The Liability of Heads of State for the Commission of International Crimes

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Abstract

The liability of heads of state for the commission of international crimes is an important debate that has been animating the international scene in the domain of criminal justice for the last few years. Many Heads of State, either directly or indirectly are at the origin of acts which constitute serious violations to fundamental human rights. Despite this unfortunate situation, they are under the cover of immunities which protect them from criminal prosecutions. This study deals with two aspects of international law, the first is 'immunities of Heads of State' and the second is 'prosecution of international crimes'. Liability of Heads of State is discussed in the context of international crimes. This work aims at investigating the extent to which immunity enjoyed by Heads of State constitute a hindrance to the engagement of their liability for the commission of international crimes. Using the dogmatic and casuistic research approaches, this work goes further to argue that these immunities constitute a stumbling block to establish the liability of Heads of State before foreign national jurisdictions but cannot hinder their liability for perpetration of international crimes before international jurisdictions. Using case law from various domestic and international jurisdictions, this work justifies that immunity ratione materiae is not a major problem in the law of international criminal responsibility. Rather, it is immunity rationepersonae enjoyed by incumbent Heads of State which is still a force to reckon with by both domestic and international criminal jurisdictions.

Key words: Liability, Head of States, international crimes.

Résume

La responsabilité des chefs d'Etat pour la commission des crimes internationaux est un débat important qui anime la scène internationale dans le domaine de la justice pénale depuis quelques années. Plusieurs Chefs d'État sont, de manière directe ou indirecte à l'origine d'actes qui constituent des violations graves aux droits fondamentaux des droits de l'homme. Malgré cette situation malheureuse, ils sont sous le couvert d'immunités qui les soustraient des poursuites pénales. Cette étude traite de deux aspects du droit international, le premier concerne les*« immunités des Chefs d'État »* et le second les*« poursuites pour crimes internationaux »*. La responsabilité des Chefs d'État est discutée dans le contexte des crimes internationaux. Ce travail vise à enquêter sur la mesure selon laquelle l'immunité dont bénéficie les Chefs d'État constitue une entrave à l'engagement de leur responsabilité pour la commission de crimes internationaux. En utilisant la méthode positiviste sous ses deux aspects à savoir a dogmatique et casuistique, cette étude va plus loin en affirmant que ces immunités constituent une pierre d'achoppement pour l'établissement de la responsabilité des Chefs d'État devant les juridictions nationales étrangères, mais ne peuvent faire obstacle à leur responsabilité pour la perpétration de crimes internationaux devant les juridictions internationales. S'appuyant sur la jurisprudence de diverses juridictions nationales et internationales, ce travail justifie que l'immunité *ratione materiae* n'est pas un problème majeur dans le droit de la responsabilité pénale internationale. C'est plutôt l'immunité *ratione personae* dont jouissent les Chefs d'État en exercice qui reste une force à prendre en compte par les juridictions pénales nationales et internationales.

Mots clés : *Responsabilité, Chef d'Etats, Crimes Internationaux.*

Introduction

The tension between the protection of human rights, the promotion of justice, the demands of state sovereignty as well as the effective functioning of the apparatus of state administration has led to the recognition of prosecutorial immunities on certain state officials especially heads of state. The reason for the recognition of these immunities on heads of state is to enable them perform their functions at the helm of their states without interference. The debate on the imperatives of the state sovereignty and the maintenance of international justice is reflected on the question whether heads of state, under the cover of these immunities should be liable for the commission of international crimes.

Given the fact that, crimes under international law are typically state crimes, living it up to the state of commission to prosecute these crimes will often mean making the perpetrators their own judges.[1] This has led to what have been describe as a culture of impunity which contribute to a climate in which human right violations persist and are not deterred.[2]

In order to counter this culture, there are a variety of ways through which judicial enforcement of laws against international crimes may take place. First, it is possible that such enforcement take place in the domestic courts of the state where the human right violation occurred under the principle of territorial jurisdiction. This is because exclusivity of jurisdiction of States over their respective territories is a central attribute of sovereignty.[3]However, in the case of international crimes, a major obstacle to the exercise territoriality principle is posed by the fact that these crimes are often committed by state officials or with their complicity or acquiescence.[4] Consequently, state judicial authorities may be reluctant to prosecute state agents or to institute proceedings against private individuals that might eventually involve state organs. Thus, the gap of impunity has to be covered by relying on the exercise extra-territorial jurisdiction which constitutes universality and complementarity.

The universality principle establishes the jurisdiction of domestic courts to prosecute and punish crimes under international law while complementarity, also known as subsidiarity principle implies that international criminal jurisdictions only intervene and apply international law to a situation when the court of a state with presumably a stronger nexus to that situation fails to adequately deal with it.[5]

A significant part of Nuremberg's legacy is the introduction of individual criminal responsibility for violations of international law which is recognized in article 6 of the Nuremberg charter. Individual criminal responsibility for crimes under international law, irrelevant of official capacity, even as head of state, was unanimously confirmed by UNGA resolution 95(1). Consequently, form 1946 the idea that a head of state was not liable for his acts officially changed to a new rule that the official capacity as head of state shall not be considered as freeing a perpetrator of international crimes.

Because legal concepts are prone to several meanings, it is important at this juncture to define the key terms related to this topic.

The Black's Law Dictionary in its 8th edition[6] defines **Liability** as the quality or state of being obligated or accountable or the legal responsibility to another person or to the society, enforceable by civil remedy or criminal punishment. Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong.[7] According to Rolins Pekins and Ronald Boyce, "liability means answerability or accountability. It is used in criminal law in the sense of criminal responsibility and hence means answerability to the criminal law".[8] These two authors try to explain the fact that liability is very pertinent in criminal law especially as it will enable accountability for any criminal act. Thus, criminal liability is the aptitude for the perpetrator of an act that is considered as a criminal act to criminally borne responsibility to the consequences of such act. Therefore, the concept of liability reflects the binding nature of a legal rule. This is why Alain pellet argued that if legal rules could be infringed without legal consequences, this would be tantamount to saying that the law does not contain binding prescriptions.[9] .

The Oxford Advanced Learner's Dictionary defines a Head of State as the chief public representative of a country who may also be the head of government.[10] The different political and constitutional systems in the world would enable us identify different categories of individuals as heads of state. In monarchical system like England, Lesotho, Saudi Arabia, it is a king or queen that is the head of state even though in some monarchical countries like England, it is the prime minister that plays the role of head of state while the queen remains a ceremonial leader.

[1]Werle Gehard, principles of international criminal law, TMC ASSER press, 2005, page 63

[2] Akande Dapo and Sangeeta shah, immunities of states officials, international crimes, and foreign domestic courts, European journal of international law, vol 21, 2011, pages 815- 852, page 816

[3]Steinberger Helmut, Sovereignty, In Encyclopedia of Public International Law, 1987. Vol. 10, P.277.

[4]Cassese Antonio, International Criminal Law, Oxford University Press, First Edition, 2003,P 15.(herein after Cassese Antonio, ICL, 2003)

[5] Ryngaer Cederic , Jurisdiction In International Law, Oxford University press, Oxford, 2008 P.42

[6] Brian A. Garner (ed) the Black's Law Dictionary, 8th edition, 2004, p.2910.

