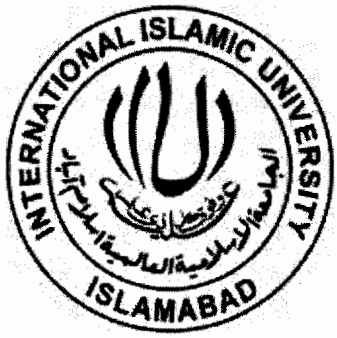
DOCTRINE OF STATE IMMUNITY AND APPLICATION OF INTERNATIONAL HUMANITARIAN LAW



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DOCTRINE OF STATE IMMUNITY AND APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

Thesis Statement: The doctrine of state immunity can no longer absolve a Head of state from criminal liability for committing grave breaches of International humanitarian law.

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LLM (International Law)

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It is certified that the work contained in this dissertation entitled "Doctrine of state immunity and application of International Humanitarian" submitted by Hina (Reg No.119-FSL /LLMIL/F08) is of sufficient standard and has been has been approved for submission at International Islamic university, Islamabad for the partial fulfillment of degree of LLM in International Law.

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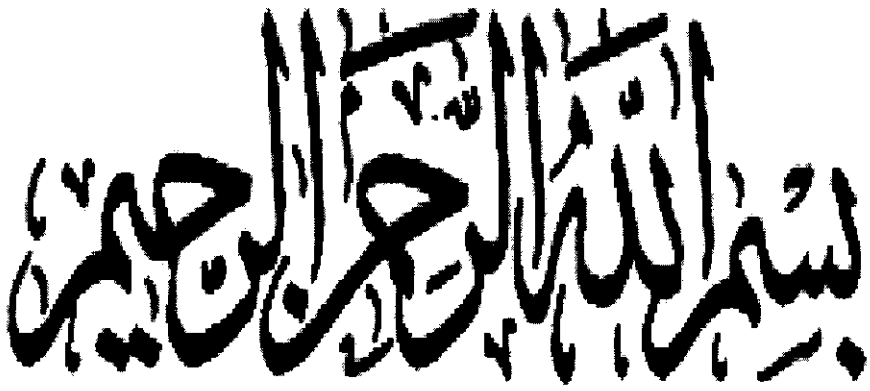

"IN THE NAME OF ALLAH WHO IS MOST

BENEFICENT AND MERCIFUL"

DEDICATION

To my

"My Mother & Humanity"

TABLE OF CONTENTS

ACKNOWLEDGEMENT

Innumerable thanks to ALMIGHTY ALLAH, for giving me courage to accomplish the assigned task completely. Also thanks to our **Holy Prophet Muhammad (SAW)** for enabling us to recognize our Lord and Creator.

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HINA

LIST OF CASES

INTRODUCTION

"But something very dramatic happened in that Belmarsh courthouse. Not something merely symbolic. For some people at least, the world had suddenly been turned upside down. For some people, life would never be the same."

Chilean writer Ariel Dorfman

During the last sixty years the question of sovereign state immunity is of great significance, had caught the attention of world community .During armed conflict over past centuries a lot of breaches of international humanitarian law were accrued. However plea of state immunity has been really did its work while protecting international criminals under the curtain of immunity. According to doctrine of state immunity the head of state and other high official will not be subject to civil and criminal prosecution. The doctrine of state immunity used, by immune officials in a negative way, which added war crimes, crimes against humanity, genocide, cultural and religious Injuries to the history of human. The purpose of this principle was for the smooth running of governmental machinery with out of unnecessary interruption by external or internal bodies.

The issue of state immunity and granting pardon to these high officials like heads of state is an incredibly complex problem for international community. This thesis will examine the international law regime which has been developed to deal with the doctrine of state immunity. The focus of this thesis is to bring an exception to doctrine of state immunity that is the principle of individual and command responsibility. The principle of individual and command responsibility rejects the plea of state immunity while deciding cases of international criminals. Over recent years this principle of individual responsibility has been recognized to some extent by world community but still it has no proper enforcement mechanisms.

This thesis is aimed to analyze of International law and International Humanitarian Law related to concerned issue. The objective of the thesis is to point out the issues regarding state immunity and its exceptions that is individual criminal responsibility under international law and international humanitarian law, to bring out the solutions for proper implementation of International Humanitarian Law.

Literature Review

The issue of state immunity has been discussed by various scholars. Heidi Altman in his article[1], says that the decision of International Court Justice in *Congo V Belgium* [2]is shocking as it harmed the process concerning state immunity and individual criminal liability. He further asserts that decision was based on political consideration rather than logical or on ethical. Altman analyzes that doctrine of state immunity has been transferred from absolute into restrictive form, the international community have recognizes the principle of universal jurisdiction in order to try core international crimes. He criticizes the Princeton Project on Universal jurisdiction, that it did not answer the question of future procedural immunity of sitting heads of states. Altman acknowledged in his article that different international law instruments like, charter of Nuremberg Trail; Far East, charter of International criminal tribunal of Yugoslavia, and Rwanda; convention against Genocide and statute of International Criminal Court, on the other hand state practice shows refusal of granting immunity in case of international crimes. According to writer both state practice and *opinio juris* shows that refusal of plea of immunity in cases of core international crimes has reached to status of customary international law.[3]

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[1] Heidi Altman, "The future of head of state immunity the case against Ariel Sharon," (April 2002),www.crimesofwar.orgonnews.belgium2.html. http:// www.indictsharon.net/heidaltman-9pro.pdf. (last accessed 12/11/2009 01:10), 4.

[2] Arrest Warrant of 11 April 200 (Congo V. Belgium), 41 I.L.M (2002).

[3] Altman, 4.

Similarly Stacy Humes –Schulz, analyzing state immunity in his article[4], criticized the decision of House of Lord in case of *John V Sudia Arabia*[5] as the House of Lord denied monetary relief demanded by John, he assert that House of Lord had ignored the current development in international law regarding doctrine of immunity. He stated that traditional immunity was not absolute by coating Rosolyn Higgins *"It is sovereign immunity which is exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity"*. Further Jurist Schulz analyzed that immunity is based on the nature of acts by coating Lord Denning *"that sovereign immunity should not depend on the wish of government but upon the nature of act"*. He suggested that now the world is global village so there should be a new international system which may bring a balance between sovereign immunity and law.

On the other hand, Lee .M Caplan, deals with doctrine of immunity in his article[6],Caplan asserts that state immunity emerged due to the conflict between two international law rules, these are sovereign equality and adjudicatory jurisdiction. While criticizing normative hierarchy theory, which suggests that, shift from absolute immunity to restrictive immunity, occurred due to recognition of human rights Caplan on the other hand says, that doctrine was not absolute and it can not shields the violator from prosecution, and if there was the normative theory cannot explain that how human rights norms can defeat the doctrine. He proposes that collective benefit theory can help to distinguish between protected and non protected sovereign conduct .Caplan further

[4] Stacy Humes- Schulz, "Limiting Sovereign Immunity in the Age of Human Rights," *Harvard Human Rights Journal* 21(2008), http://www.law Harvard.edu/student/orgs/ /hrj/iss21/105-142.pdf. (last accessed 24./05/2009),

[5] Jones V Saudia Arabia, UKHL 14 June 2006.

[6] Lee M. Caplan, "State immunity, Human Rights, and Jus Cogens: A Critique Of the Normative Hierarchy Theory," *American Journal of International Law* 97, no. 4 (October 2003), http://www.jstor.org/stable/3133679 (last accessed: 06/07/2009 06:16)

asserts that national laws of different states protects the human rights violator rather then by international law, while discussing, the decision of Al- Adsani[7] case and other cases decided by domestic court of different states..

Mark A Summer disuses in this article[8] the issue of prosecution of high officials of state. In first instance he says that father of international law Hugo Grouts will be surprised as twenty first century has brought certain rule according to which these high officials can be prosecuted. The concept of absolute immunity has been abolished after World War II. Writer has criticized the decision of International Court of Justice in arrest warrant case and its impact on future of issue of immunity. He says that trail of Nuremberg and Geneva convention has made it clear that impunity on the part of any one will not be tolerate, but International Court Justice has ignored the previous decided cases and only stick to an awkward rule of international law. He further states that even Foreign Sovereign Immunity Act of United States had brought certain amendments which have brought exception to absolute immunity. Author as well analysis the provision of International Criminal Court regarding issue of immunity, says that article 27[9] completely

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[7] Al-Adsani V Kuwait, 103 ILR 420(Q.B)

[8] Mark A Summers, "Immunity Or Impunity?" The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court," *Brook. J INT'LJ* 31, no.2, http://www.brooklaw.edu/student/journal/bjiil/bliil (last assessed 07/05/2009), 463.

[9] Article 27(1) [t]his statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of state or Government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2(27)[i]mmunities 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

override immunity while article 98[10] preserve immunity for non state parties due to which article 27 becomes non effective. But he suggest that non state parties to International Criminal Court can be prosecute for grave breaches of international humanitarian law by respective provision of Geneva conventions .In last he says that violator of human rights even now can take plead, "L'etat c est moi" in the light of International Court of Justice's decision in Congo V Belgium.

Justice Birkett, in hid article[11] says that the verdict of Nuremberg will be the verdict of history, as the trial and Charter has eliminate all the defenses which other wise could help the accused to have a safe way from punishment, That is firstly; elimination of superior order, secondly; plea of state immunity; thirdly; individual criminal responsibility. He further asserts that critics say that Nuremberg trail and charter is a victor justice but he suggests that it had opened the door to prosecute international criminal irrespective of nationality.

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[10] The court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the cooperation of that third state for the waiver of the immunity.

The court may not proceed with the request for surrender which would require the requested state to act inconsistently with its obligations under international agreement pursuant to which the consent of a sending state is required to surrender a person of that to the Court, unless the court can first obtain the cooperation of the sending state for the giving of consent for the surrender.[10]

[11] Justice Birkett, "International legal Theories Evolved at Nuremberg," *International Affairs* 23, no.3 (July 1947), http://www.jstor.org/stable/3017222 (Last accessed 02/11/2009), 325.

Jamie Allan Williamson asserts. asserts in his article[12] the under international humanitarian law the commander has the duty among other duties to control the subordinate from violation of laws of war during the hostilities, failure to do so the commander can not be absolve from criminal liability. But some time heavier punishment can be award to him. Article 86[13] of additional protocol, to Geneva Convention, requires that commander should suppress all the violation of Geneva Convention. The similar rule are also recognizes by statute of International Criminal Tribunal of Yugoslavia .The international criminal jurisprudence has made it plain that ignorance in the part of superior will amount to criminal responsibility .

Alexander Orakhelashvili, make analysis while reviewing work of Christian Tomuschat, Jean Marc and Zimmerman[14]asserts that every violation of jus cogens norms needs application of universal jurisdiction as decision of different tribunal suggested that every jus cogens norms entails universal jurisdiction, further he illustrate that even there is also a connection between jus cogens and universal jurisdiction in civil cases. He further

12 Jamie Allan Williamson, "some consideration on command responsibility and criminal liability, *"International Review of the Red Cross* 90 no.870 (June 2008), 90 no.870 (June 2008), http://jouranls.cambridge.otg/action/displyaAbstract;jsessionid=608c50139FBDD4E7D32F000AFDE4512.tomcat1?frompage=online&aid=2439028 last accessed 15/05/2009 11:51.

[13] 1 The high Contracting parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Convention or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

[14] Alexander Orakhelashvili, "The Fundamental Rules of the International Legal Order: Jus cogens and Obligations Erga Omnes,", ," *The American journal of International Law* 100, no.2 (April 2006), http://www.jstor.org/stable/3651184 (last accessed 06/01/2010), 515.

states that if there is a contradiction between state immunity and *jus cogens* norms the *Jus cogen* norm will be prevail over state immunity, as *Lex superior.*

Dapo Akande states in his article[15] that a change has been came in to existence that is restriction of the laws of immunities. As in Pinochet[16] III the House of Lord gave the ruling, that certain conduct of state official cannot invoke the plea of immunity. Similarly the different international criminal tribunals have made it clear that in case of core international crimes. But when such tribunal has been establish by prior permission of Security Council. Further he discuses the Statute of International Criminal Court, and says that in existence of article 98 of the ICC, the criminal court cannot become operative and suggest that statute shall be amended in order to get benefit of article 27 of the statute.

After review of work of some scholars it is clear that the law of immunities can not plead in cases where the high official of states involves in gross miss conduct that is grave breaches of IHL and crimes against humanity. However, Steven R. Ratner observe in his article[17] that Belgium's War crimes Statute put to certain amendment due to demand of America, as certain complaints came against US and Israeli high States officials.

There is a need to deep study of contemporary international law related to issue concerned.

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[15] International law immunities and the international criminal court," *The American Journal of International Law* 98, no.3 (july.2002), http://www.jstor.org/stable/3181639 (last accessed 06/07/2009), 407.

[16] Reg.V Bow street magistrate, ex parte. Penochet, 1999.

[17] Steven R. Ratner, "Belgium's War Crimes Statute: A Postmortem," *The American Journal of International law* 98, no.4 (2003), http://www.jstor.org/stable/3133687 (last accessed 06/07/2009 06:07),889.

Chapter I

The Principle of State Immunity in Theory and Practice

This chapter analyzes the concept of immunity in the international law. From where it started and what was its significance and impact, and a shift from absolute to restrictive theories also state practice regarding issues of immunity and prosecuting international criminals. It deals with the establishment of new international criminal jurisprudence, which had brought an exception to doctrine of individual criminal responsibility. This chapter will discuss further the immune and non immune conduct of state officials and gapes between theory and practice.

1. Introduction to State Immunity and its Historical Background

Doctrine of State Immunity is an important principle of Customary International Law. According to the doctrine of State Immunity, high officials like the Heads of States, diplomats and foreign ministers are not to be subjected to prosecution in domestic courts as well as in foreign courts in criminal and civil cases.[1] Sovereign immunity shields foreign and domestic governments from suit in the municipal courts of a particular nation without their prior consent. Thus according to Doctrine of Sovereign Immunity or State Immunity states are immune from jurisdiction of other states.

[1]Thomas R.Van Dervort, *International Law and Organization an Introduction* (London: Sage Publications, 1998), 362.

However, in the past sovereign immunity recognized a principle that a national court has no power to give decision against other sovereign state. If a state does so, the judgment would be deemed as null and void.[2] The Principle of sovereign immunity allows the governmental authority to act with in its territory without the apprehension that its actions will be subjected to adjudication by its own courts or to any foreign courts.[3] Sovereign immunity imports equal independence to all states to administer its internal policies without intervention of other states[4]. Historically, the Doctrine of State Immunity emerged in European countries in 18th & 19th century.[5]

Most of the civilized states recognized the principle settled by United Kingdom *The King Can Do No Wrong*. According to this principle, the King's authority is absolute and permanent and he would not be subjected to any code. So no court is competent to try him.[6] International law had a long list of cases in which the plea of sovereign immunity has been taken, through which violator of human rights and of other laws, may find a safe way from any kind of punishment.

1.1 Immunity *Ratione Materiea*

This kind of immunity also called functional immunity; it had been derived from customary international law. According to this theory of immunity, any state official

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[2] Stacy Humes- Schulz, "Limiting Sovereign Immunity in the Age of Human Rights," *Harvard Human Rights Journal* 21(2008), http://www.law Harvard.edu/student/orgs/ /hrj/iss21/105-142.pdf. (last accessed 24./05/2009), 109.
[3] Heidi Altman, "The future of head of state immunity the case against Ariel Sharon," (April 2002), www.crimesofwar.orgonnews.belgium2.html. http:// www.indictsharon.net/heidaltman-9pro.pdf. (Last accessed 12/11/2009 01:10), 4.
[4] Schulz, "Limiting Sovereign Immunity in the Age of Human Rights," 109.
[5] Altman , "The future of head of state immunity the case against Ariel Sharon," 4.
[6] M.Mehmood,*The Pakistan Penal Code*, 1st ed. (Lahore: Al-Qanoon Publishers, 2006), 25.

while performing duties on behalf of state is immune from criminal prosecution. The office of head of state and head of government and other high state officials are immune from prosecution.[7] Foreign minister of Democratic Republic of Congo[8] had been given the favor of immunity from criminal prosecution award by International Court of Justice. Similarly Zimbabwe's President Robert Mugabe, was awarded immunity by American court, therefore he was entitled to immunity even for serious violation of international criminal law.[9]

1.2 Immunity *Ratione personae*

The immunity Rationale personae have been granted to diplomats and their families in the host states, it is also rooted in customary international law. According to this theory, states officials in the host state are immune from civil and criminal prosecution .In case of violation of laws of the host state may declare the person as persona non grata. This immunity ceases with the expiry of term of the office.[10]

1.3 Historical Background

The King can do no wrong: According to the common law the king of England can do no wrong under the constitution of United Kingdom. The monarch authority is absolute and permanent. It follows that the monarch could not be prosecuted under

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[7] en.wikipedia.org/wiki/State_**immunity, (last accessed 21/3/2010)**
[8] Arrest Warrant of 11 April 200 (Congo V. Belgium), 41 I.L.M (2002).
[9] Michael A. Tunks"Diplomats or Defendants? Defining the future of Head –of –state Immunity," *Duke Law Journal* 52, no. 3 (December 2002), http://www.jstor.org/stable/1373165 (last accessed: 06/07/2009 06:39),655.
[10] en.wikipedia.org/wiki/State_**immunity, (last accessed 21/3/2010)**

any law because these codes are not applied to the king, nor any court is competent to try him or her[11].

