

**TRIALS OF HIGH RANKING OFFICIALS OF STATES: WHETHER IMMUNITY
IS AN EXCEPTION TO INTERNATIONAL CRIMINAL ACCOUNTABILITY IN
THE 21ST CENTURY?**

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ABSTRACT

The prosecution of high ranking officials in domestic courts and international tribunals, such as in the International Criminal court (ICC) has always been a difficult task for the courts, prosecutors, legal practitioners as well as all other stake-holders. It is imperative to note that when the person to be charged is a state official or former state official, the process of prosecution is usually faced with the immunity huddle (both *ratione personae* and *ratione materiae*). Various reasons and questions are propounded on the difficulties surrounding the prosecution of these high ranking state officials such as; is there any internationally prescribed procedure to determine under what circumstances such officials or former officials should be prosecuted?; what is the exact situation under which the suspects may successfully raise the defense of immunity? Whether there is any consensus on the principles underlying the refusal of immunity? As well as whether there are any precise rules governing the exception to immunity?

Introduction

Many states remain reluctant to prosecute former and current state leaders and high ranking officials in domestic courts. With rules on the exception to immunity developing at a very slow pace it has remained highly desirable for the high ranking state officials and heads of States to be prosecuted before foreign domestic courts, international tribunals and the International Criminal Court (ICC) under international criminal law based on the principle of universality and individual criminal responsibility. The current international criminal justice regimes have not resoundingly dealt with the protection given to these officials under international customary law regarding immunity (Bassiouni 1991). This being the case, people were hopeful that the evolution of international criminal justice will set standards and

effective mechanisms to hold all officials accountable for acts constituting most serious crimes under International Law” (Krieger 1998).

Even with the notable development of International Criminal Law, there has been a very slow development in the harmonization of the laws and rules governing the *jus cogens* principles of immunity and inviolability of heads of States and senior government officials on one hand and that of individual criminal accountability of state officials under international criminal law in domestic courts, foreign courts, Special Tribunals and the ICC. By and large, a majority of heads of States and high ranking officials tried in domestic courts, such as King William 1 of England, and Saddam Hussein of Iraq, as well as the French generals all insisted on immunity throughout their trials (Laughland 2009). Former state officials or heads of States have also raised this defense of immunity and inviolability before international tribunals such as Slobodan Milosevic who was the former President of Yugoslavia, and his cronies, insisting that they were doing whatever they did, in their official capacity and hence in the name of and on behalf of the sovereign State, hence they were not individually criminally liable (ICTY 2001).

The defense of immunity arising from the official position of the suspect at the time the alleged offences were committed (*ratione materiae*) has been difficult to deal with (Werk 2005). The suspects have also pleaded *ratione personae* which is immunity attached to their personality by virtue of being high ranking state officials and it has been equally difficult to deal with (Laughland 2009). The same defenses have been raised in special tribunals, more particularly in the trial of Charles Taylor, the former President of Liberia (SCSL 2003). The warrant of arrest case of Al Bashir, the President of Sudan under the ICC has also brought serious debate on how far does immunity attached to a head of State affect the responsibility of states and individuals to arrest and surrender such officials as suspects under international criminal law (AU 2005). What is clear from the case of Al Bashir is that it is very difficult to arrest a seating head of State without breaching the principle of immunity and violating international customary law.

This paper discusses how the principles of inviolability and immunity of state officials have been dealt with in relation to individual criminal responsibility. This research will also

interrogate how laws and procedures have been developed to balance the conflicting interests protected by immunity and inviolability in relation to individual criminal accountability of all people including high ranking state officials and former state officials. Pursuant to this, the research will investigate situations where the high ranking officials have been prosecuted despite the perceived immunity existing in their favor and the justification for that. In the same vein, focus will be directed to situations where prosecutions of high ranking officials of states have been halted as a result of the immunity protection available to the suspects under international law and the arguments raised to justify the failure to arrest, prosecute or extradite.

