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RESEARCH TITLE: THE PRINCIPLE OF UNIVERSALISM IN INTERNATIONAL CRIMINAL LAW: A CASE STUDY OF THE SITUATION IN SUDAN

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Plagiarism Declaration

The Principle of Universalism in International Criminal Law: A Case Study of the Situation in Sudan is my own original work and has never been presented to any other institution of higher learning and where the works of other people have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in fulfillment of the requirements for the award of the Master of Law Degree.

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SOPHY ELLEN AMUTAVI DATE

Acknowledgements

To God in whom I move and have my being. It is to You that I owe my all too.

To my siblings, Ell Lusala and Ess Ayesa, I would be here today without your constant encouragement, love and support. You guys are my world.

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Dedication

To my parents, John Adams Amutavi and Fidelia Lichoti Amutavi, you have supported me all through my life. Nabhayanza.

Abbreviations

AVCRP Association of Victims of Political Repressions and Crime.

ECOWAS Economic Community of West African States.

CAT Convention against Torture and other cruel inhumane or degrading treatment or punishment.

EAC Extra Ordinary African Chamber.

ICC International Criminal Court.

ICTY International Criminal Tribunal for the former Yugoslavia.

UN United Nations

UNSC United Nations Security Council.

UK United Kingdom.

VCLT Vienna Convention on the Law of Treaties.

ICJ International Court of Justice

PTC Pre-Trial Chamber

Contents

Abstract

This thesis aims to explore the evolution and practical application of the universal jurisdiction principle within the International Criminal Court (ICC). It will focus on the challenges presented by the reluctance and or refusal of states to enforce arrest warrants, particularly against sitting Heads of State. The research focuses on the role of universal jurisdiction in prosecuting crimes of international concern.

The study delves into the establishment of the ICC in 1998 through the Rome Statute, highlighting the complementary nature of its jurisdiction with national courts. It examines the criteria for ICC intervention, considering the failure of national courts to prosecute individuals for crimes highlighted in the Rome Statute. The paper addresses the procedural aspects of ICC involvement, issuance of arrest warrants, and the surrender of suspects by states.

A significant focus of the thesis is on the case of Sudan and its former President Omar Al-Bashir. Despite Sudan not being a party to the Rome Statute, the ICC gained jurisdiction through a United Nations Security Council resolution. The challenges arising from states' reluctance to enforce ICC arrest warrants, illustrated by instances like President Al- Bashir's case, are analyzed. The study also draws parallels with previous cases, such as those involving Augusto Pinochet and Hissène Habré.

I will critically examine the tension between ICC's universal jurisdiction and the doctrine of head of state immunity, exploring geopolitical considerations and the role of international relations in hindering the execution of arrest warrants. The paper questions the effectiveness of ICC's universal jurisdiction in bringing sitting heads of state to trial and proposes avenues for improvement.

In conclusion, the study underscores the need to reassess the efficacy of ICC's universal jurisdiction in the context of evolving diplomatic relations and geopolitical realities. The findings aim to contribute to an understanding of the challenges associated with enforcing ICC arrest warrants against high-profile individuals, and provide recommendations for enhancing the universal jurisdiction principle.

Keywords

a. Universal Jurisdiction
b. International Criminal Court,
c. Rome Statute
d. Head of State Immunity
e. Sudan
f. Omar Al- Bashir
g. Complementarity
h. State Sovereignty

CHAPTER 1: INTRODUCTION

1.1 Background to the study

Kenneth Randall has defined universality as a legal principle that allows and requires a state to bring criminal proceedings in respect of certain crimes irrespective of the crime's location and the perpetrator's or the victim's nationality.[1] The notion of universality and international criminal law generally implies that the international community will not turn a blind eye to crimes committed in a given territory. The same is motivated by shared values governing the international community, such that when any individual breaches the said values, any state in the international community is under an obligation if possible, to bring such persons to justice.[2]

The earliest origins of universalism in its modern conception is said to arise from admiralty practices. By the middle 19th century, changing opinions over the slave trade had led many countries to outlaw it, declaring it *hostis humanis generis*, i.e. that it was an offence against humanity.[3] This then gave rise to an *erga omnes* obligation to the international community on any state which came across as traders to punish the perpetrators.

This obligation is seen in the case of the *Enterprise,* an American ship sailing to South Carolina in 1835 that encountered problems and had to dock in Bermuda's port.[4] Because Britain had abolished slavery including in its colonies, the port's custom officials and royal navy officers boarded the ship, and served on the captain a writ to appear in court and to produce the slaves. Eventually, almost all the slaves were released leading to an international incident with the United States that demanded compensation.[5] Eventually, the matter would be settled and compensation paid out, but this demonstrated the start of international concept of acting in the interests of humanity in international criminal law.