Classical international law recognizes an absolute right of state to do all acts without being subjected to any domestic and international obligation. International legal system asserts certain rights to the states by virtue of sovereign immunity, as this assertion states are free to act without being subjected to any obligation.[12] This is known as state immunity.

The doctrine of sovereign or foreign immunity in international law was born out of the tension between the two important international law norms...*sovereign equality and exclusive territorial jurisdiction.* The two above mentioned principles explain that the concept of sovereign equality is based on what is known as the fundamental right of states. This is a settled principle of international law. The maxim par *in parem non habet imperium*, explains the principle which literally means "An equal has no power over an equal".[13]

The sovereign equality of states asserts that state immunity is an evolving exception to the principle of territorial jurisdiction. In such a situation a state waives its adjudicatory jurisdiction in respect of other state in order to run smoothly inter state

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[11] Mehmood, *The Pakistan Penal Code* ,25.

[12] Marc Weller, "On the Hazards of Foreign Travel for Dictators and Other Internati nal Criminals," *Blackwell publishing on behalf of Royal institute of international affairs* 75, no.3 (1999), .http://www.jstor.org/stable/2623638 (last accessed: 06/07/2009 06:39),599.

[13] Lee M. Caplan, "State immunity, Human Rights, and Jus Cogens: A Critique Of the Normative Hierarchy Theory," *American Journal of International Law* 97, no. 4 (October 2003), http://www.jstor.org/stable/3133679 (last accessed: 06/07/2009 06:16), 745.

relations. Theodore Giuttari explains the maxim in historical context in the classical period of international law as:

> In this period, the state was generally conceived of as a juristic entity having a distinctive personality and entitled to specific fundamental rights, such as the rights of absolute sovereignty, complete and exclusive territorial jurisdiction absolute independence and legal equality within the family of nations consequenaly it appeared as a logical deduction from such attributes to conclude that as all sovereign states were equal in law, no single state should be subjected to the jurisdiction of another state.[14]

State immunity was firmly recognizes at that time had complete independence in its internal affairs was not subject to any other authority.

The United States Supreme Court's decision in the *Schooner Exchange v McFadden* 1812[15] which was widely regarded as the first definitive statement of the doctrine of the foreign state immunity, presents the classic example of this theoretical conflict. In 1812 while sailing of the American cost, Commercial Schooner, an exchange owned by two citizen of Marry Land, was seized by the French Navy by order of the emperor Napoleon Bonaparte. The French navy converted the Schooner into a warship. due to bad weather forced the exchange into the port of Philadelphia, the original owner brought action in rem arguing that as a ship of war the exchange was an arm of emperor and was thus entitled to the same immunity privileges at the emperor himself. On appeal to Supreme Court, Chief Justice John Marshall identified the theoretical dilemma the issue. On one side he observed that as the ship entered into the territory of US, it is subjected exclusively to the national authority of US.

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[14] *Ibid.*

[15] Schooner Exchange V McFadden, 11 U.S 116, (1812).

On the other hand justice Marshal took notice of another fundamental principle of international law that the world as composed on distinct nations each evolved with, "equal rights and equal independence."

Under international law, States are equal. The sovereign equality of State became a rule of Customary International Law. The maxim *par in parem non habet imperium* supports the rule that it is impossible for one sovereign to exercise its power on the other.[16]

In *Schooner Exchange-v- McFadden* 1812 however, the United State claimed the right to exercise jurisdiction because of the physical presence of the Schooner in the US territory. France, in stark contrast, argued that the conversion of the Schooner fell within the ambit of the emperor's power and thus by virtue of its sovereign character, could not be reviewed in the US court. Thus the *Schooner Exchange-v- McFadden* 1812 recognized the doctrine of state immunity. As Napoleon Bonaparte was the Head of state , his act was not subjected to any prosecution,[17] Concept of absolute immunity was developed in eighteenth and nineteenth centuries.[18]

1.3.1 Head of State Immunity and its Purpose

As argued by Michael A. Tunks in his article, the principle of head of state immunity developed in the light of sovereign state immunity, therefore in customary international law Head of state and the state are considered as same. The Vienna

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[16] Caplan, "State immunity, Human Rights, and Jus Cogens: A critique Of the Normative Hierarchy Theory," 748.

[17] Caplan, 731, 745- 746.

[18] Denza, *Diplomatic Law and Organization*, 305.

Convention on the Law of Diplomatic Relations and Privileges provides that a diplomatic agent should enjoy complete immunity from criminal, civil and administrative prosecution in the receiving state.[19] Thus from practical point of view, the treatment towards the ruler and other state's high officials, is influenced from principle of diplomatic immunity, which is a universally accepted rule of international legal order.[20]

The rationale behind the doctrine is to promote international equality and respect among the nations and enable the head of state to run the state system smoothly. Sovereign immunity deems necessary to maintain comity between states and respect among international community.[21] Immunity was granted in a positive prospective Thus this principle allowed the governmental authority to do acts within its territory with out fear to be subjected to adjudication of municipal courts or in foreign courts.[22] The second important purpose is to respect the sovereignty of state, because subjecting ruler of state to other state, to some extent, infringe the rights of sovereignty.[23]

The principle of state immunity is necessary for conducting functions of state without unnecessary intervention of other states, thus there should be some restriction upon this fundamental principle. The heads of states are authorized with unlimited powers, which are not subject to any restriction. Head of state is considered as the

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[19] Alina [illegible] of State Immunity, The case against Ariel Sharon," 4.
[20] [illegible] Defendants? Defining the future of Head –of –state Immunity," 2.
[21] Schaf[illegible] Sovereign Immunity in the Age of Human Rights," 109.
[22] Derv[illegible] *and Organization,"* 304.
[23] Turks[illegible] Defendants? Defining the future of Head –of –state Immunity," 5.

most powerful person than anyone else in the state. One could see great violation of human rights and grave breaches of international humanitarian law at the glob committed by these immune heads of states and other high officials and had a safe way while invoking the plea of immunity. Umar al-Bashir, the president of Islamic Republic of Sudan is a very good recent example of convicting sitting head of state. Although he has been convicted but still he is a sitting head of state, no punishment is implemented on him. The rule of immunity facilitates flagrant violation of human rights.

1.4 Changing Perception of Doctrine in Modern State Practices

The doctrine of foreign state immunity, like other legal doctrine has evolved, progressing through several distinct periods. The first period, covers the eighteen and nineteen centuries has been called the period of absolute immunity. In that era foreign states used to enjoy complete immunity from domestic legal proceedings. The second period emerged during early twentieth century. Western nations, adopted a restrictive approach to immunity in response to the increased participation of state government in international trade.

The twentieth century brought new principles which made a distinction between immune and non immune conduct of State either public or governmental, immunity was granted and on the other hand if the conduct of state is commercial or private, immunity was not awarded.[24].

[24]Caplan, "State immunity, Human Rights, and Jus Cogens: A critique Of the Normative [illegible] 743.

Until the twentieth century there were no International or National courts which could exercise jurisdiction over head of the state or high official. The practice of prosecuting individual for international crimes is now evolved in international legal system.[25] The mechanisms have been established under international law, such as International Court of Justice and the United Nations Human Rights Committee recognize responsibility at state level. Holding individual liable for involvement in international wrongdoing is a modern idea. A recent example is a complaint brought by Palestinians and Lebanese against Ariel Sharon in European court shows substantive shift in international customary law regarding questions of jurisdiction and immunity. The issues of universal jurisdiction and restrictions on substantive immunity for former Heads of state are areas of law reached to the level of *lex lata.*[26]

Twentieth century development however brought some exceptions to the Justice Marshall observation of immunity, which is absolute in its nature that is sovereign state is not answerable to other state as all state are equal and not subject to other for its activities.

In respect of commercial activities most of the developed countries propose the restrictive theory of immunity, the restrictive approach as adopted by most of the states, draws a line between immune and non- immune conduct.

> Accordingly the doctrine of state immunity conduct is currently divided into three types of conduct :(1) conduct that is immune by virtue of customary

[25] Yousaf Askar , *Implementing humanitarian law* (New York: Routledge, 2004), prawfsblawg.blogs.com/prawfsblawg/.../international_law.doc last accessed 23/03/2010 09:56.

[26] Altman, "The future of Head of State Immunity: The case against Ariel Sharon," 3.

> international law, (2) conduct that is immune solely by virtue of domestic law (3) conduct that is not entitled to immunity under either customary international law nor by domestic law.[27]

The trend of absolute immunity is converting into restrictive but still the concept of state immunity uses as shield to have a safe departure from punishment. Substantive immunity for former Heads in the case of grave breaches of international law has effectively evolved into a custom. The treaty of Versailles 1919 and the Nuremberg and Tokyo tribunals have effectively removed the doctrine of immunity. Several high officials were tried for their war crimes. This was acknowledged by International Court of Justice in *Congo V Belgium*[28] case recently. [29]T

The Convention on the Prevention and Punishment of the Crime of Genocide1948 declared that who commits the crime of genocide will be punished irrespective of his status whether is a constitutional ruler, official or private persons.[30]

State custom and *opinio juris* indicate the immunity of head of state should be restrictive. Almost all the developed countries of the world are now going to abide by restrictive theory of immunity.[31]

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[27] Caplan, "State immunity, Human Rights, and Jus Cogens: A critique Of the Normative Hierarchy Theory,"758.

[28] Arrest Warrant of 11 April 200(Congo V. Belgium), 41 I.L.M (2002).
[29]Altman, "The future of Head of State Immunity: The case against Ariel Sharon," 5.

[30] Article 4 of Convention on the Crime of Genocide. 1948.
[31] Dervort, *International Law and Organization* ,304.

1.5 Is Immunity to be superseded by International Justice?

In the evolution of doctrine of state immunity the principle of diplomatic immunity and state sovereignty has played a vital role. It has also played a key role to keep one state neutral out of the actions of other state known as principle of state neutrality. But what does the principle really involve? An international law expert would define the idea that every head of state is immune from prosecution in the courts of other states. We can explain better by analyzing Article 2(1) of the United Nations Charter. "The organization is based on the principle of sovereign equality of all its members".[32]

The interpretation of this provision shows that all states are equal; no other state should interfere in its internal affairs, which give support to maxim equal rights equal independence.

Principle of sovereign equality has been decided in land mark case *Schooner Exchange vs McFadden* 1812[33]. This case recognizes that the principle of sovereign immunity, is not answerable to other. Most of the state immunity instruments clarify that no head of state shall put to prosecution in domestic courts. Such instrument includes the State immunity Act of United Kingdom, the European Convention on State Immunity and the Foreign Sovereign Immunities Act of United State of America. All these international instruments have changed the concept of absolute immunity.

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[32] Article 2(1) UN Charter.
[33] Schooner Exchange V McFadden, 11 U.S 116, (1812).

As Dervort mentioned in his book, explained the international codes and conventions, whereby the provisions of theses codes and conventions rejects the concept of absolute immunity for international crimes. While looking to international practice regarding immunities, it presents a different picture. At the level of international law, it must be shown that the practice of state should be same and consistent in order to develop a customary international rule. Therefore to establish, whether or not immunity is superseded by international justice, we must have to look into the states practices that how they deal with the issue of immunity and violate the international norm (crimes against humanity, war crimes, genocide). This will highlight the manner in which this question of immunity is dealt by the international court of justice in recent case between *Congo V Belgium.*[34]

In international law, customs have great importance because customs give rise to rule which are considered as international law. Immunity is to be superseded by international justice; this question is of great significance in present scenario. A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations of universal concern, such as piracy, genocide, war crimes, and certain acts of terrorism.[35] Modern international law recognize states jurisdiction to punish certain offenses, although neither the offences has been committed within its territory, nor are the offender and the victim, are its nationals[36].

[34] Arrest Warrant of 11 April 200(Congo V. Belgium), 41 I.L.M (2002).
[35] Dervort, *International Law and Organization*, 266.
[36] *Ibid*

Universal Jurisdictions applied to limited class of offenses recognized by the community of nations as of universal concern. [37] The rise of universal jurisdiction by the precedent of Bow Street Magistrate *ex partae Pinochet*[38] and by other international instrument like statutes of Nuremburg, Yugoslavia and Rwanda present the classical example of prosecuting high official irrespective of their official status. These examples clearly provide that no violator of laws of war, is immune. But we could not conclude without looking to the other side of practice of international community.

Different international statutes and precedent most important cases *of General Pinochet* and Yugoslavian president Milosevic brought a change in developing international law regarding law of immunity but not absolutely .Because i*n Congo vs Belgium* the court gave the ruling that all high officials can only be prosecuted by special court established by Security Council. International tribunals for Yugoslavia and Rwanda were established by United Nations Security Council under Article 39 which states that:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measure shall be taken in accordance with Article 41 and 42, to maintain or resort international peace.[39]"

Security Council has taken step in accordance with this article against Yugoslavia and Rwanda. Hence, such step has exceptional rule against traditional doctrine of state

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[37] *Ibid.*
[38] Reg.V Bow Street Magistrate;Eex prate Pinochet Ugarte [No 3] [2001] 1 AC 147.
[39] Article 39 of UN security Council.

immunity. Decision of ICJ in *Congo v Belgium*[40] disturbed a process of evolution regarding rejection of immunity for high official for violation of peremptory norms, which have not fully matured yet.

1.5.1 State Practice Regarding Doctrine of Immunity

On 11 April, 2000, a Belgian investigating judge issued an international arrest warrant against the foreign Minister of Congo,who had committed crimes against humanity and grave breaches of the Geneva Conventions of Aug 12,1949[41] and its Additional Protocols of June 8 1977[42]. Belgium claimed that according to criminal law of Belgium, it has jurisdiction over *Yerodia* by virtue of the principle of universal jurisdiction,[43] Article 7 of Belgium War Crime Statute provides universal jurisdiction to its court in respect of some crimes (war crimes, crimes against humanity and genocide), where ever the crimes have occurred and whatever is the nationality of the criminal[44] Belgium's law does not recognize any kind of immunity to international criminals.

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[40] Arrest Warrant of 11 April 200(Congo V. Belgium), 41 I.L.M (2002).

[41] Geneva convention For , The Amelioration of The Condition of The Wounded and Sick in armed Forces in The field of Aug 12,1949, Geneva Conventions for, The Amelioration of The Condition of The Wounded and Sick and Shipwrecked Members of Armed Forces at Sea of Aug 12.1949. Geneva convention , Relative to The Treatment of prisoners of War of Aug 12.1949, Geneva convention, Relative to The Protection of Civilian Persons in The Time of Ware of Aug 12.1949

[42] Protocol Additional I to the Geneva Conventions of 12 Aug 1949, and relegating to The Protection of Victims of International Armed Conflicts of June 8 1977, Protocol Additional II to the Geneva Conventions of 12 Aug 1949, and relegating to The Protection of Victims of I Non-International Armed Conflicts of June 8 1977,

[43] Tunks, "Diplomats or Defendants? Defining the future of Head –of –state Immunity," 661-662.

[44] David Turns, " Arrest warrant of 11 April 2000 Congo-v-Belgium The international court of justice's failure to take a stand on universal jurisdiction," *Melbourne Journal of International La* ,3, http://en.wikipedia.org/wiki/Case_Concerning_the_Arrest_Warrant_of_11_April_20

In *Congo –vs.- Belgium case,*[45]Congo argued that Belgium, by issuing an international arrest warrant for Mr. *Yerodia* and circulating warrant to all states, has violated of territorial sovereignty of democratic Republic of Congo in pursuant to article 2(1) of the UN Charter, and article 41(2) of Vienna Convention on Diplomatic Relation[46] which states:

> "All official business with the receiving state entrusted to the mission by the sending state shall be conducted with or through ministry for Foreign Affairs of the receiving state or such other ministry as may be agreed"[47].

Congo also argued that pursuant to article 41 (2) on diplomatic relations of 1961 the foreign ministers have the duty to represent their respective nations in other countries frequently. Hence, the issuance of arrest warrant of Congolese foreign minister is contrary to international law.

The question of immunity *rationae personae* for sitting heads of state arose before the International Court of Justice, who has committed international crimes in *Congo-vs.-Belgium.* State practice constantly protects immunity for such international crime, while *opinion juris* reject such immunity. But weak practice of state gives edge to immunity on international *Jus Cogen* norms (Crime against humanity, war crimes, Genocide).[48] The International Court of Justice has awarded absolute form of

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00_(Democratic_Republic_of_the_Congo_v._Belgium) last accessed 2410/2009 11:46.

[45] Arrest Warrant of 11 April 200(Congo V. Belgium), 41 I.L.M (2002).

[46] *Ibid*

[47] Article 41(2) of Vienna Convention.

[48] Altman, "The future of Head of State Immunity, The case against Ariel Sharon," 5.

immunity from criminal process to a serving head of state as well as to a foreign minister even though they had committed an international crime; and they will enjoy this immunity even they are on a private visit in other state.[49] International Court of Justice in Arrest Warrant case held that such immunity applies to private acts of such limited number of officials.[50] In this case the International Court of Justice ignored the significance of development after World War II in which almost every trail had denied plea of immunity and defense of official capacity.

The Court concluded in Congo V Belgium[51] "the rules concerning the immunity or criminal responsibility of persons having official capacity....do not enable it to conclude that any such exception exists in customary international law in regard to national courts"[52].

