁰⁰⁸Arrest warrant Case, ICJ, judgment 14 February 2002, op-cit, §58, p.551, emphasis added

¹⁰⁰⁹Bassiouni, ICL2008, V.I, op-cit, p.60

¹⁰¹⁰ICJ, Judgment 26 February 2007, §430, op-cit, p.295

This practical resolution called: The vicarious administration of justice -that operates as a last jurisdiction in cases of non-extradition for practical reasons- for ending to impunity which on 2004 has accepted by French legislation, too. This principle is the practical measure for enforcement of postulate, *aut dedere aut judicare*. It has practical effects for combating impunity which highlight in prosecution of Hissen Habre, in Senegal.

It is also arguable that exercise of universal jurisdiction in absentia is controversial, thus, in view of the foregoing, before foreign national courts:

Therefore serving state officials not entitled to immunity *ratione personae* and former state officials who are present on the territory of the forum state may be arrested and prosecuted for such crimes.¹⁰¹¹

It is important to note that the ICJ in the Arrest warrant case for concluding that immunity does not mean impunity held that immunity before foreign national courts does not play a similarly important role vis-à-vis certain international criminal courts. It seemed to me because the last one exercise jurisdiction on behalf of the international community.

The ICJ after mentioning the possibility for a waiver of immunity by the state concerned, uphold this distinction. Since there is under customary international law a rule of removing functional immunity for commitment of crimes under international law, I read the judgment in regard to personal immunities. It held,

They will cease to enjoy immunity from foreign jurisdiction if the State which they represent... decides to waive that immunity.¹⁰¹²

The possibility of waiving personal immunity by the state concerned has the consequence that States can alter the customary rules of international law by treaty. Since States parties to the Rome Statute have accepted removal of personal immunities under international law, thus they cannot benefit from such immunity not

¹⁰¹¹Akande and Shah, op-cit, p.849

¹⁰¹²Judgment 14 February 2002, §61, part 3, op-cit, p.552

only vis-à-vis the ICC but also vis-à-vis other States parties, when the ICC request for arrest and surrender. Thus, States parties are in agreement with each other for end impunity of their serving Heads of State (a fortiori other senior state officials).

The ICJ in the obiter dictum continued, “an incumbent... Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, *where they have jurisdiction*. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in article 27, paragraph 2”.¹⁰¹³

The situation obviously is different where the international court is created by a Security Council resolution or by a treaty. This is why the ICJ mentioned these different courts, under the same prescription.

All of them have one common aspect. They are placed above the governments on the basis of Security Council's resolution under Chapter VII of the UN Charter. The ICJ implicitly recognized that the Security Council can alter the customary rule of personal immunities. Consequently, the possession of Chapter VII powers is essential for the question of personal immunities before international criminal courts.

In addition, the phrase ‘where they have jurisdiction’ completes the expression ‘before certain international criminal courts’. The phrase ‘where they have jurisdiction’ must be interpreted to where they have universal jurisdiction, because the actual subject matter before the Court, in the Arrest warrant case, was personal immunity when the Belgian court was exercising universal jurisdiction.

It seemed to me that the ICTY and the ICTR, exercise universal jurisdiction as subsidiary organs of the Security Council, and the ICC can exercise universal jurisdiction in Security Council's referrals.

¹⁰¹³ §61, part 4, In: Ibid

Under this interpretation, in accordance with the ICJ, certain State officials clothed with personal immunity under international law may be subject to criminal proceedings by certain international courts where a situation threatens or breaches international peace and security, but only when this is recognized by the Security Council under Chapter VII of the UN Charter.

As a result, an international criminal court may have the power to exercise jurisdiction over individuals normally protected by personal immunity if the state of nationality has agreed to the jurisdiction of that court, or if that court possess power of Chapter VII of the UN Charter.

Charles Taylor, Omar Al Bashir, and Muammar Gaddafi, subject to prosecution by treaty-based international courts that were rejected their immunities, as serving Heads of State of non-States parties.

With regard to the SCSL, it creates by treaty without power of Chapter VII of the UN Charter. Thus personal immunities of Charles Taylor as serving Head of State of non-State party, bars the SCSL for exercise of its jurisdiction.

With regard to the ICC, it has power of Chapter VII of the UN Charter, only in Security Council's referrals pursuant to article 13(b) of the Rome Statute. Thus, on one hand, the referred non-State party (to the Rome Statute) as UN Member State is obliged to accept the referral and consequently, the jurisdiction of the ICC. On the other hand, the referred non-State party (to the Rome Statute) as UN Member State has the right for benefiting from the UN Charter, in relation to all UN Member States.

The Organization and its Members, in pursuit of the purpose stated in Article 1, including maintenance of international peace and security, shall act in accordance with the principles that are expressed under Article 2 of the UN Charter; as a first principle 'the Organization is based on the principle of the sovereign equality of its

Members'. The principle of state immunity derives from the equality of sovereign states¹⁰¹⁴.

The sovereign equality of states prevents all UN Member States, from prosecuting a serving Head of State of non-State party to the Rome Statute. Here, must bring in mind, the main rationale of personal immunity, namely 'effective performance' of function that express by the ICJ in the Arrest warrant case.

Therefore, the referred non-State party obliges to accept (indirectly) jurisdiction of the ICC as a multilateral treaty court. In return, it enjoys rights for benefiting from consequences of the sovereign equality of States, before all UN Member States. This right is referred to in article 98(1) of the Rome Statute, calling to respect the personal immunity of non-States parties to the Rome Statute.

Under the article 98(1), the ICC Statute permits States parties to depart from the obligation to arrest and surrender serving state officials which enjoys personal immunities of non-States parties. In other words, the immunity from the jurisdiction of national courts limits the enforceability of arrest warrants of the ICC.

In view of the foregoing, there is no functional immunity for crimes under international law. Personal immunities of Heads of State of States parties to the Rome Statute only remain for proceedings before foreign national courts. However, personal immunities of Heads of State of non-States parties to the Rome Statute have been removed only vis-à-vis the ICC, when it has power of Chapter VII of the UN Charter.

There is no exception for respecting to immunity *ratione personae* of Heads of State of non-States parties vis-a-vis foreign national authorities, not only for proceedings before national courts, but also when the ICC request from State parties for arrest and surrender.

¹⁰¹⁴SCSL, Decision³¹ May 2004, op-cit, §51

It seemed to me that in no far future, top representatives of non-States parties lost their personal immunities under customary international law, even for commitment of crimes (within the jurisdiction of the ICC), in territory of States parties. However, remain their personal immunities vis-à-vis other States, when the ICC request for arrest and surrender.

The end

Hamburg, March 2012, Mahdizadeh

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