[7] ibid

[8] Rolins M. Pekins and Ronald N. Boyce, Criminal law and procedure: cases and materials, EJIL, vol. 15, 1977 p.399.

[9] Pellet Alain, the definition of responsibility in international law, in Crawford, pellet, and olleson, p.4.

[10] Oxford Advanced Learner's Dictionary, P. 576

In countries with republican systems like USA, France, Cameroon, the head of state is a president. Whatever name it may be called in different political systems, a head of state is an individual who is at the helm of political decision making in a country. In other words, a head of state is the official leader of a country. There are individuals with special status regarded as incarnating their state at the international level.

International public law dictionary defines an International Crime as any act be it a felony or a misdemeanour which by reason of their gravity, exceptional character and the serious consequences that can result there from are defined and punished under international criminal law irrespective of where or by whom it is committed.[11] These international crimes again known as core crimes or *jus cogens* crimes are defined by international law and is imposed on all states without consideration of sovereignty. This international crime is a crime against international humanitarian and human rights law or a crime that as a result of it gravity, generalized and systematic character violates the fundamental values of the international community as a whole where ever they are committed. These are crimes against humanity, war crimes, genocide and crimes of aggression as are previewed in the statute of the ICC.[12]

The objective of this work is to investigate whether heads of state under cover of immunity can be prosecuted when they violate fundamental human rights amounting to international crimes as well as to examine the position of international law with regards to the punishment of international crimes as a *jus cogens* norm and respect of immunities as a customary norm of international law.

In context, many authors have written about the liability of heads of state, immunity and international crimes, most particularly defining immunities and the different types of international crimes as well as demonstrating the attribution of liability of these crimes to heads of state. What is most common in the whole literature about liability of heads of state for international crimes and the influence immunity has on this process is that international law has evolved since 1945 and the absolute theory of immunity has lost grounds to a new conception which favors the prevalence of international justice and the fight against impunity. Unanimity is reached in all these works on persecution of heads of state when they commit international crimes but the only difference lies in the different approaches used and the different theories defended about the extent of this liability.

Some of these theories include that of Dapo Akanda and Sangeeta Shah[13] who in their publication entitled **"**immunities of states of state officials, international crimes and foreign domestic courts", examined the extent to which state officials are subject to persecution in foreign domestic courts for international crimes. After studying the different types of immunities, they expatiate on the officials entitled to immunities in which the head of state was one as a public official. Finally they came to the conclusion that immunity *ratione materae* does not apply in criminal prosecution for international crimes.[14] This view is shared by Elizabeth Helen Franey who in her work entitled "immunity, individuals and international law" concludes that immunity is necessary for state officials to enable them perform their functions but it should not be blanket immunity.[15] According to Hossein Mahdizadeh Karsineh in his work "immunities of head of state and its effects on the context of international law", there is functional immunity for crimes under international law. Personal immunities of heads of states, parties to the Rome statute only remain for preceding before foreign domestic court.

In agreement with the views held by other authors, Dr. Chacha Bhoke Murungu in his book titled **"**Immunities *of State Officials and Prosecution of International Crimes in Africa***"*** argues that although immunity is founded under customary international law, it cannot prevail over the international law norm of *jus cogens* incriminating international crimes because such *jus cogens* norms trumps immunities while emphasizing that heads of states cannot claim immunity for international crimes because committing these crimes does not qualify as an official function of a head of state. However, very few studies such as that by Simbeye[16] have argued that the immunity of heads of state should be respected at all times even if they are accused of core crimes because the immunities enjoyed by them is derived from the sovereignty of their states which at all times must never be violated.

[11] International public law dictionary, 7th edition; 2017, p.778

[12] See article 5 of the Rome statute of the international criminal court. Available at http://www.icc.cpi.int

[13] Akande Dapo and Sangeeta Shah, immunities of states officials, international crimes and foreign domestic courts. European journal of international law, vol 21.No 4, 2011, pp.815-852.

[14] Ibid.

[15] Elisabeth Helen franey, immunities, individuals and international laws. Ph.D. thesis, London schools of economics and law, London, June 2009, p.13

[16] Simbeye Y, "immunities and international criminal law, Ashgate publishers limited, Aldershot, 2004.

Now that this literature review has put the current work in its factual and legal context, It is pertinent to make a statement of the problem facing us here which is that prosecuting serious violations of international humanitarian law is a huge, wide and complex process because these violations usually occur in large scales, spread over a wide geographical area and involves numerous actors, victims and perpetrators who are sometimes heads of state. Investigating, prosecuting and ascribing liability to heads of state if they are accused to have committed these crimes requires a whole apparatus of various legal instruments to be searched and assembled normatively and institutionally.[17]

At this juncture, it is worth mentioning that the major articulation which preoccupies this work is the weight of immunity under international law in the face of international crimes. In order to solve the problem posed by this articulation, this work will dwell on the following research question: Are heads of state liable for the commission of international crimes in that capacity?

Since the WW II, the international community has focused more and more of its attention to the fight against impunity and the suppression of gross human right violations. To achieve this goal, certain values have been defined as values common to mankind where ever they may be found. This has led to the definition of some human right violations as international or core crimes with the status of *jus cogens* norms. The above research question brings us to the hypothesis that in the face of international crimes, it seems official capacity or status is irrelevant. All governmental officials, including heads of state are criminally accountable under international law if they commit international crimes. Both foreign national courts and international jurisdictions engage their responsibility at different levels. However, the immunity protecting heads of States influence this procedure a lot.

The importance of the question which this theme raises, requires that we adopt a suitable methodology that will enable us analyse and clarify our preoccupation and attain the objective assigned. We are going to adopt in an analytical and comparative manner the legal research method focus on the dogmatic and casuistic approach, which are suitable methodological tools used in a legal study. So, our method here would be purely exegetic and positivist.

The engagement of the liability of heads of State by the national courts of their States for whatever crimes is always very difficult, if not impossible. This is because of the influence most heads of State have on the judicial systems of their countries. Therefore, this dissertation will focus on universality and complementarity principles as two preferred modes for prosecution of international crimes.

In order to better approach the above question, we shall be talking in the first part about the foundation or basis of the engagement of liability of heads of State for the commission international crimes (I), and in the second part of this work, we shall dwell on the procedural assessment and some stakes usually encountered in international criminal proceedings (II).

I: The Foundation of the Engagement of Criminal Liability of Heads of State for the Commission of International Crimes

The concept of liability at law is derived from classical theory[18] and the recognition of its existences goes centuries back. This concept evolved through history but was never explicitly codified until the 20th century. However, it was only state responsibility that was envisaged as international law was only applicable on states not their governmental leaders. This was because of the existence of absolute theory of immunity for governmental leaders who posed all acts in the name of their states. While the trend was that the criminal liability of governmental leaders could not be invoked individually because of absolute immunity, some of these leaders committed serious human rights violations with much impunity. Under this heading, we shall be analysing the historical foundation for head of state liability for international crimes in (A), as well as the legal foundation in (B).