The court stated that it has been 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 Minister for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[53]

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[49] Dapo Akande "International law immunities and the international criminal court," *The American Journal of International Law* 98,no.3 (july.2002), http://www.jstor.org/stable/3181639 (last accessed 06/07/2009),410.
[50] ibid
[51] Arrest Warrant of 11 April 200(Congo V. Belgium), 41 I.L.M (2002).
[52] Mark A Summers, "Immuniy Or Impunity?" The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court," *Brook. J INT'L* 31,no.2, http://www.brooklaw.edu/student/journal/bjiil/bliil (last assessed 07/05/2009),481.
[53] Akande, "International law immunities and the international criminal court," 410.

According to Dapo Akande the principle of awarding immunity to all serving state official which has been recognized on the basis of absence of any kind of immunity in context of violation of human rights, will hinder international cooperation. According to above reasoning any effort of removing immunity will prevent the foreign official from traveling abroad.[54]

Furthermore the International Court of Justice on the other side observed that the only exceptions to head of state immunity under international law are:

1) that head of state is not immune under international law from process in his own country;
2) Likewise, a head of state's home country may waive his immunity in foreign courts
3) A former head of state is not immune for acts committed before or after his period in office or for private acts (including international crimes) committed while in office
4) A head of state enjoys no immunity when that immunity has been validly abrogated by an international tribunal.[55]

By describing these exceptions it seems that International Court of Justice recognized discretion of the state concerned whose national has committed international crimes, can waives his or her immunity by itself. A serving or former foreign Minister may be subjected to criminal prosecution before a foreign tribunal, if such foreign tribunal possess jurisdiction. The ICJ only recognized the jurisdiction of

[54] *Ibid*, 411.
[55] Tunks, "Diplomats or Defendants? Defining the future of Head –of –state Immunity,"665.

particular international tribunals made for particular region that is international tribunals of Yugoslavia and Rwanda.

Recent state practice shows several examples which provides that a head of state is immune from criminal prosecution. On March 4, 1999 the French Supreme Court upheld the plea of state immunity by deciding the case brought against *Mouammar Ghaddafi* head of state of Libya, alleging his involvement in 1989 bombing of French airliner. The decision was based on the doctrine of state immunity; the court found that a sitting head of a state can not be criminally prosecuted according to international customary law[56].

The principle of state immunity still exists while looking to recent practices of international community. As most of the states endeavored to try international criminals but could not succeed in their goal. Judicial opinion and state practices are same on the concerned issue, no case could be found in which a serving head of state or minister is put to criminal prosecution in a foreign state. Who possess immunity ration personae even though they are alleged that he or she has committed an international crime. No single nation could pass judgment against a sitting head of state or minister. Only in Noriega case in which united state denied immunity for him by taking the plea that US did not recognized Noriega as legitimate head of state.

While looking into the question of immunity for violator of jus cogens norms (war crimes, crimes against humanity and genocide) state practices that it recognizes

[56] Tunks, "Diplomats or Defendants? Defining the future of Head –of –state Immunity," 662.

absolute immunity for international criminals. In *Gabriel_Mugabe*[57] case on October United States of America recognized immunity for serving head of state against the prosecution of crimes against humanity including extra-judicial killing and torture. The court based its decision to grant immunity to a serving head of state upon the US Supreme Court decision, *Schooner Exchange –vs- McFadden*, in which immunity was awarded under the principle of state immunity.[58]. The United States recognized sovereign immunity in case of *Mugabe*, according to the principle that, Mugabe was recognized head of state, as the US Government had recognized him as legal head of state.[59] In *Mugabe* case two cases were discussed that of *Clinton –vs- John*[60] and *United State –vs- Noriega*.in the former case, the court denied immunity rationae personae in respect of civil suit for monetary compensation. In the latter case[61] the United State did not recognize Noriega as legitimate head of state of Panama.[62] That's why the court denied immunity to Noriega.

Case of *Al- Adsani v United Kingdom*[63]; Al-Adsani an UK national was being tortured in Kuwait, he brought suit against the Kuwait's Government in England seeking damages for the physical and psychological injuries that had resulted from his alleged ordeal in Kuwait. The court dismissed the suit holding that Kuwait was entitled to foreign state immunity under the UK state immunity ACT 1878. Al –Adsani then

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[57] Tachiona V Mugabe, 2001 Us Dist LEXIS 18612(US S.D. NY 2001).
[58] Altman, "The future of Head of State Immunity: The case against Ariel Sharon,"6.
[59] Tunks, "Diplomats or Defendants? Defining the future of Head –of –state Immunity," 675.
[60] Clinton V Jones, 520 US 681(Supreme Court of United States, 1997)
[61] United States V Noriega, 117 F.3d 1206,1212(11th Cir.1997).
[62] Altman, "The future of Head of State Immunity, The case against Ariel Sharon,"6.
[63] Al-Adsani V. Kuwait, 103 ILR 420 (queen Bench. 1995).

appealed against the decision in English court of appeal but against lost on ground of sovereign immunity.

Al-Adsani then filed application with the European Court of Human Rights (ECHR) arguing principally that the United Kingdom had failed to protect his right not to be tortured and had deemed him access to legal process. Though Al-Adsani was not indemnified and his case was dismissed by both the UK and European Court Of Human Rights, by invoking the plea of immunity. But still some of the judges had the opinion that immunity should not bar the suit against the Heads of state in grave breaches of human rights abuse. In Al-Adsani case the following Judges, Christos Rozakis, Lucius Caflisch, Luzius Wildhaber, and Jean-paul Costa.,supported that there should be some restriction on sovereign immunity. Thus the minority concluded that Kuwait cannot "hide behind the rules on state immunity to avoid proceeding for serious claim of torture made before a foreign jurisdiction"[64]. From the above state practice it is clear that powerful states of the world still recognize doctrine of state immunity.

1.4.2 *Opinio Juris* Regarding State Immunity

The decision of Pinochet[65] is also directly related to a sitting head of state immunity. In first Pinochet case while discussing the core issue of head of state immunity two opinions could be found. First, that a former head of state holds absolute immunity from criminal prosecution for acts performed as head of state. Two, asserts that a head

[64] Caplan,"State immunity, Human Rights, and Jus Cogens: A critique Of the Normative Hierarchy Theory," 742.

[65] Reg.V Bow Street Magistrate;Eex prate Pinochet Ugarte [No 3] [2001] 1 AC 147.

of state will be immune for only that functions which are recognized by international law, and international law does not recognize any function of head of state which are contrary to international law.[66] It is clear that international law does not recognize any international crime as a function of head of state rather core international crimes has been defined by international law as private acts.

Lord Nicholls of Birkenhead in his opinion in a second warrant only gave his intention to two kinds of crimes that is torture and hostage taking.[67]

Pinochet's torture on Chilean subject or of aliens, is not an act which can be termed under international law an official act, all nations have been agreed that the crime of torture on the part of any one cannot invoke the plea of immunity.

Lord Browne-Wilkinson put it best in his judgment stating that certain crimes, such as war crimes, genocide, and torture have gained the status of jus cogens, so state who claims universal jurisdiction over it, is not against international law. International law states that certain crimes can be tried by any state and punish the offender as they are common enemy of all mankind. All states have a common right to punish these offenders.

March 24 1999, the House of Lord issued the final ruling of the trilogy, holding that Pinochet was not entitled to enjoy immunity for his alleged crime since such

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[66] Hazel Fox, Colin Warbrick, Dominic McGoldrick." The Firs Pinochet Case: Immunity Of a Former Head of State," *The International and Comparative Law Quarterly* 48,no (Jan 1999). http://www.jstor.org/stable/761629 (last accessed: 06/07/2009 06:03),213.

[67] Kriangsak Kittichaisaree, *International criminal Law*, (New York: Oxford University Press, 2001), 58.

allegation could not be considered official acts under international's principle of immunity.

The practice of states shows the continuity of head of state immunity, while *opinio Juris* (legal obligation) felt by the states at international level shows a strong rejection of the concept immunity *rationae personae*,and recognizing the individual responsibility(who had involved in grave breach of human rights), with the establishment of the Ad Hoc Tribunals for the former Yugoslavia and Rwanda, in May 1993, the secretary General of the UN issued a report regarding the establishment of the International criminal Tribunal for Yugoslavia including the following remark..

Virtually all the written comment reversed by the Secretary General have suggested that the statute of the International Tribunal should contain provision with regard to the individual criminal responsibility of the Head of the state Government official and person acting in a official capacity . These suggestions were drawn on the basis of precedent of the World War II. The statute should, the fore, contain provision which specify that a plea of the head of state immunity or that an act was committed in the official capacity of the accused will not constitute a defense, nor will it mitigate punishment[68].

Parallel to customary international law and Treaty, for example, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or

[68]Altman,"The future of Head of State Immunity, The case against Ariel Sharon,"6.

Punishment 1984,and trails held by International Criminal Tribunal for Yugoslavia and International Criminal Tribunal for Rwanda have made it clear that impunity is not an official act of the state official these tribunals have historical place in International Humanitarian law since were truly established international criminal tribunals which had set the precedent of trying and punishing high ranking personal[69].

Article 7(2) of the International Criminal Tribunal for former Yugoslavia (ICTY) and6 (2) of the International Criminal Tribunal for former Rwanda (ICTR) statutes provides that: "The official position of any accused person, whether a Head of state or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

The International Criminal Tribunal for Yugoslavia made it clear as an international body has stripped away immunity for sitting Head of State. Milosevic had been elected President of the Federal Republic of Yugoslavia on 15 July 1979 and remained President at the date of ICTY indictment. Milosevic was indicted by United Nation's war crime tribunal for former Yugoslavia on May1999, alleging war crimes and crimes against humanity in Kosovo.[70]The president was removed from office in October 2000, Milosevic was charged with personal responsibility for *"ordering, planning, instigating, executing and adding and abetting the persecution, deportation, and murder of Kosovo Albanians from January, 1999 to June 1999*[71] ".The movement

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[69] *Ibid.*

[70] Ibid.

[71] Adam Iaac Hasson, "Extra Territorial Jurisdiction and Sovereign Immunity on Trail: Noriega, Pinochet, and Milosevic-Trends in Political Accountability and

was started by the order of President Milosevic to remove a big section of population of Kosovo Albanian in order to show persistence of authority for Serbian over the province[72].

The court addressed the question of immunity in its preliminary motion in November 2001. The trial chamber rejected Milosevic's and his amici curiae arguments that is:

> [T]he tribunal is illegal as the UN security council lacked power to establish it; (2) the prosecutor had not maintained prosecutorial independence, and was therefore in violation of the tribunal statute, Article 16(2); (3) the tribunal was impermissibility tainted with bias against Milosevic; (4) the tribunal lacked competence to prosecute Milosevic as the former President of Yugoslavia;(5) the tribunal lacked competence to prosecute Milosevic due to his unlawful surrender and extradition to the Hague; and (6) the tribunal lacked jurisdiction".

Claims of immunity due to his status of the former Head of State, were rejected by trial chamber, on the basis of Para 2 of article 7 of statute, states: "The official position of any accused persons, whether as Head of state or Government or as a responsible Government official, shall not relive such person of criminal responsibility nor mitigate punishment". Article 7 of criminal tribunal for Yugoslavia, explicitly rejects head of state immunity, which shows that denial of immunity to international criminal is an accepted rule of customary international law. Additionally

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Transitional Criminal Law," http//www.be.edu/bc.org/avp/law//wsch/...125...105-TXT.nt (last accessed 11/02/2010).

[72] *Ibid.*

the trail chamber rallied on the Pinochet case and the Rome statute of the international Criminal court of 1998[73].

1.6 Concluding Remarks:

In this chapter we discussed doctrine of state immunity and its development in different times, different cases some of which support the principle, and however, some cases deny the immunity for criminal conduct .New international legal order had introduced the trend of prosecuting of heads of stats for violation of jus cogens. But some states are still reluctant to stick with new order they support the obsolete form of immunity. On the other hand international community trying at their level best to prosecute the perpetrators of core international crimes regardless of their nationality by virtue the principle of universal jurisdiction. The one important issue in my view has been solved by practice of international community that is the prosecution of former heads and other officials because every incumbent official of state have to be former. Therefore international community should have a common practice to prosecute the offender of certain crimes in order to settle the issue of immunity. The International Criminal Court is a new hope to settle the issue but opposition of some powerful state brings an obstacle in achieving the said objective.

[73] *Ibid.*

CHAPTER II

INDIVIDUAL RESPONSIBILITY OF HEAD OF STATE

International humanitarian law originated through customary international law and sought to implement individual criminal responsibility through either domestic courts or international Tribunals (ad hoc or permanent),These Courts appear to international courts according to rule of universal jurisdiction. The purpose of International humanitarian law is to enforce individual criminal responsibility. This concept could not be truly implemented by the international community in its full sense. However, certain steps were taken by international community.

In the past, the rule of international law was only to regulate the conduct of states so only states were subject to International law. The individual were not subjected to international law.

Jurists like Oppenheim, and Martin Dixon are of the opinion that only states are subject to International law. But with the passage of time and emergence of the new events the question arose that how state can be punished, this question gives a way to responsibility of individual and brings them out to be subject of international law.20th century brought a lot of events which caught the attention of the world community to take such steps in order to make a law to cope with question of immunity. These events resulted in the notion that individual criminal responsibility should be enforced by the international and national courts or Tribunal in order to deter future criminals and to prevent future conflicts.

2.1 Principle of Individual Responsibility

The doctrine of state immunity pursue by an exception that is individual responsibility. Concept of substantive immunity for former head of state as well for incumbent head of state in case of grave breach of international norms has been changed. Hugo Grotius, the father of international law, would be shocked if came to know that 21st century has brought the principle of prosecution of international criminals irrespective of place of accurance of crime. After World War II international law adopted certain regulation in order to impose individual criminal responsibility on states officials. Different international codes and conventions have been adopted to prosecute international wrong doers[74]. International Criminal law has been rapidly evolving under the influence of International Human Rights law and international Humanitarian law. However, it is also important to note that International Humanitarian Law has been nourished by International Criminal Law and International Human Rights law.[75]

Similarly under international humanitarian law, a military commander has a duty to ensure respect for the law of the war during the time of hostilities. International humanitarian law does not recognize safe passage for high ranking military offices if

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[74] Mark A Summers, "Immunity Or Impunity?" The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court," *Brook. J INT'L J* 31, no.2, http://www.brooklaw.edu/student/journal/bjiil/bliil (last assessed 07/05/2009), 463.

[75] Yousaf Asker. *Implementing humanitarian law*, (New York: Routledge, 2004), prawfsblawg.blogs.com/prawfsblawg/.../international_law.doc last accessed 23/03/2010 09:56), 4.

law of war was not observed by his subordinate office. Such violations give rise to individual and command responsibility[76].The inclusion of principle of individual responsibility for grave breaches of humanitarian law in international law is surely the contribution of The Charter of Nuremberg as well as the charter of Far East.

The latest examples are the establishment of the tribunals of Yugoslavia and Rwanda. It is, however, undesirable that the Nuremburg and Tokyo tribunals ,provide good earlier precedent.

Article 6(c) of the Nuremberg Charter provides in its pertinent part "leaders, Organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crime are responsible for all acts performed by any persons in execution of such plan."[77]

Nuremberg charter had strict criteria of making a person responsible for crime against peace. The trail has made most of those persons who were at that time in high level (policy makers):

> Article II(2)(f) of Control council Law No.10 state: An individual to be deemed to have committed a crime of aggression he must 'held a high political civil, or military position in Germany or in one of its Allies, co_ belligerents or satellites or held high position in financial, industrial, or economic life of any such country.[78]

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[76] Jamie Allan Williamson, "some consideration on command responsibility and criminal liability,"*International Review of the Red Cross* 90 no.870 (June 2008), http://journals.cambridge.org/action/displayAbstract;jsessionid=608C50139FBDD4E7D32F000A2FDE4512.tomcat1?fromPage=online&aid=2439028 last accessed 15/05/2009 11:51, 303.

[77] kriangsak Kittichaisaree, *International criminal Law*, (New York: Oxford University Press, 2001).221.

International Criminal Tribunal sitting at Nuremberg

The rational was explained in the High Command case. As they state that there is difference between a dictator and commander of armed forces and in an ordinary soldier is the margin between criminal and forgivable contribution in the waging of an aggressive war by an individual engaged in it. The Tribunal reasoned as follows:

> [I]f and as long as a member of the armed forces does not participate in preparation, planning, initiating, or waging of the aggressive war on the policy level, his war activities do not fall under the definition of the crime against peace. It is not a matter of a person's rank or status, but his power to shape or influence the policy of his state, which is the relevant issue for determining his criminality under the charge of the crime against peace.[79]

Whether an individual can be classified as being on a policy level is question of fact to be proved on a case by case basis.

These approaches were also utilized by the Tokyo Tribunal. For example, in the case of Muto, the tribunal found that he was a soldier and before his holding the important post of the chief of the military affairs Bureau of the Ministry of the war held no appointment which involved the making of the high policy. He was held to have joined the conspiracy once he becomes Chief of the Military Affairs Bureau.

The same reasoning was applied to the case of Sato, Muto's successor as chief of the military affairs bureau in 1942. It was not until 1941, when Sato becomes Chief of the Military Affairs section of that Bureau that he was able to influence policy

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Article II(2)(f) of Control council Law No.*10*.