It is noteworthy that whereas universal values were recognized, it took a while before prohibition of certain conduct came to give rise to criminal responsibility. For instance, while the 1907 Hague Naval Regulations contained certain prohibitions giving rise to claims of compensation, there was no set individual criminal responsibility attached to these actions.[6] Through World War I, the United States made explicit reservations about trying for war crimes that were

[1] Randall K 'Universal jurisdiction under international law' (1988) 783.
[2] Randall K 'Universal jurisdiction under international law' (1988) 783.
[3] Martinez J, 'Hostis Humani GenerisEnemies of Mankind' (2012) 114
4 Nuhija B, Memiti A, 'The Concept of erga omnes obligations in International Criminal Law' (2013)
5 Ragazzi M, 'The Concept of International Obligations Erga Omnes' (2002)
[6] Bergsmo M, Ling C and Ping Y, 'Historical Origins of International Criminal Law Volume I' (2014) 361

previously unknown and without precedent.[7] France however is reported to have set up military courts to try German soldiers by 1914.[8]

During these formative years, the difficulty in getting international acceptance to try war criminals especially lay in the defence that these criminals were following superior commands. In 1915 for instance, the Austro-Hungarian military court, and even the Leipzig war trials after World War I were accepting the defence of superior command for alleged violations to the customs of war of civilized nations.[9] However, by the Nuremburg trials after World War II, it had become a recognized position, one that the tribunal reiterated that individuals bore criminal responsibility for violating international law.[10]

Following the Nuremburg trials, the UNGA on 11 December 1946 passed a resolution affirming the principles that had arisen in the Nuremburg trials.[11] This was accompanied by a report of the International Law Commission in 1950 affirming the principles used in the Nuremburg trials as part of positive international law.[12] These principles would see their use in the various tribunals that were established in the late 20th century to try various war criminals. By 1998, there was general consensus in the international community for the need for a permanent court to try war crimes, which led to the establishment of the International Criminal Court (ICC) through the Rome Statute.

To ensure that justice is served to the victims, the ICC was created to be on standby mode by the Rome Statute to punish crimes that are deemed not capable of punishment by the national courts because of the status of the perpetrators hold within the given territory; be it being in power or having the state machinery support and thus not capable of being prosecuted by the national courts. The ICC was established to protect and guarantee justice to the victims of crimes committed by the most influential individuals in a given territory, especially those who are usually in power.

The primary fear of states has been that the ICC would usurp their right to try war criminals within their territories. The Rome statute was thus drafted to provide that the Court's jurisdiction would only come into play when the said state has failed to exercise the primary jurisdiction to try the war criminals. Here, ICC would be justified to employ universal jurisdiction and to take the mantle of investigating, compiling evidence, and prosecuting those who will be found to have

[7] Bergsmo M, Ling C and Ping Y, "Historical Origins of International Criminal Law Volume I' (2014) 362
[8] Bergsmo M, Ling C and Ping Y, Historical Origins of International Criminal Law Volume I' (2014) 363
[9] Bergsmo M, Ling C and Ping Y, Historical Origins of International Criminal Law Volume I' (2014) 368
[10] In The Trial Of The Major War Criminals (Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, H.M. Attorney General by HMSO, London 1950, Part 22, 447
[11] UNGA, 'Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal'
[12] ILC, 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal'

participated in one way or another in the commission of any of the covered offences.[13] The jurisdiction of the ICC is thus complementary to the national Court.

Before the ICC takes over a given case from an assigned territory, it has to weigh two things. First, as will be seen throughout this paper, is whether the acts that have been committed at a given territory amount to the crimes that fall under the crimes which are prescribed by the Rome Statute. Secondly, it has to be satisfied that the national courts in that assigned territory which the crimes that have been committed has failed to exercise that mandate of arraigning and prosecuting the offenders. It is noteworthy that where the federal courts have opted to prosecute the offenders, the ICC will not take over the said matters unless it is shown that justice won't be served to the victims.[14] If the two considerations are satisfied that they are affirmative, the Court will proceed to hear the said case.

The normal procedure once the ICC is seized of a matter is that the Prosecutor usually conducts investigations and typically meets with the victims, government agencies, and other individuals who will volunteer information. After the perpetrator of the crime is identified, the ICC issues arrest warrants and it is upon the state or the nation where the perpetrator is located to surrender the perpetrator to the ICC for prosecution.

