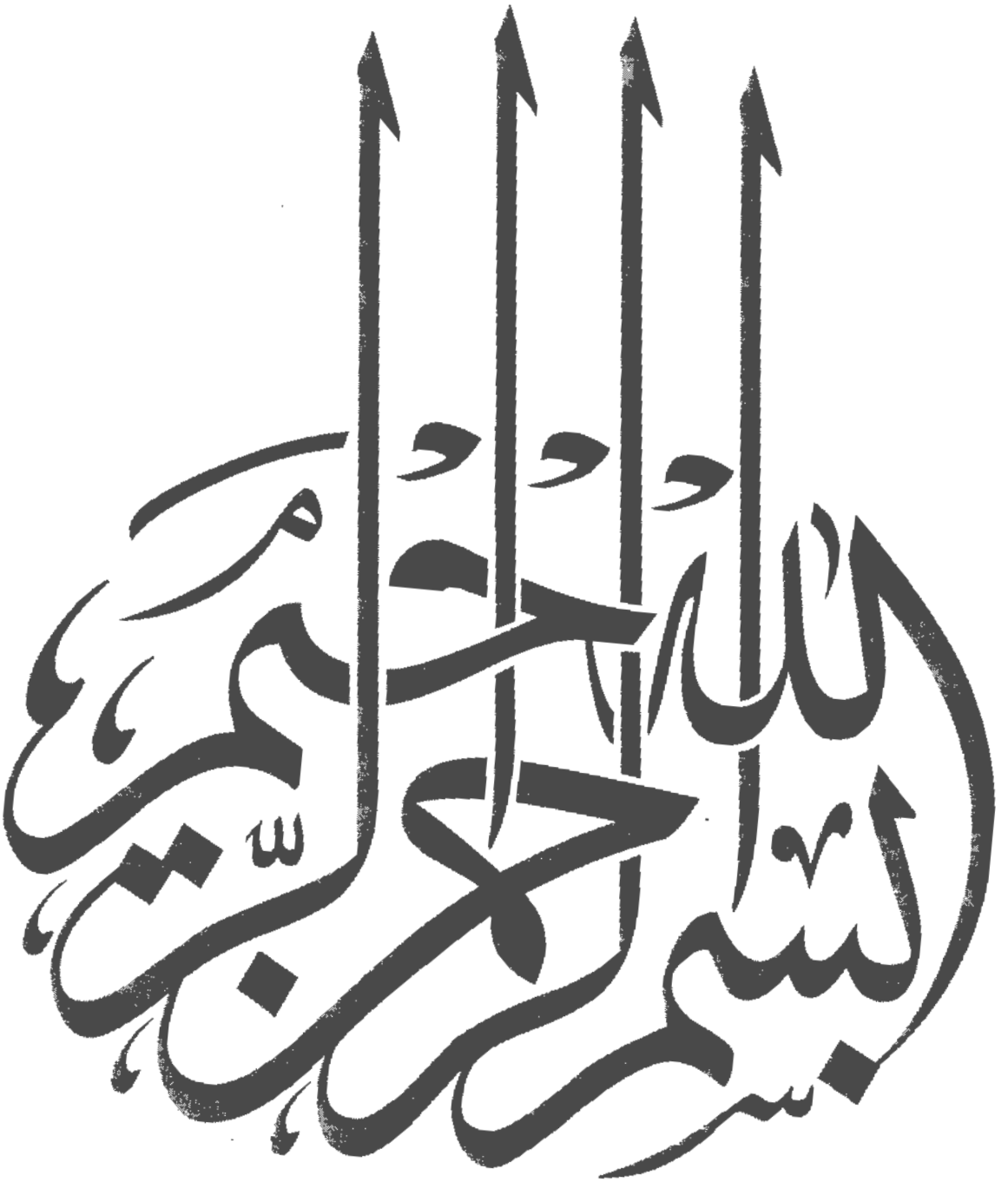
DEDICATED TO MY PARENTS

War crimes
Human Rights
International Law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APPROVAL SHEET

BLANKET IMMUNITY AGAINST WAR CRIMES AND GROSS VIOLATION OF HUMAN RIGHTS UNDER THE UMBRELLA OF INTERNATIONAL LAW

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ACKNOWLEDGEMENT

Innumerable thanks to ALMIGHTY ALLAH who bestowed on me the courage to accomplish this dissertation. Also thanks to our Holy Prophet Muhammad (Peace and Blessings of Allah be Upon Him) who enabled us to know and recognize our Lord "Allah" (SW) Creator of all things. I am thankful to my respected and Honorable teacher and supervisor Prof. Dr. Muhammad Munir, for inspiring and encouraging me in writing this dissertation. He patiently made me believe in myself and guided me throughout this dissertation.

I am also thankful to all my friends for their help, support and advice in analyzing issues. I also acknowledge that their company enabled me to accomplish my LLB (H) and LLM degrees.

DECLARATION

I Raza ul Mustafa s/o Hafiz Faiz Muhammad, holding Registration No. 155 FSL/LLMIL/S13 hereby declare that "BLANKET IMMUNITY AGAINST WAR CRIMES AND GROSS VIOLATION OF HUMAN RIGHTS UNDER THE UMBRELLA OF INTERNATIONAL LAW" submitted by me in partial fulfillment of LLM International Law degree is my original work and has not been submitted or published earlier. All sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Student: Raza ul Mustafa

Signature: _____

Dated _____

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ABSTRACT

The title of my research thesis is Blanket Immunity against War Crimes and Gross violation of Human Rights, under the Umbrella of International Law. My precise aim is to find out the impact of blanket immunity against the war crimes and gross violation of human rights. For this purpose the research thesis have divided into four chapters. Each chapter has sections and sub-sections.

The first chapter is co-related to the concept of immunity. Immunity confers a status on a person or body that places them above the law and makes that person or body free from otherwise legal obligations such as, for example, liability for torts or damages, or prosecution under criminal law for criminal acts. There are various types of immunity, such as that given to sovereigns, parliament officials, diplomats, prosecutors, or witnesses to crimes.

Following types of immunity are briefly explained.

1. Personal Immunity
2. Functional Immunity
3. Sovereign Immunity
4. Diplomatic Immunity etc.

In second chapter it is explained that Blanket immunity has raised serious human rights violations. A series of International Law Conventions has been adopted which obligates states to prosecutes international criminal found within their territory, regardless of where crimes were committed. Blanket Immunity is defined in such a way that it is the immunity that completely protects the witness from future prosecution for crimes related to his or her territory.

While impunity is defined in such a way that it means exemption from punishment or loss or escape from fines. In the international law of human rights, it refers to the failure to bring perpetrators of human rights violations to justice and, as such, itself constitutes a denial of the victims' right to justice and redress. Impunity is especially common in countries that lack a tradition of the rule of law, suffer from corruption or that have entrenched systems of patronage, or where the judiciary is weak or members of the security forces are protected by special jurisdictions or immunities.

In third chapter the concept of prosecution, amnesty law and Truth Commissions are briefly described. Immunity from prosecution is a doctrine of international law that allows an accused to avoid prosecution for criminal offences. Truth and reconciliation commissions are frequently established by nations emerging from periods marked by human rights violations. Some cases are also discusses to explain the concept of immunity and impunity such as:

1. Congo v. Belgium
2. The Pinochet case etc.

It is also tried to explain the term gross violations of human rights. It is cleared from discussions that different countries have chosen widely different strategies to deal with the past and may be classified in retributive justice prosecutions, trials and restorative Justice. Although justice is crucial after violations of human rights, it may not be possible or practical. International tribunals are useful, but they are not the full solution.

The last chapter of my thesis expresses the details of Gross Violation of Human Rights in Afghanistan and Yemen. It is openly explained that the main cause of this gross violation is blanket immunity. In both cases government and parliament were responsible for this kind of international crimes.

In the case of Afghanistan, Afghan government and parliament provided blanket immunity to non state-actors and this law was approved by the parliament. While in the case of Yemen the parliament provides blanket immunity to official person which was the president Abdullah Saleh. The result of both the cases is in front of us. Result shows that the crime ratio was raised by providing blanket immunity to the criminals.

INTRODUCTION

Immunity, an act exempting someone in term of law is understood as exemption from crimes, local laws and liabilities1. Blanket Immunity is an exemption given to someone from prosecution, past crimes and liabilities under certain conditions. Overtime, different situations surfaced in which amnesty is granted to war criminals and gross violators of Human Rights Law, leading to the contention of International and local laws enacted to safeguard a group of few against public at large, creating a scenario for international law experts to deal with this intrusion in purpose and resolve of International Humanitarian Law and Human Rights Law.

Immunities are granted in different sphere in collusion with International Law rules but sometime the sphere of its implication is increased to the extent that it interferes with purpose of United Nation, to safeguard human's interest and are in contravention with the state obligation towards international law. US worked for protection of its soldiers against humanitarian crimes in Iraq and Afghanistan; whereas Afghanistan, Guatemala and other enacted laws to safeguard war criminals from prosecution against their gross violation of Human Rights and Humanitarian law.

The scholars are divided into two groups, one supporting impunity norms, based on trading peace for justice whereas the other supporting anti impunity norms based on justice and accountability[2]. If we accept the notion of scholars supporting impunity norms, it will be like giving an open invitation to people, grab government by hook or crook, pass a law to safeguard oneself, like-minded people and pave way towards anarchy by trading justice for temporary peace, whereas, tilting towards the second group supporting anti-impunity norm

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[1]Robert Cryer and others, *Introduction to International Criminal Law and Procedure*, (New York: Cambridge University Press, 2007) 17.

[2] William A. Schabas, *An Introduction to the International Criminal Court*, (New York: 3rd Edition, Cambridge University Press, 2007), 12.

might have some discrepancies but it ensures justice and accountability principles, which are the cornerstone of peace.

CHAPTER ONE: IMMUNITY AND ITS DIFFERENT TYPES

1.1. INTRODUCTION

It deals with the types of immunity. There are two main types of immunity, Functional and Personal immunity. Functional immunities protect all government officials indefinitely, but their protection is limited to official government acts. Unofficial government acts, which include committing an international core crime, are not protected by functional immunity. This chapter also explains the historical background of Diplomatic immunity. The last part deals with the concept of State immunity.

1.2. PERSONAL IMMUNITY AND FUNCTIONAL IMMUNITY: INTERNATIONAL LAW AND IMMUNITIES: BACKGROUND

Mr. Dan Terizan,[3] a prominent scholar, writes that International law derives primarily from two sources: treaties and customary international law.[4] A written agreement by which two or more states or international organizations create or intend to create a relation between themselves operating within the sphere of international law is known as a treaty. The Treaty imposes express obligations upon the states party to it,[5] but it cannot, in and of itself, impose obligations on non-party states.[6] However, it is possible for a treaty's principles to legally bind non-party states if these principles become customary international law.

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[3]Dan Terzian is a commercial litigator. Dan has litigated in a broad array of areas, including: class actions; the Computer Fraud and Abuse Act; the Comprehensive Computer Data Access and Fraud Act; construction defect; defamation; the Financial Institutions Reform, Recovery and Enforcement Act of 1989

[4]Dan Terizan "Personal Immunity and President Omar Al Bashir: An Analysis Under Customary International Law and Security Council Resolution 1593".[Online].2015 [cited 12 Dec 2016] Available From: <http://ssrn.com> See also Phillip R. Trimble "A Revisionist View of Customary International Law" *UCLA L. REV 665, 669*, 1986. 39

[5] Bradley & Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position". *110 HARV. L. REV.* 815, 818 (1997), 12 .

[6]Vienna Convention on the Law of Treaties art.34, May 23, 1969, 1155 U.N.T.S. 331

Customary international law legally binds all states, regardless of whether a state has expressly accepted it. The scopes of treaties and customary internal law differ and the scope of a treaty is virtually unlimited. The scope of customary international law was historically limited to governing relations among nations, such as the treatment of diplomats and rules of war. But now, customary international law also regulates the relationship between a nation and its own citizens, particularly in the area of human rights". Whereas states explicitly create treaties, states absolutely create customary international law through their actions and statements.

For establishing customary international law, both a widespread and uniform practice of nations must exist and nations must engage in that practice out of a sense of legal obligation.

Mr. Dan Terizan explains that the states are the dominant creators of customary international law and to many they are essentially the only creators. Mr. Dan Terizan writes the opinion of a prominent scholar who summarizes states' primacy:

> While states are clearly not the only actors of importance on the international stages, as the sole holders of full international legal personality, they are almost entirely responsible for the behavior which makes and changes international law, even though that behavior may be heavily influenced by the activities of other, non-state actors. Consequently, an explanation of a process of international law creation, in a fairly restricted sense, does not necessarily have to deal with non-state actors.[7]

However, others argue that non-state actors, such as non-governmental organizations and transnational corporations, non-trivially influence customary international law.

State practice refers to how states interact with each other and generally includes international conventions, judicial decisions, and treaties. A treaty may, by itself, establish

[7] Dan Terzian, "Personal Immunity and President Omar Al Bashir: An Analysis Under Customary International Law and Security Council Resolution 1593".[Online].2015 [cited 12 Dec 2016] Available From: <http://ssrn.com>

customary international law if the practice embodied in the treaty achieves widespread and uniform acceptance.

Some kinds of state practice play a greater role in establishing customary international law than others. Two such forms are the practices of both the most powerful nations and the states specially affected,[8] which play a greater role than the practice of nations generally. In addition to these foundational rules for establishing customary international law, two supplementary rules—the persistent objector rule and *jus cogens*norms, etermine whether a state can avoid customary international law's constraints. These rules are beyond this Comment's scope, as they do not affect its analysis.[9]

1.3. INTERNATIONAL CRIMINAL COURT AND PERSONAL IMMUNITIES

It is stated by the Mr. Harmen van der Wilt[10] that immunities of state officials for international crimes are a highly controversial topic. As is well known, the International Criminal Court issued a warrant for the arrest and surrender of the incumbent president of Sudan Mr. Al Bashir[11] and has held that his current position as Head of a state, which was not a party to the Rome Statute, 'had no effect on the Court's jurisdiction over the present case.[12]

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[8]Dan Terizan, , "Personal Immunity and President Omar Al Bashir: An Analysis Under Customary International Law and Security Council Resolution 1593".[Online].2015 [cited 12 Dec 2016] Available From: <http://ssrn.com>

[9]Ted L. Stein, "The Approach of a Different Drummer: The Persistent Objector in International Law" *26 HARV. INT'L L.J. 457, 457* (1985). 25. See Michael Byers "custom Power and the Power Rules of Customary International Law from an Interdisciplinary Perspective" *17 MICH. J. INT'L l. 109, 112 n 4* (1995)

[10] Harmen van der Wilt is a Professor of international criminal law at the Amsterdam School of Law, University of Amsterdam.