[79] Tribunal reasoning at Tokyo trial.

making, and the Tribunal found no evidence that before then he had indulged in plotting to influence policy making. On the other hand Hashemite, an army Officer, who never held high government office, was convicted for his publication and support or establishment of the societies devoted to warlike purposes.[80]

Command Responsibility is articulated in the statues of the ICTY and ICTR. Several prominent cases have brought individual to justice for international crime under command responsibility. In a case brought by the ICTR against Jean Kambanda, former prime Minister of Rwanda, the court assigned responsibility to Kambanda based upon his acknowledgment that as a Head of the government, he exercised de jure and de facto control over state policy and the armed forces. The court noted that Kambanda had direct knowledge of the proceeding of the massacres but "an action was not taken by him to stop them". Principle is a growing norm of modern international law.

2.2 Restrictive Policies towards Head of State Immunity

There is tension between two principles of international law; these are law of immunity and human rights law. Internationals law recognizes law of immunity according to which all state are equal, whereby, one state should not interfere in the affairs of other state and vice versa. On the other hand there are new emerging principle of international law based on humanitarian values clarifies certain type of

[80] Kittichaisaree, *International criminal Law*,222-223.

conduct as crime under international law.[81] The second area of the international law is quiet complex which has brought certain challenges to international community. In order to solve the problem of prosecution of International criminals who have committed International crimes, and the doctrine of state immunity, have gave birth to international tribunals, as states are often fails to prosecute its own officials. While looking to different international instrument deals with immunity for foreign state also has restricted absolute immunity, most importantly a prior example of United State Foreign State Immunity Act. The Foreign Sovereign Immunity Act has distinguished the non immune conduct in 28 U.S.C. s 1605(a) (1) (7).

The FSIA codified restrictive foreign sovereign immunity. Structurally, it retained immunity for :

> States are immune from the jurisdiction of US. Courts, expert in those cases provided for in the statute. Thee exception are 1) wavier, 2) disputes over commercial activities, 3) disputes over rights to property "taken in violation of international law ,4) disputes over rights to immovable property or property acquired by succession or gift in the US, 5) torts committed in the US by a foreign state,6) enforcement of agreement to attribute, and 7) terrorist acts(including torture, extrajudicial killing, aircraft sabotage, and hostage taking) that result in personal injury or death of a US national committed by states that have been designated as stat4e sponsors of terrorism.[82]

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[81] Dapo Akande, "International law immunities and the international criminal court," *The American Journal of International Law* 98, no.3 (july.2002), http://www.jstor.org/stable/3181639 (last accessed 06/07/2009), 407.

[82] Summers, "Immunity Or Impunity?" The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court,"470.

The above text shows that most of the modern countries of the world also recognize restrictive immunity rather than absolute. But still the question of head of state immunity is missing while involved in grave breaches of IHL or other heinous international crimes.

2.2.1 Absolute Immunity :

Traditional international law recognizes absolute immunity for state from jurisdiction of other states. Justice Marshall asserted this principle in land mark case *Schooner v McFadden 1812*[83]. The concept of absolute immunity was developed in eighteen and nineteen century.

2.2.2 Restrictive Immunity:

With the emergence of new incident and development in commercial activities turned international to restricted immunity. Since 1950 most of the states have adopted restrictive doctrine. Today absolute immunity finds only minority support among international community[84].

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[83] Schooner Exchange V McFadden, 11 U.S 116, (1812).
[84] Thomas R.Van Dervort, *International Law and Organization An Introduction* (London: Sage Publications, 1998),530.

2.3 Development of international humanitarian law from World War I till ICC:

Until the 20th century there were no international or national courts which could exercise jurisdiction over head of the state or on high official this practice is now evolved in international customary law[85].

The nineteenth century gave birth to modern international war law while prohibiting certain war weapons as does the "Lieber Code" (1863) the fires code on land warfare but no state nor any jurist even proposed that war was wrong or unjust. Theory of Just War for the first time given by Augustine; allowing the Princes to defend their faith and land and some time to extend the faith. In 1899-1907 a Peace Conferences was held in Hague, which took an attempt to make war less destructive but there was no step taken by the Peace Conference to declare war a criminal act or the perpetrator of war crimes put to justice[86].

Firstly in world history the world community brought the treaty of Versailles (1919). In 1919 at the end of WW I a commission on the responsibility of the authors of the war and on the enforcement of the penalties listed at least 32 categories of violation of the Laws and customs of war committed by the government and armed forces of Germany, Italy and their allies during WW I. The commission proposed that all should be punished who had violated the custom of war, particular German

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[85] Yousaf Asker. *Implementing humanitarian law* (New York: Routledge, 2004), prawfsblawg.blogs.com/prawfsblawg/.../international_law.doc last accessed 23/03/2010 09:56.

[86] Jonathan A Bush, "The Supreme ...Crime and Its Origins: The Legislative History of the Crime of Aggressive Wart," *Columbia Law Review* 102, no.8 (Dec2002), http://www.jstor.org/stable/1123729 (last accessed: 06/07/2009 06:18), 2329-2330.

Emperor Kaiser Willem II stated that: The applicable law would be the principle of the law of the nations as they resulted from the usage established among the nation civilized from the law of humanity and from dictates of public conscience. This proposal failed after being opposed by the US, contending by domestic courts not by ad hoc, international Tribunal other wise it would be violated the principle of the legality[87]. The final text of the Versailles Treaty created a positive change in development of humanitarian law by including Article 227 in Treaty condemned William II for supreme offence against international morality but the loose language of the provision couldn't put him to trail fled to Netherlands refused to extradite him.[88] For the first time, treaty of Versailles recognized the individual responsibility of head of state for initiating and conducting an aggressive war. The US member of the commission in1919 treaty challenged the proposal of making a head of state responsible for war crime or crimes against humanity, as well as criticized the notion individual criminal responsibility. While US position was completely changed at the Nuremberg. Great Britain suggested that Americans only got afraid that US president could be subjected to trail, that why Americans opposing the trail of head of state[89]. The matter come to an end without setting a rule or precedent for trying war crime and other prohibited acts as did by the head of the state during their stay in offices[90]. Article 227 of the treaty became dead because it could not operate due of objection of

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[87] Kittichaisaree, *International criminal Law*,15.
[88] Bush, "The Supreme ...Crime and Its Origins: The Legislative History of the Crime of Aggressive War,"2332.
[89] Theodor Meron, "Reflection of War Crimes by International Tribunals," *The American journal of International Law* 100, no.3 (July 2006), http:// www.jstor.org/stable/4091370 (last accessed 06/07/2009 06:07), 555.
[90] Kittichaisaree, *International criminal Law*, 15.

Americans, whereby Dutch refused to extradite Kaiser for prosecution. International humanitarian law got considerable doctrinal development as most of the nation codified different laws of war. The concept of individual responsibility acquires the status of Nuremberg Trial. Most of the nation has rejected the doctrine of head of state immunity. Different steps taken after World War I could not succeeded in its full sense because of interest of powerful states.

After World War II one could see some development in international criminal law. After the war, the international community make efforts to establish international Criminal Tribunals. After the Moscow Declarations 1943, the international community established the Nuremberg and Tokyo tribunals. The tribunals were based on the 1929 Geneva Convention and the fourth Hague convention as substantive law to be applied. As argued above, the Nuremberg and Tokyo tribunals were the milestone on the way toward recognition of individuals Criminal Liability in international law. The Yugoslavia and Rwanda tribunals are the most recent examples. Recently international community has established international criminal court under the treaty of Rome 1998.in order to try international wrong doer.

2.4 Is Individual Criminal Responsibility an Exception to State Immunity?

2.4.1 Individual criminal responsibility for grave breaches of IHL:

Arguably, the doctrine of individual Criminal Liability has made significant progress since the Second World War. The recent adoption of the former Geneva Convention and the Statute of the International Criminal Court, are worth mentioning examples.

A - Nuremberg Charter and Trial:

Nuremberg charter for the first time in world history brought an exception to absolute immunity for core international crimes. The process of trying the World War –I criminals was disappointing. Two German Sailors were charged for opening five at a British hospital ship. They were awarded only four years imprisonment. The main defense of the two culprits was that they acted under the German of their superior officers, the court accepted that defense.[91]

2.4.2 Legal Principles Established by Nuremberg Charter:

Nuremberg charter and trial has recognized different legal theories which have contributed to the establishment of international humanitarian law. The following are examples:

2.4.2.1 Elimination of Defense of Superior Order:

Hans Keelson of of opinion that "Superior Order" can be termed as an act of the State. This view militates against the spirit of prosecuting war criminals. The Nuremberg and Tokyo tribunals marked a departure from this rule.

2.4.2.2 Principle of Individual Responsibility:

Author contributions of the Nuremberg Charter is that it has successfully established the principle of individual liability needless to say, in conventional international law, individual is not a subject of law.

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[91] Summer, "Immunity Or Impunity?" The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court,"482.

It addressed to individuals when they act as representative of states, which are the immediate subjects of international law, and it binds individual in other cases as well particularly in the field of human rights. As a former president of the International Court of Justice, Judge Jessup, once put it the law of nations may be primarily a law between states, but "states themselves operate by virtue of the will of individual and the individual is thus the ultimate source of authority.[92]

Hence the main subject of the law is an individual rather than a state because the state is directly governed by the individuals.

Article 6 of the charter removes the ambiguity that individual are subject to international law while they are involve in core international crimes. The following acts, or any of them, are crimes within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **Crimes against Peace: namely.** Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **War Crimes:** violation of laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity:

(c) **Crimes against Humanity:**

[92]Judgment. command.6964, of Nuremberg Trail.

> murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, racial or religious grounds in execution of or in connection with any crime within jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the forgoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 6 of Nuremberg Charter had made it clear that no one should left unpunished "under it were indicted named organizations, the leadership Corps of the Nazi party, the Reich Cabinet... the General Staff and High Command of the German Armed Forces"[93]

Beside the charter, the judgments also insures liability upon persons irrespective of their official positions, Judgment Command Number (6964) had made it clear that anyone who was involved in any of above mentioned crimes would be put to punishment:

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[94]

2.4.2.3 Rejection of immunity for core international crimes:

The Nuremberg trial established a very important legal theory in international law it recognized exception to state immunity principle of individual criminal responsibility.

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[93] Justice Birkett, "International legal Theories Evolved at Nuremberg," *International Affairs* 23,no.3(July 1947), http://www.jstor.org/stable/3017222 (last accessed 02/11/2009),318.

[94] Kurtha, *Prisoners of War and War Crime, 60.*

Sir Hastly Showers, the chief prosecutor from the UK argued that the actions of States are the actions of men, who should not be able to seek immunity behind the intangible personality of state. The Tribunal held: "The principal of International law, which, under certain circumstances, protects the representative of the state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceeding."[95]

Article 7 of statue of Nuremberg Tribunal states:

"The official position of defendant, whether as Head of state or responsible official in Government Departments, shall not be considered as freeing them form responsibility or mitigating punishment."[96]

The above mentioned article declares that official capacity of any person's whether Head of State or any other responsible high official cannot find a safe way from punishment nor can mitigate their criminal responsibility.

Similarly a high command case, awarded death penalty to General Yamashita, under the basic principle of individual and command responsibility:

"An officer who merely stands by while his subordinates execute a criminal order of his superior which he knows is criminal violates a moral obligations under international law. By doing nothing he cannot wash his hand of international responsibility."[97]

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[95] Kittichaisaree, *International criminal Law*, 259.
[96] Article 7 of statute of Nuremberg
[97] Williamson,"Some Consideration on Command Responsibility and Criminal Liability"305.

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 relive him from responsibility under international law[98].The defense of diplomatic immunity was raised in Tokyo trail by Hiroshi Oshima. The tribunal rejected the plea of immunity in the following words:

"Diplomatic privilege does not import immunity from legal liability, but only exemption from trail by the courts of the state to which the ambassador accredited. In any event this immunity has no relation to crimes against international la".[99]Lord Nichols of Birkenhead while dealing *ex-partae* Pinochet[100] has relied upon Nuremberg charter:

> "[I]nternational law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of any one. That applies as much to head of State, or even more so, as it does to everyone else: the contrary conclusion would make a mockery of international law.[101]

His Lordship relied upon Nuremberg Charter which has abolished the plea of immunity for head of states and diplomats. The rule (rejection of immunity) has been endorsed by international community as the General Assembly has affirmed the Nuremberg Charter in 1950.

The Nuremberg Charter contains clear provisions related to criminal responsibility as an exception to absolute immunity based on "official capacity", It also eliminates the defense of superior order. As the Nuremberg charter ratified by the

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[98] Nuremberg principle III

[99] Reg.V Bow Street Magistrate;Eex prate Pinochet Ugarte [No 3] [2001] 1 AC 147.

[101] Kittichaisaree, *International criminal Law*,59

big powers and by other nineteen states, at the time of its promulgation, one commentator concluded that "*charter was supported by general principle of international law which constitute a source of international law*"[102]. However critics assert that it has a "victor's Justice", court was composed of entirely representative of victorious power: the Great Britain, America, France and Soviet Union. Of course it was undesirable that justice could be held. As the whole sitting of the court was not neutral no enemy could do justice fairly. The defendant were in the power of victorious belligerents were entirely under the supervision of court, the court was completely under influence of victorious power. It is argued that waging aggressive war was already prohibited by international law.

It has been argued that President Roseolvet has committed the crimes of the more severe intensity dropping atomic bombs on Hiroshima and Nagasaki but he was never prosecuted like others from Germany and Japan. It is clear that Nuremberg charter and trial has been contributed in developing international law regarding recognition of human rights[103].

2.5 The Geneva Conventions and Additional Protocols:

Basically the four Geneva Conventions and The Additional Protocols to it are the real sources of international humanitarian law. The main object of The Geneva Conventions and Additional Protocols 1977 was to define war crimes and to set a

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[102] Summers. "Immunity Or Impunity? The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court." 484.

[103] Allen Buchanan. "Reforming The Law of Humanitarian Intervention," in *Humanitarian Intervention Ethical, Legal and Political Dilemmas*,ed.J.L.Holzgree and Robert O. Keohane (Cambridge:Cambridge University Press, 2003),136.

definite guide line to stop further atrocities and violations of the laws of war. Geneva conventions and two Additional Protocols prescribes provisions which contains rules to be followed by parties to a conflict as well as third parties, both is armed conflict and non-armed conflict. The four Geneva Conventions prescribes to breaches of international humanitarian law.

> Article 50 of GCI; 51, of GCII; 130 of GCIII; and147ofGCIV , 1949 states as:
>
> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[104]

The above articles define War Crimes. The ratification of these conventions requires the contracting parties to promulgated laws at the national level. Such laws shall be applicable to war criminals, irrespective of their nationality and the place where the war crimes have been committed. if the contracting parties are unable to make such laws, they should make necessary amendments in their existing penal laws.[105] Subsequent provisions of the Geneva Convention also large contracting parties not to absolve persons who have committed grave breaches of the loss of war. Generally most of the international conventions and codes recognized state as subject to

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[105] Jean de Preux, *Commentary III Geneva Convention Relative to The treatment of Prisoner of war.* (Geneva, Switzerland: ICRC), 629.

international law but now most of the international agreement obliges individual as well subject of public international law. They are bound to respect international law like their domestic law.[106]

Article 51 of Geneva Convention on the Protection of Wounded and Sick Combatants on Land says:

> "No high contracting parties shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by anther High Contracting Party in respect of breach referred to in the preceding Article."[107]

So whoever is involved in grave breaches of IHL can not absolve from criminal responsibility. The Geneva Conventions require parties to abide by the laws of war and shall not involve in war crimes. It also recommend the parties to enact laws at national level which make it clear that the commissions of breaches of IHL by state itself or ordering other to commit are illegal.[108]

Now states have recognized these international instruments through their internal legislations and recognize their certain rights and duties. Additionally, under well establish precedent settle by war crimes International trials by Nuremberg and Tokyo had made clear any person involves in breaches of IHL held responsible[109]. Beside military personal civilian were held responsible by both trials. Tokyo trail prosecuted

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[106] Joshua Willenstein "Punishing Words: An analysis of the Necessity of Element of Causations in Prosecutions for Incitement to Genocide,"*Stanford Law Review* 54, no.3 (Nov 2001), http://www.jstor.org/stable/1229401 (last accessed 06/07/2009 06:21), 359.

[108] Wallenstein, "Punishing Words: An analysis of the Necessity of Element of Causations in Prosecutions for Incitement to Genocide," 359.

[109] Wallenstein ,360.

former foreign minister of Japan, convicted for war crimes particularly for criminal negligence and reckless for crimes committed by Japanese soldiers during the rape of Nanking. Liability of civilian for war crimes is favored by most of international instruments in order to protect war victims from atrocities. These conventions are applicable to state official as well as to civilians[110].