A/ The historical foundation

Today, just like in the past, state leaders commit crimes. However, each time these crimes were committed, the perpetrators tend to invoke circumstances, including immunities to exclude criminal liability. Under this heading, we shall trace the historical background for individual criminal responsibility for international crimes in (1), and the traditional objectives of international criminalization of these crimes in (2)

[17]Mutabazi Etienne, The United Nations Ad Hoc Tribunal's Effectiveness In Prosecuting International Crimes, PhD thesis, university of south Africa, 2014. P.9.

[18]See the works of Emile Durkeim and Cesare Baccaria on the classical theory of law.

Historical Background Of Individual Criminal Responsibility For International Crimes

The concept of individual criminal liability as we have it in international law today is a result of centuries of legal development that help in the understanding of the personal accountability of heads of state for crimes. Absolute sovereignty has been recognized on states since the advent of the Westphalia concept in 1648. This absolute sovereignty was extended to protect all actions posed by state leaders in their official capacity by granting them immunities.

We think of the twentieth century as the century of democratic break through and technological progress but, it is to no less a degree an unparalleled age of wars, bombings, massacres as well as a period when oppression, persecution, and terror cost millions of civilian lives. Mass outrages in the form of massacres, rape, torture and other nefarious deeds were perpetrated in many parts of the world. We have the 1915 Armenian massacres in the Ottoman Empire, the Nazi persecution of the Jews during WWII, crimes by the Kmer Rouge Regime in Cambodia in the late 70s, Genocide in Rwanda and the former Federal Republic of Yugoslavia (FRY) just to name but these. It was sad enough that while millions and millions of civilians around the world suffer the effects of these crimes; their perpetrators continue to stay in power and were totally unaccountable. The very first attempt of attributing liability on a state leader in modern times was the proposal to prosecute Kaiser Wilhelm II of Germany after WW I in 1919.[19] However, this trial never took place and the Kaiser was exiled to Netherland. Before Kaiser Wilhelm, king Charles I was tried by the high court of justice in the palace of Westminster in 1649 on allegations that his army had committed war crimes against civilians. The trial of King Charles was followed by that of Louis XVI of France in December 1792 by the French national convention.

Against this background, an important development occurred in the domain of international criminal law after the Second World War. This was the beginning of personal accountability of governmental leaders for their actions under the notion of individual criminal responsibility. During this period, the theory of absolute immunity for state leaders had begun to loose grounds to a new theory known as normative hierarchy theory. According to this new theory, jurisdictional immunity is no longer applicable if a state leader breaches fundamental norms of international law known as *Jus cogens*.[20] From that period onwards, leaders were tried for conduct that amounted to international crimes.

It started with the Nuremburg trials of Nazi war commanders in 1946, the trials of former Japanese prime minster Hideki Tojo and others in the Tokyo war crime tribunal. We have also seen the trial of former Yugoslavian president Slobodan Milosevic by the ICTY and those considered principally responsible for the genocide in Rwanda especially prime minister Kambanda Kambanda Jean by the ICTR in the 90s. The most revolutionary development in this domain was the convening of United Nations Diplomatic conference of Plenipotentiaries on the establishment of the International Criminal Court[21] which lead to the creation of the ICC, a permanent international jurisdiction charged with the responsibility to indict persons considered to be most responsible for war crimes, crimes against humanity, genocide and crimes of aggression even though the ICC does not exercise jurisdiction over crimes of aggression for now.

So, international criminal justice has evolved since 1945 putting an obligation on national courts to prosecute the perpetrators of international crimes, failure to which international jurisdictions have the obligation to do so. It was due to this development in international criminal justice that Margeret Thatcher, the former British prime minister made the statement "henceforth, all former heads of government are potentially at risk".[22]

Historical Traditional Objectives Of International Criminalization Of Core Crimes

International law imposes an obligation on states to prosecute those who have committed international crimes within their territory. However, this method of judicial enforcement of human rights law always fail because international crimes are mostly committed by state agents as part of state policy. So, governments do not routinely punish their own officials engaged in such actions.[23] This has led to what has been described as a culture of impunity which contribute to a climate in which human rights violations persist and are not deterred in most domestic judicial systems.

[19]Williams A, Shabas, the trial of Kaiser wilhelm, oxford university press, 2018, p.67.

[20] "*Jus cogens* is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom otherwise establish contrary rules on a consensual bases". Brian A Garner's the Black's Law dictionary, 8th edition, 2004, p. 2513. In Mark W Janis, an introduction to international law, Aspen publishers. New York 2003.p 62,63.

[21]Mark klamberg, commentary on the law of international criminal court, Torkel Opsahl academic E. publishers, 2017, page 68

[22]Margaret Thatcher, Lords Hansard home page, 6th July 1999, column 800-801 available at https://www.parliament.the stationary office CO-UK

[23] Akande dapo and Sangeeta Shah, *op cit.*, P. 816.

Sometimes, these human rights violations occur in large scale causing many casualties. In order to counter this culture, international law has qualify some of these human rights violations as international or *jus cogens* crimes with the internationalization of their criminalization. One of the objectives the Security Council of the United Nations (UNSC) and all the courts involved in the fight against impunity intend to achieve by prosecuting the perpetrators of core crimes is to put an end to such crimes. Deterrence and the fight against impunity constitute some of the ideological traditional basis for the universal criminalization of gross human rights violations. Deterrence and the fight against impunity go hand in hand, especially in the field of international criminal law. If deterrence succeeds, impunity may be eradicated. Conversely, if the effects of deterrence fail, impunity is cultivated and entertained. Generally, the role of criminal law in the society is to protect the public and maintain social order. This is according to a positivist approach by criminal law legislators. Bassiouni suggest that, prosecuting international crimes can serve to deter the commission of future atrocities or as a means of preventing future atrocities.[24]

However, some writers believe that deterrence is an assumption which is more hypothetical than real in the prosecution of international crimes. This is the view held by Wipmann who believes that the connection between international prosecutions and the actual deterrence of future commission of international crimes is best a plausible but largely untested assumption.[25] This is largely due to the lack of political will by stake holders in the international criminal justice and the selective and biased application of international law especially on leaders of weak states. We believe that if international criminal prosecutions are carried out genuinely and void of political interest, the deterrent effect it is intended to achieve will be felt. Optimistically, Groome suggests that, for international prosecutions to have or achieve their deterrent effect, they must be conducted in a way that can leave no doubt that the international community's resolve to end impunity is not larger than its capacity and will to do so.[26]

Besides deterrence, the fight against impunity has also featured in the literature of international criminal Prosecutions. The Preamble to the Rome Statute of the ICC recalls the determination to "put an end to impunity" for the perpetrators of "the most serious crimes of concern to the international community as a whole".[27] This resolve is also mentioned in the statutes of other international jurisdictions.

Also, the continuous violation of human rights as well as the escalation of the perpetration of crimes around the world has led to a breakdown of the state of international peace and harmony. Other methods like economic and political sanctions and diplomacy have been largely insignificant to halt this situation. It is thus the wish of the international community that justice intervenes to wipe out this practice.