[11]Mr. Omar Hassan Ahmad al-Bashir was a Sudanese politician, the seventh president of Sudan and head of the National Congress Party. He came to power in 1989.

[12]Harmen van der Wilt "The continuting story of the international criminal court and personal immunities" Amsterdam Law School Legal Studies Research Paper No. 2015-48: 1-2, See also ICC, Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, § 41.

After Chad and Malawi, both States Parties to the Rome Statute, refused to surrender Mr. Al Bashir when he visited those countries, the Pre Trial Chamber, in a different composition, held these states liable for their failure to comply with the cooperation requests issued by the Court.[13] This final decision in its turn spawned a fierce reaction from the African Union Commission which expressed its 'deep regret', arguing that the decision purported to change customary international law in relation to immunity *ratione personae.*' In the meantime, the Protocol on the Statute of the Human Rights and African Court of Justice that seeks to expand the judicial powers of that court with criminal jurisdiction has preserved the personal jurisdiction of acting heads of states. The International Criminal Court was not swayed by this vociferous resistance and reiterated its position that states parties are under an obligation to cooperate with the Court and surrender Mr. Al-Bashir, when the Democratic Republic of Congo appeared reluctant to do so. While Pre Trial Chamber I in the Malawi/Chad cases predicated its decision on customary international law, Pre Trial Chamber II in the case against Congo referred to the Resolution of the Security Council that prompted Sudan to cooperate fully with the Court. The Chamber subsequently invoked Article 103 of the UN Charter, which gives precedence to obligations of and ensuing from the Charter over all contrary obligations. The itinerant President of Sudan has continued causing headaches to both African countries and the International Criminal Court, lastly at the occasion of his visit to South Africa, where the Executive flouted the injunction of a domestic court to arrest and detain Mr. Al Bashir, pending a formal request for his surrender from the International

[13] ICC, Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, No,: ICC-02/05- 01/09, 12 December 2011.

Criminal Court. The position of heads of states of non-states parties vis à vis the International Criminal Court and the issue of their immunity have triggered much scholarly debate.[14]

1.4. PERSONAL AND FUNCTIONAL IMMUNITIES

Both treaties and customary international law vest government officials with immunities.[15]These immunities come into two types:

i) Functional immunity

ii) Personal Immunity

Functional and personal immunities have the same effect of barring international and foreign national criminal tribunals from indicting, arresting, or prosecuting a government official.

These ultimately have the same effect, these immunities differ in what, whom, and how long they protect.

Mr. Dan Terizan writes that functional immunities protect all government officials indefinitely, but their protection is limited to official government acts.[16]Unofficial government acts, which include committing an international core crime, are not protected by functional immunity. Mr. Dan Terizan explains the relation between Functional and Personal immunities that in addition to functional immunities, select government officials are also protected by personal immunities.[17]

While in contrast to functional immunities, personal immunities protect only high-ranking government officials, such as heads of state, heads of government and ministers for foreign affairs. Personal immunities protect these officials absolutely, protecting both their

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[14]See Harmen van der Wilt, "the continuing story of the International Criminal Court and personal immunities" 1-4

[15]Akande, "International Law Immunities and the International Criminal Court" 98 *AM. J. INT'L L. 407, 409* (2004). 26

[16]ibid

[17]ibid

unofficial and official acts.[18]But personal immunities do not protect indefinitely; their protection ceases when an official vacates her high ranking position, after which only functional immunity remains.[19]

Mr. Dan Terizan argues that personal immunities no longer protect absolutely, because a new customary international law has emerged. It is also claim that an official who committed an international core crime is not protected from indictment, arrest, or prosecution.[20]

It is stated that customary international law, the person of the head of state is regarded as inviolable when immunity and abroad from crime jurisdiction includes immunity from arrest. As mention by Mr. Dan Terizan, contrarily, personal immunities always protects high-ranking government official before a foreign state's national criminal tribunal, the ICJ acknowledged this principle in the *Arrest Warrant* case:

> The court has been unable to deduce from State 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.[21]They advance several arguments supporting this assertion, including the actions of the Nuremberg Trials, the Security Council's creation of international criminal tribunals, the ratification of the Rome Statute, and the ICJ *Arrest Warrant* case. These arguments are flawed. The Nuremberg trials did not address personal immunities; the Security Council's tribunals cannot establish customary international law because it is not a state practice;[22] the Rome Statute does not establish customary law because it lacks sufficient acceptance; and the I.C.J does not recognize the

[18]It is also showed that the personal immunity of a current high-ranking government official may be removed by her own state.

[19]Akande, "International Law Immunities and the International Criminal Court" 98 *AM. J. INT'L L. 407, 409* (2004). 26

[20]See Arrest Warrant, *2002 International Court of Justice*. at 58; Dapo Akande, "the Legal Nature of the Security Council Referral to the ICC and its impact on Al Bashir's Immunities", *7 INT'L CRIM. J.* (2009) *333, 224*

[21]See Dan Terizan, "Personal Immunity and President Omar Al Bashir: An Analysis Under Customary International Law and Security Council Resolution 1593".[Online].2015 [cited 12 Dec 2016] Available From: <http://ssrn.com>

[22]ibid

existence of a new customary law. In short, no customary international law removing personal immunities has emerged.

1.5. PERSONAL AND FUNCTIONAL IMMUNITIES: STATE OF THE ART IN INTERNATIONAL LAW

Mr. Hewitt writes that in the context of prosecution for international courts, crimes and legal doctrine have distinguished between both the immunities (immunity *rationemateriae* and immunity *ratione personae*, respectively).[23] Functional immunities pertain to the 'official' conduct of state representatives that can be considered as actions of the state. It explains the idea of sovereign equality and that no state should sit in judgment over the actions of another state while Personal immunity attaches to certain representatives of the state while they are in office.

Personal immunity covers both official acts and private conduct but evaporates with the official leaving office. To a certain extent, both immunities are complementary Functional immunities potentially benefit a vast category of state officials and offer permanent protection, the conduct that is covered by the immunity is limited (only 'official' acts). Personal immunities entail comprehensive shelter against criminal prosecution, but only for a restricted number of state officials (heads of states, ministers of foreign affairs, diplomats) and they are temporary in nature.[24]

Mr. Wilt writes that the landmark decision of the House of Lords in the case of former dictator of Chile, Augusto Pinochet, is often advanced as proof that functional immunities for international crimes are on the wane.[25] One should perhaps be cautious not to jump to conclusions, because the Lords all vented their separate and slightly differing opinions and

[23] For a very lucid explanation, see Robert Cryer, HåkanFriman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd ed. Cambridge 2014, 542.

[24] Ibid.

[25] Ibid

the judgment arguably applied to the limited issue whether functional immunities for torture still prevailed.[26] Lord Millet referred to torture when he argued that 'the offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity *rationemateriae* could not possible be available.

International law cannot be supposed to have established a crime having the character of *iuscogens*and at the same time to have provided immunity which is co- extensive with the obligation to impose.[27] The findings of Lord Hutton and Lord Browne- Wilkinson that 'these acts could not rank for immunity purposes as performance of an official function' suggest a wider bearing that is not restricted to torture, but covers all international crimes.[28]

It will be sure that, International Court of Justice in the *Arrest Warrant* case was 'unable to deduce from State practice that there exists under customary international law any exception to personal immunity for crimes against humanity or war crimes.[29] Former heads of states and other high officials who have stepped down from office may have reason to fear prosecution for international crimes, personal immunity still persists and offers complete protection, at least in the context of inter-state relations. The ICJ emphasized that immunity from jurisdiction did not necessarily imply impunity, adding that 'immunity from individual criminal responsibility and criminal jurisdiction are quite separate concepts.[30]

The court identified four circumstances in which an incumbent or former state official in this particular case the Minister of Foreign Affairs of the Democratic Republic of the

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[26] R.van Alebeek "The Immunity of States and their Officials in the Light of International Criminal Law and International Human Rights Law" Oxford, Oxford University Press 2008: 237.

[27]Pinochet-case, 179

[28]Pinochet-case, 114, See also See Harmen van der Wilt, "the continuing story of the International Criminal Court and personal immunities" 4

[29]ICJ, 14 February 2002 General List No. 121, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 58

[30]Arrest Warrant case, 60.

Congo, Mr. Yerodia[31] might be subject to criminal proceedings. The first was that he would not enjoy any criminal immunity under international law before the domestic courts of his home country. Secondly, Mr. Yerodia would cease to enjoy immunity if the State which he represented decided to waive that immunity. Thirdly, he would be exposed to criminal prosecution in another State after he had left office, in respect of acts committed prior or subsequent to his period in office and in respect of acts committed during that period of office in a private capacity. In fourth an incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[32]

The ICJ explicitly mentioned the International Criminal Court as an example of such international criminal courts.[33] Article 27, holds 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'. The provision espouses one of the famous Nuremberg Principles.[34]

Mr. Wilt states that As Article 27 of the Rome Statute does not distinguish between functional immunity and personal immunity and therefore stipulates that no state official enjoy immunity before the Court, the position of incumbent heads of states before the ICC clearly deviates from the one he still holds before foreign domestic courts. The question is

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[31] Mr. Abdoulaye Yerodia was a Congolese politician who served in the government of the Democratic Republic of the Congo as Minister of Foreign Affairs from 1999 to 2000 and as Vice-President from 2003 to 2006.

[32] Arrest Warrant case, 61

[33] See Harmen van der Wilt, "the continuing story of the International Criminal Court and personal immunities" 4

[34] Nuremberg Principle, Geneva 29 July 1950, UNGA OR, 5th Session, Supp. No 12, UN Doc A/1316 (1950), Principle 3: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

why this should be so. It is a good idea to start the discourse with some reflections on the rationales for immunities.[35]

Functional immunities are usually understood against the backdrop of the high authority of the sovereign state which does not tolerate superior authority to sit in judgment of its acts and personal immunities derive from more practical considerations. Criminal prosecution of high state officials would seriously impede their traveling abroad and thus affect international relations. In the Taylor case Special Court for Sierra Leone made an important observation:

> 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 derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.[36]

1.6. DIPLOMATIC IMMUNITY

In earlier literature of a diplomatic representative from the criminal jurisdiction of the receiving state was regarded as indistinguishable from his personal inviolability. It was the time when the principle of personal inviolability was first clearly established, it was unusual for criminal proceedings to take place without prior arrest and detention of the accused. As time passed and the arrest and detention of the accused was not essential for criminal proceeding, diplomatic immunity emerged as a separate principle of diplomatic law.

Need for diplomatic immunities are not so self-evident. A majority of scholars believe in such a need and do not admit any exceptions. So, there are also those who oppose these

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[35]See Harmen van der Wilt, "the continuing story of the International Criminal Court and personal immunities" 5

[36]See Special Court for Sierra Leone, Prosecutor v. Taylor, Decision on Immunity from Jurisdiction, SCSL-2003-01-I, 31 May 2004, § 51

immunities or permit certain exceptions. But when speaking of the legal basis of diplomatic immunity, three theories are usually mentioned.[37] Firstly, theory of extraterritoriality, which was a legal fiction based on the notion that the territory of the receiving state used by the diplomatic mission of above mentioned theory was replaced by the theory of representative character, which was also partly used in the Vienna Convention.[38]

This theory is based on the idea that the diplomatic mission, and thus also diplomatic, personify the sending state and therefore they should be granted the same independence and immunities as those granted to the sending state.

Thirdly, there is now the theory of functional necessity, which provides a conceptual basis for the Vienna Convention. According of this theory, the justification for granting immunities to diplomatic agents is based on the need to enable normal functioning of diplomats and diplomatic mission. The legal basis of diplomatic immunities in the Vienna Convention can be found in the preamble, which explains that the purpose of such privileges and immunities is not benefiting individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.

In respect of the functions necessity, this theory confers a certain minimum immunity on the diplomatic agent to perform his functions without hindrance. It makes a link between granting immunities and performing the diplomatic functions and can also provide a certain level of control where such a link is missing. This type of immunity protects diplomats from the receiving state for various reasons, want to hinder the diplomatic agent in carrying out his functions effectively, for example, by commencing unfounded penal proceeding.

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[37]Rene Vark, "Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimesi" 3
[38]Ibid 4

What is the immunity? The judge said in the classic case of *Empson v. Smith* that "it is elementary law that diplomatic immunity is not immunity from legal liability, but immunity from suit".[39] That means diplomatic agents are not above the law, they are under an obligation to respect the laws and regulations of the receiving State and if they breach the law they are still liable, but they cannot be sued in the receiving state unless they submit to the jurisdiction.[40] But, personal inviolability is a physical privilege and diplomatic immunity is a procedural obstacle.

Diplomatic immunity from criminal jurisdiction is unqualified and absolute while in the case of administrative and civil jurisdiction, there are certain exceptions. Paragraph I, Article 31 confirms that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of receiving state. It also concerns all possible minor offences as well as grave crimes, starting with breaches of traffic regulations and finishing with conspiracy against the national security of the receiving state or crimes against humanity.

The legal consequence of diplomatic immunity from criminal jurisdiction is procedural in character and this immunity does not affect any underlying substantive liability. Whenever immunity is established and accepted by the court, the latter must discontinue all proceedings against the defendant concerned. When this issue comes before it and not on the facts at the time the court has to determine the issue of immunity on the facts at the date when an event gave rise to the claim of immunity or at the time when proceedings were begun.

It shows that if a diplomatic agent becomes, in the eyes of the court, entitled to immunity he may raise it as a bar to both proceedings relating to prior events that occurred before he became a diplomat and entitled and proceedings already instituted against him. The

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[39]Rene Vark, "Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimesi" 3

[40]Arrest Warrant case of 11 April 2000

diplomatic agent is also immune from any measure of execution and he can raise his immunity from execution to bar any form of enforcement of a conviction of judgment against him.