Under the international criminal justice system, all states are obliged to prosecute, punish or arrest and surrender or extradite all perpetrators of international crimes and this has become a *jus cogens* norm (Murungu 2011). It is now very difficult to see how this *jus cogens* norm and the long established *jus cogens* norm of immunity attached to high ranking state officials can be balanced. This research will assess on whether the contemporary international criminal justice system in the 21st century has managed to clearly balance the two compelling norms as well as come up with guidelines on how the two norms can be administered and applied.

Theoretical Framework

The research is informed by the realist theory, which explains amongst other attributes that;

- i) there is no overarching power that can enforce global rules or punish bad behavior and,
- ii) International organizations and law have no power or force, and they exist only as long as states accept them (Morgenthau 1978), as well as that;
- iii) States are primarily concerned with their self interests of survival, to which international law is epiphenomenal to international politics in assisting them to choose which course of action to take and which norm to follow in their international relations (Anne-Marie Slaughter).

This theory focuses on how international legal processes are viewed within the wider spectrum of international relations. It is this theory that informs on why states and state actors have not behaved consistently and uniformly on immunity and individual criminal responsibility. States choose at every given time what is best for them and what best serves their common interests between the two competing norms. States consider their self-interests in choosing which one of the two norms is most suitable and appropriate to apply and comply with in a particular situation. If the particular situation involving a head of State or government or high ranking state official compels the state to invoke immunity, the state will do so, and if another situation presents itself where it is prudent to arrest, prosecute, extradite or surrender, the state will again act likewise. States do not therefore generally act upon international law, but only pursuant to their own self interests.

The continued existence of the two compelling, but conflicting norms in international law is a clear indication and confirmation of the realist theory. If the states were really acting according to international law, they should have by the 21st century agreed on abolishing or modifying either one of the two norms, so that state behavior becomes relatively uniform and predictable. The reality on the ground is currently that it is up to an individual state, from time to time to chose between immunity and individual criminal accountability.

Prosecution of State Officials before Domestic Courts

The trial of King Charles 1 of England in 1649 was the beginning of individual criminal responsibility of former state officials for acts they committed in their official capacity as heads of States or officials of government. It was a clear test of personal inviolability and immunity of state officials in relation to both their personal and official capacities. During the trial of King Charles 1, no law could be found in England's history that dealt with the trial of the King or Monarch and the State had to engage a Dutch lawyer named Isaac Dorislaus to find out how a court could try a tyrant after their overthrow (Laughland 2009). The basis for the trial of King Charles 1 was eventually found in an ancient Roman law which stated that a military body (in this case a government) could legally overthrow a tyrant (www.historylearningsite.co.uk). In this case, the King was finally charged with treason and accused of being a tyrant, traitor, murderer, and a public and implacable enemy to the commonwealth of England. From this case, the national jurisprudence was founded, to the

effect that it is possible to bring to trial state officials for prosecution for criminal conduct that is not consistent with their official capacity and responsibility. It was from this case that a precedent was set to the effect that heads of States and senior government officials are individually criminally responsible and accountable for their criminal conduct.

The trial of King Charles 1 marks the most significant milestone where a domestic court exercised its jurisdiction over an official or former official of the state. King Charles I had remained immune and inviolable and stood as a symbol of power and sovereignty for England (www.eyewitnessstohistory.com.2003”). He remained immune to any prosecution until his trial in August 1648, after 6 years of a civil war, where he was defeated by Parliamentary forces under the command of Oliver Cromwell (Robinson 1906). At the time of his trial, King Charles I had been overthrown and was tried as a former state official. The king was brought to court for the first three days where he was asked to plead and he said that he remained the King of England and the court had no power to try him and he refused to answer any questions (Robinson 1906). The court chose to ignore the immunity of the king and tried him and sentenced him to death.