This constitutes one of the principal aims of the creation of the United Nations. Article 39 of the UN charter empowers the UNSC to determine situations that constitute threats and breaches to international peace and security. The Security Council may also decide measures in accordance with articles 41 and 42 of the charter to restore and maintain international peace and security. Thus, it is the conviction of the Security Council and the international community as a whole that the establishment of tribunals and other courts both at the national and international levels to try persons responsible for the violation of international humanitarian law and the international criminalization of these acts would have an impact on the maintenance of international peace and security.

B/The legal foundation

The purpose of international law is to facilitate peaceful international relations between states and respecting state immunity is one of the mechanisms whereby international conflicts are avoided. Since states begin to exist as legal entities from times in antiquity, they have always recognized each other as sovereign institutions with immunities in order to permit peaceful co-existence and effective performance of functions by their officials. Modern international law in its development has tried to conserve this value while trying to balance it with the exigencies of international justice. The necessity to maintain equilibrium between state sovereignty and the imperatives of international justice stands as the legal foundation of immunities (1) in which modern international law has developed to distinguish two types of immunities (2).

[24] Bassiouni M. Sheriff, Universal Jurisdiction, *op cit.*, P. 285.

[25] Wippman David, Atrocities, deterrence and the limits of international justice, *Fordham International Law Journal*, Vol. 23, 1999, p. 473.

[26] Groome M. Dermot, The future of International Criminal Justice: re-evaluating the theoretical basis and Methodology of International law, *Pennsylvania State International Law Review*, Vol. 25, No. 4, 2006,P. 800.

[27] See paragraphs 4 and 5 of the preamble of the Rome statute of the ICC. Available www.icc.cpi.int

The Legal Rational for Recognizing Immunities on Heads of State

The necessity to maintain peaceful international relations while safe guarding the values of justice through the repression of human right violations and the prosecution of its perpetrators has led to the development of two schools of thought. A school of thought led by Hugo Grocius has resulted to the birth of the absolute immunity theory while another school of thought that has developed from the ideas of Immanuel Kant has brought about the normative hierarchy theory.

The school of thought influenced by the writings of Hugo Grocius favours the traditional model of an international community with inter-state relationships. This model gives priority to state sovereignty and equality of all states in the international community. This ideology have been expressed by Hugo Grocius in his book *"De Jure Belli Ac Pacis Libri Tres" (*on the law of war and peace), published in 1625. According to Grocius and all the proponents of this school of thought, all states are equal in international law. There are equal members of the international community and consequently, no state can claim jurisdiction over another state. This is expressed in the maxim *'par in parem non habet imperium'*[28]which means (an equal has no authority over an equal); that is one sovereign state cannot be subjected to the jurisdiction of another sovereign state. This view is supported by Sir Arthur Watts, who believes that a head of state's entitlement to immunity is in part a matter of ensuring respect for the head of state's dignity, in part a matter of acknowledging his role as a representative par excellence of his state, and in part a matter of enabling them carry out their official functions without interference.[29]This is a fundamental principle of international law stated in article 2 of the United Nations (UN) charter.

Another school of thought influenced by the writings of Immanuel kant is advocating for a supra-state international community in which the interest of the international community as a whole will supersede individual state interest. This is the contemporary conception of international criminal law which has developed extensively since the end of WW II.

Kant's ideology was that, if a ruler becomes a despot, his responsibility should be engaged if they commit any criminal act. This conception is at the origin of the relativism of immunity for heads of state. This theory of relative immunity implies that jurisdictional immunity is no longer applicable if a state leader breaches a fundamental norm of international law known as *jus cogens.* The underlying thought is that international law norms rank higher in hierarchy than the norms providing for state immunity because they are *jus cogens* norms that will always prevail over non-*jus cogens* norms.[30] This rule was stated in *Siderman de Blake v. Republic of Argentina (*1992) in the following words*; "jus cogens* norms enjoy the highest status within international law; and thus prevail and invalidate […] when a state violate *jus cogens* norms, the cloak of immunity provided by international law falls away, leaving the state amenable to suit".[31]Reasoning from the above, the law defining international crimes is a *jus cogens* norms placing an *erga omnes* obligation on states to incriminate these acts, while the immunity of states is an ordinary norm of international law that could be ignored if the imperatives of international justice and the indictment of perpetrators of international crimes requires.

At this stage, we can conclude that the recognition of immunity on heads of state have its origin in the recognition of the rule of sovereign equality of all states which is a fundamental principle of international law stated in article 2 of the U.N charter. The need to maintain this state sovereignty while enforcing international justice constitute the theoretical foundation from which immunity is born but international law has evolved from the period when immunity of heads of state was an absolute rule, to a contemporary ideology which place the prosecution of international crimes(a *jus cogens* norm) over immunity. Now, let us look at the types of immunities defined by international law.

Types of Immunity Recognized by International Law

Considering the theoretical foundation of immunity, international law has made a very important distinction on the different types of immunities that will offer different regimes of protection to those exercising them. The word immunity is derived from the Latin word *immunitas* meaning (exemption from charge). As we have mentioned above, immunity traditionally finds its place as an attribute of sovereignty.

[28] The Origins of this Concept are Traced Back to the Fourteenth-Century Italian Jurist, Bartolus Who Wrote "Non Enim Una Civitas Potest Facere Legen Super Alteram, Quia Par Un Parem Non Habet Imperium", Brain A. Gamer, Black's Law Dictionary, West Group. St Paul 1999.P 1673.

[29] Watts, Sir Arthur, the legal position in international law of heads of states, heads of governments and foreign ministers. 247 Recueils des cours, vol.111, 1994.p.53.

[30] See Sir Arthur Watts, *Op-cit.,* p.72

[31] Siderman de Blake V. Republic of Argentina. At 718 (CA 19th Cir. 1992). A similar argument was made and accepted in Ferrrini v. federal republic of Germany(2004).

That has led to the distinction of immunity *ratione personae* from immunity *ratione materae* by international law. This distinction is necessary because it is going to help us distinguish a situation in which a head of state cumulates the two immunities (situation of an incumbent head of state), from a situation of exercise of residual immunity (situation of a former head of state).

One of the types of immunity recognized by international law on state officials is immunity *ratione personae*, also known as personal immunity. Personal immunity, which attaches to the office or status of the person enjoying it prevents them from the criminal jurisdiction of foreign states for both their official and private acts as long as the official is still in active service. It has long been clear that under customary international law, the head of state possess such immunities from the jurisdiction of foreign states. In addition, treaties confer similar immunities on diplomats, representatives of states to international organizations,[32] and other officials on special mission in foreign states.[33]The absolute nature of immunity *ratione personae* means that it prohibits the exercise of criminal jurisdiction not only in cases involving the acts of these individuals in their official capacity but also in cases involving private acts.[34] In brief, the underlying idea behind immunity *ratione personae* is that, it protects its beneficiary from criminal prosecutions in respect to both their official and private acts and only applies as long as the official remains in office. It loses its validity as long as the official functions of its beneficiary come to an end. Thus, it constitutes only a procedural obstacle.