For IHL prospective, the codification of those rules set by International Criminal Tribunals .Precedents set by Nuremberg and Tokyo trails has influenced codifications of Protocol I Additional to the Four Geneva conventions:

> 1. The high Contracting parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Convention or of this Protocol which result from a failure to act when under a duty to do so.
> 2. The fact that a breach of the Conventions of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[111]

Article 86 of the protocol Additional to Geneva Conventions deals with superior authority state that the entire superior are under duty to respect the conventions and to take such necessary measures to suppress all the breach of conventions. While reading article 86 of API to Geneva Convention with common article 1 of the Geneva conventions, clarify the responsibility of high

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[110] *Ibid.*
[111] Article 86 of API to Four Geneva Conventions

official of the states which states that: "The high contracting parties under take to respect and to ensure respect for the present convention in all circumstances". Jean S. Pictet, while commenting on first Geneva Convention says that when a state, engage herself in an obligations, such obligation "to respect and to ensure respect for the present convention in all circumstances" such obligations automatically extent to all authority of the state who runs the state not only the commander in chief of the armed forces. The words: "and to ensure respect" was intentionally inserted in or order to strengthen the responsibility of the states to make sure that obligation imposed by conventions should be dully respected in war and peace time. Only giving order and directions to military and civil authority is not enough, states are under obligation to ensure that the conventions are respected in all circumstances.[112]

2.6 Post Nuremberg Facts:

After Nuremberg trial which has set the rule of prosecuting international criminal for core international crimes. Other tribunal created by international community has explicitly abolished head of state and other high official immunity from criminal prosecution. The language of all statute regarding denial of immunity is same. The Charter of International Military Tribunals of Nuremberg, Yugoslavia and Rwanda

[112] Jean S. Pictet, *Commentary I Geneva Convention for the Amelioration of the Condition of the Wended and Sick in armed Forces in the Field*,(Geneva Swirzarland:ICRC),25-26.

contains a clear provision which waive any kind of immunity[113].The indictment of Jean Kambanda Prime Minister during Rwandan Genocide 1994, has made it clear that the doctrine of immunity and defense of official capacity can no longer be used as shield from prosecution and punishment. Although the Statute of International Criminal Tribunal is not directly applicable in domestic courts, but the provision of statute and precedent set by these courts has now became an accepted part of international law.[114]

The establishment of ICTY and ICTR is a sufficient evidence of rejecting the plea of immunity and recognizing individual criminal responsibility. At this time this rule reflects as customary international law[115].

At the time of establishment of the Ad Hoc Tribunals for the former Yugoslavia and Rwanda, in May 1993, the Secretary General of the UN issued a report regarding the establishment of the International Criminal Tribunal for Yugoslavia including the following remark:

> Virtually all the written comment reversed by the secretary General has suggested that the Statute of the International Tribunal should contain provision with regard to the individual criminal responsibility of the Head of the state, government official and persons acting in an official capacity. These suggestions were drawn on the basis of precedent of the 2nd WW. The Statute should, therefore, contain provision which specify that a plea of the

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[113] Summer, "Immunity Or Impunity? The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court," 487.
[114] Geoffrey Robertson QC, "Ending Impunity: How International Criminal Law can put Tyrants on trail," *Cornell International law Journal* 38, no.469 (2005), http://heinonline.org/HOL/License (last assessed 15/11/2009), 656.
[115] *Ibid.*

> Head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defense, nor will it mitigate punishment.[116]

ICTY brought for the first time a sitting Head of State to be prosecuted for crime against humanity and genocide. The *Foca* situation documented that rape and sexual enslavement plan as an instrument of terrifying the masses and amount to crime against humanity, while *Serbrencia* case concluded that massacre of 70000 Muslims constitute genocide[117]. In November 2001 Milosevic was identified "as having planned, order or at least inspired genocide and full range of other crimes as the head of a "joint criminal enterprise"[118]. The decision of Milosevic case concluded that at the time of commission of all crimes against humanity and genocide he was de-jur and de-facto head of state, which amount to command responsibility in his part. [119]

The Rome statute of international Criminal Court clarified the rule that no head of state can claim state immunity in international court, while involved in core international crimes. Article (27) of the Statute states:

> Official capacity as Head of State or Government or member of Government or parliament, an elected representative or a Government official shall in no case exempt a person from criminal responsibility under this statute. Immunities or special procedural rules which may attach to the

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[116] Altman, "The future of head of State Immunity: The case against Ariel Sharon", (April 2002), www.crimesofwar.orgonnews.belgium2.html. http:// www.indictsharon.net/heidaltman-9pro.pdf. (last accessed 12/11/2009 01:10), 8.

[117] Prosecutor V. Kirstic, . case No. IT-93-33, Trail Chamber, Augest,2 2001.
[118] Prosecutor v. Milosevic, Indictment, November 22, 2001.
[119] John Hagan, Ron Levi," crime of War and the Force of Law, *"University of North Carolina* 83, no. 4 (June 2005), http://www.jstore.org?stable?3598402 (last assessed 06/07/2009 06:09), 1500-1522.

official capacity of a person, whether under national law or international, shall not bar the court from exerting its jurisdiction over such person.[120]

2.7 Heavier sentences for superior:

International humanitarian law and international criminal justice place upon superiors a greater responsibility than of their subordinates in ensuring that the law is not to be violated. Superior, due to their high position, has an affirmative duty to ensure that IHL is duly respected. Their failure to do so will give rise to grave breaches of IHL and will develop a culture of impunity. International tribunal while awarding sentences had a keen observation on the status of commander.[121] The international criminal tribunals have further explained that when a commander fails in his duty to prevent the crime or to punish the perpetrator thereof, he should receive a heavier sentence than the subordinates who have committed the crime. Therefore, when a commander fails in his duty to prevent the crime or to punish the criminal thus, he may receive a heavier sentence than the actual criminal.[122]

The plea that they are not direct actors of alleged crimes also has been denied in the Pinochet case where Lord Steyn states. It is crystal clear that Senator Pinochet had not committed crimes by himself. In fact the members of group have committed these crimes on the order of General Pinochet, and they are responsible to him directly. The conclusion is that, that a superior cannot take the plea that he was not

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[120] Robertson, "Ending Impunity: How International Criminal Law can put Tyrants on trail,"656.

[121] Williamson, "Some consideration on command responsibility and criminal liability," 305.

[122] *Ibid.*

direct actor of atrocities. From finding of the case it is easily clear that Lord Steyn not only removed immunity for a former head of state but, rejected the plea of immunity for every violator who commits crimes which are universally prohibited.[123]

2.8 How international jurisdiction can be invoked to try international crimes?

"Jurisdiction defines the extent of authority to exercise public order over object and subject through legislation, adjudication and law enforcement."[124]

International law recognizes authority of states to try international criminals through different theories of jurisdiction. However, state jurisdiction is subject to certain rules recognized by international law. International law recognizes territorial, nationality, extraterritorial and universality principle of jurisdiction. The international scenario has been changed after World War II. State or an ordinary civil or military official can not exercise its jurisdiction according to its national law. State jurisdiction should be based upon the principle defined by international law.

i) Territorial Principle: Every state can claim jurisdiction over crimes committed on its territory.[125]This jurisdiction extends to everyone, to its own nationals or whoever enters to its territory.[126] Territorial principle covers both the acts committed inside or

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[123] Hazel Fox, Colin Warbrick and Dominic Mc Golrick,"The First Pinochet Case: Immunity of a former Head of State," *The International and Comparative Law Quarterly* 48,no.1(Jan 1999), http://www.jstor.org/stable/761629 (last accessed 06/07/2009 06:03),214.

[124] Marc Weller, "On the Hazards of Foreign Travel for Dictators and Other International Criminals," *Royal institute of international affairs*75, no.3 (1999), http://www.jstor.org/stable/2623638 (last accessed: 06/07/2009 06:39), 603.

[125] Akhurts, *Modern introduction to international law* (New York:: Rutledge, 1998),110.

[126] Weller, "On the Hazards of Foreign Travel for Dictators and Other International Criminals," 604.

even aboard when it effect the state this is also knows as "effects doctrine"[127]. State can exercise its jurisdiction while a crime commits on its own territory or abroad and that affects the state.

ii) Nationality Principle: A state may prosecute its own national for crime committed on its own territory or abroard this is called active nationality principle, which a settled rule of international law. A state may exercise its jurisdiction abroad while its national being harmed some where else not on its own territory. The principle of passive nationality is now accepted by United States in Third Restatement for terrorist activities and other serious crimes.[128]

iii) Extraterritorial Principle: this Principle applies to crimes of piracy and hijacking the state may legislate and enforce its laws relating to such crimes.

iv) Universality Principle: A state may exercise its jurisdiction to try international criminals for core international crime of universal concern whoever and wherever committed this is known as universal jurisdiction.

In international law a state claims to jurisdiction must come under the above mentioned principles[129].

2.9 Universal Jurisdiction over Grave Breaches of IHL:

"International Universal jurisdiction relates to crimes considered to be of concern to the international community at large and can be established or exercised regardless of

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[127] Akhurts,110.
[128] Akhurts, 111.
[129] Weller, "On the Hazards of Foreign Travel for Dictators and Other International Criminals,"604.

the *locus delicti*, the nationality of the suspect, and the nationality of the victim."[130] International law prescribe limited class of offences which could be tried irrespective of territory or nationality of offender and even the victim, because these crimes have been recognize as of universal concern. The offences like piracy, slave trade, attack on aircrafts, hijacking of aircraft, genocide, war crimes[131] falling under the 'grave breaches' of four Geneva Convention relating to the protection of victim of war, are also subject to universal jurisdiction[132] and certain acts of terrorism. Most of states have ratified the Geneva Convention, which prescribes the conduct of world that they accepted the doctrine of universal jurisdiction. Modern international law recognizes jurisdiction of every state to try these offences wherever the crimes has been committed, irrespective of nationality of offender or victim.[133] After the World War II, international law has changed. On the one side, it recognizes the state sovereignty over its internal affairs. On the other side, it recognizes the importance of international public order, which assigns the international community the duty to enforce international law. [134]

The Principle of universal jurisdiction has closed the door for international criminals. It has evolved alongside the international human rights movement as part of a growing refusal to impunity for the preparators of gross violation of human

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[130] Richard Van Elst "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions," *Leiden Journal of International law* 13 (3 march 2004), http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=207911, (last accessed 23/11/2009), 823.
[131] Dervert, *International Law and Organization*, 226.
[132] Kittichaisare, , *International criminal Law*, 39.
[133] Dervort, *International Law and Organization*, 266.
[134] Weller, "On the Hazards of Foreign Travel for Dictators and Other International Criminals, "599.

rights. Universal jurisdiction was included in the four Geneva Conventions when the proposal of Italy at the Diplomatic Conference 12 July 1949, rejected and the proposal of Netherlands, was affirmed in order to enable the contracting parties to prosecute wherever a suspected war criminal is founded as stated: "the Italian delegates proposed to limit the obligation of the parties to the conflict to search for persons alleged to have committed any of the grave breaches and to bring them before the courts". The Italian suggestion was rejected as it proposed a limited obligation of state to conduct search of the suspected criminals involved in grave breaches of Conventions.

"[t]he Netherlands Delegate.....that each party should be under this obligation, even if neutral in a conflict. The principle of universality should be applied here."[135]

Similarly Article 146 of the fourth Geneva Convention states:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanction for person committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligations to search for person alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such, persons, regardless of their nationality, before its own court. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such person over for trail to another High Contracting concerned, provided such High Contracting Party has made out a prima facie case.[136]

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[135] Elst, "Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions,"821-823.

[136] See commen article 49 of GC I,50 of GCII129 ofGCIII

Most of the civilized states of the world have incorporated universal jurisdiction over grave breaches in their national laws but through different ways. Some of them have adopted special acts to penalize, the breaches of Geneva Conventions. While some of them have incorporated all the breaches specified by Geneva Conventions in their military penal codes among them Switzerland, Norway and Venezuela, are included.

Nine counties had incorporated these breaches in their particular penal codes. The United Kingdom considered as a rule settler in international community, had adopted the UK Geneva Convention Act, 1957. Section 1 has defined the grave breaches as defined by Geneva Conventions. It reads as under:

> Any person, whatever his nationality, who whatever in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, any such grave of the scheduled as is referred to in the following articles respectively of those Conventions [art 50 (ii) art 130 (iii) art 147 (iv) shall be guilty of felony and on conviction thereof.[137]

From the above mentioned discussion, one can conclude that the world community has adopted the principle of universal jurisdiction to prosecute suspected criminals.

Former UK colonies have promulgated their own Geneva Convention similar to UK; they are India, Ireland and Zimbabwe Netherlands and Belgium have penalized

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[137] Elst, "Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions," 826.

through special Acts, while Switzerland had modified its own military penal code to cope with grave breaches.

The following are examples of application of universal jurisdiction are:

Goran Grabez 32 year old chaffer a foreigner has been prosecuted in Switzerland for the first time for war crimes committed in former Yugoslavia. He was accused of having ill-treatment with six prisoners in Omarska concentration camp. Later on he was acquitted on the ground that case was mainly based on contradictory order testimony. The courts ruled that it was competent to try war crimes under section 109 of the Military Penal Code[138].

In case of *Eichmann,*[139] the District Court of Jerusalem upheld the principle of universal Jurisdiction to bring Eichmann to justice for crime committed against the Jewish people during Nazi regime even when the state of Israel was not existed. The court asserted the right of universal jurisdiction in all states to prosecute and punish the offender of crimes of international concern.[140]

Unlike other countries Germany has also incorporated provision of grave breaches in section 6 Para 9 of the German Penal Code: "Acts which are according to an international convention binding on the Federal Republic of Germany, to be prosecuted if committed abroad." For violation of section 211 of the German Penal Code, Germany prosecuted *Navislav Djajic*, who took part in shooting 15 Muslims of

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[138] Elst,"Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions," 827.
[139] Attorney –General of Israel V.Eichmann,36 I.L.R.5(supreme Court of Israel 1962)
[140] Kittichaisare, *International criminal Law*, 39.

Trnovaca near the river Drina on 22 June 1992. The court exercised its jurisdiction under section 6 Para 9 of German Penal Code, mentioned above.[141]

The principle of the universality, however, provides that there are certain crimes, such as genocide, torture and other crimes of horrifying nature, which cause injury to all states, not only grave breaches of conventions mentioned in common article of the four Geneva conventions[142], all states have a legal interest to prosecute and punish heinous crimes. Hence, it is concluded that even in the absence of a particular international treaty, states have authority and in some circumstance, an obligation to prosecute the particular criminal who has committed crimes against humanity.[143]

The incorporation of grave breaches in national law of states as blanket norm is more appropriate then adopting new provision in national law[144]. The method of implementing the universality principle has come under great scrutiny in recent time, alongside the impending establishment of the International Criminal Court and the highly publicized proceeding of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, as well the trial of such famous figures as, Ugrate Pinochet and Slobodan Milosevic.[145]More interestingly, the former UK Prime Minister Margaret Thatcher rescheduled her foreign trips because of fear to be arrested, "as result what has been called "the Pinochet syndrome" as stated by Elst:

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[141] Elst, Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions," 829-830.
[142] GC I 49/GC II 50/GC III129/GC IV 146
[143] Luc Reydams, "In re Pinochet. Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), November 8, 1998," *The American Journal of International Law* 93, no.3 (July 1999), http://www.jstor.org/stable/2555270 (last accessed 06/07/2009 06:03), 702.
[144] Elst, "Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions,"844.
[145]Kittichaisare, *International criminal Law*, 39.

> Lady Thatcher is said to be anxious that might be indicted if she raveled to parts of South America in the light of her decision to recapture the Falkland by force. She said to have been concerned that some countries might try to indict her for role in Northern Ireland policy, including detentions without trial and claim of alleged shoot-to-kill operation by the security forces.[146]

Similarly according to report of Israeli newspaper Ha'aretz, Avi Dichter, the Head of Internal Intelligence Service had cancelled a trip to Belgium for a conference out of concern that he might be arrested for actions in occupied territories[147].

On the contrary International Court of Justice in *Congo V Belgium,*[148] held that Belgium does not enjoy right to universal principle. Critics say however, the ICJ has ignored the previous steps taken by the international community. The most important that *ex-partie* Pinochet[149] and Slobodan Milosevic[150] sitting head of state indicted by international criminal tribunal empowered by Security Council under chapter VII.

After World War II, the doctrine of universal jurisdiction got significant development big powers that are Great Britain, United State, France and Soviet Union affirmed such jurisdiction, as parties to Nuremberg charter had used their extraterritorial jurisdiction over Nuremberg defendants which amount to that they had denied doctrine of state immunity for core international crime and violation of jus cogens. The indictment of Eichmann by Israel District Court, the issuance of arrest warrant of Pinochet by the Spanish court and the authorization of the ICC by security

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[146] Elst,, "Implementing Universal jurisdiction over Grave Breaches of Geneva Conventions,"852.
[147] Anthony Dworkin, "Belguim Court upholds Universal Jurisdiction, but Law's Future is uncertain," www.crimesofwar.orgonnewsnews-belgium2.html (Last accessed 25/12/2009 04:20)
[148] Arrest Warrant of 11 April 200(Congo V. Belgium), 41 I.L.M (2002).
[149] Reg.V Bow Street Magistrate;Eex prate Pinochet Ugarte [No 3] [2001] 1 AC 147.
[150] Prosecutor V. Milosevic, Indictment, November 22 2001.

Council without US opposition, are very appropriate example of prosecution of international criminals. [151]other example has made it clear that universal jurisdiction exists to try international criminal irrespective of their nationality. The universal jurisdiction has effectively used by Belgium to convict Hutu nuns for Rwandan genocide.[152]The conclusion of the discussion is that, universal jurisdiction has been accepted by most of the civilized states like Belgium, Span, Canada, and Australia and recently United Kingdom.