According to the reports of International Law, in the case *Empson v. Smith* the court made it clear that on termination of diplomatic status for whatever reason, any subsisting action that had to be stayed on the ground of the defendant's immunity could be revived.[41] This can be done even though he was entitled to immunity when the events concerned took place or when process was originally begun. At the same time, the trial of a diplomatic agent after dismissal from his post and loss of his immunity does not violate the prohibition of retroactive application of criminal laws.

The reasoning is that the effect of the loss immunity is to remove the procedural impediment and enable judicial authorities to prosecute a former diplomat for acts, which at the date of their alleged commission constituted crimes according to local law.[42]

1.7. HISTORY OF DIPLOMATIC IMMUNITY

Diplomats and Diplomatic intercourse have been with us since the earliest days of human civilization. It is cleared from the records of ancient Summer Egypt,[43]that kings sent ambassadors to other monarchs for any number of reasons: to conclude peace or to make war to demand reparation, to honor a more powerful monarch, or to negotiate for trade.

Any group of independents stats with interests and ambitions of their own must have some degree of formal and organized contact with one another.[44]

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[41]See Empson v. Smith, *Queen's bench Division*, 1 Q.B. 246 (1996)

[42]Rene Vark, "Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes" 4

[43]McCoubrey, Hilaire, "Natural Law, Religion, and the Development of International law" 177-89

[44]Anderson, M.S, *the rise of Modern Diplomasy viii* 1992

Just as the exchange of diplomatic envoys has a long history, so does the recognition that there was something special about them.[45] A matter of sovereign immunity, functional necessity or religious proscription, diplomatic envoys have at all time enjoyed unique status and protection.

1.7.1. OVERVIEW OF THE THEORETICAL CONSTRUCTS

The diplomatic immunity law can be roughly divided into four main theoretical constructs. These the rough order of development,

i. Religious Protections

ii. Representative Character

iii. Extraterritoriality; and

iv. Functional Necessity[46]

e. RELIGIOUS PROTECTION

It is claimed that the original basis for the inviolability of envoys was religious. Mr. Jeffery K. Walker[47] writes that whether envoys were viewed as honored guests who had a religiously sanctioned right to hospitality, as personifications of a divine ruler, or as earthly minions of supernatural messengers, the violation of their persons was widely considered in the ancient world to be offensive to the gods or sinful in the eyes of God.

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[45]the preamble to the Vienna Convention on Diplomatic Relations states, "Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents," *Vienna Convention,* Vienna Convention on the Law of Treaties, 1155 UNTS 331, entered into force 27 January (1980), 213.

[46]Jeffery K Walker "Fiction versus function: the persistence of Representative character theory in the law of diplomatic immunity" [Online].2016 [cited 12 Oct 2016] Available From: <http://ssrn.com>

[47] Jeffrey K. Walker joins St. John's as Assistant Dean for Transnational Programs and Adjunct Professor of Law. Prior to coming to St. John's, he served for eight years as founding and managing partner of BlueLaw International LLP, an international law and development firm

f. REPRESENTATIVE CHARACTER

It is also written by Mr. Jeffery K. Walker that very early in the history of the use of envoys, dating back at least to the Greeks, a general norm arose based on religious precepts that envoys of all kinds stood in the shoes of, the sovereign who sent them. This notion of the envoys as a personification of his sovereign, heavy with religious connotation would have been quite familiar and acceptable to the peoples of the ancient world.[48] In the mid-nineteenth century, the attorney general of U.S noted that it was a tenet of customary international law that the authority of any ambassador of minister ended on the death of the monarch that appointed him.[49]

g. EXTRATERRITORIALITY

After the result of establishment of permanent embassies the second theory of immunity developed, beginning around the middle of the fifteenth century. Based on an extension of the canon law notion that church property and the people occupying it were beyond the criminal and civil reach of temporal rulers, the legal fiction emerged that diplomatic premises and the people that occupied them were not within the territory of receiving state. So the principle of extraterritoriality is still applied occasionally to the armed forces of a state residing in another state's territory.[50] This situation is mire often related by consensual status of forces agreements.

h. FUNCTIONAL NECESSITY

In the Beginning of late nineteenth and early twentieth century, attempts were made, to disregard the interesting by anachronistic legal fictions of representative character and

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[48]Ibid

[49]David R Dreener "The United State Attorney General and International Law" (1957) 266

[50]Jeffery K Walker "Fiction versus function: the persistence of Representative character theory in the law of diplomatic immunity" [Online].2016 [cited 12 Oct 2016] Available From: <http://ssrn.com>

extraterritoriality in favor of a positive treaty-based regime of diplomatic immunities based to satisfy the need of diplomatic missions when carrying out their routine representational functions. Mr. Jeffery states that the proponents of this functional necessity theory asserted that state should simply agree on what set of immunities were essential to allow diplomatic agents to perform their necessary factions and then to consent to limited reciprocal waiver of their otherwise exclusive state territorial sovereignty. 1961 and 1962 to this is the dominant but this is not exclusive theory underpinning diplomatic immunity in contemporary international law.

1.7.2. RELIGIOUS ROOTS OF DIPLOMATIC IMMUNITY

Envoys in many kinds, ambassadors, legates, heralds and messengers, have long imbued with a religious or quasi-religious aura. Many scholars have noted that protection afforded envoys were originally based on religious taboos.[51]In Judeo-Christian religious culture, the intertwining of diplomacy and religious has deep roots.

Diplomatic agents can trace they ancestry very far into the past, all the way back to the angels, the envoys of God. The early modern jurist Alberico Gentili recounts that King Hared Horrified by the death of his envoys to the Arabs, called the murder a horrible in the eyes of, especially in the eyes of the Jews to whom the sacred law of God had been given the angels who fulfilled the functions of heralds and ambassadors.[52]

1.7.3. MODERN DEVELOPMENT

By the second half of the twentieth century the law of immunity of diplomats enjoyed universal acceptance. So in the International Court of Justice, the American diplomats taken hostage at the U.S embassy in Tehran in 1979 when considering the potential culpability of

[51]ibid
[52]Ibid

the government of Iran for failing to protect, found that the principle of inviolability may have matured into a peremptory norm of international law.

As such, the principle of diplomatic inviolability would be binding upon all states, with or without their consent, and cannot be abrogated by treaty or other agreement.[53]

1.7.4. THE MODERN IDEA OF SOVEREIGNTY

Mr. Jeffery explained the modern idea of sovereignty and its relation with diplomatic immunity. He writes that the representative character theory of diplomatic immunity from the person of the sovereign to *representatives* of that sovereign. He also described it in four steps.

a. First and foremost, states have rights to autonomy, independence and liberty, in short, to exist as an entity within the community of nations.[54]
b. Second, states have the right to sovereignty in terms of exclusivity and jurisdiction within their borders, put simply, *internal autonomy.*[55]
c. Third, states ate entitled to legal equality within international community.[56]
d. Four, states are entitled to representation within the international system, particularly within international institutions, and bilaterally with the consent of other individual states.

1.7.5. DEVELOPING STATE PRACTICE

After World War II many states began asserting a more restrictive interpretation of the heretofore absolute theory of sovereign immunity. In 1952, the acting legal advisor to the U.S

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[53]Hannikainen, Lauri, "Peremptory Norms in International law" (1988) 193. However, as professor Haanikaien points out, the English text of the ICJ decision does not exactly track the language of the Vienna Convention on the Law of Treaties, Article 53

[54]Charter of the United Nations, art 2 Para 4 The international Courts of Justice's opinion in the 1949 Corfu Chanel Case stated that within the international community"

[55]Ibid

[56]Ibid

State Department issued a landmark memorandum setting out a restrictive interpretation of immunity as the official U.S position.

1.7.6. VIENNA CONVENTIONS

The opening for signature of the 1961 Vienna Convention on Diplomatic Relation and its companion the 1962 Vienna Convention on Consular Relations represented a triumph for the functional necessity theory of diplomatic immunity.[57]The immediate and resounding acceptance[58]of the 1961 Vienna Convention was a result of the confluence of several factors.

First, diplomatic law had remained fairly stable for some time. Second, there was a keen interest among states in clear rules of reciprocity of treatment, particularly with the rapid expansion of the number of new states in the late 1940s and the 1950s. Third and final, there was mutual interest in reaching a compromise on uniform rules between states, the International Law Commission, and the United Nations Sixth Committee (International Law).[59]

1.8. STATE IMMUNITY

This is an important whether a state and its agents enjoy immunity from jurisdiction in cases concerning of international crimes is among the most controversial topic of contemporary international law. Now many state officials are reluctant to travel abroad for fear of being arrested in a host country. The adoption by the institute of International Law of a resolution on this very topic is timely. This resolution makes clear that *former* state officials as well as those officials, who are not protected by personal immunities, may lawfully be arrested and

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[57]Vienna Convention on the Law of Treaties, *1155 UNTS 331, entered into force 27 January* (1980), 993.

[58]According to the official UN treaty database, there are currently 179 states party ot the Vienna Convention on Diplomatic Relations. The list of states is available at http://untreaty.un.org.

[59]Vienna Convention on the Law of Treaties, 1155 UNTS 331, entered into force 27 January (1980), 1-3.

prosecuted in foreign national courts when they are accused of having committed an international crime.

In this resolution Institute has clarified some divisive points of the *Arrest Warrant* case decided in 2002 by the International Court of Justice.[60]

This clarification is important so, one cannot help but be a little disappointed by the rest of the Resolution. It is showed by the mandate of the Third Commission of the Institute of International Law, which carried out a preliminary study prior to the adoption of the resolution, was to consider The International Law. It ended up focusing on international crimes, which is more restrictive set of norms than the fundamental rights of persons and addressed primarily the extent of immunity of persons acting on behalf of the state, leaving aside all controversial issues concerning state immunity in foreign jurisdictions.

This will be described only important points of the resolution which is co-related to the topic. Article I of the Resolution explains the definition of the words ' international crimes' and clarifies which type of proceedings is covered by the term ' jurisdiction' in the Resolution.

The first paragraph of Article I define international crimes as "Serious crimes under international law such as genocide, crimes against humanity, torture and war crimes as reflected in relevant treaties, statutes and jurisprudence of the international courts and tribunals".

And the Paragraph 2 of Article I made it clear that a broader definition of the term 'jurisdiction' is envisaged "or the purposes of this Resolution 'jurisdiction' means the criminal, civil and administrative jurisdiction of national courts of one State as it relates to the

[60]See Annyssa Bellal "National prosecution of international crimes: cases and legislation, The 2009 Resolution of the Institute of International Law on Immunity and International Crimes A Partial Codification of the Law?" [Online].2016 [cited 05 Nov 2016] Available From: <http://ssrn.com>

immunity of another State or its agents conferred by treaties of customary international law".[61]

It should be noted that the second part of the sentence also defines the term jurisdictions and it relates to the immunity of another State or its agents conferred by treaties of customary law.[62]

Article II of resolution is on 'Principles' which is complex provision that deals with many important issues in a rather compact manner. First, Paragraph 1 of Article II seems to evoke the principles underlying immunities:

> 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 the State.

Bellal writes that the International Law Commission in its commentary of the draft articles on state responsibility has identified as peremptory norms on international law the 'prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[63]

While Paragraph 2 puts forward two important principles:

> Pursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute

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[61] See Annyssa Bellal "National prosecution of international crimes: cases and legislation, The 2009 Resolution of the Institute of International Law on Immunity and International Crimes A Partial Codification of the Law?" [Online].2016 [cited 05 Nov 2016] Available From: <http://ssrn.com>

[62] Bellal writes that the international Law Commission in its commentary of the draft articles on state responsibility has identified as peremptory norms of international law and 'prohibitions of aggression.' genocide, slavery, racial discrimination, crimes against humanity and torture, and the right self-determination', see ILC, Commentary of Art, 26, *Yearbook of the International Law Commission, 2001,* Vol, II Part two, at 85

[63] See "ILC, Commentary of Art 26" *Yearbook of the International Law Commission, 2001,* Vol. II, Part Two at 85

an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled.

It seems to restated in another manner the alleged conflict between immunity and international crimes, the obligation to prevent and suppress international crimes is imposed for example in the grave breach regime of the Geneva Convention of 1949 and of Protocol I of 1977 Additional to Geneva Conventions.[64]

Last paragraph of the article declared that State should consider waiving immunity where international crimes are allegedly committed by their agents.[65]

The resolution declared that there is no functional immunity of former agents in case of international crimes and one can understand that this paragraph can thus only refer to sitting agents. In view of the aforementioned conflict between immunity and international crimes, the Resolution encourages states to also consider waiving immunity of their *sitting* heads of states or other high-level officials when accused of international crimes.

It is cleared that the core of the Resolution, deals with the crucial question of which and to *what extent* persons acting on behalf of the state are protected by immunity when facing prosecution for international crimes.

On that point, the Institute makes a clear and strong statement in the *Arrest Warrant* case, Bellal also explained that the court had declared that, even when accused of international crimes, heads of state, prime ministers and foreign ministers enjoyed immunities from jurisdiction in other States, both civil and criminal under international customary law. However in a controversial *obiterdictum,* the ICJ left open the issue whether *former* foreign ministers still enjoyed immunity for alleged international crimes. This particular *obiter*

[64]See Art.146 of the Geneva Convention (IV) of 1949 and Art.85 of Additional Protocol I.
[65]See Art. 146 of the Geneva Convention (IV) of 1949 and Art. 85 of Additional Protocol I

dictum has been criticized by scholars, notably because the courts did not resort, in its analysis, to the distinction between functional immunity (or immunity *rationaemateriae*) *and* personal immunity (or immunity *rationae personae.*)

High-level officials and heads of states would still be protected by immunity *rationae personae* while in office. This is, in essence, what Paragraph 1 of Article III declares "No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes".[66]

[66]Annyssa Bellal, "National prosecution of international crimes: cases and legislation, The 2009 Resolution of the Institute of International Law on Immunity and International Crimes A Partial Codification of the Law?" [Online].2016 [cited 05 Nov 2016] Available From: <http://ssrn.com>

CONCLUSION

Personal immunities protect only high-ranking government officials, such as heads of state, heads of government and ministers for foreign affairs. Personal immunities protect these officials absolutely, protecting both their unofficial and official acts. But personal immunities do not protect indefinitely; their protection ceases when an official vacates her high ranking position, after which only functional immunity remains. The opening for signature of the 1961 Vienna Convention on Diplomatic Relation represented a triumph for the functional necessity theory of diplomatic immunity.