Again, 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 they are protected by immunity *ratione materae* (functional immunity*)*, which is a mechanism for diverting responsibility to the state. The functional immunity applies, on the strength of the so-called 'Act of State doctrine', to all state agents discharging their official duties[35]. In fact, functional immunities cover official acts of any *de jure* or *de facto* of state agent, do not cease at the end of the discharge of official functions by the state agent and attaches to acts performed by State officials in their official capacity. Thus, this kind of immunity operates as a substantive defence to bar criminal prosecutions.

Ii/Procedural Assessment In The Engagement Of Criminal Liability Of Heads Of State For Commission Of International Crimes

The perpetration of international crimes is a complex and wide enterprise usually with a concerted and organized policy or plan by well-coordinated groups. It so happens that the soldiers or armed men whose faces are seen at the scene of crime, who inflict the blows and who cause all the material and human damage are not the ones in control of the operations. They are always controlled and ordered by some powerful men at the background known as intellectual perpetrators who may sometimes be a head of state. The universal nature of this category of crimes permits its indictment in both domestic and international criminal jurisdictions. As it has been noticed, the indictment and trial of any head of state, whether still in power or after official function is usually a complex procedure. Given the fact that immunity is an influencing factor for international crimes prosecutions, cooperation at the national and international levels becomes an indispensable procedural concern in the whole procedure of the fight against impunity for international crimes. This part will be devoted to jurisdictional assessment (A) and later on, we shall do an assessment of the state of international judicial cooperation in the prosecution of international crimes (B).

A/ Jurisdictional assessment

In the fight against impunity and the engagement of liability of heads of state for international crimes, different courts and judges play an important and non-negligible role. This is because jurisprudence is a powerful element in the development of law. Jurisprudence is the interpretation of the law by judges and courts. By assessing the jurisprudence of different courts, we shall ascertain the position of different judges on the question about liability of heads of state for the perpetration of international crimes despite the immunity they enjoy.

[32] See articles 29 And 31 Vienna Convention On Diplomatic Relations 1961 (VCDR), 500 UNTS 95; Art. IV, Section 11, Convention On The Privileges And Immunities Of The United Nations 1946, 1 UNTS 15 And 90 UNTS 327

[33] See articles 21, 39, and 31 of UN Convention on Special Missions 1969, 1400 UNTS 231

[34] See *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*) [2002] ICJ Rep 3, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in para. 75: 'immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system'.

[35] Cassese Antonio, International Criminal Law, Oxford University Press, First Edition, 2003,P 302.(herein after Cassese Antonio, ICL, 2003.

Since the shattering of the myth of absolute immunity and the introduction of individual criminal liability for gross human rights violations after WWII, a major issue in international law has been the question on prosecutorial immunities enjoyed by heads of state. The question asked is if immunity can prevent the engagement of their liability for international crimes. The response of international law to this preoccupation varies depending on whether the question is posed before a foreign domestic court (1) or if it is posed before an international criminal jurisdiction (2).

Assessment in foreign domestic Courts

As we have mentioned above, the problem is that of prosecutorial immunities enjoyed by heads of state when facing trials for international crimes before the jurisdiction of a foreign state since in international law, one state cannot stand in trial of as they are equal members of the international community. This problem is resolved depending on whether it is a former or an incumbent head of state to be put on trial. Also, the type of immunity (personal or functional) determines the position of international law. To better understand the situation in foreign domestic courts, we shall use the Pinochet case as an example.

Augusto Pinochet was 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. 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[36]. On 16th 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 and he was arrested in a London hospital on 17 October 1998. After his arrest, 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. The core question in the Pinochet case was to know if a former head of state can be indicted by a foreign domestic court for international crimes.

The Divisional Court of London comprising three judges unanimously found that Pinochet was entitled to immunity. This decision of the Divisional Court was taken on appeal to the House of Lords,[37] which On November 25th 1998, passed its judgment and found that Pinochet was not immune. Lord Nicholls and Lord Steyn both found that the conduct alleged was not recognized by international law as a function of a head of state, and therefore Pinochet was not entitled to immunity. Even though on 15thJanuary 1999, the House of Lords[38] set aside the judgment of 25 November 1998 on the grounds that the court was not properly constituted, and on the24 March 1999 the House of Lords comprising seven different Judges, gave a second and final judgment as to whether Pinochet was entitled to immunity from the criminal jurisdiction of foreign domestic court.

The final decision of the House of Lords on the Pinochet case was that Pinochet could not claim immunity for torture, murder and kidnappings as these acts could not be considered as official functions of a head of state. Thus, Pinochet was to be extradited to Spain to stand trial for these acts that constituted international crimes. Therefore, after this judgment of the House of Lords, an ex-head of state and analogously any ex-official could not claim continuing immunity from prosecution for international crimes before the national courts of other states. Thus, in relation to material immunity, a head of state can be indicted by the domestic court of another state only if the acts he is indicted for constitute international crimes. They are covered by immunities for all acts done in the exercise of their official functions and on behalf of their state. In relation to personal immunity, it must be said that personal immunity operates as a procedural defence in front of foreign domestic courts, even for crimes under international law. Serving Heads of State or Government enjoy absolute personal 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 their State. This was the judgment of the ICJs judges in the arrest warrant case[39]. Only judges AWN Al Kahsawneh and Van den Wyngaert dissented to this decision. The ICJ's view in this regard has been subjected to widespread criticism. As correctly stated by professor Sands, Broad presumptions in favour 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.

[36] Wilkinston Brown (Lord In The UK House Of Lords), Judgment Of 24th March 1999, ILM (1999), P 582.

[37] R. Bow Street Metropolitan Stipendiary Magistrate and Others, *Ex Parte* Pinochet Ugarte, Case No 1, 1999 (Amnesty International and Others Intervening).

[38] RvBowStreetMetropolitanStipendiaryMagistrateandothers,expartePinochetUgarte(No2) [2000]1AC119

[39] ICJ in the case between the Democratic Republic of Congo against Belgium(arrest warrant case), Judgment

Practice before International Criminal Jurisdictions

Since the Nuremberg and Tokyo military tribunals, international courts including the ICC, the two UN *ad hoc* and other hybrid tribunals have gained interest and have taken a strong position in the fight against impunity and the end to gross human rights violations. This is because after the Nuremberg and Tokyo trials, new patterns of international crimes have been committed in different parts of the world. However, there have been a plethora of international criminal jurisdictions created in different regions of the world to prosecute persons accused of core crimes. The jurisdiction of an international judicial body is dependent on its constitutive instrument.

Under conventional international law, it is a rule that no head of state can claim immunity *ratione personae* for any act which constitute a core crime. This is contained in article 7(2) of the Statute of the ICTY, same like article 6(2) of the statutes of the SCSL which is to the effect 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. This is in line with article 27 of the Rome statute which states "The Statute shall apply equally to all persons without any distinction based on official capacity and official capacity as a Head of State…". In *Prosecutor v. Charles Taylor*,[40] the court argues that; "customary international law permits international criminal tribunals to indict acting heads of state…...".[41] This position in international law has been reiterated by the ICC in *Prosecutor v.AlBashir*.[42] The Al Bashir case has been one of the most interesting and controversial cases in modern international criminal law. Omar Hassan Ahmad Al Bashir was president of Sudan from 16th October 1993 till 19th April 2019 when he was ousted by a military coup.