Increasing knowledge and adoption of principle of universal jurisdiction for core international crimes by ad hoc tribunal and international criminal courts and by various national courts ensure that other states have to abide the same principle in order to make difficult for suspected war criminals to have a safe haven. [153]Despite recognitions of universal jurisdiction for criminal prosecution of international criminals, one could see also development of universal jurisdiction in civil cases against states. Example s are the Canadian courts decisions *in Bouzari v Iran* and decision of Italian Supreme Court in *Ferrini v Federal republic of Germany.*[154]

The UN General Assembly recognizes the principle of international cooperation. Such principle extends to arrest and detention, extradition and punishment of person guilty of war crimes and crimes against humanity. The recogni9tion of this principle by the

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[151] Robertson, "Ending Impunity: How International Criminal Law can put Tyrants on trail," 667.

[152]en.www.wikipedia.org/wiki/Universal Jurisdiction (last accessed 21/1/2010)

[153] Elst, "Implementing Universal jurisdiction over Grave Breaches of Geneva Conventions," 854.

[154] Alexander Orakhelashvili,"The Fundamental Rules of the International Legal Order: jus cogens and Obligation Erga Omens," T*he American journal of International Law* 100, no.2 (Apr 2006), http://www.jstor.org/stable/3651184 (last accessed 06/01/2010), 515.

international; community indicates that a customary law is in the emerging process. One may argue that such principle has attained the status of jus cogens, which authorizes states to introduce legislation at national level. Whether these violations took place in armed conflict or in peace time.[155]A positive development that even a prosecutor of the ICC may initiate proceedings against any international criminal. Some of problem in implementing universal jurisdiction might be solved through legislation of different state of the world however, political and economic interests of states are hurdles in prosecuting war criminals.[156]

2.10 Statute of International Criminal Court

The Rome statute of International Criminal Court of 1998 is a multilateral treaty, deals with the question of immunity of Head of State very explicitly. It declares that "official capacity" of head of state or heads of Government or other high official shall not exempt from criminal responsibility. It also recognizes jurisdiction upon defendants of state parties, even it also recognizes jurisdiction when a core international crime committed by other national of a state party on territory of other state party. According to the Rome statute, the court has jurisdiction on the heads of states party to it[157].

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[155] Reydams, "In re Pinochet. Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), November 8, 1998," 703.

[156] Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal jurisdiction in Europe 1998-2008,"Michigan journal of international law 30, No.27 , http://students.law.umich.edu/mjil/ l(ast accessed 17/05/2010 11:15), 964.

[157] Michael A. Tunks, "Diplomats or Defendants? Defining the future of Head –of – state Immunity," *Duke Law Journal* 52,no. 3(December 2002), http://www.jstore.org/stable /1373165(last accessed : 06/07/2009 06:39),661.

2.10.1 Article 27 of the ICC in contradiction with Article 98:

The international criminal court of justice contains two provisions article 27(1)(2), regarding the matter of immunities of high official of states, head of state and other diplomats etc. Articles 27 of the statute of ICC primarily waive any kind of immunity for certain conduct that is war crime, genocide, crimes against humanity, etc. The language of Article 27(1) is similar to the other charters that of Nuremberg, Tokyo, Rwanda and Yugoslavia[158]. It reads

> This statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of state or Government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

The main object of 27(1) is to abolish the plea of immunity completely. It clearly states that official positions of any person cannot absolve him from criminal responsibility. The language of 27(1) confers jurisdiction on all state parties. These can argue that immunity is not a bar to ICC jurisdiction.

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[158] Dapo Akande "International Law Immunities and the International Criminal Court", *The American Journal of International Law* 98, no.3 (Jul 2004), http://www.jstore.org/stable/3181639 (last accessed 06/07/2009 06:17), 419-420.

Secondly, article 27(2) is clear regarding immunity; it rejects the immunity in strict sense whether it is in international law or in national laws as stated: "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".

Article 27(2) applies to both kinds of immunities that are immunity *rationae materiae* and immunity *rationea personae* as explained in first chapter.Article 27 lays down the rule that immunity can not be bar in prosecution of international criminals. But article 27(2) completely bars a situation that a criminal can raise the plea of immunity *rationea personae* as a defense which can be otherwise raised by virtue of27(1) of the statute.

Article 27(2) is completely new in its nature there is no counter part of it in other international criminal statutes.[159]

Part 9 of the statue requires the state parties to cooperate with the court in arresting and surrender of the alleged criminal, so state parties are under obligation to handover to court. As the court does not have independent power to arrest the international criminals.[160]

Part 9 also contains Article 98 which presents a different picture under:

> The court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations

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[159] Summers, Immunity Or Impunity?" The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court." 490.

[160] Akande, "International Law Immunities and the International Criminal Court," 420.

under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the cooperation of that third state for the waiver of the immunity.

The court may not proceed with the request for surrender which would require the requested state to act inconsistently with its obligations under international agreement pursuant to which the consent of a sending state is required to surrender a person of that to the Court, unless the court can first obtain the cooperation of the sending state for the giving of consent for the surrender.

Simple interpretation of article 98 is that non state parties to ICC statute enjoys all the immunities even they are present in state parties to statute[161],they can not be arrested nor ICC can issue an arrest warrant of ,which it can other wise issue under article 58 of the statute. Unless the third state cooperates with the court and waives immunity of the alleged criminal and permits its arrest[162]

2.10.2 Critique of Article 98 of ICC Statute

Article 98 states that a court will not ask for assistance of a state party which would otherwise amount to breach of an international obligation between a state party and a non state party. Nor can the court ask the surrender of alleged criminal of non state party, but only in case if the state concerned cooperates with the ICC. One may be able to say that these are loophole in statute of ICC, which grants safe heaven to international criminals. The ICC is a protector of human rights. It seeks to punish the

[161] Summers, "Immunity Or Impunity?" The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court." 491.

abuser. But a problem arises when the state is not a party to the ICC and the alleged criminal is in a state party. Hence, in pursuance of Article 98, and article 27 seems ineffective regarding arresting and surrendering of the criminals. It follows that state actors are immune even if they committed violation of jus cogens (genocide, war crimes and crime against humanity).Articles of the Vienna convention on the laws of treaties states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[163]

Article 98 of ICC Statute did not address the type of international obligations. Since the Vienna Convention on the laws of treaty does not recognize any treaty which contradicts with *jus cogens* or preemptory norms. So if a treaty between a state party and non state party contradicts with *jus cogens* norm, the treaty is null and void.

2.10.3 Article 27 is a Promise to Bring International Criminal to Justice:

Article 27 obliges the state parties to cooperate with the ICC in order to bring the preparators of core international crimes, to justice. It is a sign of hope as it not only waives international immunities of high official of the state parties but also ensures the possibility of the arrest of the alleged criminals of one state from other state party.

[163] Vienna Convention on the Law of Treaties, Article 53, May 23, 1969, 1155 U.N.T.S

Some of civilized states of the world have incorporated the ICC statute in to their domestic legislation, for example, the UK's International Criminal Court Act of 2001 provides in section 23(1), "any state or diplomatic immunity attaching to a person by reason of the connection with a state party to ICC statute, does not prevents his or her arrest in United Kingdom." Similar provisions are also present in the respective legislation of Malta and Ireland.[164] Once a state becomes a party to the statute, it is under an obligation to cooperate with the court in arresting and surrendering of alleged criminal under part 9 of the statute. So, it can be concluded that article 27 plays an important role in bringing violator of human rights to justice irrespective of their official position.

2.11 Indictment of Sitting Head of Sudan's State:

A prosecutor of the ICC, Luis Moreno- Ocampo filed case against President Omer Al Basher accusing him of genocide, war crimes and crimes against humanity, during the Darfar crises of July 4, 2009. the International Criminal Court issued an arrest warrant of Mr. Basher for crimes against humanity and war crimes, but not for the crime of genocide. The court asserted that there was no sufficient evidence in respect of crimes of genocide.

2.11.1 Court Jurisdiction:

According to statute of ICC, the court has no jurisdiction on a state not a party to the Statute. But the case of Darfar was referred to the ICC by United Nations Security

[164] Akande, "International Law Immunities and the International Criminal Court,"422.

Council through a resolution no 1953(2005). As the Security Council considered that situation in Darfar could harm international peace and security.

2.11.2 Charges against Omer Al Basher:

Alleged charges against Omer Al basher in arrest warrant of 4th march 2009.Court asserted that he is criminally responsible under Art 25 of the statue as he has committed crimes against humanity and war crimes.

The charge was that during attack on El Fasher airport, from April 2003-July 2008, war crimes were committed in obedeience to Omer Al Bashir's Orders. It was alleged that articles 7(1)(a),(b)(d),(f) and (g) were violated.

The court has reasonable ground to believe that civilians have been attacked in Darfar, intentionally belonging to largely to Far, Mastic and Zasghwa group.

The court issued an arrest warrant as court considered that Omer Al Basher has been *de jure* and *de facto* president of Sudan and Commander In Chief of Army. He has control over armed forces Militia and police; according to article 25(3) the court considered that Omer al Basher is criminally responsible.[165]

Al Basher is the first sitting head of state indicted by international criminal court.

2.11.3 International Community Response:

The Arab league and African league didn't accept the arrest warrant. During his visit to Egypt and Qatar, the Prosecutor and Amnesty International

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[165] International Criminal Court (4 March 2009). Warrant of Arrest for Omar Hassan Ahmad Al BashirPDF (358 KB). Retrieved on 4 March 2009. (last accessed 25/02\2010 04:51)

declared that he could be arrested Sudan declared that his plan will be protected by Sudanese Air Force. On the other hand United Nations Security Council demands that, Sudan should cooperate with the ICC. Sudan argued that the arrest warrant was illegal and that Sudan is not party to ICC.[166] Mummer Al Qaddafi, the elected Chairman of African Union has managed that the union oppose the International Criminal Court and to assure that Omer is protected from arrest.[167]

2.12 Aut Dedere Aut Judicare:[168]

International treaty law obliges states to either prosecute or extradite certain international criminals. Most notably the four Geneva Conventions require the contracting parties to prosecute or extradite a particular criminal for grave breaches of international humanitarian law. It is not the matter of concern that what is nationality of the alleged criminal or where the crime took place, the principle has been combined with universal jurisdiction.[169]These provisions provide that the alleged criminal must not go unpunished, if the state does not prosecute the criminal, then it is under obligation to extradite the particular criminal to other state where he or she can be prosecuted.

The doctrine *aut dedere aut judicare* also deals obviously with the question of immunity as there is a close link between international crimes and immunity. It

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[166] en.wikipdia.org/wiki/Omer_al Basher.(lasr accessed 3/01/2010 03:54)
[167] Geoffrey Robertson, "Gaddafi Getting Away with Murder" *guardian.co.uk*, 21,Sep,2009.
[168] Joseph Davids, "Political Consideration and the Prosecution of International Crimes," works.bepress.com/cgi/viewcontent.cgi?article=1000&context. (Last accessed 09/02/2010 09:15), 8-9.
[169] See common article,49/ 50/129/146, also article 5 of Genocide convention of 1948

overrides the doctrine of immunity as it requires all state to establish universal jurisdiction over international crimes. One may conclude that if a state does not prosecute the international crimes it does not bar other states to prosecute the accused.[170]

2.13 Concluding Remark:

It is clear from above discussion that international law recognizes individual criminal responsibility, for core international crimes. The Geneva Conventions provide that all state parties shall ensure to discourage the grave breaches of international humanitarian law during armed conflict. Articles 49/50/129/146 of the Conventions require contracting parties to establish universal jurisdiction in order to try or extradite the culprits accused of grave breaches of IHL. Also different states practice from Nuremberg to Hague have made it clear that certain gross crimes should not be tolerated on the part of any one irrespective of their official status. Despite steps taken by international community and treaty law pertaining to stop the gross violation of human rights and to bring perpetrators of core international crimes, facing some strong problems. In June 2001 some of survivors of the massacre of Palestine filed complaint against Ariel Sharon and Amos Yaron. In March 2003, some Iraqi families requested an investigation against US president H.W Bush and Vice president Dick Cheney and former Chief of Joint Staff Colin Powell and retired General Norman Schwarzkopf alleging that they have committed war crimes during 1991.The Gulf War Secretary Powell warranted that Belgium should amend its law, as Belgium can

[170] Joseph Davids. "Political Consideration and the Prosecution of International Crimes."9.

face consequences. Then Belgium proposed amendment in its war crimes statute in April 2003Tthe new law precludes cases against Head of State and government, and Foreign Minister while in office, and the person whose immunity is recognized by treaty law to which Belgium is a party[171] So Belgium war crimes law which in past was of universal jurisdiction has been replace because of US pressure. The most recent example is that of the ICJ decision against Belgium, as Belgium used this law on the basis of universal jurisdiction to prosecute *Yerodia* foreign Minster of Republic of Congo for grave breaches of IHL.The most recent step, is the inquiry of British prime minister, Tony Blair in respect of Iraq war is also an evidence of individual accountability, although it has been pronounced that, there will be no legal action against him, before conducting inquiry. So it seems that accountability of power full state actors can also conduct in near future.

[171] Steven R. Ratner, "Belgium's War Crimes Statute: A Postmortem," *The American Journal of International law* 98, no.4 (2003), http://www.jstor.org/stable/3133687 (last accessed 06/07/2009 06:07), 889-890.

CHAPTER III

ISSUES OF INTERNATIONAL HUMANITARIAN LAW

3. States as subject To International law for International Wrong:

A state may enjoy freedom from litigation or may be immune from jurisdiction in its national courts. However, in international law, a state bears responsibility for its wrongful acts as an international entity.

State responsibility is of two kinds. First, the acts have done by state officials, government or private individuals with express authorization of state's government. Second, the acts have done by private individual state officials in private capacity without state authorization. The forum is called 'original' and the latter 'vicarious' responsibility.[172]A state may internationally responsible for an act of private individual, which creates a breach of an international obligation by virtue of an act not attributable to state. In Noyes Claim *United State V Panama*[173] case, injury incurred by a private individual to Noyes on simple ground not committed by Panama but the US claim that Panama was responsible as it could not protect Noyes from injury[174].

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[172]Ed.Robert Jennings QC & Arthur Watts KCMG QC, *Oppenhiem's International law*, 9th ed., Vol 1(India:PEACE,2003), 501

[173] Noyes Claim (United State V Panama) (1933)6 RIAA 308.

[174] Martin Dixon MA, *International Law* (London: Blackstone Press Limitrd, 2000), 236.

Similarly in *US V Iran* [175], Iran was not directly responsible for damage caused by private individual but may responsible as it failed to protect the embassy.[176]

3.1 Criminal responsibility of state:

State also bears criminal responsibility for its criminal conduct. The civilized international community has defined a certain conduct as contrary to international law that is certain crimes which are universally considered as international wrongs. Thus, if a state government orders to do acts contrary to international law with in its own territory or abroad the state doing so may criminally responsible for such criminal conduct .Beside the state responsibility the individual acting behalf of state will also be responsible for their criminal conduct.

The International Law commission in 1954 has adopted the Draft Code of Offences against the Peace and Security of Mankind, Which make individual responsible for wrong full acts. Article 1 of the Code provides that: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished".

A long list of offences has been defined in the 2nd article of the Code considered against the peace and security of mankind. The Code also states in its article 3 and

[175] United States V Iran 1980 ICJ Rep 3.
[176] Akehurst, *Modern Introduction to International Law*, 7th ed. (New York: Rutledge, 1998), 260.

4[177] that an individual will be responsible for the alleged act defined in article 2 of the Code.[178]

However, the International Law Commission started again consideration on the topic of individual criminal responsibility in 1982, in order to make criminal responsible for the acts done in their private capacity. Later on, the Draft Article 3 was provisionally adopted by the commission in 1987. It provides that the prosecution of individual for a crime against the peace and security of mankind does not relive a state of any responsibility under international law for an act or omission attributable to it."[179]

3.2 Can a Sitting Head of State be prosecuted for Grave Breaches of IHL?

However, an international consensus has emerged that violation of jus cogens peremptory norms can not amount to official acts of state. Ruling of *Schooner*

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[177] Article 3 and 4 of Draft Code of Offences against peace and Security of Mankind of 1954
The fact that a person acted as Head of State or as responsible government official does not
relieve him of responsibility for committing any of the offences defined in this Code.
Article 4
The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

[178] Jennings, *Oppenhiem's International law*, 503.
[179] *Ibid*, 535.

Exchange v McFadden[180] has been replaced by other rules that are set by international community through adapting different international instruments protecting human rights. The international community has adopted legal order which supersedes immunity in case of violation of grown norms (war crimes, crimes against humanity and genocide etc). The recognition of Nuremberg Charter and judgment by General Assembly, Convention on prevention of crime of Genocide of 1948, Convention against torture and other Cruel, inhuman or Degrading Treatment or Punishment of 1987 and formulation of International Criminal Tribunal for former Yugoslavia and recently International Criminal Court. All these steps clarify that war crimes or grave breaches of IHL will no more be tolerated on part of any one.

According to most of the world constitutions head of state usually serves commander of Armed Forces. This awards *de jure* authority to Heads of State regarding military actions. They are supposed to control subordinates and suppress all violations.

Article 86 of Additional Protocol I of 1977 provides that:

> 1. "The high Contracting parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Convention or of this Protocol which result from a failure to act when under a duty to do so.
> 2. The fact that a breach of the Conventions of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach".