CHAPTER TWO: IMMUNITY, IMPUNITY AND BLANKET IMMUNITY

2.1. INTRODUCTION

It is tried to explain the concept of impunity and blanket immunity in this chapter. It is also explained that how the tide of international law is rapidly turning against the reign of impunity. It is also explained that blanket immunity has raised serious human violations.

2.2. IMMUNITY OR IMPUNITY

In his article Mr. Mark A. Summers[67] writes that Hugo Grotius, often called the father of international law, would be shocked to learn that in the 21st century the international community asserts the right to prosecute state officials for international crimes. He also state that only since World War II has international law expanded to impose individual criminal responsibility on state officials.[68] A series of international criminal law conventions has been adopted which obligates states to extradite or prosecute international criminals found within their territories, regardless of where the crimes were committed.[69]

International tribunals have been created to deal with the most heinous crimes and the most prominent wrongdoers, while national tribunals, which are left to prosecute the lesser malefactors, remain an integral part of this developing system of international criminal law enforcement.[70]

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[67] Mark A. Summers has been a Professor of Law at Barry University School of Law since 2003. Professor Summers was a charter member of the faculty at Florida Coastal School of Law, where he taught from 1996-2003, and a Visiting Associate Professor of Law at West Virginia University College of Law (1994-95)

[68] Mark A. Summers, "Immunity or impunity? the potential effect of prosecutions of state officials for core international crimes in states like the united states that are not parties to the statute of the international criminal court" [Online].2015 [cited 10 Nov 2016] Available From: <http://ssrn.com>

[69] Ibid

[70] Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Beig.), Feb. 10, 1999, 127

2.2.1. ENTER CONGO V. BELGIUM

A Belgian investigating magistrate stated that, issued an international arrest warrant for Mr. Adbulaye Yerodia Ndombasi *(Yerodia),* on April 11, 2000 then the incumbent foreign minister of the Congo.[71] Mr. Yerodia was alleged to have made speeches inciting racial hatred during the month of August 1998, which constituted grave reaches of the Geneva Conventions of 1949 and their two 1977 Additional Protocols.

These kind of international crimes were punishable in Belgium pursuant to a 1999 law that gave its court jurisdiction over such offenses where ever they may have been committed, and also contained the provision that immunity attaching to the official capacity of a person shall not prevent application of the present Law. While Congo protested by filing an application and a request for provisional measures before the International Court of Justice claiming, inter alia, that the Belgian law's abrogation of the immunity of a sitting foreign minister was a 'violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State.[72] So the Court proceeded to the merits of the immunity question assuming" that the Belgian judge had jurisdiction to issue the arrest warrant in the first place.

It is also reasoned by the court that the immunities of incumbent diplomatic and consular agents, and "certain holders of high-ranking office in a State, such as the Hëad of Government, Head of State and Minister of Foreign Affairs, must be sufficient so that the officials will not be hindered in the performance of his or her duties.[73] Sitting foreign ministers and heads of state must therefore be accorded both full immunity and inviolability from the criminal jurisdiction of another state because any assertion of another state's

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[71] Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Beig.), Feb. 10, 1999, Congo, 2002 I.C.J at 128

[74] Mark A. Summers, "Immunity or impunity? the potential effect of prosecutions of state officials for core international crimes in states like the united states that are not parties to the statute of the international criminal court" [Online].2015 [cited 10 Nov 2016] Available From: <http://ssrn.com>

[73] Regina v. Bartle & the Comm'r of Police for the Metropolis & Others Ex Parte Pinochet (Pinochet 11 ,20 00 1 A.C. 119 (H.L. 1999) reprintedi n 38 I.L.M. 581 (1999). Congo, 2002 I.C.J at 18-20

criminal process could affect their ability to travel internationally, one of their essential job functions.[74]

The Court had to dispose of Belgium's argument that an exception to full immunity and inviolability *ratione personae* now exists for those incumbent state officials accused of war crimes or crimes against humanity.[75] The Court rejected the contention that there was state practice that supported the existence of such an exception. Nor did the statutes of the various international criminal tribunals established since World War II, all of which specifically abolished official position immunity, amount to state practice because these rules do not enable the Court to conclude that any exception exists in customary international law in regard to national courts. Similarly, none of the cases of the international tribunals deals with the question of the immunities of Ministers of Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity.[76]

The Court was unable to deduce 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.[77] Then Court ventured even further to outline the exceptions to the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs.

Although this portion of its opinion is clearly obiter dictum, binding only the parties to the case and therefore has no formal precedential value, there is no doubt that *Congo v. Belgium* will substantially affect the development of the law of state official immunity in both international and national courts.

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[74] e.g., VCDR, supra note 60, at art. 29

75 Salvatore Zappalh, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation" *12 EUR. J. INT'L L.* (2001), 595, 596, 19, Congo, 2002 I.C.J at 20

76 Congo, 2002 I.C.J at 20

77 Congo, 2002 I.C.J at 21

2.2.2. STATE PRACTICE

It had analyzed by the court that the state legislation that does exist and found it wanting in its support for the existence of an exception to state official immunity for core international crimes. The Court also apparently accepted Congo's interpretation that *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*[78] and *the Qaddafi*[79] case confirm the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs.[80] A closer analysis of the cases is necessary in order to appreciate the import of this conclusion.

While in Mr. *Qaddafi* the Libyan leader was sued in France based on his government's involvement in terrorist acts that caused the crash of a French airliner and the death of French nationals. Although highly critical of the French Court de Cassation's decision, one commentator's interpretation of it is far more nuanced than the ICJ's:

> The decision implicitly admits the possibility of exceptions to immunity from jurisdiction of Heads of State in office. The Court concluded: 'at this stage of development of international customary law, the crime charged i.e., terrorism, no matter how serious does not fall within the exceptions to the principle of immunity from jurisdiction of foreign Heads of State in office.' An a *contrario* interpretation of this passage leads to the conclusion that there are crimes that constitute exceptions of the jurisdictional immunity of Heads of State. This passage, however, does not shed any light on the type of immunity involved.[81]

The Pinochet and *Qaddafi* cases actually evince the views of those courts that an exception to state official immunity exists for at least some core international crimes, although the cases

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[78] Augusto Pinochet, the general who overthrew President Salvador Allende of Chile in 1973, was the first dictator in Latin America - or the world - to be humbled by the international justice system since the Nuremberg trials

[79] Muammar Mohammed Abu Minyar Gaddafi commonly known as Colonel Gaddafi, was a Libyan revolutionary, politician, and political theorist. He governed Libya as Revolutionary Chairman of the Libyan Arab Republic from 1969 to 1977 and then as the "Brotherly Leader" of the Great Socialist People's Libyan Arab Jamahiriya from 1977 to 2011.

11 Congo, 2002 I.C.J at 21

[81] Pinochet II, 38 I.L.M. at 594 (Lord Browne-Williamson, *Pinochet I, [2000] 1 A.C.* p. 108.

do not make the parameters of the exception clear. The ICJ must have either ignored or rejected this interpretation when, referring specifically to these cases, it stated that it had not been able to deduce any form of exception to the rule according immunity to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity. [82]

Even so, it is significant that at least one post-Congo v. Belgium court has read the case precisely this way. In *Prosecutor v. Charles Ghankay Taylor*, 158 the Special Court for Sierra Leone said, the International Court of Justice in *Congo v. Belgium* upheld immunities in national courts even in respect of war crimes and crimes against humanity relying on customary international law., 159 Given this, it cannot be said that the potential for misinterpretation of *Congo v. Belgium* in national tribunals is illusory.

This is particularly unfortunate since if one accepts the proposition that the states most likely not to ratify the ICC treaty are those most likely to engage in conduct it prohibits, then, it follows that non-party state officials will also be those who most frequently commit core crim.[83] In such kind of cases, the courts in their nationality states, where they are most apt to be found, may be motivated to shield them from prosecution by an international court, which they abjure, by applying a rule of immunity based on a colorable reading of *Congo v. Belgium*.

The effects will not be limited to non-parties to the ICC Statute. The ICC will be precluded from requesting the surrender of the officials of non-party states because, if *Congo v. Belgium* means that non-party state officials have immunity for core crimes, such a request would require the state party 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. In

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82 Pinochet 11, 38 I.L.M. at 641-42, (Lord Saville of Newdigate), id at 643-45 (Lord Millett); id at 661 (Lord Phillips of Worth-Matravers);

83 Lord Saville of Newdigate, Pinochet 1, [2000] 1 A.C. 107-09 (Lord Nicholls of Birkenhead).Congo, 2002 I.C.J. 21

either situation it is unlikely that the ICC will ever be able to assume jurisdiction by invoking the exception to the rule of complementarily for a prosecution that lacks genuineness.

Equally unfortunate is the opportunity missed to bring some clarity to an underdeveloped area of international law.[84] Instead, in *Congo v. Belgium*'s wake the status of state official immunity is even more in doubt.[85]

2.3. BLANKET IMMUNITY: CURRENT INTERNATIONAL LEGAL DISPENSATION

It is stated that the tide of international law is rapidly turning against the reign of impunity. It is also said that the impact of the New World order, would make the whole world a much better place for human beings. The issue of who would have jurisdiction to try international crimes has been a point of concern and contention, it has received some very clear answers. In 1993 the United Nations Security Council set up the ICT for the former Yugoslavia (ICTY) to prosecute individuals for international crimes committed in the former Yugoslavia.[86] On the other hand, the United Nations established the criminal tribunal for Rwanda (ICTR) to try individual for international crimes committed during the Rwandan genocide.6 the adoption of the Rome Statute of the International Criminal Court, was supposed to be of great significance to Africa as its coming into existence was to mark the end of immunity and the dawn of a new era of criminal accountability.[87]

It is stated that the end of the last century brought about a great awakening; a new order of international law, in which the world would no longer stand by while some human beings subject their fellows to inhumane treatment without fear of being confronted by the judicial process ten years after the adoption of the Rome Stature, Cameroonians have instead found themselves held hostage to a dictatorship and the prospect of accountability seems to

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[84] Cour de Cassation (Fr.), Mar. 13, 2001, Judgment No. 1414, reprinted in 105 Revue Generale De Droit International Public 473 (2001), 102.

[85] Ibid

[86] CL.Sungra, "demerging system of international criminal law" (1997), 251

[87] Ibid

be fading. A main feature of the ICC is that a state must have ratified the Rome Statute for the Court to have jurisdiction over that country.

Since the adoption of the Stature of the ICC in 1998, Cameroon has refrained from the ratifying the treaty in order to avoid criminal liability under the court.[88]

2.3.1. THE PRINCIPLE OF UNIVERSAL JURISDICTION

It is also noted that the logical reaction to infringement of penal laws is prosecution. Violations must be prosecuted in order to bring their perpetrator to justice and this position is in line with the principle of the rule of law. The rule of law entail that all persons are equal before, and equally bound by the law and no one should be above the law. When crimes are not prosecuted, the principle of the rule of law is totally disregarded and perpetrators continue to be a threat to the society in which they reside.[89]The prosecuting criminals are based on the needs to protect society and the international community as a whole.[90]

A nation's respect for few suffers when military and civilian authorities can commit criminal acts with impunity. Viewed from this perspective, there is urgency to investigate and prosecute violators of human rights by government officials who now act with impunity under the cover protection of the current regime in Cameroon.[91]

That is why, the limitation on the International Criminal Court and also the inability of national courts in Cameroon to bring some perpetrators of human rights abuses to justice. The exercise of universal jurisdiction will offer the widest possibility whereby the legal systems of other countries can be utilized to bring public officials accused of international crimes to justice. So the Universal jurisdiction describes the competence of a State to define and to prescribe punishment for international crimes even in the absence of any of the traditional judicial links. It is defined as:

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[88] Ibid
[89] Ibid
[90] Ibid
[91] Ibid

> The principle that certain crimes are so heinous, and so universally recognized and abhorred, that a state is entitled or even obliged to undertake legal proceedings without regard to where the crime was committed or the nationality the perpetrators or the victims.

In the final analysis, the postulate that universal jurisdiction is fundamental to the effective functioning of the international human rights and criminal justice regime is twofold:

1. So, anyone who perpetrates a criminal act in an area beyond the jurisdiction of a State should not be immune from prosecution merely because the locus commission of the offense (the place in which the crime was committed) may not be covered by the domestic criminal law of any State. Such acts should be made subject to the criminal jurisdiction of every state equally to increase deterrence.
2. Certain acts, no matter where committed; whether in territory res commuis omnium (a place where no State has authority to exercise jurisdiction) or within the territory of a State are of such gravity that every State should be authorized to exercise criminal jurisdiction over the offender.[92]

2.3.2. SCOPE BLANKET IMMUNITY

A principle pragmatic reason why international law provides for universal jurisdiction is to make sure that there is no safe haven for those responsible for the most serious crimes. In this position, the legality of some provisions of the 2008 Amended Constitution of Cameroon should be carefully scrutinized. The article 53states that: "Acts committed by the President of the Republic n pursuance of Articles 5,8,9 and 10 of the constitution shall be covered by immunity and he shall not be accountable for them after the exercise of his functions".[93]

The legality of this constitutional provision is contentious. So Blanket immunity for all Presidential actions is null and illegal. Unlawful acts committed by the President in the execution of his duties should still be subject to legal scrutiny. Despite instituting this

[92] Ibid
[93] Ibid

provision into the constitution to provide cover for criminal conducts, the jurisdiction of international criminal law will not recognize such immunity. Even if the acts of the President and members of his administration cannot be subjected to criminal prosecutions within the national legal system because of this immunity provision, therefore international legal actions can still be brought against them successfully.

In this regard, it is worth mentioning that the functions of the presidency do not entail as of privilege or right, criminality. While, in other words, a President can function effectively without engaging in criminal conduct. The President is in essence recognizing that his actions run contrary to the law by using the constitution to provide blanket immunity for himself. Embedded in this immunity provision is also the inference that future presidential actions may continue to violate established legal framework. Therefore it is important for the international community to pay close attention to the situation in Cameroon, and take all necessary steps to avert continued human rights violations, while bringing those responsible for such violations to justice, regardless of their official status.