Al Bashir was charged with 5 counts of crimes against humanity and two counts of war crimes and an international warrant was issued for his arrest by the ICC while he was still the president in Sudan. The request made for his arrest and surrender by the court is not respected by any state under pretext that AL Bashir as acting head of state in Sudan enjoys absolute personal immunity. The position of the ICC has always been very clear on this question in the Al Bashir case, they do not accept any form of immunity for him. With regards to proceedings before international courts, it is argued that immunity *ratione personae* does not apply. This has been confirmed by the pre-trial chamber of the International Criminal Court during the confirmation of charges in the Al Bashir case, and other. Consequently, the ICC, and other international courts would have jurisdiction over incumbent heads of state even if they are nationals of a non-state party that has not voluntarily waived the immunity of their state officials especially if the situation is referred to such a jurisdiction by the Security Council.

B/An Assessment of International Judicial Cooperation in the Prosecution of International Crimes

The fight against impunity and the restoration of global peace and justice has been a driving principle of international law since 1945. However, the repression of violations of international humanitarian and human rights law often require the cooperation of different states and actors, not only because the persons involved in the trials (the accused, victims, witnesses) maybe of different nationalities or located in different countries, but also because the most serious violations of human rights are considered to affect the international community as a whole. Heads of state being personalities with special status, cooperation in the establishment of their liability for commission of international crimes requires the involvement of many actors, institutions and rules.

An analytical and cooperative review on how institutional and statutory resources consecrated for the prosecution of international crimes are utilized will help provide an insightful approach to international criminal justice. As Damaska argues; "it will be wrong for us to close our eyes to the shortcomings of international criminal justice".[43] Despite all the statutory provisions and the different courts with jurisdiction both at the national and international levels, judicial cooperation in prosecuting heads of state and other perpetrators of core crimes still presents many failures. In our assessment, we shall analyse lack of political will by actors (1), and the problematic nature of arrest and transfer of incumbent heads of state due to prevalence of personal immunity (2) as weakness of the fight against impunity.

[40]Defence Motion to quash the indictment and to declare the Warrant of Arrest null and void .Case No. SCSL-03-01 (7th March 2003)

[41] SCSL,theAppealsChamber,DecisiononImmunityfromJurisdiction,31 May2004, para 16. availableatwww.sc-sl.org

[42]*Case No* ICC-02/05-01/09

[43] DAMASKA Mirjan, What Is The Point Of International Criminal Justice, Chicago Kent Law Review, Vol 83 No 1,2008, P. 329.

Lack of political will by actors in the International Criminal Justice System

The cry for accountability for the violation of human rights as well as the need to do justice to its victims is being followed up in every corner of the world with so much determination.

Human right activists and most judges pursue this goal with goodwill and genuine conviction. However, the implementation of international law could only be done by states. This is because it entails a lot of material and financial cost that can only be borne by states and other international organizations. Unfortunately, the follow up of this goal in the part of states is usually driven by political goals and aspirations. As Bassioni argues; "*most international prosecutions are the ones most fraught with political considerations and thus are difficult to pursue*". He continues by saying that; "there will always be instances where some governments or the Security Council will manipulate international criminal justice to achieve the goal of realpolitik which so frequently conflict with international criminal justice.[44] The perpetration of most international crimes is usually complex. It involves widespread attacks that may sometimes go across state borders and cause casualties on persons with different nationalities.

In these circumstances, evidence relating to the trial of such crimes is located in states other than the trial state or in several different countries. State assistance is thus indispensable because carrying out investigations, getting access to documents, arrest and transfer or extradition of accused persons requires state authorization. Ironically, when the time comes to provide such assistance, states turn to give excuses like national security concerns, the fear of jeopardizing its diplomatic relations with the state against whom that assistance is sorted turn to refuse such assistance. Worst of all, when the accused persons is a head of state, they use their status and influence to convince other heads of state who will in turn manipulate the judicial systems of their countries to thwart efforts of cooperation. This is the reason why most heads of state, despite international warrants demanding their arrest and transfer or extradition always travel around freely claiming immunity. Some even live as free men until they die despite request for their extradition by courts.

A case in point is the Pinochet trial. AUGUSTO Pinochet was charged with international crimes by a Spanish court which demanded his arrest and extradition to Spain for trial. Before then, his national state (Chile) had granted him immunity and ignored all the crimes he committed while in power between 1973 to 1990. He was arrested in England in 1998 and the judgment for his extradition was passed by the House of Lords in 1999. Finally, the British secretary of state for foreign affairs decided to return Pinochet to Chile on 2nd march 2000 instead of extraditing him to Spain to stand trial.

Many critics and human rights activists have questioned why it was the secretary of state, a politician instead of the law lords that determined the suit on the extradition of a hardened criminal. This was the height of lack of political will to cooperate in the prosecution of international crimes. More generally, the project of international criminal justice from the time of its inception has always been "a political undertaking which serves the interest of great powers".[45]

THE PREVALENCE OF PERSONAL IMMUNITY FOR INCUMBENT HEADS OF STATE

It has already been established in international criminal law that official capacity of a perpetrator is irrelevant to international criminal prosecution for core crimes. This principle is enshrined in article 27 of the statute of the International Criminal Court which highlights that the statute shall apply equally on all persons without any distinction based on official capacity. This article goes further to add 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 persons. This is in line with paragraph (2) of articles 6 and 7 of the statutes of the ICTR and ICTY respectively. This has also been confirmed by different judges in the House of Lords in the Pinochet case.

Heads of state, being persons who enjoy a special status in international law are protected by immunities. It is always so easy to waive the immunity of fallen heads of state when they are sorted for trial by national and international courts. However, incumbent heads of state enjoy immunity *ratione personae* for both their official and private acts recognized by conventional international law .This makes it very difficult for them to be arrested and surrendered without violating international law. This violates the very essence of recognizing universal jurisdiction in the persecution of core crimes. This is because each time a warrant is issued against an incumbent head of state, states refuse to cooperate in their arrest invoking immunity and inviolability protecting them.

[44] Bassiouni M. Cherif, The Philosophy and Policy of International Criminal Law, Virginia Journal of International Law, Vol.50 No 2, 2009. P.92.

[45] Darcy Shane, Imputed Criminal Liability And The Goals Of International Justice, Leiden Journal Of International Law, Vol. 20, 2007, P 377.

Article 98 of the Rome statute is in sharp contrast with article 86 of the same statute. Article 86 puts states under the obligation to fairly cooperate with the court in the investigation and prosecution of crimes within the jurisdiction of the court yet article 98 (1) and (2) contradicts the former as a request cannot be made which will require the requested state to act inconsistently with its obligations under international law.

Each time the ICC request cooperation to arrest a head of state from a state party pursuant to article 86, the requested state always invoke article 98 as defence not to cooperate. The pre-trial chamber I of ICC argued that AL Bashir (who was incumbent head of state of Sudan at the time) did not enjoy immunity from jurisdiction of the court and a warrant was issued for his arrest on 4th march 2009.[46] When Malawi was requested to arrest and surrender Al Bashir to the court in 2012, Malawi invoked article 98 to justify reason for non-cooperation. This was the same position taken by Kenya and many other states requested to arrest Al Bashir.