[180] Schooner Exchange V McFadden, 11 U.S 116, (1812).

The Commander in Chief is under an obligation to prevent all breaches of custom of war. Any negligence on his part will make him liable for punishment. Customary international humanitarian law has set the rules for violators that they can not go unpunished. Article (7) of the Nuremberg Charter provides that: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[181]

Article (7) (2) of statute of International Tribunal for Yugoslavia and article (6) (2) of the Rwanda tribunal and article 27 of International Criminal Court contains the same rules.

While concentrating on interpretation of different articles of international instruments, one can concludes that they have waived immunity from office of heads of state or head of government. The second thing is that there is no specific rule given in these articles regarding the status of Head of State as former or sitting, only they gives the rule that a Head of State can no longer absolve from criminal liability for alleged war crimes. It follows that a sitting head of state can be put to punishment. One of the prosecutor, open his case with proclamation that the privileges which international law has awarded to state should not shield from punishment:[182]

> "These defendants were men of a station and rank which does not souk its hands with blood. They were men who knew how to use lesser folk as tools.

[181] See. Article (6) (2) of Rwandan criminal tribunal statute and (7) (2) of Yugoslavia criminal tribunal statute.

[182] The trial of Gen Major War criminal by the International military tribunal setting as Nuremberg Germany.

> We want to reach the planners and designer, the inciter and leaders... The idea that a state, any more than a corporation, commits is a fiction. Crimes are always committed only by person...It is quiet intolerable to let such a legalism became the basis of personal immunity...Modern civilization puts unlimited weapons of destruction in hands of men. It cannot tolerate an area of legal irresponsibility"[183].

The judgment of Nuremberg had removed shield of sovereign immunity for crimes against humanity as stated:

> It was submitted that....where the act in question is an act of state, those who carry it out are not personally responsible ,but are protected by the doctrine of sovereignty of the state. In the opinion of the tribunal (this contention) must be rejected. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced.
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> The principle of international law, which under certain circumstances protects the representative of the state, cannot be applied to acts which are considered as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceeding.[184]

Most of the international law academics say that the trial of Nuremberg had made crakes in laws of immunity. It is true in real sense, as above mentioned Article and judgment removes the ambiguity that a sitting head can be put to trail and

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[183] Geoffrey Robertson QC, "Ending Impunity: How International Criminal Law can put Tyrants on trail." *Cornell. International law Journal* 38 no. 469 (2005), http://heinonline.org//HOL//Leciens (last assessed 15/11/2009), 655.

[184] *ibid.*

punishment. There is also a special universality in international law regime which has established a universal basis of jurisdiction for a particular conduct[185].

The international community has adopted a legal order which supersede immunity in case of violation of grown norms. The recognition of Nuremberg Charter and judgment by General Assembly in 1946 reaffirmed the principles laid down by Nuremberg Trail and Judgment of 1950. Along with treaty laws, one may say that customary international humanitarian law also condemned grave breaches of IHL. Common article 50/51/130/147 of Geneva Conventions prescribes grave breaches of international humanitarian law:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[186]

Above mentioned crimes or grave breaches of IHL has also recognized in other international treaties as war crimes. These breaches are not tolerable on part of any one. After defining grave breaches, the conventions also state that no contracting

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[185] Marc Weller, "On the Hazards of Foreign Travel for Dictators and Other International Criminals," *Royal institute of international affairs*75, no.3 (1999), http://www.jstor.org/stable/2623638 (last accessed: 06/07/2009 06:39), 607.
[186] Article common to all four conventions, Article 51of GCII, Article 130 of GCIII and Article 147 of GCIV.

party can absolve itself from criminal responsibility or any one else who have committed these grave breaches[187].

Geneva conventions also bind states parties to legislate domestic laws to punish the criminals, who have committed grave breaches as stated: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanction for person committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article"

> Each High Contracting Part shall be under the obligations to search for person alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such, persons, regardless of their nationality, before its own court. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such person over for trail to another High Contracting concerned, provided such High Contracting Party has made out a prima facie case."[188]

Conventional law obliges contracting parties to create a universal jurisdiction system on grave breaches of IHL. The International Committee of Red Cross commentary on this article concludes that these obligations are absolute.[189] Article 3 of The Hague convention 1907 Concerning Laws and Custom of War on Land can termed as also customary international law asserts liability on states party to try

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[187] See common article51,52,131,148 of Geneva Conventions

[188] see common article 49/50/129/146

[189] Yasmin Naqvi, "Amnesty for War Crimes: defining the Limits of International Recognition", *International Red Cross Review* 85 no.851 www.icrc.org/Web/eng/siteeng0.nsf/htmlall/.../$File/irrc_851_Naqvi.pdf last accessed 14/09/2009 12:02 , 595.

alleged criminal and not to absolve from criminal liability.[190] These article impose two kinds of obligations on contracting parties: first, states parties to legislate domestic laws in order to criminalize grave breaches of IHL. This also means that the Geneva Conventions authorizes contracting parties to apply universal jurisdiction for grave breaches through their domestic courts. Secondly, the states have to search the person accused of committing grave breaches; if they find him on their territory they have to try him .And they may extradite him to other contracting party who also seek to try him for the same grave breaches.[191] The simple language of all international instruments regarding war crimes or grave breaches of IHL had made it crystal clear that no one is above the law, whether a Head of State or an ordinary state official, if they are involved in grave breaches of international humanitarian law they can put to trail.

3.3 Rejecting the Plea of Immunity for violation of Jus Cogens:

> The Judgment No.6964 at Nuremberg trial stated as:
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> "The principle of international; law which under certain circumstances protects the representative of state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceeding."[192]

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[190] Bardo Fassbender, "Can victim sue state official for torture? Reflection on *Rasul V Myers* from the Prospectine of International Law," (oxford university press ,2008), http://jicj.oxfordjournals.org/cgi/content/full/6/2/347 last accessed 13/11/2009 10:23.

[191] Georges Abi-Saab, "The Concept of War Crimes," International *Law in the Post-Cold War World*, ed. Sienho Yee and Wang Tieya (London and New York: Rutledge. Taylor & Francis Group, 2003),115.

[192] Robertson, "Ending Impunity: How International Criminals Law Can Put Tyrants On Trail," 655.

Nuremberg judgment and Charter is considered as a mile stone in introducing new international order, the conduct or acts which is not permissible in part of any one that is violations of jus cogens norms. These are crimes against humanity, human rights abuse torture, war crimes.

The Vienna Convention on the laws of treaty, defines a jus cogens norm as a "peremptory norm" of international law, accepted and recognized by international community from which no derogation is permitted. It can only modified by a subsequent norm of general international law of the same character.[193]

3.3.1 Status of jus Cogens in International law Superior than doctrine of State Immunity:

Jus cogens do not need to be affirmed by states for their self interest "jus cogens enjoy the highest status within international law".

International law and jus cogens are related but they differs on one point, ordinary international law is a product of international treaties and agreement, when a state continuously objects to a particular treaty or convention, it cannot be bound of it. International agreement creates a norm termed as *jus dispositorm* which only obliges those state who affirm that agreements. Jus cogens or peremptory norm is a fundamental principle of international law and no derogation from it is permitted.[194]

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[193]Thomas R.Van Dervort, *International Law and Organization An Introduction* (London: Sage Publications, 1998), 108.
[194] Dervort, 109.

The Vienna convention on the law of treaty states that any treaty or agreement contrary to jus cogens norm are null and void. Some of the jus cogens norm is termed as of criminal character, which is assumed to be enforcing against any one irrespective of their official positions. This practice has been emerged because of trial of Nuremberg.[195]War crime has gained the status of jus cogen. Is not permitted on the part of any one. Since charter of Nuremberg till charter of Rwanda grave breaches regime has converted in war crimes law.[196]

Legitimacy of the Nuremberg trial was not dependent upon the wish neither of victor's power nor by consent of the defendants but according to the nature of the crimes which have been committed by criminals during the war. All those acts which are declared by international community as criminal, the trial and Charter has recognized the natural and fundamental right of human being ,these are right against genocide, torture, enslavement and all other inhuman acts known as jus cogens. The same fundamental principle has been recognized by International Court of Justice in Belgium v Spain 1970.[197] The Barcelona Traction principle and rules concerning the basic right of the human person are the concern of all stats they are obligation erga omens.[198]

Whenever there is a contradiction between state immunity and *jus cogen* norm, one can argue that jus cogens norm may prevail over state immunity. Such

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[195] www.wikipedia.com jus cogens
[196] Marko Divac Oberg. "The absorption of grave breaches into war crimes law". *International Review of the Red Cross* 91 no .873(March 2009), http://www.icrc.org/web/eng/siteeng0.nsf/html/section_review_2009_873?opendocument (last accessed 24/11/2009 05:22). 167.
[197] Belgium v Spain. 1970 I.C.J.3,32.
[198] Dervort. 109.

conduct can not triumph even if the doctrine has gained the status of customary international law. The preemptory norm will be superior over state immunity as *lex superior*.[199]While looking at the state immunity, it may not be a fundamental principle of customary international law. If it was a fundamental principle of international law, there would be no concept of adoption of restrictive approach, which differentiates between private and public acts.[200]The division between public acts and private acts indicates craks have in doctrine of immunity. While looking at doctrine and the cases which have been decided by different states, we may argue that the state practice towards immunity issue is according to their national laws of immunity not according to international law. For example, the case of *AL_Adsani* v Kuwait[201] and case of *Siderman v Argentina*[202] decided by United Kingdom and United State,the decision was by virtue of their respective statute of foreign state immunity. It does not create international law norms in contrast jus cogens are international law norm. *Prosecutor v Blaskic*[203]. In appeal decision, at the request of Federal Republic of Croatia stated, some exception has been prescribed by international criminal law prohibiting war crimes, crime against humanity, torture and genocide. According to these norms one can not take the plea of immunity by pleading that these acts are committed under

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[199] Alexander Orakhelashvili, "The Fundamental Rules of the International Legal Order: Jus cogens and Obligations Erga Omnes," *The American Journal of International Law* 100, No.2 (April 2006),http://www.jstor.org/stable/3651184 last accessed 06/012010 02:41, 515-516.

[200] Caplin, "State immunity, Human Rights, and Jus Cogens: A critique Of the Normative Hierarchy Theory,"754.

[201] Al-Adsani V. Kuwait, 103 ILR 420 (queen Bench. 1995).

[202] Siderman V the Republic of Argentina, 965 F.2d 699,(9th Cir,1992.

[203] Prosecutor V Blaskic, case No.IT-95-14 , available at http://www.un.org/icty/blaskic/appeal/deciaion-e /71029JT3.html.

official capacity.[204]Lord Wilberforce in *I Congreso* and Lord Denning in *Trendtex Trading corps v Central Bank of Nigeria, 1977*[205] gave the ruling that state immunity is a matter of comity between the states; not an obligation under customary international law.[206]Lord Denning, while addressing speech in 1885 in case of *Rahmathula V Nazim of Hyderabad*, stated that sovereign immunity is not dependent on the wish of the state for what they had pleaded, but on the nature of acts. His comment was based on case law of 1820, regarding ship accident in which immunity has been rejected for sovereign.[207]Thus the idea that state immunity is a customary international law's principle and obligation upon all the state, is misinterpreted and even could not be supported by evidence.[208] All international criminal law documents from Nuremberg Charter till the Darfur waived the immunity and ensured respect for jus cogen norm, which means that violations of such norm is not permissible on part of any one. The new international public order ensures human rights and respect for jus cogens norms. The world has become a global village, in which any human rights abuse affects the other states. For example, management of refugees is a difficult task. It can cause harm to the host state. In like manner any abuse of jus cogen brings harm

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[204] Summers, Immunity Or Impunity?" The potent ional effect of prosecutions of state official for core international crimes in state like the United State that are not parties to the Statue of the international criminal court" *BROOK.J.INT'LL* 31 no.2(2206) , http://www.brooklaw.edu/student/journal/bjiil/bliil.(last accessed 27/9/2009).489.

[205] Trandtex Trading Crop.V Central Bank Of Nigeria,[1977] I Q.B.

[206] Orakhelashvili,"The Fundamental Rules of the International Legal Order: Jus cogens and Obligations Erga Omnes,"515.

[207]Stacy Humes –Schulz, "Limiting sovereign Immunity in the Age of Human Rights" *Harvard human Rights journal*, 21(2008), http://www.law.Harvard.edu/students/orgs/hrj/iss21/105-142.pdf (last accessed 25/6/2009), 136.

[208] Orakhelashvili, 515.

to other state. In such situations, a remedy is necessary to create balance between immunity and jus cogen. The principle of universal jurisdiction can play its role positively. In Congo v Belgium, concurring minority Judge Van Dan Wyngaert and Al Khasawneh concluded that immunity from jurisdiction may not be invoked in case of violation of jus cogens. In case of a former Head of State of Liberia, Charles Taylor, he challenged the verdict on the basis of law of immunities under international law that he had committed the alleged acts while in office. But the appeal chamber rejected the plea, relaying upon the Nuremberg and Far East Charters and on the Statue of ICC as well precedent of Pinochet.[209]Several cases including that of Pinochet have been decided on the principle of the Nuremberg Charter. Similar is the position of the Milosevic trial. It appears that the defense immunity has not prevailed with the tribunals. The Pinochet ex parte and the Congo vs. Belgium are further good examples in this point.

3.4 Decision International Court of Justice in Congo v Belgium:

The United Nation ad hoc criminal courts, authorized by Security Council ensure that immunity is not a viable defense.[210] Such a defense setup by Yugoslavian President Slobodan Milosevic and for Rwandan Prime Minister Kambanda has been rejected.. On April 2000, a Belgium Court of first instance issued arrest warrant of Congo's

[209] Dapo Akande, "International Law Immunities and the International Criminal Court," *The American Journal of International Law* 98 no.3 (Jul 2004), http://www.jstore.org/stable/3181639 (last accessed 06/07/2009 06:17),416.
[210] Steven R Ratner, "International Law: The Trails of Global Norms," *Washingtonpost.Newsweek Interactive, LLC*, http://www.jstore.org/stable/1149277(last accessed 06/07/2009 06:16),71.

Foreign Minister Yerodia by virtue of the Belgium War Crime Statute of 1993,[211] charging Yerodia with grave breaches of IHL (Geneva Conventions and Additional Protocols to Geneva Conventions) coupled with article 7 of the said statute. The court involved universal jurisdiction in respect of genocide, war crimes and crimes against humanity.[212]

ICJ in this case considered the law of immunity and upheld immunity for the Foreign Minister and for other high officials of Congo. It ruled that the warrant was illegal under international law and that Belgium has violated international law of immunities.[213]The Republic of Congo requested relief in the light of article 2(1) of United Nation, which requires respect for sovereignty of all state of the world and by virtue of article 4(2) of Vienna Convention on principle of diplomatic immunity. Congo asserted that Belgium has violated international law by issuing arrest warrant of an incumbent Foreign Minister.[214]

The most surprising thing in the case is that Congo did not argue against the issue of universal jurisdiction, as it might have favored the Belgium's claim. The principle

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[211] Alexander Orakhelashvili, "Arrest Warrant of April 2000(Democratic Republic of the Congo V. Belgium),"*The American Journal of International Law* 96, no.3 (Jul 2002), http://www.jstore.org/stable/3062170 (last accessed 06/01/2010 02:47, 677.

[212] David Turns "Arrest warrant of 11 April 200(Democratic Republic of the Cong V Belgium) The International Court of Justice's Failure to take a stand on Universal Jurisdiction", *Melbourne Journal of International law* 3, http://en.wikipedia.org/wiki/Case_Concerning_the_Arrest_Warrant_of_11_April_2000_(Democratic_Republic_of_the_Congo_v._Belgium) (last accessed 24/19/2009 11:46).

[213] Robertson , "Ending Impunity: How International Criminal Law can put Tyrants on trail," 657.

[213] ibid

[214] David Turns "Arrest warrant of 11 April 200(Democratic Republic of the Cong V Belgium) The International Court of Justice's Failure to take a stand on Universal Jurisdiction", *Melbourne Journal of International law*

of universal jurisdiction is present against certain crime of universal concern in international law as well in international treaties.[215] The court only confined itself to international law of immunity, ignored the treaty laws and different statutes of international criminal tribunals. The same law of Belgium has been used against the conduct of Rwandan Nuns during Rwandan genocide. The nuns have been convicted for their alleged crimes.

The court upheld immunity and discussed the nature of immunity, its importance in foreign affairs. The foreign ministers are required to go out side the country in order to represent their country. So special privileges and immunity is required to exercise their duties without fear of arrest. But the ICJ here ignored the Charter and trial of Nuremberg.[216]Most of the states of the world today are members of United Nations; it can be argued that all states have become a party automatically to principles prescribed by Nuremberg charter and trail adopted by General Assembly. They are under legal obligation to respect the law set by international community. The court rejected the jurisdiction of a national court on a foreign minister justifying its decision that foreign minister need to represent their state in other countries, which may termed as an extension of full immunity to other high official of states even for activities outside of their official capacity.[217] Paragraph 61 of the judgment states that:

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[215] David Turns "Arrest warrant of 11 April 200(Democratic Republic of the Cong V Belgium) The International Court of Justice's Failure to take a stand on Universal Jurisdiction",

[216] Report of the international law Commission, to General Assembly 2nd session, 1950.

[217] Orakhelashvili, "Arrest Warrant of April 2000(Democratic Republic of the Congo V. Belgium),"681.

Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign affairs do not represent a bar to criminal prosecution in certain circumstances.

Firstly, such persons enjoy no immunity under international law in their countries' court in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the state which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all the immunities accorded by international law. A court of one state may try a former Minister for foreign affairs of another state in respect of acts committed prior or subsequent to his or her period of the office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former minister for foreign affairs may be subject to criminal proceeding before certain international criminal courts, where they have jurisdiction. Example for the former Yugoslavia, and the international criminal tribunal for Rwanda, establish pursuant to Security Council resolution under chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's statute expressly provides, in Article 27, Paragraph 2,that"(i)mmunities 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 majority opinion as already discussed have ignored the principle of universal jurisdiction and the four Geneva Conventions.[218]

In first three propositions the court had ignored the relevant law regarding grave breaches as the judges of majority opinion have failed to deal with international law

[218] See common article 49(I),50(II),129(III),146(IV)

of universal jurisdiction. In the last proposition, however, the court clearly recognized the jurisdiction of international criminal courts.. Here, one may assert that the court permits the Nuremberg tribunal along with other criminal tribunals. The Nuremberg Charter overrides any immunity in part of any person. Similarly, the Charter did not take any prior permission from Germany, while convicting the Nazi leaders.[219] Article 12 of Nuremberg Charter authorizes the tribunal to prosecute or charged a person who has committed the crimes mentioned in article 6 of Charter even in his or her absences; if such conviction is necessary for the interest of justice.

This article denotes that the court can exercise jurisdiction even the alleged criminal if he or she is outside of its jurisdiction.[220] It can be concluded that immunity does not means impunity. Nuremberg trail has override immunity for Admiral Doenitz, Reich Marshal Goering and for other Nazi officials.[221]

3.5 Ex- partae Pinochet:[222]

The precedent of Pinochet is very important as it has opened door to end immunity. In *Pinochet I* ,[223]majority of Law Lords made it clear that crimes under international law cannot be termed as official acts. Core international crimes on the part of a Head of State cannot be covered by immunity *rationae materiae*.

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[219] Robertson , "Ending Impunity: How International Criminal Law can put Tyrants on trail," 661.
[220] Article 12 of Nuremberg charter
[221] Robertson , "Ending Impunity: How International Criminal Law can put Tyrants on trail," 661.
[222] Reg.V Bow Street Magistrate;Eex prate Pinochet Ugarte [No 3] [2001] 1 AC 147.
[223] Regina V Bow Street Stipendiary Maggistrate, ex partae Pinochet (No. 1). [1998]

Lord Steyn argued:

> [T]he development of international law since the second world war, justifies the conclusion that by the time of the 1973 coup d'etat, and certainly ever since international law condemned genocide, torture, hostage-taking and crimes against humanity (during armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such crimes may amount to acts performed in exercise of the functions of a head of a state.[224]

The conclusion of Lord Styen is that the House of Lords has accepted the transition of doctrine of state immunity from absolute to restrictive theory. The two Law Lords, Lord Styen and Lord Lloyd Berwick have dissenting opinion that Pinochet was entitled to immunity as he had committed those acts in official capacity,i.e. Head of State[225]. Lord Lloyd Berwick gave the opinion that almost all revolutionary leaders were guilty of heinous crimes.

But the majority had made it clear that Pinochet's conduct while committing genocide and other core international crimes, does not attract immunity of a Head of State.

> Torture of his own country's subjects, or of aliens, would not be regarded by international law as a function of the state. All states disavow the use of torture as abhorrent, although from still resort to it....

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[224] J.Craig Barket, Colin Warbrick, Dominc Mc Doldrick, "The future of former head of state immunity after ex Parte Pinochet,"*The International and Comparative Law quarterly* 48, no.4 http://www.jstor.org/stable/761742 (last accessed 06/07/2009), 942.

[225] Robertson, "Ending Impunity: How International Criminal Law can put Tyrants on trail," 662.

> Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognizes. Of course, that the function of a Head of State might include activities, which are wrongful, even illegal, by of his own state or by the laws other states. But international has made it plain that certain type of conduct, including torture and hostage- taking are not acceptable conduct on the part of any one. That applies as much to head of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law. That was made clear along before 1973 and the events which took place in Chile then after"[226].

Former heads of state can not enjoy immunity for their criminal conduct; as such heinous abuses of human rights not fall within authority of head of state. Acts of torture was committed by Pinochet, while he was serving Head of State; international law prescribes such acts outside of official capacity of Head of State. So Pinochet is considered as a private actor regarding such conduct. The acts done by state actors under official authority, which are contrary to international law, cannot be termed as official acts. [227]

> The decision of House of Lord in *ex parte Pinochet* 1 reflects the fact that the House of Lords has recognize the principle of universal jurisdiction over core international crimes. Pinochet was not a British national, nor have the alleged crimes been committed in England and Wales, nor are the victims of those crimes were British subjects.[228]

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[226] Kriangsak Kittichaisaree, *International criminal Law* ,(New York: Oxford University Press, 2001), 58-59.
[227] Michael A. Tunks"Diplomats or Defendants? Defining the future of Head –of - state Immunity" *Duke Law Journal* 52, no. 3(December 2002). http://www.jstor.org/stable/1373165(last accessed : 06/07/2009 06:39),659.
[228] Kittichaisaree, *International criminal Law*, 59.

In Pinochet case no. III, the two charges discussed were torture and hostage taking. So Torture has been defined by the Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment 1984. Lord Browne-Wilkinson discussed under the light of said Convention.

Lord Wilkinson gave the conclusion that a crime which international law has defined against humanity and jus cogens can not be termed as official act of the state.

Similarly Lord Hutton concluded that General Pinochet is not entitled to immunity to which a former Head of State would be otherwise entitled.

Nevertheless Lord Philips concluded finally that he does not believe that a conduct of Head of State could be extent to official capacity to acts which has already been prohibited by international law. That is commission of core in international crimes which has gained the status of jus cogens.[229]

Nevertheless Lord Brown Wilkinson while dealing with the question of official acts of state actor under the color of official capacity, which are contrary to international law, removes the liability of state in international law and makes the actor directs liable. Lord Brown-e Wilkinson relies on the finding of Sir Arthur Watt's Hague lectures. Generally, international law does not directly oblige the individual for certain conduct. But it is not in all cases the idea that an individual will be personally

[229] J.Craig Barket, Colin Warbrick, Dominc Mc Doldrick, "The future of former head of state immunity after ex Parte Pinochet,"*The International and Comparative Law quarterly* 48, no.4 http://www.jstor.org/stable/761742 (last accessed 06/07/2009),943.

accountable for certain conduct which has been described as criminal by international legal order. Sir Watts further states that the problem of non- existence of an international tribunal to have jurisdiction on such conduct can not provide a safe way to from individual criminal responsibility.[230]

The issue of jurisdiction also has considered by Lord Brown-e Wilkinson states that Convention against Torture and Hostage Convention have authorizes the state parties to take jurisdiction on the alleged crime internationally.[231]

The Torture Convention has made it clear that a widespread act of torture by the state official is genuine Universal crime. Since 1984 convention, a process of change has been started imposing an obligation to establish jurisdiction of the state in order to try and extradite the alleged official of state for crime of torture.[232]

While looking at minority dissenting note in *Congo V Belgium*, it is clear that they recognize the new development of international law is brought by International instrument; The precedent of *ex parte Pinochet* discussed above is recent example. So the third proposition in *Congo V Belgium* while reading with makes clear that judges have ignored present development in international law.[233]

An another point which is necessary to be discussed is that the sovereign immunity is a rule of international law, so the functions of a head of state cannot be extend to acts which are contrary to international law's other rule that is jus cogens,

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[230] *Ibid.* 945.
[231] *Ibid.*
[232] Marc Weller, "On the Hazards of Foreign Travel for Dictators and Other International Criminals", *Royal institute of international affairs* 75, no.3 (1999), .http://www.jstor.org/stable/2623638 (last accessed 06/07/2009 06:39), 605.
[233] Robertson, "Ending Impunity: How International Criminal Law can put Tyrants on trail," 664.

every sovereign is under an *erga omens* obligation to respect jus cogens norms. The plea of immunity does not work regarding an international crime committed under color of official capacity. The decision of Pinochet is very important as it for he first time a municipal court refused to award immunity to a former head of state, giving reason that there could be no immunity against the prosecution of states officials for core international crimes. Lord Phillips has made a distinction between official acts and private acts of state officials. According to Lord Philips' approach to torture is surely that torture cannot be termed as an official act whether committed in interest of state or for any other malicious pleasure.[234]

3.6 Head of State Immunity in Present International law:

As argued above, immunity was not allowed by the Nuremberg tribunal. Article 7 of the Statue has clearly rejected immunity for Heads of State. The same rule is adopted by other statute of different international criminal tribunals. It can be argued that this is now a settled rule of international law. The traditional state immunity is the product of 17th century. It was to enable the state to run its business without hurdles. As there is a hell of difference between the seventeenth century and twenty-first century, states are now equipped with information technology due to which there is a little need of state officials to go out side from home state. Even while looking at decision of ICJ in *Congo V Belgium*, has open door to accountability of state officials for conduct contrary to international law. The court stated that after leaving office, a state official can be tried by other state if it has jurisdiction under international law. The dissenting

[234] Robertson, "Ending Impunity: How International Criminal Law can put Tyrants on trail," 666.

minority clearly state that state official can be tried by other state, according to principle of universal jurisdiction in case of violation of jus cogens.

The case of Pinochet is of great importance, for the first time a national court denied immunity to a former Head of State. The question of immunity of a sitting Head of State is not discussed by the court. The Law Lords have clearly mentioned that if certain acts are done by state officials for benefit of the state and it is contrary to international law, will not be termed official acts but will be presumed that it has been done in private capacity. The modern international law has entered in to Modern positivism, which prohibits torture irrespective of the motive behind it. The case has been decided by virtue of Convention against Torture to which Chile and United Kingdom are parties[235].

Similarly the four Geneva Conventions require the state parties to prevent all breaches of IHL; Most of states of the world are parties to the Convention; they are under obligation to search and try the suspected criminals. So other countries which are not party to the ICC, can take benefit of Article 98 of its Statute. But they are still under obligation, in pursuant to the Geneva Conventions, customary international law, and precedents set by different international criminal tribunals.

It is open to question whether a national Court can exercise the principles of Universal jurisdiction. The key decision in Cango Vs.Belgium and the US Court decision in *Tachiona V Mugabe*,[236] explain that a national court has no such universal

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[235] Marc Weller. "On the hazards of foreign travel for dictators and other international criminals." *Royal Institute International affairs* 75, no.3 (Jul 1999), http://www.jstor.org/stable/2623638 (last accessed 06/07/2009/06:39), 631.
[236] Tachiona V Mugabe. 2001 Us Dist LEXIS 18612(US S.D. NY 2001).

jurisdiction. But a special court with special criminal power can prosecute a sitting and former Head of State where sufficient evidence shows him or her of guilty of war crimes or crimes against humanity.

The Position of Immunity in International Law till 2009

i. According to Geoffrey Robertson no immunity could be claimed by an incumbent or a former president, ambassador or foreign minister or other high official to stop the prosecution and indictment or arrest for war crimes or crimes against humanity. Where the court is competent international criminal court is awarded with special jurisdiction to try all the alleged criminals irrespective of their officials positions.

ii. Immunity could be claimed in national criminal court and international criminal court which lacks necessary jurisdiction, immunity can bar prosecution in case of serving head of state.[237]

iii. Immunity cannot be claimed by an incumbent Head of State where the Security Council directs an international criminal court to prosecute a war criminal, irrespective of his or her official position.

3.7 Concluding Remark:

It is crystal clear that law regarding prosecution of international criminals is a well settled rule of international law. The treaty of Varssalis of 1919, the Charter of Nuremberg and Yugoslavia establish this fact. Nuremberg principle has been affirmed by the

[237] Robertson. "Ending Impunity: How International Criminal Law can put Tyrants on trail,"667.

United Nation s' General Assembly in 1946 and reaffirmed in1950, is clear evidence that international community expressly binding its self to incriminate individual, involved in core international crimes, irrespective of their official status. The most recently the authorization of international criminal court to deal with Darfur case shows that, position of ICC has been recognized by all states. Unfortunately the powerful states agents cannot be prosecuted by other states; therefore selected trails of weaker state's agents have been conducted. The tools of prosecution of international criminals have been restricted to limited number of states. Which has enabled the powerful to give threat of imposing economic and political sanctions, and if they would endeavor to prosecute them or their political allies, they would face the consequences. Particularly the American attitude towards Belgium, the only state which used its law regarding universal jurisdiction frequently, became a threat to war criminals, insisted by US and Israel to amend Belgian war crime law. Similarly the disappointing decision of ICJ in *Yerodia case*, where innocent could not avail justice, in presence of clear rule that where jus cogens and state immunity comes in conflict the jus cogens norm will be prevail. The states who want to prosecute international criminal have to wait of their retirement.

CHAPTER VI

SUGGESTIONS AND RECOMMENDATIONS

The thesis has discussed the doctrine of state immunity in the context of International law, and its practice by modern state system. However the main concentration of thesis is on the interpretation of different international instruments regarding the doctrine of state immunity and its exception that is individual criminal responsibility. Similarly the decision of different international courts, national court and different Ad Hoc courts have been discussed, which represent a completely different picture of theories regarding restrictive form of immunity. The shift from absolute immunity in to restrictive form has been discussed. The simple interpretation of different international instrument has been discussed which has made it clear that the absolute form of immunity has been transformed into restrictive form, as the provisions of international instrument clearly states; that core international crimes will not be tolerated in the part of any one, whether the violator is a head of state either sitting or former or any other responsible state officials. The intent of these international instruments is clear that is a world without impunity. The Senator Pinochet would have certainly ratified the Torture Convention which has made a successful prosecution of the president in United Kingdom, he was not national of United Kingdom nor the crimes were committed on UK territory but the case has been decided in the light of universal jurisdiction principle by virtue of Torture Convention to which both the countries are parties.. Senator Pinochet Case is very important in its nature, as it can be used in future as a precedent for persecution of other international

criminals. It is very clear that every sitting head of state or other high official one day have to be former, unless he or she dies, the other states may use the precedent to prosecute former heads of states that are consider as international criminals. It is clear that the main source of international law is the uniform practice of states at large which becomes latter on a customary international law rule. While looking to modern state practice regarding trying international criminals this practice has double standard that is the nationals of weaker has been tried by using United Nations' s Security Council as tool on the other hand international criminal nationals of stronger state went unpunished. This inequality of deciding international issues amounts a great harm to international stability and harmony, and has make some states above the international law. The recent decision of American Court of the case of Zimbabwe President Robert Mugabe, as the court recognized immunity for President Mugabe and case of Noriega only relying that Noriega was not recognized by American administration as panama's legitimate head of state it seems ridicules. The application of Universal Jurisdiction by Western countries also shows that there is still inequality regarding prosecuting international criminals, as Belgium was pressurized to amend its war crimes statute regarding Universal jurisdiction after receiving complains against former American President George W Bush, Collin Powell and Israel's former Prime Minister. The International Court of Justice's decision in Congo V Belgium is really disappointing as the court stated that it is unable to deduced an authority from international law in order to remove immunity form Congolese foreign minister Mr. Yerodia the court had ignored the current development of international criminal jurisprudence, the most recent the charter of International Tribunal for Yugoslavia and

Rwanda introduce by the other body of the same organization, by virtue of which the Yugoslavian President and Rwandan Prime Minister have been indicted fror the same crime that of Mr. Yerodia. Moreover the court has also ignored the precedent of Senator Pinochet case. According to Academic Mark a Summer the international criminals can still take the plea of immunity form prosecution.

Recommendations:

1 Immunity shall be restrictive doctrine of absolute state; immunity should be transfered into restrictive form in its full sense. It is clear that a head of state is most power full person within their respective state, as it is understood that power corrupts, which can amount to human rights abuse.

2 Most of the State Immunity Acts of different states of the world have restricted the immunity of foreign sovereign in cases of commercial transactions; therefore they shall also remove immunity of defendant for violation of jus conges.

3 Contradiction between law of Immunity and principle of individual criminal responsibility shall be removed. The principle of individual criminal responsibility shall be enforcing in its full sense. Whenever the individual criminal responsibility comes to play its role, the doctrine of state immunity becomes operative to absolve the offender from punishment.

4 Universal jurisdiction shall be applied against international criminals beyond the principle of nationality, Furthermore the principle of passive nationality shall be enforced against the criminal by all states.

5 Statute of international Criminal Court shall apply to all states of the world with out their consent, irrespective of powerful sates and weaker states. The inequality of prosecution of international criminal amounted to world peace ad security, such inequality shall be removed, and therefore an international consensus shall be enhanced while determining international issues. The world should discourage a sole decision maker, as United States seems as an international police, which has threatened international peace and security.

6 Contradiction between the provisions of International Criminal Court's shall be removed; article 27 of the statute removes immunity of all high officials of states, irrespective of their official position, while article 98 states that no state shall be obliged to hand over an offender of the non state parties to the court, if which amount to breach of an obligation by state party.

7 Lapses in enforcement mechanism shall be removed. Although international provides laws to restrict state immunity, still there are a lot of loopholes in enforcement mechanism in case of Umer Al-Bashir the Sudani President that has been convicted but still not has been arrested.

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