1.2 Statement of the Problem

Sudan gained independence on 1 January 1956 and was recognized as a state on 9 July 2011.[15] To date, Sudan has never ratified the Rome Statute and is thus not a party to the International Criminal Court and cannot be therefore bound by the treaty unless sanctioned by the United Nations Security Council.[16] The Vienna Convention on the Law of Treaties which is the guiding treaty on matters of treaties, states that a treaty is binding upon its members, and they are expected to perform the obligations in a manner that meets the goals and ambitions of that treaty.[17]

Sudan came under the radar of the ICC via Security Council Resolution No. 1593 of 2005, adopted on 31 March 2005 for the crimes committed within the territory, which had gained international concern calling for the punishment of all the perpetrators.[18] The suspects to be

[13] Article 1 of the Rome Statute establishing the International Criminal Court.
[14] Article 1 of the Rome Statute establishing the International Criminal Court.
[15] Moschetti D 'A brief history of modern Sudan and South Sudan' available at https://combonimissionaries.org/a-brief-history-of-the-civil-war-in-south-sudan/ (Accessed on 19 July 2021).
[16] International Criminal Court 'Understanding the International Criminal Court. Sudan' available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/3DDA32F5-129A-4B95-94C1-916A51666ED8/280973/UICCSudanEngLR94.pdf (Accessed on 17 May 2021).
[17] Vienna Convention on the Law of Treaties of 1969.
[18] United Nations Security Council Resolution 1593 (2005).

punished comprised, among others, President Omar Al- Bashir, suspected of having committed crimes that fell within the ambit of the ICC, including Crime Against Humanity, Genocide, and War Crimes.[19] The Security Council referred the case to the Prosecutor, who launched investigations. Upon concluding the said investigations, the Prosecutor approached the Court, where they sought an arrest warrant against President Omar Al- Bashir.[20] The ICC was satisfied that there was a need to have Omar Al- Bashir brought to the Court to answer the charges that were to be preferred by the Prosecutor and issued two warrants of arrest, which have remained in force up to date.[21]

The key challenge to enforcing ICC's universal jurisdiction has been that most states are unwilling to effect arrest warrants issued by the Court. This usually occurs when an ICC suspect is within another state's territory. For instance, in 2015, President Bashir attended the African Union Summit in Johannesburg, South Africa, and thereafter flew back to Sudan.[22] Even though South Africa, as a States Party to the Rome Statute, had an obligation to effect the warrant of arrest, the country failed to arrest him.[23] South Africa cited that he was immune from arrest as a Head of State leading his country's delegation to the meeting.

The paper explores this problem of states refusing to effect arrest warrant issued by ICC especially against heads of state, and its challenge to ICC's universal jurisdiction. It explores the principle of head of state immunity coupled with many country's diplomatic and other relations and hos this has presented a formidable challenge to bringing heads of state to trial for crimes prescribed by the Rome Statute. It also explores geopolitically relevant considerations such as the African Union which is also adamant that its leaders should be immune from prosecution by the ICC. The case of Sudan's former president, Omar Al- Bashir will be the main case study of this as it is the most recent instance where a Rome Statute signatory failed to effect the court's arrest warrants. This paper will also draw lessons from the landmark universal jurisdiction cases of Augusto Pinochet and Hissene Habre while examining the relevant sections of the ICC Statute.

1.3 Literature review

The conflict between ICC's universal jurisdiction and head of state immunity has featured in number of previous cases. In *Prosecutor v. Tadic,* the ICC found that the doctrine of head of state immunity cannot be used or relied upon under the ICC when the perpetrators are called upon to answer to the human rights violations they are accused of.[24] The purpose of ensuring that sovereignty is not a defence and thus maintains the position that the borders should not be

[19] United Nations Security Council Resolution 1593 (2005).
[20] *Prosecutor v Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09-3 (2009).
[21] *Prosecutor v Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09-3 (2009).
[22] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[23] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[24] *Prosecutor v Dusko Tadic* T-94-1-T (1995).

considered as a shield against the reach of the law and as a protection for those who violate the most elementary rights of humanity are to be punished for their acts.[25] The other reasons why the international community takes issues of crimes that are so grave to it seriously are that, unlike the previous times when countries stood on their own, the current tenure has formed an interdependence culture, and thus, states depend on one another, including safeguarding rights.[26] Jurisdiction has thus been defined to arise from the *jus cogens* norms of international Law and therefore has universal applicability in all states and is acceptable and recognized by the international community.[27]