The development of the law in relation to domestic jurisdiction over heads of States or high ranking officials, precludes their prosecution while they are still in authority. It follows therefore that any charges can only be raised after they leave office. It is not possible and practical to try a head of State in a domestic court whilst they are still in power, because of various logistical reasons relating to arrest of the official, *subpoena* of the witness as well as enforcement of the judgment. This position was also buttressed in the trial and execution of Louis XVI of France after the French revolution of 1789 (Laughland 2009). The new French authorities had to trial the King after abolishing the Monarch and he was taken to the Guillotine. This scenario is the same as the trial of Marshal Antonescu where domestic courts only managed to deal with the officials after they left office (Laughland 2009).

After the invasion of Iraq by the USA and its allies in 2003 and the subsequent over throw of Saddam Hussein’s government, he was captured and brought for trial in the domestic courts of Iraq (SCI 2005). The former Iraq leader was subsequently convicted and sentenced to death by the domestic court of Iraq (Elich 2008). During his trial, he challenged the

legitimacy of the court to try him and the manner in which his government was overthrown. This attitude is synonymous with that of King Charles 1 and other suspects tried in domestic courts. The court had to protect its jurisdiction by alluding that the accused was being charged with an offence and that the court had jurisdiction to try that offence and hence in turn the former state official was compelled to cooperate with the trial (Elich 2008). Nevertheless, the challenges put to the courts relate to their jurisdiction and competence to try the officials or former officials of the state as well as its independence and impartiality from the politics of the day.

There is no clear jurisprudence from these domestic trials on the breaking point on when to choose between immunity and individual criminal responsibility and as a result these trials have been viewed as just a history of political trials as opposed to clear judicial precedents (Laughland 2009). In all these trial episodes, the accused were disposed government officials brought to appear in the domestic courts and this has raised a lot of constitutional questions. The laws that have been applied by the new rulers adjudicating their predecessors' acts have not always been laid down in advance. It has been an issue of victors justifying their position by portraying their predecessors as criminals and this reflects a pure exercise of raw political power over the opponents (Laughland 2009). Usually the court is set up by victors to deal with the former state officials and judges and prosecutors will comprise of sympathizers of the new order. Domestic courts have only been able to deal with former state officials when unseated and hence it is clear that seating heads of State or high ranking officials have remained immune to prosecution before domestic courts during their tenure.

Domestic trials for officials and former State officials have been seriously undermined by various legal barriers. State officials, especially high ranking officials occupy very important positions in the State, sometimes as heads of State, heads of government, commander in chief of armed forces and members of the police. The senior military, police and judicial officers are appointed by them (Laughland 2009). It has always been very difficult to institute proceedings against these high ranking officials, as these are the employers of the directors of public prosecution or Attorney Generals and it is very difficult for these officers to institute proceedings against their superiors. This is the reason why there is hardly any precedent where a seating President or Head of State, or King has been brought before domestic courts,

for criminal trial. This is because they are immune to prosecution, which immunity is both functional (*ratione materiae*) and personal immunity (*ratione personae*). The Constitution of Malawi of 1994 prohibits and punishes acts of genocide but upholds functional immunity of the President before any court for official acts performed in his term of office, unless charged and impeached (Malawi Constitution 1994). In Zimbabwe, Section 98 of the Constitution provides immunity from prosecution to the sitting President and the President can only be prosecuted after leaving the office (Zim Constitution 2013). It is clear that personal inviolability of serving high ranking officials is still upheld in domestic courts and the immunity of these officials is still binding, even for serious international crimes. The inviolability of high ranking officials, who are still serving is generally absolute in many States.

The official position of State officials, who are still in power, is a bar to prosecution in a majority of domestic courts. The President or Head of State may not be subject to any criminal prosecution whilst still serving in that office, since they enjoy both functional and personal immunity to any criminal jurisdiction of the national court. For any domestic court to prosecute a President, they must wait until they are out of power to start prosecuting them. There is no precedent of any domestic or national court prosecuting a sitting head of state for international crimes, or calling on them to appear even as competent and compellable witnesses.