Thus various precedents exist for legal actions against actors and former and sitting state official under the principle of universal jurisdiction. A Belgian Court convicted four Rwandans for their role in the 1994 Rwandan genocide.[94] The case of Mr. Hissen Hebre of Chad and Mr. Augusto Pinochet of Chile are among the several other cases where the principle of universal jurisdiction has been employed to bring officials to justice. Utilizing this principle to hold Cameroon public officials accountable for their human rights atrocities would not be a great accomplishment of the international human rights regime.

The inability of existing national legal mechanisms to deal with gross human rights violations in Cameroon makes the case for the utilization of the principle of universal jurisdiction compelling. Making use of this international criminal law principle will

[94] Ibid

strengthen the international community's commitment to safeguarding human beings from persecution. This legal avenue can help deter some of the worst crimes and help uphold stability and the rule of law not only in Cameroon, but in Africa and the world at large.[95]

[95] Ibid

CONCLUSION

It is cleared that when crimes are not prosecuted, the principle of the rule of law is totally disregarded and perpetrators continue to be a threat to the society in which they reside. It also shows that the prosecuting criminals are based on the needs to protect society and the international community as a whole. A nation's respect for few suffers when military and civilian authorities can commit criminal acts with impunity.

prosecutors the resources they need to ensure effective prosecution; and intimidation of witnesses whose testimony is needed to ensure a full legal reckoning.

3.2.1. CATEGORIES OF AMNESTIES

Many commentators have proposed to classify amnesty laws. Here is the UN classification: Self-amnesties these are amnesties adopted by those responsible for human rights violations to shield themselves from accountability. Human rights treaty bodies, jurists and others have strongly criticized self-amnesties, which by their nature epitomize impunity.

3.2.2. BLANKET AMNESTIES

Blanket amnesties exempt broad categories of offenders from prosecution and/or civil liability without the beneficiaries' having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis. These amnesties have been nearly universally condemned when they cover gross violations of human rights and serious violations of humanitarian law.

3.2.3. CONDITIONAL AMNESTIES

Conditional amnesties exempt an individual from prosecution if he or she applies for amnesty and satisfies several conditions, such as full disclosure of the facts about the violations committed.[98] Conditional amnesty often involves a prior investigation to allocate individual responsibility. Conditional, accountable amnesties could be considered for less serious crimes to facilitate truth-recovery and reconciliation initiatives. Thus, they must impose on the perpetrators applying for amnesty certain conditions such as: acknowledgement of harm done, seeking an apology, full disclosure of the facts about the violations committed commitment to cooperate with truth telling procedures national and traditional aimed to promote reconciliation.

[98] Prosecutor v. Kondewa "Separate Opinion of Justice Robertson" para. 15.

3.2.4. DE FACTO AMNESTIES

De facto amnesties these amnesties describe legal measures, such types of State laws, decrees or regulations that effectively foreclose prosecutions. While not explicitly ruling out criminal prosecution or civil remedies, they have the same effect as an explicit amnesty law. Such amnesties are impermissible if they prevent the prosecution of offences that may not lawfully be subject to an explicit amnesty.

3.2.5. DISGUISED AMNESTIES

Disguised amnesties can take various forms. They include amnesties whose operation is prescribed in regulations interpreting laws that, on their face, may be compatible with international law but which, as interpreted by their implementing regulations, are inconsistent with a State's human rights obligations. Such amnesties are impermissible if they prevent the prosecution of offences that may not lawfully be subject to an undisguised amnesty.

3.2.6. CONFORMITY WITH INTERNATIONAL LAW

Despite the increased codification of international crimes, no international convention explicitly prohibits amnesty laws.[99] So, substantial body of international law sets limits on their permissible scope.

A number of widely ratified international human rights and humanitarian law treaties explicitly require States parties to ensure punishment of specific offences either by instituting criminal proceedings against suspected perpetrators in their own courts or by sending the suspects to another appropriate jurisdiction for prosecution. It is generally accepted that an amnesty that foreclosed prosecution of an offence that is subject to this type of obligation would violate the treaty concerned.[100]

Amnesties have also been found to be incompatible with human rights treaties that do not explicitly address prosecution but which have consistently been interpreted to require.

[99] Louise Mallinder, "Amnesties and International Criminal Law" 4

[100] For example, "Special Court for Sierra Leone" *Prosecutor v. Morris Kallon, case No. SCSL-2004-15-AR72(E)*

States parties to institute criminal proceedings when serious violations occur. Amnesties for gross violations of human rights and serious violations of humanitarian law may also violate customary international law.

With the exception of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, all the human rights treaties summarized in this section explicitly requires that victims of specified violations should have access to remedies.[101] An amnesty that interfered with civil remedies would violate these treaty provisions. Moreover, victims of genocide and other human rights violations enjoy the right to an effective remedy, including reparation, under general international law.[102]

The following crimes can never be amnestied:[103]

a. Genocide

b. Crimes against humanity Rome Statute of the International Criminal Court (Preamble: obligation to punish and prosecute)

c. War crimes

In international armed conflict: The four Geneva Conventions of 1949 and Additional Protocol I of 1977 (in international armed conflict: obligation to search for persons allegedly responsible for grave breaches and to ensure that they are prosecuted).

The Rome Statute of the International Criminal Court Article 8.2:

Enumerate 26 other serious violations of the laws and customs applicable in international armed conflict that can be prosecuted by the ICC.

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[101] International Court of Justice, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)", *Judgment of 26 February 2007, Para. 460.*

[102] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147).

[103] OHCHR, 11-24.

CONCLUSION

It is cleared that when crimes are not prosecuted, the principle of the rule of law is totally disregarded and perpetrators continue to be a threat to the society in which they reside. It also shows that the prosecuting criminals are based on the needs to protect society and the international community as a whole. A nation's respect for few suffers when military and civilian authorities can commit criminal acts with impunity.

CHAPTER THREE: AMNESTY LAWS, PROSECUTION OR TRUTH COMMISSION

3.1. INTRODUCTION

This chapter describes the immunities laws and truth commissions. It is also tried to co-relate it with the contents of previous discussions. Five main categories of amnesties are also discussed. It is also described the relationship between ICC and Truth Commissions.

3.2. AMNESTY LAWS

An amnesty refers to legal measures that have the effect of prospectively barring criminal prosecution and in some cases, civil action against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption or retroactively nullifying legal liability previously established.[96]

Amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law.

An amnesty is distinct from a pardon, which refers to an official act that exempts a convicted criminal or criminals from serving their sentences different forms of official immunity under international law, such as Head of State and diplomatic immunities, which shield officials from the exercise of a foreign State's jurisdiction under certain circumstances.[97] And other elements of impunity that do not fall within the definition of amnesty used here but which may achieve similar effects.

These include States' failure to enact laws prohibiting crimes that should, under international law, be punished; to bring criminal prosecutions against those responsible for human rights violations even when their laws present no barriers to punishment; to provide

[96] United Nations Human Rights, Office of the High Commissioner, [Online] [cited 23 Oct 2016] Available From http://www.ohchr.org/EN.

[97] United Nations Human Rights, Office of the High Commissioner, [Online] [cited 26 Oct 2016] Available From http://www.ohchr.org/EN.

prosecutors the resources they need to ensure effective prosecution; and intimidation of witnesses whose testimony is needed to ensure a full legal reckoning.

3.2.1. CATEGORIES OF AMNESTIES

Many commentators have proposed to classify amnesty laws. Here is the UN classification: Self-amnesties these are amnesties adopted by those responsible for human rights violations to shield themselves from accountability. Human rights treaty bodies, jurists and others have strongly criticized self-amnesties, which by their nature epitomize impunity.

3.2.2. BLANKET AMNESTIES

Blanket amnesties exempt broad categories of offenders from prosecution and/or civil liability without the beneficiaries' having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis. These amnesties have been nearly universally condemned when they cover gross violations of human rights and serious violations of humanitarian law.

3.2.3. CONDITIONAL AMNESTIES

Conditional amnesties exempt an individual from prosecution if he or she applies for amnesty and satisfies several conditions, such as full disclosure of the facts about the violations committed.[98] Conditional amnesty often involves a prior investigation to allocate individual responsibility. Conditional, accountable amnesties could be considered for less serious crimes to facilitate truth-recovery and reconciliation initiatives. Thus, they must impose on the perpetrators applying for amnesty certain conditions such as: acknowledgement of harm done, seeking an apology, full disclosure of the facts about the violations committed commitment to cooperate with truth telling procedures national and traditional aimed to promote reconciliation.

[98] Prosecutor v. Kondewa "Separate Opinion of Justice Robertson" para. 15.

3.2.4. DE FACTO AMNESTIES

De facto amnesties these amnesties describe legal measures, such types of State laws, decrees or regulations that effectively foreclose prosecutions. While not explicitly ruling out criminal prosecution or civil remedies, they have the same effect as an explicit amnesty law. Such amnesties are impermissible if they prevent the prosecution of offences that may not lawfully be subject to an explicit amnesty.

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[101] International Court of Justice, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)", *Judgment of 26 February 2007, Para. 460.*
[102] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147).
[103] OHCHR, 11-24.

The Customary International Law, In non-international armed conflict:

Common Article 3 of the four Geneva Conventions of 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949

Rome Statute (Article 8.2.c: punish serious violations of common article 3; Article 8.2.e) Customary International law

An amnesty that encompassed serious violations of the laws of war governing non-international armed conflicts would be of doubtful validity. Indeed, article 6.5 PA II stipulates that at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained. The ICRC has affirmed that article 6.5 aims at

> Encouraging a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law. While excluding war crimes, article 6.5 of Additional Protocol II encourages States to grant former rebels amnesty for such crimes as rebellion, sedition and treason. States can also grant rebels amnesty for legitimate acts of war, such as killing members of the opposing forces under circumstances not amounting to a war crime.

d. Torture

- ☆ The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 4.1, 4.2: obligation to criminalise and punish; Article 7.1: obligation to extradite or prosecute)
- ☆ Customary international Law (ICRC Study). The ICTY has expressed the view that an amnesty for torture would be "internationally unlawful."[104]

104 ICTY, Prosecutor v. Anto Furundžija, case No. IT-95-17/1-T, Judgement of 10 December 1998, para. 155.

e. Enforced disappearance

It should be stated that many States do not include in their criminal codes a crime of enforced disappearance as such. In these States, enforced disappearances might be prosecuted as unlawful detention or arbitrary arrest and detention. It is therefore important, when considering the scope of a proposed amnesty, to ensure that the proposed law does not prevent States from punishing enforced disappearances by including in the proposed amnesty crimes that appear to be ordinary crimes but which in fact, under relevant national law, provide the principal basis for prosecuting the crime of enforced disappearance.

f. Other gross violations of human rights

☆ International and regional human rights treaties (obligation to conduct effective investigation, ensure prosecution and victim's right to a remedy and reparations)

☆ United Nations principles and guidelines. [105]

Although the phrase "gross violations of human rights" is widely used in human rights law, it has not been formally defined. It is generally assumed that this category includes:

a. genocide;

b. slavery and slave trade;

c. extrajudicial, summary or arbitrary executions;

d. enforced disappearances;

e. torture or other cruel, inhuman or degrading treatment or punishment;

f. prolonged arbitrary detention;

g. deportation or forcible transfers of population;

h. systematic racial discrimination and; .

i. the gender-specific instances of these violations, such as rape.

105 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (preamble).

Deliberate and systematic deprivation of essential foodstuffs, essential primary health care, and/or basic shelter and housing may also amount to gross violations of human rights.

In those six instances, the aim of the amnesty law is irrelevant. Invalid amnesties are impermissible even if they are used as an inducement for rebels to demobilize or secure a stable transition to democracy and promote reconciliation. Similarly, democratic processes cannot transform an amnesty that would otherwise be invalid into a lawful amnesty.

When States adopt amnesties that exclude war crimes, genocide, crimes against humanity and other violations of human rights, they must take care to ensure that the amnesties do not restrict or imperil the enjoyment of human rights, including those that are ostensibly restored.[106]

3.3. AMNESTY, PROSECUTION OR TRUTH COMMISION

Amnesty is a practice that has its roots in the early history of mankind. From time immemorial successor regimes sought to secure peace though the pardoning of their enemies. The sole alternative, until present times, was brutal punishment without trial. Human rights advocates pleaded for amnesty for political prisoners, even for those form fallen regimes.

But the past decade has seen a change in attitude. There is a demand for prosecution of the violins of past regimes. So there are many reasons for this. The abuse of amnesty by military dictatorships that have enacted 'self-amnesty' laws before surrendering power is an obvious reason.

However, the most important reason is the internationalization of crime in the global village. They are frequently international crimes – genocide, crimes against humanity, torture, and hostage-taking, which concern the international community as well as the national state. ICC has been stances the international community has an interest in the

[106] Ibid

treatment of human rights violations, and sees punishment before national courts or international courts as the best solution.

Successor regimes are now told by the high priests of public opinion – NGOs and scholars – not only that they ought to prosecute but that they are obliged under international law to prosecute.

An argument is to be found in the Genocide Convention of 1948, which contains an absolute obligation to prosecute offenders;[107] In decisions of the Inter-America Courts and Commission of Human Rights holding that amnesties granted by Argentina and Uruguay were incompatible with the America Convention on Human Rights; in the decision of the American Court of Human Rights in *the Velasquez Rodriquez Case*[108] holding, in respect of Honduras, that Article 1 of the Convention, requiring states to ensure the rights set forth in the Convention obliged states to investigate and punish and violation of the rights recognized by the American Convention of Human Rights.

In a comment by the UN Human Rights Committee that amnesties covering acts of torture are generally incompatible with the duty of states to investigate such acts. In the 1996 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, which obliges states to try or extradite those alleged to have committed crimes against humanity;[109]

While in the final Declaration and Programmed of Action of the 1993 World Conference on Human Rights calling on states to prosecute those responsible for grave human rights violations, such as torture, and to abrogate legislation leading to impunity for such crimes; in the convention on the Non-Applicability of Statutory Limitations to War

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[107] Art. 4 Convention on the Prevention and Punishment of the Crime of Genocide, *78 UNTS 277* (1951)

[108] For detail, 1988 IACHR (Ser. C.) No.4 Para.165

[109] Art. 6 Draft Code of Crimes against the Peace and Security of Mankind, Report of the international Law Commission of the Work of its Forty-eight Session, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1966)

Crimes and Crimes against Humanity of 1968; and in the Statutes for the International Criminal Tribunal for the former[110] Yugoslavia and the International Criminal Tribunal for Rwanda (ICTR)[111] which require prosecution of those responsible for the crimes punishable under these statutes.