Since the first request for arrest of Al Bashir by the ICC in 2009, he remained in power in Sudan until April 2019, a period during which he travelled far and wide very freely. Thus, the inviolability of incumbent heads of state because of the international law norms of personal immunity remains a dilemma for international criminal law and a major weakness of international judicial cooperation in the prosecution of international crimes.

At this juncture, time is now ripe to draw a conclusion and make some recommendations. The general contention is that, faced with an increasing trend of impunity for the perpetration of international crimes, the immunities enjoyed by heads of state had to be bypassed through international criminal trials.

Conclusion

The aim of this piece of work was to investigate whether heads of state under the cover of immunities can be prosecuted when they violate fundamental norms of international law amounting to international crimes. Our main target was to examine the position of international law with regards to punishment of core crimes as a *juscogens* norm and respect of immunity as a customary norm of international law. Thus, we posed the question to know if the liability of heads of state can be engage if they commit international crimes.

In attention that crimes under international law are often state crimes, the international community cannot leave the prosecution of such crimes only to domestic jurisdictions. Other national and international criminal jurisdictions must intervene to fill the gap of impunity through the exercise of extraterritorial jurisdiction because international crimes are crimes of concern to the international community as a whole. For some reasons, including the respect of sovereign equality of states, it is widely acknowledged that certain state officials such as heads of State enjoy two types of immunities. Immunity *ratione materae* for acts that they perform on behalf of their states which operates as a substantive defence even after cease of official functions. Consequently, it diverts the liability of state officials for their official acts to their states. Again, they benefit from immunity *ratione personae* which covers both official and private acts to permit them carry out their functions without interference. This type of immunity operates as a procedural defence only during exercise of official functions.

After 1946, it was certain that immunity, both functional and personal could not be used as a plea for defence by a head of state. The problem now is the extent to which these immunities enjoyed by heads of state could be bypassed by courts seeking to engage their criminal liability for gross violations of human rights. That is, the dilemma of international criminal law has been to determine whether international law of *jus cogens*, imposing an obligation *erga omnes* to prosecute and punish perpetrators of international crimes should prevail over immunities enjoyed by heads of state, which is a customary law rule.

From our findings, the extent of protection offered by immunities will depend on whether the head of State in question enjoys immunity *ratione materiae* (a former head of State) or immunity *ratione personae* (an incumbent head of State). It will also depend on whether it is a foreign domestic jurisdiction or an international jurisdiction seeking to engage their liability.

In respect of functional immunity before foreign domestic courts, it has been established that, every former head of state, who acted on behalf of their state, in exercise of official functions is immune from the jurisdiction of other states, except for the commission of crimes under international law. The decisions of the British House of Lords in the Pinochet case is a leading jurisprudence. Customary international law provides that heads of State and other public officials who are no longer in office may not stand trial in the court of another State for official acts performed on behalf of their states but cannot benefit from substantive immunities for acts that violates international law . After

[46] See The Decision Of Pre-Trial Chamber I Of The ICC In Prosecutor V. Omar AL Bashir, Decision Pursuant To Prosecutions Application For A Warrant Of Arrest Against Omar Hassan Ahmad Al Bashir, ICC 02/03/2009.

period of office, all State officials, including heads of State are punishable for committing *jus cogens* crimes even if they acted in official capacity and on behalf of their state.

However, the result is very different when it is immunity *ratione personae* in play, which certainly covers incumbent heads of state, diplomats and others incumbent state dignitaries.

In respect of personal immunity before a foreign domestic court, the judgment of the ICJ in the arrest warrant case is the leading jurisprudence. Due to the lack of hard law (treaty law) on the subject, the ICJ relied on state practice to hold that under international law, it has been firmly established that in the absence of waiver by a state, an incumbent head of state is immune from criminal proceeding before the court of another state even if such a head of state is accused of *jus cogens* crimes such as genocide, war crimes and crimes against humanity. By this dictum, the ICJ has established the rule in international law according to which siting heads of state and other siting state officials who benefit from personal immunity enjoy absolute inviolability from foreign criminal prosecutions without any exception even when they are accused of international crimes.

However, immunity before foreign domestic courts does not have the same value and importance vis-à-vis international criminal jurisdictions. As concerns functional immunity, it is already certain that it protects heads of State from criminal prosecution for all their official acts but not when a crime under international law has been committed by such a head of State because as stated by lord Millet in the House of Lords, perpetration of international crimes is not an official function of a head of state.

The problem that still stands in international criminal law today is the spiny nature of personal immunity enjoyed by incumbent heads of State. Whether an incumbent head of State can be held accountable for the perpetration of international crimes by in international court is going to depend on the scope of powers of such a court. The scope of powers of an international court is determined by the basis of its foundation. The situation obviously is different where the international court is created by a treaty and by UNSC resolution using chapter VII powers of the UN charter.

For a court created by a Security Council resolution, there is no exception of immunity for any head of state indicted for international crimes. Under this hypothesis, all heads of state clothed with personal immunity are subject to criminal proceedings when indicted for international crimes. However, this is only when the UNSC determines a situation of threats and breach to international peace and security and decides to create the international court using chapter VII powers of the UN charter. The decision of the ICTY during the trial of Slobodan Milosevic when he claimed personal immunity stands as precedent in this domain.

However, for an international court created by a treaty, like the ICC, the powers of such a court will only extend to affect the immunity of all officials of state parties. This is because states by ratifying the treaty creating the court have impliedly waived the immunities enjoyed by their officials to crimes under the jurisdiction of the court. In respect to non-state parties, a treaty based court can only engage the liability of an incumbent head of state for commission of international crimes if the situation is referred to the court by the UN through the Security Council. This will give such a treaty based court universal jurisdiction based on articles 25 and 103 of the UN charter. This was the only possibility for the ICC to indict Omar Al Bashir, who at the time of his indictment was the president of Sudan, a non-state party to the Rome statute. This same position has been held by the pre-trial chamber of the ICC at the time of issuing a warrant for the arrest of Libyan president Muammar Gadhafi in 2010.

In view of the foregoing, it is appropriate to conclude that, under international law, there is no functional immunity for international crimes. All former heads of state are liable for the commission of international crimes. Personal immunity of heads of state only protect them when accused of international crimes for proceedings before foreign domestic courts. However, personal immunity of heads of a state not parties to the Rome statute can only be removed vis-à-vis the ICC, when it has power of chapter VII of the UN charter.

However, the findings in this study shows that international law of *jus cogens* imposing an obligation *erga omnes* in relation to the prosecution of international crimes prevails over immunities of heads of state. Despite this, the perpetration of international crimes by heads of state still prevails. This is due to some loopholes in the international criminal justice system. To this effect, this study recommends the following;

As we have mentioned in this work, political considerations influence international criminal prosecutions deeply. This is because international criminal prosecutions are not at all times guided by its dual role of fighting crimes and doing justice. Recent studies such as that by Ellen Lutz and Caitlin Reigers which is a collection of case study on the

prosecution of heads of State and government reveals that, out of ninety nine indictments against sixty-seven heads of state and heads of government, only seventeen served some form of sentence.[47]

This demonstrates a huge failure in the quest to fight the perpetration of international crimes. This is largely due to the lack of political will on the part of states as important stakeholders in international crimes prosecutions.