Prosecution of State Officials before Domestic Foreign Courts

A sovereign representative may not be embarrassed by being forced to appear before a foreign court, as it affects the concept of sovereign equality. However, as already alluded, official positions of state officials prevents them from being tried in domestic courts, and this implies that if the same principles are applied in foreign or international courts, these state officials will then enjoy impunity for all the criminal acts that they commit whilst occupying the official state positions. A domestic court of another country has no jurisdiction to prosecute a state official of another country in its domestic jurisdiction generally (Murungu). The concept is usually that, the trial of the head of State of another country undermines the authority, sovereignty, and independence of that country. In the case of Charles Taylor of Liberia, the Special Court for Sierra Leone distinguished between foreign courts and

international courts and ruled that, whereas officials of other states ordinarily enjoy immunity from prosecution in foreign courts, they are subjected to the jurisdiction of international courts or special tribunals (SCSL 2003). The finding of the Special Court for Sierra Leone recognized and enforced the immunity of state officials before domestic foreign courts.

In the case of the Democratic Republic of Congo (DRC) vs Belgium, the International Court of Justice reiterated the notion that Belgium had no right and Belgian courts had no jurisdiction to prosecute the officials of the DRC as that amounted to unlawful interference with the sovereignty of another state and the court ruled that the conduct of Belgium was a violation of the immunity enjoyed by the officials in their capacity as representatives of their countries in foreign territories (ICJ Judgment). In the foregoing, it is clear that state officials cannot be subjected to prosecution before foreign jurisdictions. The Pinochet decision of the House of Lords gave precedent only relating to former heads of State which implies that serving officials are still shielded by immunity (Sison 2000).

The aspects of foreign domestic court's jurisdiction have appeared very challenging and are visible in the case of Hissene Habre, the former president of Chad currently in Senegal. The Court of Appeal of Senegal declared that the domestic court of Senegal did not have competence to prosecute Hissen Habre for atrocities allegedly committed in Chad (Murungu 2011). This finding necessitated the victim to file a case in the Belgian Court of first instance, employing it to invoke its universal jurisdiction principle (Morrison et al 2010). The Belgian court issued a warrant of arrest against Hissene Habre, for war crimes, crimes against humanity and acts of torture and the Belgian authorities asked for Habre's extradition from Senegal (ICJ 2009). The Senegalese indicting chamber of the court of appeals ruled that Hissene Habre enjoys immunity from the jurisdiction of Belgium. This position clearly reveals that states have not been consistent in dealing with the immunity of state officials to the jurisdiction of foreign domestic courts. There has been a move by the African Union to empower Senegal to try Habre in its domestic court to avoid him being transferred to a European jurisdiction (AU 2006). It remains very clear that trial of state officials and former state officials in foreign domestic courts has remained politicized and controversial and no clear jurisprudence has been established (HRW 2005). There remains no clear legal position

on which one of the two norms is more compelling than the other, between immunity and individual criminal responsibility.

Prosecution of State Officials before Special Courts

At the end of World War I, former Germany Emperor Wilhelm II, who was to be tried in terms of Article 227 of the Versailles Treaty, was never brought to trial. The Government of Netherlands refused to surrender the emperor to the Allied and Associated powers (Tavernier 1997). The basis of the non-cooperation by Netherlands was that the government of Netherlands perceived that the Emperor was not going to get a fair trial as the proceedings would amount to Victors Justice (Laughland 2009). This was the First attempt to bring a former state official to an international trial, and there was no law or precedent for the special court. It was not even clear how the trial was to be conducted and whether or not the guarantees of a fair trial existed under the circumstances. Because of the absence of any precedent, it was also not clear which defenses were available to the suspect during the trial. There was no precedent on the relevancy of immunity of the emperor as an official of the State of Germany.

By the end of the World War II, there was no precedent for the trial of a state official or former state official in an international court or tribunal. At the end of the World War II, the international community was faced with the challenge to try those who were most responsible for the greatest atrocities of the war and the Nuremberg Tribunal and Tokyo Tribunal were established to try Nazi and Japanese former state officials for their responsibilities in the war (Laughland 2009). In those trials, former state officials for Germany and Japan were brought to trial for crimes against peace, crimes against humanity and aggressions (Laughland 2009). The trials were faced with great challenges of jurisdiction, precedent and immunity as well as defenses of superior orders.