Thus support for prosecution is also derived from the obligation to prosecute to extradite those guilty of grave breaches of the 1949 Geneva Convention.[112] An argument also present that the distinction between international and non-international armed conflict has largely disappeared and that the obligation to prosecute grave breaches of similar war crimes extends to internal conflicts. At last, there is a substantial body of academic writing to support this argument.[113]

The implication of this argument is that international law prohibits amnesty. Clearly it is spelt out by the trail Chamber of the ICTY in Prosecutor v. Furundzija which held that amnesties for torture are null and avoid and will not receive foreign recognition.

It is, doubtful, whether international law has reached this stage.[114] It is noted that state practice hardly supports such a rule because modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them.

In *Pinochet* case, only one Lord commented on the question of amnesty. Although he was one of the minority judges in the first Pinochet case, few would disagree with Lord Lloyd's statement that:

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[110] Security Council Resolution 827 (1993); 32 ILM 1192 (1993)
[111] Security Council Resolution 955 (1993); 33 ILM 1598 (1994)
[112] Art. 146 and 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950)
[113] Edelenbos, Human Rights Violations; A duty to Prosecute? 7 Leiden Journal of international law 6, 15 (1994)
[114] M. Scharf, "the Letter of the Law: the scope of the International Legal Obligation to prosecute Human Rights Crimes, 59" *Law and Contemporary Problems* (1996). 41, 47

> Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accursed of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government. It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.[115]

While international law does not prohibit the granting of amnesty for international crimes it is clearly moving in this direction. The statute of the international Criminal Court[116] adopted in Rome in 1998, makes no provision for amnesty and the adoption of the principle of complementarily in the Rome Statute,[117] which gives both national courts and the International Criminal Court jurisdiction over war crimes, crimes against humanity and genocide, suggests that national courts will assert their permissive jurisdiction over such crimes with more enthusiasm that in the past.

It is important to state that the Louis Joinet in his 1997 report, on the Question of the Impunity of Perpetrators of Human Rights Violations to the sub-commission on Prevention of Discrimination and Protection of Minorities[118] recommends that and extra-judicial commission of enquiry into the events of the past should go hand in hand with prosecution and punishment of human rights violators. But in practice the position is very different. In most cases a truth commission is established because the new regime lacks the power to embark on prosecution as in the case of Chile where President Mr. Aylwin's democratic

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[115] R. v. Bow Street Metropolitan Stipendiary Magistrate. Ex Parte Pinochet [1998] 4 ALL ER 897 (HL). at 929 h-i

[116] The Rome Statute of the international Criminal Courts. UN Doc. A/CONF. 183/9 (1998), reprinted in 37 ILM 999 (1998).

[117] Preamble, Para. 10, Art. 17

[118] UN Doc. E/CN, 4/sub. 2/997/20/Rev I (1997)

government operated in the shadow of the Pinochet-led military; or because the political compact that has produced democracy is premised on a compromise between old and new regimes which precludes prosecution in the case of South Africa. Mr. Pricilla Hayner states that prosecutions are very rare after a truth commission report even where the identity of the perpetrators is known. While in other cases there was in effect a de facto amnesty prosecution was never seriously considered[119]

Practically truth commissions and prosecutions are competing mechanism for dealing with crimes of the past. Blanket, unconditional amnesty, unaccompanied by a truth commission is no longer an acceptable option. The choice is between prosecution or amnesty accompanied by a truth commission.

Each has its merits. Prosecution emphasizes the right to justice and society's demand for retribution. The truth commission seeks to satisfy the right to know and understated the past, and aims at reconciliation rather than retribution. Which course is most likely to heal a divided society is unclear.

3.3.1. THE PINOCHET CASE

It is noted that Mr. Augusto *Pinochet* has been granted amnesty by a military decree of 1978, which granted unconditional, total amnesty for crimes committed between 1973 and 1978.[120] *Pinochet* was also entitled to immunity from prosecution in Chile by virtue of his office of senator. Neither his lawyers nor the Chilean government raised this amnesty in the legal proceedings. It was realized that a foreign court was unlikely to give serious consideration to an amnesty decree in effect granted by Mr. Pinochet to himself.

While the Law Lords, with two exceptions, failed even to mention the question of amnesty. This does not mean that they were unsympathetic to the view that the treatment of a

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[119] Andrea Bianchi "Immunity versus Human Rights: The Pinochet Case" *EJIL (1999) Vol. 10 No. 2*: 237-277

[120] N.J. Kritz (Ed.), "Transitional Justice. How Emerging Democracies Deal With Former Regimes?" Vol. 2, (1995). 500

former head of state is best left to the territorial state, the state in which the crimes were committed. There is no express approval of this view.

There are two reasons; first, although both judgments may be labeled as progressive by reason of their refusal to accord immunity to a former head of state in respect of international crimes (in *casu* torture, while the second and decisive judgment was hardly progressive in its reasoning or effect. It is important to note that only one judge was prepared to accept that torture was an international crime with universal jurisdiction under customary international law before 1988, with the result that the double criminality requiremeut was met in respect of acts of torture committed from 1973 onwards. The other judges insisted that only the enactment of the Torture Convention of 1984 into English law in 1988 made the international crime of torture punishable under English law in fulfillment of the double criminality requirement.

The judicial decision is an exercise in choice, particularly in the field of statutory interpretation. It is trite that the judges are frequently influenced by extra-legal factors in their choice and properly so because judges are not bricklayers of the law but architects. They must interpret the law in its political and social context.

In the Pinochet case it is not improbable that judges were influenced by the argument strongly advance by the government of Chile in its public utterances that it should be left to Chile to deal with Mr. Pinochet, it necessary by trying him itself, and that the extradition of *Pinochet* to Spain would endanger the fragile peace between army and civilian government in that country.

3.3.2. PERMISSIBLE AND IMPERMISSIBLE AMNESTIES, THE CASE OF SOUTH AFRICA

A solution must be made to reconcile the competing interest and needs of the territorial states and the international community. This means that an-attempt must be made to provide for the legitimating of amnesty, and for its recognition by foreign and international court.

Obviously not all amnesties should be recognized abroad. The kind of blanket, unconditional amnesty given by Mr. *Pinochet* and his regime to themselves cannot hope to receive international recognition. But does this apply to conditional amnesty, accompanied by a thorough investigation by a truth and reconciliation commission, of the South African kind? The South African truth and Reconciliation Commission (TRC) obviously believed it was entitled to more favour-able treatment as in its final Report it appealed to the international community for recognition of its process. The Report states:

> The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of its Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.[121]

3.4. INTERNATIONAL CRIMINAL COURT AND TRUTH COMMISSIONS

Different countries have chosen widely different strategies to deal with the past and may be classified in retributive justice prosecutions, trials and restorative Justice. Although justice is crucial after violations of human rights, it may not be possible or practical. International trihunals are useful, but they are not the full solution. They are hugely expensive and can try only a small group of perpetrators, the most .responsible. Ironically, many times, those who

[121] TRC Report. Vol.5, 349, 1998

are tried are not the most responsible but the most available in the country, to use the terms of Alex Boraine[122]

That is why justice becomes extremely selective and seems to be the way of granting de facto amnesty to those who fled the country and those responsible. Then come the necessity of truth commissions not as a panacea for all the challenges of transition, or an alternative, but as a complement way to be used by broken societies, in order to bring the benefits of justice to the victims and the to the political culture. However, this is challenging and there are always tensions between the requirements of the criminal justice system and those of non-punitive approaches to gross and systematic human rights violations. Rightly, Charles Villa-Vicencio pointed out that, .the tension between justice and reconciliation and revenge, prosecution and amnesty is grounded as much in principled debate as in a tug-of-war between deep emotions, unresolved memories and uncertain futures it is a tension that is best not collapsed into an attempted neat synthesis of a complex set of contradictions.

The contradictions need to be sustained. The demands of the one side need to impact on the other. It is through honest encounter that opposing groups stand the best chance of knowing that they need one another. It is then that new possibilities begin to be imagined-and sometimes realized[123]

3.4.1. THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND TRUTH COMMISSIONS

While welcoming the creation of the ICC, some authors have expressed concerns that its approach may prove to be too blunt in dealing with the varied and complex situations facing democracies in transition. For example, Charles Villa-Vicencio greets the ICC as both morally impressive and legally a little frightening because it could be misinterpreted albeit

122 Boraine used the term .most available. during course sessions for the Fellowship in Transitional Justice/Cape Town/2005

123 Charles Villa-Vicencio, .Reconciliation as Political Necessity: Reflections in the wake of Civil and Political Strife., p.3

incorrectly, as foreclosing the use of truth commissions.[124] Similarly, Mr. Alex Boraine observes that: .It is to be hoped. That when the ICC comes into being, it will not, either by definition or by approach, discourage attempts by national states to come to terms with their past. It would be regrettable if the only approach to gross human rights violations comes in the form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights.[125]

These fears were justified. There is a cause for celebration that, the majority of nations resolved to create a court (ICC) to pursue criminal accountability for gross violations of human rights. However important, prosecution and punishment should not be viewed as the only, or even the most important, means to end impunity. If we confine to courts the struggle to guarantee human rights, we ignore many other important initiatives designed to assist victims, rebuild societies and defend democracies. So therefore, we should try to sequence the use of the ICC and national mechanisms such as truth commissions to cover the entire gap.

Mr. Juan Mendez in his presentation at the JICA conference write: In most parts of the world, the South African example stands out as an attempt to achieve reconciliation and forgiveness without impunity. Others decry the fact that most perpetrators of the worst crimes of apartheid did evade justice. In my view, however, the South African exercise with truth, justice and reconciliation is notable for its insistence on hearing the victims, consulting with all members of society, allowing participation by all stakeholders, and conducting the exercise in complete transparency. It is in this sense that the South African example continues to inspire all those who decide to turn a page in a country's history without forgetting the plight of those who suffered.

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[124] Villa-Vicencio, "Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet., 49" *Emory Law Journal* (2000). 205

[125] A. Boraine, .A Country Unmasked: South Africa.s Truth and Reconciliation Commission. (2000)

Having submitted that truth commissions are proposed for different reasons and driven by diverse motives .They can be used firstly, for the purpose of national reconciliation and in the interests of the society; secondly, sometimes can be used to avoid accountability or prosecution and merely to shield an offender from justice.[126] As we may know, in some countries the purpose of a truth commission may be not genuine and reasonable.

As we may recalled, in many transition periods two methods are used to establish record of grave human rights crimes following a conflict/war: prosecutions at national or international level and truth commissions with various names, which investigate situations and submits reports. Both of those two methods are not sufficient and therefore, the need to complement each other.[127]

[126] Juan E Mendez, "Transitional Justice in Historical Perspective" *Outline, Somerset West Conference, March 28, 2005 Inaugural Address*
[127] Ibid

CONCLUSION

This shows the role of amnesty law in International Human Rights law. It is also tried to explain the term gross violations of human rights. It is cleared from pervious discussions that different countries have chosen widely different strategies to deal with the past and may be classified in retributive justice prosecutions, trials and restorative Justice. Although justice is crucial after violations of human rights, it may not be possible or practical. International tribunals are useful, but they are not the full solution.

CHAPTER FOUR: LAW ENACTED TO GRANT BLANKET IMMUNITY AND ITS STATUS

4.1. INTRODUCTION

This chapter gives the details of gross violation of human rights in Afghanistan and Yemen. It describes the causes of these violations. Afghan government is responsible for provided blanket amnesty to serious criminals. The case of Yemen is not different from this.

4.2. AMNESTY LAW AND RECONCILIATION PROCESS

4.2.1. Mr. HAMID KARZAI'S RECONCILIATION STRATEGY

As part of the reconciliation effort, Mr. Karzai[128] is supporting an amnesty law that offers blanket immunity to all parties responsible for atrocities committed in Afghanistan over the past few decades, including Taliban militants.

In legislative process of Afghanistan, a draft law must be ratified by parliament, signed by the president, and then published in an official gazette before it takes effect.[129] The actual process is sometimes far murkier. Afghan Parliament passed a controversial amnesty law - offering immunity to all those involved in past, present and future hostilities, including war crimes or crimes against humanity - in 2007. But the initiative generated considerable opposition from Afghan Government international allies and human rights groups who saw it as an attempt by former commanders-turned-MPs to give themselves immunity.[130] However, news was spread that the law had been quietly printed in December of 2008. With

[128]Mr. Hamid Karzai served as President of Afghanistan for almost ten years, from 7 December 2004 to 29 September 2014.

[129] United States Department of State (11 March 2010) 2009 Human Rights Report: *Afghanistan, Section 1d 'Arbitrary Arrest or Detention/Amnesty*

[130] United States Department of State (11 March 2010) 2009 Human Rights Report: *Afghanistan, Section 1d 'Arbitrary Arrest or Detention/Amnesty*

the international community behind Mr. Karzai's reconciliation strategy, the government was apparently hoping that the amnesty law will be accepted without creating too much of a stir.

Growing opposition from within Afghanistan, led by human rights and civil society groups, also indicates that the president's reconciliation efforts may soon hit a brick wall.[131]

4.2.2. **OPPONENT OF AMNESTY LAW**

Opponents of the amnesty law contend that it is unconstitutional. According to a paper prepared jointly by the Afghan Independent Human Rights Commission, a body mandated by the Afghan constitution, and ICTJ, the amnesty law contradicts Kabul's obligations under international law to prosecute serious crimes such as torture, rape, war crimes, crimes against humanity, and genocide. Article 7 of the Afghan constitution spells out the country's obligations to abide by international treaties covering war crimes.

Activists described as especially problematic the "blanket" amnesty from prosecution, which did not make exceptions for war crimes such as rape, torture and genocide; grants immunity for crimes that may be committed in the future; and benefits former combatants who voted for the bill in their current roles as MPs.