This was the situation in the Pinochet case where despite the decision of the judges of House of Lords to extradite Pinochet to Spain for trial, he was acquitted by the British secretary of state for foreign affairs under pretext of ill health. We strongly recommend a stop to the prevalence of political interest in the fight against impunity. The Security Council and states should not let politics get into the way of international law. Politicians should let judges do the job for which they have a mandate. This will enable the judges to deliver justice without pressure and interference.

Also, the ICJ's view point on the current State of international law on absolute personal immunity for incumbent heads of state in foreign domestic courts breeds impunity. To the aid of some heads of state, such absolute protection is going to serve as an incentive to cling to state power in perpetuity. The resultant effect will be a continuation of impunity that encourages continues perpetration of crimes. Even worse, is the fact that those who have suffered the effects of these crimes may be left with the sense that the wrongs they have suffered will never be redressed and that the perpetrators may never be brought to justice. Thus, a position that is truly reflective of the current international legal thinking is required. The Security Council should always give prompt intervention and quickly refer situations of human rights violations by state leaders to courts with jurisdiction. There is need for practitioners to help build a strong *opinio juris* and a strong state practice on this issue.

States and other actors in international criminal justice should lend the support required by international courts to fight against the perpetration of international crimes. As we have mentioned in the last part of this work, some individual states like Malawi and Kenya, that have both ratified the Rome statute yet refusing calls to arrest Al Bashir. By refusing to cooperate with the ICC on the arrest warrant against Al Bashir, such states have violated their obligations in respect to cooperation with the ICC under article 86 of the Rome statute. Thus, if the international criminal justice apparatus must rise into a fully functional system to the fight against impunity, it must receive the unreserved support and cooperation of all stakeholders. A refusal of cooperation should never be tolerated by the ICC. The ICC should make use of article 87(7) of the Rome statute by filing a petition of non-cooperation to either the assembly of state parties to the Rome statute in case of cooperation refusal by a state party or to the Security Council in situations of Security Council referrals.

As we have also discovered, the referral of a situation of human rights violations to any court by the UNSC grants universal jurisdiction to such a court. In case of refusal to cooperate in such a situation, we recommend that the Security Council take all necessary measures at its disposal to ensure cooperation. The UN should also take steps to clarify the legal nature and status of UNSC referrals within the ICC framework.

Although international law developed alongside statehood, its original premise was based on human values. The ideal conception is to secure the greater wellbeing of the human family. International law must acknowledge the fact that the individual is an indispensable facet of statehood without which a state cannot exist. Therefore, we do recommend generally that each time there is conflict between safeguarding state sovereignty and the protection of human rights, international law should intervene in the side of humanity.

Bibliography

Books and journal articles

Books

Gehard W. (2005), principles of international criminal law, TMC ASSER press, second edition.
Steinberger H. (1987), Sovereignty,In EncyclopediaOf Public InternationalLaw,Vol 10.
Cassese A. (ed) (2009), The Rational Of International Criminal Justice, The Oxford Companion Of International Criminal Justice, Oxford.
Cassese A. (2003), International Criminal Law, Oxford University Press, Oxford, First Edition.WillardB. C. (1945) ,Universal Jurisdiction over War Crimes, California Law Review, vol 33.
Ryngaer C. (2008), Jurisdiction In International Law, Oxford University press, Oxford.
Williams A. S. (2008), the trial of Kaiser wilhelm, oxford university press, Oxford.
Mark W. J. (2003), an introduction to international law, Aspen publishers. New York.

[47] Ellen Lutz and Caitlin Reigers (eds) "prosecuting heads of state", Cambridge University press, New York, 2009. P.14

Simbeye Y. (2004), immunities and international criminal law, Ashgate publishers limited, Aldershot.[1]
Mutabazi E. (2014), The United Nations Ad Hoc Tribunal's Effectiveness in Prosecuting International Crimes, PhD thesis, university of South Africa, (unpublished).
Mark K. (ed) (2017), commentary on the law of international criminal court, Torkel Opsahl academic E. publishers, Brussels.
Chacha B. M. (2011), immunities of state officials and the prosecution of international crimes in Africa, Pretoria university law press, Pretoria.
Ellen L. and Caitlin R. (eds) (2009) "prosecuting heads of state", Cambridge University press, New York.

Journal articles

Akande D and Sangeeta S (2011), immunities of states officials, international crimes, and foreign domestic courts, European journal of international law, vol 21, pages 815- 852.
Rolins M. P. and Ronald N. B. (1977) , Criminal law and procedure: cases and materials, EJIL, vol 15.
Bassiouni M. C. (2009), *The Perspectives Of International Criminal Justice*, Virginia Journal Of International Law, Vol 50, Pp. 269-324.
Watts, sir A. (1994), the legal position in international law of heads of states, heads of governments and foreign ministers. Recueils des cours,vol 111, Academie de droit International.
Wippman D. (1999), Atrocities, deterrence and the limits of international justice, *Fordham International Law review.*
Groome M. D. (2007), the future of international criminal justice: re-evaluating the theoretical basis and methodology of international criminal trials, Pennsylvania state international law review, vol 25.
Damaska M. (2008), What Is The Point of International Criminal Justice, Chicago Kent Law Review, Vol 83 No 1.
Darcy S. (2007), Imputed Criminal Liability and The Goals Of International Justice, Leiden Journal Of International Law, Vol 20.

Other Sources

List of cases

Prosecutor v.AlBashir(case No-ICC-02/05-01/09)
Prosecutor v. Slobodan Milošević(CaseNo.IT-02-54)
Case Concerning the Arrest Warrant of 11 April 2000 *(The Democratic Republic ofCongo v Belgium),* 2002, ICJ Reports, 14 February 2002.
Prosecutor v.Charles Taylor (CaseNo. SCSL-03-01)
RvBowStreetMetropolitanStipendiaryMagistrateandothers,expartePinochetUgarte(Amnesty Internationalandothersintervening)[2000]1AC6.
RvBowStreetMetropolitanStipendiaryMagistrateandothers,expartePinochetUgarte(No2) [2000]1AC119.
RvBowStreetMetropolitanStipendiaryMagistrateandothers,expartePinochetUgarte(No3) [2000]1AC147.
Sidermann de Blake v. the republic of Argentina, 965 F.2699(1992),united states court of Appeal for the ninth circuit 22nd May 1992 available athttps://www.refworld.org/cases.USA .

Dictionaries

Brian A. Garner (ed) the Black's Law Dictionary, 8th edition, 2004
International public law dictionary, 7th edition, 2017.
Oxford Advanced Learner's Dictionary, 7th edition (2005), Oxford University Press:Oxford.
Webster new law dictionary, published in 2006,
Concise Law Dictionary: With legal maxims, Latin terms, words and phrases, 3rd edition, 2005