The court had to come up with principles, to address those challenges and empower itself to deal with the suspects. These principles are known as the Nuremberg Principles and were used by the court as the basis for the prosecution as well as standards of procedure for a legitimate international trial (UNGA 1946). One of the principles of the Nuremberg was that “Any person who commits an act which constituted a crime under international law is responsible therefore and liable to punishment” (Bantekas & Nash 2007). This principle was to the effect that every individual who commits an international crime be individually

criminally responsible and subject, to be tried and punished. This brought about the concept of individual criminal responsibility. This was the shaping of a deeper consciousness of the need to prosecute serious violations of international law by state officials (Gureppi 1999). The Nuremberg and Tokyo Trials produced a number of Judgments, which have greatly contributed to the concept of individual criminal responsibility (Taylor 1992).

The other Nuremberg principle was that *“The fact that a person who committed an act which constitutes a crime under international law acted as a Head of State or responsible government official does not relieve him from responsibility under international law”* (Bantekas & Nash 2007). This was an affirmation of the fact that individuals and not states commit offences and as such if they are prosecuted their official position shall not be a defense. In actual fact, this was after a realization that international crimes are usually committed by those people with political power, who are able to influence the commission of grave atrocities. International crimes are usually committed against a large group of people and over a very wide geographical area and this can only happen with the commission or complicity of responsible government officials. It was at this point that immunity of state officials was ruled not to be a valid defense before special courts or tribunals. Anyone found to be criminally responsible was held to be subject to prosecution and is not protected by either functional or personal immunity. It is however imperative to note that the Nuremberg trials did not abolish the immunity attached to high ranking officials but merely circumvented it.

Prosecution of State Officials before Ad hoc Tribunals: Development of Relative Immunity

As has already been alluded, domestic courts have not been very effective in prosecuting state officials for international crimes. The establishment of alternative courts by the international community was designed in order to prosecute and punish those high ranking officials responsible for committing international crimes. Most notable are the International Criminal Tribunals for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), which were established to try those responsible for committing international crimes in Yugoslavia and Rwanda in the 1990s (UNSC 1994). These special courts were mandated to deal with crimes committed mainly by state officials and former state officials where trials had failed in the respective countries.

During the trials in the international criminal tribunals, the Nuremberg defenses emerged again, where the state officials were challenging the jurisdiction of the tribunals over them, on the basis that they were state officials and entitled to inviolability protection under the doctrine of immunity. In the trial of Slobodan Milosevic, the former President of Yugoslavia, he challenged the constitutionality and legality of the Tribunal which was trying him (ICTY 2001). Preliminary objections were that the Tribunal was illegally founded because the UN Security Council lacked power to establish it. Milosevic also argued that the creations of an Ad hoc tribunal targeting his country “...corrupts justice and law.....violates the most basic principles of all law... ..an international court established to prosecute acts in single nations and primarily, if not entirely one limited group is pre-programmed to persecute, incipient of equality...” (ICTY 2001). By and large, the defense of immunity was raised and the jurisprudence of the ICTY did not necessarily abolish but only circumvented it.

In the trials before the ICTR, the court was also faced with the same test of legitimacy. The leaders of the former government which was pre-dominating Hutu was prosecuted even though there was a large cry that the Tutsi leaders were also involved in the atrocities (ICTY 2001). For political reasons and also in a bid to obtain co-operation from the current Rwanda government which is pre-dominantly Tutsi to facilitate the availing of witnesses and enforce orders against suspects, the tribunal decided not to prosecute any one of the current government members. This clearly exhibits the already notorious fact that heads of State and government are not easy to prosecute even before international tribunals and also that immunity still exists as a compelling and binding norm despite the emergency of the doctrine of individual criminal responsibility.