As worded, the law covers all political factions and hostile parties who were involved in a way or another in hostilities before establishing of the interim administration in 2001 as well as those individuals and groups who are still in opposition to the Islamic Republic of Afghanistan and cease enmity after the enforcement of this resolution and join the process of national reconciliation and respect the constitution and other laws and abide them. Without a

[131] Eurasianet (5 April 2010) Afghanistan: Rights Experts Have Doubts about Reconciliation with Taliban). Citing the APRP (Afghan Peace and Reintegration Programme)

cut-off date, the law offers those committing crimes impunity to continue doing so until they please.[132]

As a concession to victims of war crimes, the law provided for individuals to make claims against alleged assailants for specific crimes. Human rights groups point out that the lack of security and rule of law in Afghanistan made it almost impossible for individuals to gather evidence and pursue criminal cases against powerful parties involved in the war. It is fantasy to think that an individual can take on a major war criminal alone, Mr. Brad Adams, Asia Director of Human Rights Watch, said in a March 10 statement. "In practice, individuals have severely limited access to the justice system in Afghanistan," he pointed out, adding that the state should not transfer its obligation to investigate and prosecute serious human rights violations to individuals.[133]

It was the duty of government that it should immediately suspend the law, argued the Transitional Justice Coordination Group (TJCG), a coalition of 24 Afghan civil society organizations. Group leaders said that, rather than promoting reconciliation and stability, the law, by granting blanket amnesty, "promotes impunity and prevents genuine reconciliation." The coalition seeks "accountability not amnesia for past and present crimes as a prerequisite for genuine reconciliation and peace," the group said in a statement. "The government of Afghanistan does not have the right to usurp the rights of victims."[134]

The stated purpose of the law was "strengthening the reconciliation and national stability." But the TJCG coalition, human rights groups and analysts view the amnesty law as a political maneuver. "Short-term expediency in the form of reconciliation with the Taliban

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[132] Human Rights Watch (10 March 2010) Afghanistan: *Repeal Amnesty Law*[Online]. [cited 3 Oct 2016] Available From https://www.hrw.org

[133] Ibid

[134]International Centre for Transitional Justice (16 March 2010) Afghanistan Enacts Law That Gives War Criminals Blanket Immunity.

should not trump the rights of the Afghan people," Amnesty International said in a statement that the legislation is simply an effort to pervert the course of justice under the faulty guise of providing security.[135]

Mr. Adam said that the existence of this law is as much a test of the principles of Afghanistan's international backers, such as the United States, as it is of Mr. Karzai, Will they stand with abusive warlords and insurgents, or will they stand with the Afghan people?[136]

4.3. GROSS VIOLATIONS OF HUMAN RIGHTS IN AFGHANITAN

An article in The Guardian published in February 2010 states that Taliban fighters who have murdered and maimed but who lay down their weapons will be given immunity from prosecution according to a law that came into force without announcement in the weeks running up to last month's London conference on Afghanistan. The sudden implementation of the controversial law, which had been shelved for almost two years since it was passed by a slim parliamentary majority in 2007, has raised fears that the Afghan government is ignoring the rights of Taliban victims for the sake of President Hamid Karzai's push for a quick peace deal with insurgents. The reconciliation and general amnesty law also gives immunity from prosecution to all of the country's warlords, the former factional leaders, many of whom are hated for the atrocities they committed during Afghanistan's civil war in the 1990.[137]

In February 2010 it is noted by Amnesty International that under this legislation, people who committed serious human rights violations and violations of the laws of war, including massacres, widespread enforced disappearances, and systematic use of torture, and

[135] Ibid
[136] Ibid
[137] The Guardian (11 February 2010) Afghanistan quietly brings into force Taliban amnesty law

other forms of ill-treatment would be immune to criminal prosecution if they pledge cooperation with the Afghan government.[138]

It is also mention that under the provisions of this legislation, Taleban figures who agree to cooperate with the Afghan government would also be immune to prosecution. The Afghan government and its international supporters identified reconciliation with the Taleban as a priority during the London conference in January 201.[139]

A paper issued in February 2010 by ICTJ notes the following that It is very difficult to see how this amnesty would particularly operate in practice. It is unusual in its open-ended nature and does not set time-lines for compliance. It is unclear from Art. 3 whether certain conditions attach, such as adherence to the Constitution, disarmament, etc. It is also unclear how the extraordinary commission referenced in Art. 5 will function[140].

A report by HRW states that in March 2010:

> Human Rights watch expressed concern that the law may be used to provide immunity from prosecution for members of the Taliban and other insurgent groups who have committed war crimes. The government has made a reconciliation process a main plank of their counter-insurgency strategy. "It the amnesty law was collecting dust for nearly three years," A member of parliament, told Human Rights Watch. "But now that the president wants to talk to the Taliban -for his own interests, and for his friends' interests -he makes it law." The law states that those engaged in current hostilities will be granted immunity if they agree to reconciliation with the government, effectively providing amnesty for future crimes. "The amnesty law is an invitation for future human rights abuses," said Adams. "It allows insurgent commanders to get away with mass murder. All they need to do is offer to join the government and renounce violence and all past crimes will be forgiven -including crimes against humanity.[141]

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[138]Amnesty International (9 February 2010)Afghanistan must not grant impunity to war criminals[Online]. [cited 1 Oct 2016] Available From http://www.amnesty.org

[139] ibid

[140] International Centre for Transitional Justice (21 February 2010) Discussion Paper on the Legality of Amnesties [Online]. [cited 3 Oct 2016] Available From http://www.amnesty.org

[141] Human Rights Watch (10 March 2010) Afghanistan: Repeal Amnesty Law [Online]. [cited 3 Oct 2016] Available From https://www.hrw.org

United States Department of State note in a publication released in March 2010 that: "The Law on National Reconciliation and Amnesty, which was published in December 2008, grants amnesty to persons engaged in conflict during the past 25 years"[142]

The ICTJ in March 2010 reports that the law that provides blanket immunity and pardons former members of Afghanistan's armed factions for war crimes and human rights abuses committed prior to December 2001 was quietly enacted three years ago by parliament, despite previous assurances by President Hamid Karzai that he would not sign it or allow it to take effect"[143]

This document also states that "The ICTJ an organization founded in 2001 that assists countries in their pursuit of accountability for mass atrocities or human rights abuses, said "blanket amnesties promote impunity and are currently deemed unlawful under international law"[144]

The UN News Service in March 2010 states "The UN human rights office in Afghanistan today called for the repeal of a controversial amnesty law in the Asian country, saying that it green-lights impunity for serious crimes and continued rights violations"[145]

Eurasianet in March 2010 notes that:

> "As worded, the law covers "all political factions and hostile parties who were in hostilities before establishing of the interim administration [in 2001]," as well as "those individuals and groups who are still in opposition to the Islamic Republic of

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[142] United States Department of State (11 March 2010) 2009 Human Rights Report: Afghanistan, Section 1d 'Arbitrary Arrest or Detention/Amnesty [Online]. [cite 3 Oct 2016] Available From https://www.hrw.org

[143] International Centre for Transitional Justice (16 March 2010) Afghanistan Enacts Law That Gives War Criminals Blanket Immunity.

[144] ibid

[145] UN News Service (25 March 2010) Top UN human rights official in Afghanistan calls for repeal of amnesty law

> Afghanistan and cease enmity after the enforcement of this resolution and join the process of national reconciliation and respect the constitution and other laws and abide them." Without a cut-off date, the law offers those committing crimes impunity to continue doing so until they please"[146]

A paper by the Afghanistan Research and Evaluation Unit states that

> Many CSOs question the timing of the publication of law in the month leading up to the announcement of the national "Peace and Reintegration Programme." While, Section 3, extends immunity from prosecution by the government to: armed people who are against the government of Afghanistan, after the passing of this law, if they cease from their objections, join the national reconciliation process, and respect constitutional law and other regulations of the Islamic Republic of Afghanistan. They will have all the perquisites of this law. The timely appearance prompted some human rights activists to suggest that it was designed to incentivise the Taliban to reconcile. However, Karzai's spokesman claimed there was "no link" between the gazetting of the law and reconciliation plans. Regardless of the intent behind the publication, the law could perhaps be used to demonstrate to Taliban insurgents that they will not face criminal prosecutions if they lay down arms. It is worth noting that in the aforementioned clause, there is no mention of any time limitations on the benefits of amnesty. So, this could mean that amnesty could be granted for an indefinite time[147]

In April 2010 Eurasianet states that the Afghan government has proposed a law that would grant amnesty to Taliban fighters in order to peel them away from the radical Islamic movement and to promote peace in Afghanistan. However, the government has not made public details of the legislation, including who would be eligible for the amnesty, what crimes might be excluded, and what Taliban members would have to do to be eligible for the amnesty.[148]

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[146] Eurasianet (14 March 2010) Afghanistan: Amnesty Law Fuels Debate on Reconciliation Process

[147] Afghanistan Research and Evaluation Unit (April 2010) The State of Transitional Justice in Afghanistan, Actors, Approaches and Challenges, 9-10

[148] Eurasianet (5 April 2010) Afghanistan: Rights Experts Have Doubts about Reconciliation with Taliban). Citing the APRP (Afghan Peace and Reintegration Programme)

A document published by IRIN News in June 2010 states that Amnesty will be granted to ex-combatant commanders, vetted by security institutions and communities, where local grievances can be resolved and where ex-combatants will live in accordance with the laws and Constitution of Afghanistan, renounce violence, and have no current or future ties to Al-Qaeda or other terrorist groups, states the APRP. Senior Taliban leaders on a UN Security Council blacklist will have their names cleared if and when they side with the government, according to the APRP.

As a confidence-building gesture, five Taliban officials were removed from the list in the January. However, Human rights organizations, however, criticize a blanket amnesty for Taliban fighters and say no viable peace can be achieved without justice. "The worsening human rights situation in Afghanistan has deep-rooted connections to had governance, the existence of the culture of impunity in Afghanistan, absence of the accountability for the past and continuous human rights violations,"

A report which was published in July 2010 by Human Rights Watch states:

> The Amnesty Law states that all those who were engaged in armed conflict before the formation of Afghanistan's Interim Administration in December 2001 shall "enjoy all their legal rights and shall not be prosecuted." It also says that those engaged in current hostilities will be granted immunity if they agree to reconciliation with the government, effectively providing amnesty for future crimes. The law thus provides immunity from prosecution for members of the Taliban and other insurgent groups, as well as pro-government warlords, who have committed war crimes[149]

A paper issued in October 2010 by the Afghanistan Research and Evaluation Unit states that a common refrain was that the amnesty law will be instrumental in enticing insurgent groups and their leaders to come to the table through generating assurances that no action, retributive or otherwise, will be taken against them for their actions in the years of conflict.

[149] Human Rights Watch (12 July 2010) The "Ten-Dollar Talib" and Women's Rights [Online]. [cited 9 Oct 2016] Available From https://www.hrw.org

Some interviewees saw the passage of the amnesty law and its sweeping nature—it potentially forgives past, present and future crime[150]

4.4. BLANKET IMMUNITY; AFGHANISTAN CRISES

It is describe that provides blanket immunity and pardons former members of Afghanistan's armed factions for war crimes and human rights abuses committed prior to December 2001 was quietly enacted three years ago by parliament, despite previous assurances by President Hamid Karzai that he would not sign it or allow it to take effect.[151]

According to Mr. Karzai's spokesperson, the amnesty law was enacted because it was approved by two-thirds of parliament and therefore did not need Mr. Karzai's signature. Parliament is made up largely of former warlords who were accused by Afghans and human rights groups of war crimes.[152]

Mr. Waheed Omer said that this law was passed with a two-thirds majority in our parliament, and according to our constitution, when a law is passed with a two-thirds majority, it does not require the president to sign it,"

He also said during a briefing Tuesday, publicly acknowledging for the first time the blanket immunity provision is now law. His comments were first reported by Reuters.

Human rights groups learned that the law was enacted after it was published in Afghanistan's official gazette.

> It is not clear when this happened, as the date on the gazetted law is December 2008, while some sources say it was not published until January 2010, when printed copies

150 Afghanistan Research and Evaluation Unit (October 2010) Peace at All Costs? Reintegration and Reconciliation in Afghanistan

[151] International Centre for Transitional Justice (16 March 2010) Afghanistan Enacts Law That Gives War Criminals Blanket Immunity

[152] International Centre for Transitional Justice (16 March 2010) Afghanistan Enacts Law That Gives War Criminals Blanket Immunity

of the law were received by organizations that monitor the gazette," according to Human Rights Watch, which condemned the law and demanded that it be repealed.[153]

4.4.1. IMPACTS OF LAW

When this law passed in early 2007, the National Reconciliation, General Amnesty and National Stability Law said anyone engaged in armed conflict before the formation of the Interim Administration in Afghanistan shall enjoy all their legal rights and not be prosecuted.[154]

This law provides amnesty to all political factions and hostile parties who were involved in a way or another in hostilities before establishing of the interim administration in December 2001, including "those individuals and groups who are still in opposition to the Islamic Republic of Afghanistan and cease enmity after the enforcement of this resolution and join the process of national reconciliation and respect the constitution and other laws and abide them.[155]

HRW said that the amnesty law was passed at a time when Afghan public opinion was beginning to mobilize against warlords and impunity.

An opinion survey published by the Afghan Independent Human Rights Commission indicated that large majorities favored prosecutions, according to HRW, which documented some of the widespread human rights abuses that took place between 1992 and 1993 in a report, Blood Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity. The Afghan government, the UN, the Commission, donor governments and others were involved in discussions about addressing past abuses through the government's Transitional Justice Action Plan.[156]

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[153] Human Rights Watch (10 March 2010) Afghanistan: Repeal Amnesty Law [Online]. [cited 12 Oct 2016] Available From https://www.hrw.org

[154] Human Rights Watch (10 March 2010) Afghanistan: Repeal Amnesty Law [Online]. [cited 2 Nov 2016] Available From https://www.hrw.org

[155] Ibid

[156] Ibid

In 2006 the Afghanistan government launched the Action Plan for Peace, Reconciliation and Justice in Afghanistan, which makes clear commitments to:

1) Acknowledge the suffering of the Afghan people
2) Ensure credible and accountable state institutions and purge human rights violators and criminals from the state institutions.
3) Undertake truth-seeking and documentation.
4) Promote reconciliation and improvement of national unity.
5) According to HRW establish a task force to recommend an additional accountability mechanism.[157]

Mr. Brad Adams was director of HRW in Asia. He said that Afghans had been losing hope in their government because so many alleged war criminals and human rights abusers remain in positions of power.[158]

He also said that the amnesty law was passed to protect these people from prosecution, sending a message to Afghans that not only are these rights abusers here to stay. The Eurasianet states that:

> The government of Afghanistan did not have the right to usurp the rights of victims. But the state had a duty to investigate and prosecute war crimes, crimes against humanity and other serious human rights violations such as disappearances, torture and extra judicial killings.[159]

Although a provision in the amnesty law allows victims of atrocities to file individual claims against alleged perpetrators, TJCG said it "places an unfair burden upon victims, who have already suffered so much and would put themselves at risk of reprisals given the impunity that prevails in Afghanistan today."