The concept of personal inviolability has also been addressed in the Special Courts, for example the Special Court for Sierra Leone (SCSL). After a bloody civil war in Sierra Leone which led to widespread atrocities and recruitment of child soldiers, the international community decided to establish the SCSR to deal with those responsible for committing serious crimes as well as those who were aiding and abetting in those violations. Charles Taylor, the former President of Liberia was prosecuted and sentenced to 51 years, but not without the usual problems of jurisdictional challenge and official position of the state official (Chacha et al 2011). Charles Taylor challenged the jurisdiction of the special court as he argued that he was the President of Liberia and could not be prosecuted in the domestic

court of Sierra Leone (SCSL 2003). The court had to preserve its powers by pronouncing that it was not a domestic court of Sierra Leone and as such had capacity to try him for international crimes. In this case the court acknowledged that, had Charles Taylor been brought before a domestic court in Sierra Leone, the defense of immunity would have prevailed. This court recognized that although the official position of an individual is not considered as a defense before international tribunals, it was still valid in domestic and foreign domestic courts for officials of states who are being tried for international crimes.

Prosecution of State Officials before the ICC: The doctrine of inviolability of State Officials.

The approach of the ICC to the official positions of state officials and individual criminal responsibility is addressed in Article 27 (2) of the Rome Statute (1998). The provision states that;

“Immunities or special procedural rules which may attach to the official capacity of a person whether under national or international law, shall not bar the ICC from exercising its jurisdiction over such a person”.

In this instance the official position of an individual has been pronounced irrelevant for purposes of the jurisdiction of the court. The Rome Statute applies equally to all persons, regardless of their official positions. This has been clearly pronounced as the case of Al Bashir (ICC 2009), and Bemba (President of Sudan and the Vice President of DRC respectively), where warrants of arrest were issued against seating high ranking state officials (ICC 2008).

In the ICC, at least on paper, the law has made it clear that individual criminal responsibility and the duty to prosecute prevails over the immunity of state officials. This is a very different position from that in the case of the Congo vs Belgium (ICJ 2002). The position in the Congo case expressed tension between the need to safe guard sovereignty of States and the demands of emerging universal values which may undermine those prorogations (Cassese 2002). To put an end to impunity, the Rome Statute stressed that the official status will in no case exempt the perpetrator from criminal responsibility and will not bar the court from exercising its jurisdiction (Knuchel 2011). To buttress this position, Articles 86 and 89 of the Rome Statute mandates all States Parties to the ICC to fully cooperate with ICC processes and

procedures in respect of all such persons wanted before the ICC. Therefore, the ICC regime on the face of it abolishes the defense of immunity in relation to all suspects who are charged under the Rome Statute and are already appearing in the ICC.

Prohibition of genocide, war crimes, and crimes against humanity in the Rome Statute, have obtained a superior status which would require superior means of enforcement, since the material *jus Cogens* rules also contains in them a procedural *jus Cogens rules* prohibiting certain limits to its enforcement (Knuchel 2011). The recognition and application of immunity for acts which are contrary to peremptory international criminal law norms would amount to complicity to crime (ICJ `997). There is no way violations of *jus Cogens* can be regarded as a legitimate sovereign act of a state or state official as the conduct falls outside state actions protected by immunity.

In the ICC regime, the issue of immunity has emerged significantly in the Al Bashir case, where despite the compelling norm of individual criminal responsibility, states have not arrested the suspect on grounds that he is the Head of State of Sudan (AU 2007). The African Union has gone a step further and issued a directive to all its members not to comply with the warrant of arrest issued against Al Bashir, thereby reinforcing the binding nature of immunity and international relations over individual criminal responsibility and the duty to prosecute or extradite/ surrender. The ICC indictments of Al Bashir, Muammar Gaddafi, Laurent Gbagbo, and Uhuru Kenyatta presents a novel incursion into the otherwise impenetrable immunity of incumbent heads of States that has long been enjoyed under international customary law (Phillip 2011).

It is however the provisions of Article 98 of the Rome Statute which resurrects the otherwise dead immunity principle. The provisions of Article 98(1) of the Rome Statute provide that:

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

Through this provision, States are not obliged to pursue their obligations under the ICC if that can result in the State breaching its existing obligations under international customary law, with respect to diplomatic immunity of a person (Rome Statute 1998). Article 98(1) of

the Rome Statute calls for waiver of immunity to be done before a request is proceeded with in terms of the Rome Statute. States can still lawfully not comply with their obligations under the ICC, as long as it is in terms of Article 98, and as a result, within the ICC regime, immunity has again prevailed over individual criminal accountability as well as the duty to prosecute or extradite/ surrender. The ICC regime has also failed to exclude the defense of immunity of high ranking officials of States in international criminal justice. Article 27 of the Rome statute outlaws the defense of immunity to a person already brought before the ICC, yet Article 98 of the same legalizes the non-cooperation by states and state actors when a valid defense of immunity is available. The Rome Statute fails to deal with the abolition of immunity under international criminal law. It remains up to the individual States to choose whether or not to abide with the obligation to prosecute or extradite/surrender high ranking officials as suspects or to shield them under the pretext of immunity. Malawi, Chad and Kenya although with direct obligations as member states to the Rome Statute to arrest and extradite Al Bashir chose to accord him his Head of State status and allowed him to visit their countries and decided not to arrest him although he had two valid warrants of arrests from the ICC (ICC 2010).

Conclusion

The trial of officials in both domestic and international courts has serious challenges, both procedural and substantive. Since the time of the Versailles Treaty, international criminal law has slowly developed and no clear laws or rules have been developed on how the duty to prosecute or extradite/surrender can be reconciled with the immunity attached to State officials and obligations of state actors to abide by their international customary obligations, including the duty to comply with immunity obligations. Both former and current officials of states have been called to answer to various acts that constitute international crimes, though in many instances, national courts have found it difficult to prosecute these officials. Despite various challenges of immunity and legitimacy, some state officials and former state officials have been prosecuted before Ad hoc Tribunals or the ICC regime, showing that it remains very important to pursue international criminal prosecutions, in order to curb serious abuses and set precedent on international criminal law.

Customarily international law recognizes certain degrees of immunity in criminal prosecution for heads of States and other officials (Schabas 2000). States are reluctant to prosecute heads

of States within their domestic courts as they are protected by immunity. However, contemporary practice has shown that former heads of States have been tried in domestic courts after leaving office and also that international criminal tribunals and the ICC have the jurisdiction to try them. It must however be made clear that state behavior points to the position that States behave in a realist way in a particular situation to choose between immunity and individual criminal responsibility and therefore states act in a way that best preserves them as states and also safeguard their interests. States can chose between the two norms and will still be deemed to have acted in accordance with their obligations under international law.

The continued existence of the two competing norms, immunity on one hand and individual criminal responsibility and duty to prosecute or extradite/surrender on the other, confirms the realist theory, that state behavior is not generally guided by international laws and norms but by the quest for survival and their best interests. State resorts to either immunity of high ranking state officials or individual criminal accountability in their actions when it is to their best interest and not necessarily on the basis that either one of the norms is more compelling than the other. There is need to achieve a smooth official function of senior government officials and equality and sovereignty of states on one hand, and individual criminal responsibility and the obligation to prosecute or surrender suspects of crimes of great concern to the international community on the other hand. It is this lack of a clear international policy or guidelines on how to apply the two norms that has resulted in the international law discord when it comes to prosecuting State and former State officials under domestic courts, foreign domestic courts, international tribunals and the ICC regime.

As a result, impunity is still rampant, as states choose not to arrest high ranking officials and bring them before international criminal law institution to answer for their wrongs. This has impacted negatively the relevance and effectiveness of international criminal justice. The international community has failed to deal with the doctrine of immunity and as a result high ranking state officials have been very difficult to prosecute for international crimes, in both domestic and international courts. Immunity has stood as a major stumbling block to the international criminal justice system in the 21st century, and until such a time that immunity is abolished it remains clear that prosecuting high ranking officials of states remains by and large very difficult.

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