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[157] International Centre for Transitional Justice (16 March 2010) Afghanistan Enacts Law That Gives War Criminals Blanket Immunity

[158] Ibid

[159] Eurasianet (5 April 2010) *Afghanistan: Rights Experts Have Doubts about Reconciliation with Taliban* [Online] 2016 [cited 19 Nov 2016] Available From http://www.amnesty.org

> This provision is particularly impractical so far as it concerns women and the many victims of sexual violence, who already face considerable barriers to obtaining justice," TJCG said. "Provision for the granting of amnesty in respect of future crimes further undermines the legitimacy of the law and serves as an open invitation for the continued commission of abuses with impunity.[160]

4.4.2. GROSS VIOLATION OF HUMAN RIGHTS IN AFGHANISTAN

Mr. Karzai's government includes high-level officials who were accused of war crimes. It is reported by Reuters that both of Mr. Karzai's vice presidents were former leaders of armed groups whose factions squabbled for control of Kabul in the 1990s, when thousands of civilians were killed and hundreds of thousands fled their homes.

The amnesty law absolves them of their past crimes. So, Mr. Karzai approved the re-appointment in January of General Abdul Rashid Dotsum, an ex-militia chief, to a high-level military position, which was harshly criticized by civil rights groups.[161]

Reuter also reported that Washington and other capitals have accused Mr. Abdur Rashid Dostum of 'massive war crimes,' including the death of some 2,000 Taliban fighters who suffocated in cargo containers in which they were being held after surrendering to Dostum in 2001,

> His style of governing had been harshly criticized by United States officials.[162]

It was also reported by the Reuters that this was not the first time Mr. Karzai had ushered through a law after promising not to pass it, or pledging to make changes to the law before signing it only to revoke those changes later.[163]

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[160] Ibid

[161] Eurasianet (5 April 2016)s *Afghanistan: Rights Experts Have Doubts about Reconciliation with Taliban* [Online] 2016 [cited 19 Nov 2016] Available From <http://www.amnesty.org>

[162] Ibid

4.5. GROSS VIOLATION OF HUMAN RIGHTS IN YEMAN: BLANKET IMMUNITY FOR YEMANI PRESIDENT

The Cairo Institute for Human Rights Studies (CIHRS) its deepest concern regarding the continuously deteriorating human rights situation in the Republic of Yemen, fostered by an environment of legalized immunity granted to perpetrators of alleged War Crimes and Crimes against Humanity. Considering the bloody warfare launched by state lead troops against peaceful protestors throughout the year, and in light of the ongoing human rights violations. It was viewed with great concern that the Parliament's decision to pass a law granting immunity to President Ali Abdullah Saleh[164] and high officials. It was consider as a step towards embedding impunity in a new Yemen in addition to being a real obstacle to the creation of the state that Yemenis have aspired to and sacrificed for: namely one that respects and promotes the rule of law.[165]

4.5.1. ILLEGAL BLANKET IMMUNITY

While in 2012, the Yemeni Parliament approved a law granting Mr. Ali Abdullah Saleh, along with his aides, domestic immunity from all political crimes committed during his 33 years as president. Given that all the crime committed by him could be considered political. Ali Abdullah Saleh and his aides were granted illegal blanket immunity from serious international crimes. Amid wide national dissent, the law came as a part of the deal that Saleh struck by signing the Gulf Cooperation Council's (GCC) initiative in November 2011. The initiative, with its clauses permitting the amnesty, received the support of numerous states and bodies, including the United State and the EU, in addition to the backing of United

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[163] Ibid

[164] Mr. Ali Abdullah Saleh Al-Sanhani Al-Humairi is a Yemeni politician who was ousted as President of Yemen in 2012. Mr. Saleh previously served as President of North Yemen from 1978 until unification with South Yemen in 1990.

[165] 2012 UNHCR country operations profile – Yemen, UNHCR, http://www.unhcr.org/pages/49e486ba6.html S/RES/2014 (2011): http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/YEMEN%20S%20RES%202014.pdf

Nation Secretary General Ban Ki-moon and his Special Adviser for Yemen Mr. Jamal Benomar. However, it is said that the passing of this legislation a clear violation of national and international law. The impunity clause would impede and obstruct future negotiations within Yemen to ratify the ICC Rome Statute as aspired to by several Yemeni groups.[166]

4.5.2. GROSS VIOLATION OF HUMAN RIGHTS IN YEMAN

The continuous attempts by Mr. Abduulah Saleh's regime to quell the revolution in Yemen had resulted in the death of around hundreds of individuals, who either died in protests or due to random shelling across the country. In addition to the over thousands injured during one year, there are numerous documented cases of enforced disappearances, arbitrary detentions, and allegedly torture in detention facilities in Yemen, especially in camps run by Central Security Forces, the Republican Guard, and the Air Force. A number of children had been killed and 800 others injured also, in addition to the illegal use of children in armed conflict. The media had been targeted, with journalists killed, detained, and assaulted, and offices raided and closed. Human rights defenders also faced numerous violations, including assassinations.

That is in addition to the collective punishment of the population through continuously cutting off communications, fuel shortages, electricity, premeditated governmental attacks against medical personal, attacks against local volunteers, crippling and halting the work of national and international humanitarian NGOs, and the random shelling of civilian populated areas. According to the UNHCR, "By August 2011, some 100,000 IDPs were registered in the south, in addition to the 299,000 IDPs already in the north."[167]

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[166] Ibid

[167] 2012 UNHCR country operations profile – Yemen, [Online]. [cited 13 Oct 2016] Available From http://www.ohchr.org/EN

Some of the massacres that the Mr. Abdullah Saleh regime committed throughout the past year, and for which president Abdullah Saleh and his officials should carry full political and criminal responsibility, include the killing of peaceful protesters in *Taghyeer* Square in *Sanaa* by government led militias; the killing of another protesters in *Taiz*, some of which were burnt to death; and, even after Mr. Saleh presumably entered negotiations to leave office, the massacre of at least 26 protesters on September 18 by security officers and snipers in *Sanaa's* Taghyeer Square. So, the random shelling of populated areas had resulted in additional human rights catastrophes.

4.5.3. DEMAND OF UN SECURITY COUNCIL

Shortly after the United Nation Security Council voted on Resolution 2014[168] demanding that the killings and other human rights violations in Yemen been halted, dozens of clashes erupted in the country leaving dozens dead and hundreds wounded. In November alone, around 35 were killed in random shelling in *Taiz*. On November 11, at least 17 people were killed and dozens wounded in random shelling by Mr. Abdullah Saleh's forces across *Taiz*. Hospitals and houses were also reportedly shelled in these attacks. Even as Mr. Abdullah Saleh makes use of his diplomatic immunity and travels to the U.S. for medical treatment, the country remains in a highly unstable security situation, as noted in the High Commissioner's report on the OHCHR visit to Yemen from June 28- July 6[169] and human rights violations are yet to be halted.

It is also that the current political atmosphere continues to be characterized by the complexity of Yemen's tribal structure, the interference of foreign non-state and state actors, deep-rooted territorial cleavages (South-North), and psychological wounds of repeated civil

[168] S/RES/2014 (2011) [Online]. [cited 13 Oct 2016] Available From http://www.securitycouncilreport.org

[169] 2012 UNHCR country operations profile – Yemen, [Online]. [cited 13 Oct 2016] Available From http://www.ohchr.org/EN

wars fostered by Mr. Abdullah Saleh's regime during the past three decades. It was also doubtful that the Gulf Initiative, which entered into force after it was signed by the Yemeni vice-president and the opposition Joint Meeting Parties (JMP), or the immunity law, which came as a result, will successfully end the conflict in Yemen. CIHRS had repeatedly called on the international community to withdraw their support for the security and military strategies of Mr. Abdullah Saleh's regime to end the tribal conflict in the country. Political and Social negotiations had proven to be useful in unifying the opposition and tribal positions during the past years.

It is very necessary to know that under Article 153 of the Yemeni constitution, the Yemeni Supreme Court can rule the law unconstitutional, while internationally any country can claim universal jurisdiction for the international crimes that Mr. Abdullah Saleh had committed while in office, after his diplomatic immunity ends by the end on February 21, 2012.

The UN High Commissioner for Human Rights Navi Pillay expressed her complete rejection of the immunity law while the UN Special Adviser to the Secretary-General for Yemen, Mr. Jamal Benomar, said "I was pleased that immunity law had been modified but it did not go far enough. The UN could not condone a broad amnesty that covers UN classified crimes against humanity, genocide, war crimes, gross violations of human rights, and sexual violence,[170] four Regional human rights groups and prominent civil society actors, including Nobel Peace Prize laureate Tawakkol Karman, went further condemning this law, which prioritizes Yemen's "stability" as a geopolitical ally of the Gulf countries and the U.S. in the Gulf of Aden and their fight against *Al-Qaeda,* over the atrocities committed during Mr. Abdullah Saleh's 33-year rule. It was also stress that principles of transitional justice and human rights could not be achieved in an environment that fosters impunity and disregards

[170]As quoted in "Yemen grants Saleh immunity to try to end crisis", Reuters. January 21, 2012. [Online] 2016[cited 13 Dec 2016] Available From http://af.reuters.com/article

accountability. Despite the numerous massacres and violations that had been committed against peaceful civilians, only the events of March 18 were referred for domestic investigations following public pressure. Authorities had held more than hundred individuals on charges, but it remains unknown whether security forces are included among the defendants or not. In this regard, the UN Human Rights Council resolution on Yemen[171] that notes the Yemeni government's announcement that it will conduct the proper investigations and inquiries into the committed violations is neither reasonable nor comprehensible, especially in light of the government's direct involvement in committing such crimes and its blatant unwillingness to conduct fair and independent investigations. So, CIHRS calls upon the members of the Human Rights Council to:

- ☆ Retract any acknowledgement of the amnesty law and call upon the government of Yemen to revoke this unconstitutional law that blatantly violates international law.

- ☆ It is also demanded that the continuous human rights violations in Yemen are immediately stopped, especially considering the upcoming presidential elections in February 21, and establish an independent international investigation mandated to investigate all alleged international crimes committed in Yemen since the beginning of protests in 2011.

- ☆ It is also necessary to allocate the proper budget and staffmg required for an OHCHR country office in Yemen that can provide logistical support to the Yemeni government, civil society organizations (including human rights NGOs), and political parties willing to engage positively in a transitional justice process.[172]

[171] A/HRC/18/L.32 (2011) [Online] 2015[cited 23 Nov 2016] Available From http://daccess-dds-ny.un.org

[172] Ibid

CONCLUSION

It is cleared that the amnesty law will be instrumental in enticing insurgent groups and their leaders to come to the table through generating assurances that no action, retributive or otherwise, will be taken against them for their actions in the years of conflict. But, Human rights organizations criticize a blanket amnesty for serious criminals because this action is the main cause of gross violations of human rights.

CONCLUSIONS AND RECOMMENDATIONS

Personal immunities protect only high-ranking government officials, such as heads of state, heads of government and ministers for foreign affairs. Personal immunities protect these officials absolutely, protecting both their unofficial and official acts. But personal immunities do not protect indefinitely; their protection ceases when an official vacates her high ranking position, after which only functional immunity remains. The opening for signature of the 1961 Vienna Convention on Diplomatic Relation represented a triumph for the functional necessity theory of diplomatic immunity.

It is cleared that when crimes are not prosecuted, the principle of the rule of law is totally disregarded and perpetrators continue to be a threat to the society in which they reside. It also shows that the prosecuting criminals are based on the needs to protect society and the international community as a whole. A nation's respect for few suffers when military and civilian authorities can commit criminal acts with impunity.

This shows the role of amnesty law in International Human Rights law. It is also tried to explain the term gross violations of human rights. It is cleared from pervious discussions that different countries have chosen widely different strategies to deal with the past and may be classified in retributive justice prosecutions, trials and restorative Justice. Although justice is crucial after violations of human rights, it may not be possible or practical. International tribunals are useful, but they are not the full solution.

It is also cleared that the amnesty law will be instrumental in enticing insurgent groups and their leaders to come to the table through generating assurances that no action, retributive or otherwise, will be taken against them for their actions in the years of conflict. But, Human rights organizations criticize a blanket amnesty for serious criminals because this action is the main cause of gross violations of human rights.

RECOMMENDATIONS

To International Community

1. Blanket immunity should be restricted and its scope needs to be narrowed down.
2. Humanity should be saved from gross violation of human rights on the name of blanket immunity by making some regulations on use of blanket immunity.
3. It will be sure that the criminals should be punished to establish the rule of law in the society.
4. International tribunals and organizations should be encourage for playing their role in restricting use of blanket immunity and in punishing criminals who falsely took blanket immunity for hiding their gross violation.
5. Rule of law should be encourage and to discourage use of blanket immunity for further progress in saving humanity from gross violation of human rights

To domestic communities

1. International standers should be apply in exercising blanket immunity and make sure that international norms and standers are being enforced in the country for protecting humanity from gross violation of human rights.
2. It should be made sure that criminal who took blanket immunity falsely they must be punished.
3. Their legislation should be made in the light of international standers and norms lay down by civilized countries for the protection of human rights and for saving humanity from gross violations.
4. It should be necessary to discourage use of blanket immunity and give sport to international community for narrowing down the scope of blanket immunity.
5. It should be necessary to protect humanity from gross violation of human rights
6. It should be make sure implement international conventions and international regulations for protection gross violation of human rights.

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