Phillipe X opined that the ICC complements national courts based on the rationale that the Federal Court is vested with the primary role of ensuring that any perpetrator of human rights violation is held to account within the country and failure to which the ICC takes over.[28] John T. Holmes argues that the complementarity principle should be balanced between national and international courts.[29] He further states that before the ICC takes over a case for crimes stipulated by the Rome Statute and the conditions therein.[30]

ICC complements the national courts and does not in any way usurp their powers. When a crime is committed within a specific territory, the National Court has the Jurisdiction in the first instance to punish the perpetrators of those crimes. The ICC will only come into the place of the national courts when they fail to assume the primary Jurisdiction.[31] The preamble to the Rome Statute states that the Statute's objectives do not justify the use of force against states, interference in their internal affairs, or other acts inconsistent with the United Nations Charter. This is a replication of the position mentioned above that ICC will only act when the State party fails to assume that jurisdiction; or following a referral by the Security Council Prosecutor. In the latter circumstance, ICC's prosecutor will conduct investigations and move the Court appropriately once the investigations are done. In doing so, the prosecutor seeks that ICC issues a warrant of arrest against the suspect to answer to the charges that are to be preferred by the prosecutor as was the case of President Omar Al- Bashir.[32]

The idea of the existence of shared values by the international community has led to the acceptance of universal Jurisdiction among states as a community. However, some doubts still

[25] K Randall 'Universal jurisdiction under international law' (1988) 783.
[26] Vermon R 'Crime against humanity' https://www.britannica.com/topic/crime-against-humanity (Accessed on 5 February 2023).
[27] Goldsmith L and Posner E 'A Theory of Customary International Law' (1999) 1114.
[28] See generally Phillipe X 'The principles of universal jurisdiction and complementarity: How do the two principles intermesh?' (2006).
[29] Holmes J 'Complementarity: National Courts versus the International Criminal Court' (2002) in Cassese A Gaeta P (eds) *The ICC Statute of The International Criminal Court: A Commentary* (2002) 677.
[30] Holmes J 'Complementarity: National Courts versus the International Criminal Court' (2002) in Cassese A Gaeta P (eds) *The ICC Statute of The International Criminal Court: A Commentary* (2002) 677.
[31] Article 1 of the Rome Statute establishing the International Criminal Court.
[32] Preamble of the Rome Statute establishing the International Criminal Court.

exist about the relevance and legitimacy of the ICC since most states especially developing conditions form negative perceptions about the impartiality of the ICC. They usually deem that the same is not partial as it acts against them at the behest of the more powerful member's states, notably Security Council member states with veto powers.[33]

The adoption of universal Jurisdiction was because of the need to expand enforcement mechanisms of the perpetrators of the most severe crimes. They want to abuse national justice systems due to their influence and thus escape punishment.[34] The expansion was also needed to counter the more serious transgressions and the assumption that an expanded jurisdictional enforcement network will produce deterrence, prevention, and retribution, and ultimately will enhance world order, justice, and peace as the perpetrators won't have an escape route in the eyes of the international community and those who have the intentions or committing such crimes are deterred as they will be sure that they will be called to account for those acts either nationally or internationally.[35]

The need for punishment of those crimes that the international community has classified as crimes of grave concern has seen the universal jurisdiction doctrine being organized as part of customary international Law. Consequently, it has thus gained the classification of superior legal norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and is also applicable to all states.[36]

Criticisms to the application of universal Jurisdiction have been argued to the extent that the action of the Court is excessively dependent on the Security Council recommendation on non-state parties and that is perceived to have allowed external forces to creep into the internal affairs of other states without their prior consent.[37] Satow argues that immunity, as applied in the national arena, should still apply to a leader even upon resignation, which then tends to prohibit them from prosecution for the crimes they committed while in office, which the Rome Statute still accords under article 98 of the Rome Statute to ensure that it waives the immunity it had in place.[38] The position given by Satow should be treated with circumspection and will be challenged in this thesis.

[33] Mckeon P 'An International Criminal Court: Balancing the principle of sovereignty against the demands of international Justice' (1996) 538.
[34] Bassiouni MC *Preliminary Material. In Introduction to International Criminal Law* (2014) 147.
[35] Bassiouni MC Preliminary Material. In Introduction to International Criminal Law (2014) 147.
[36] Article 53 of the Vienna Convention on the Law of Treaties.
[37] Holmes J 'Complementarity: National Courts versus the International Criminal Court' (2002) in Cassese A and Gaeta P (eds) *The ICC Statute of The International Criminal Court: A Commentary* (2002) 677.
[38] Satow E '*A Guide to Diplomatic Practice'* in Wood M British Contributions to International Law (1917) 10.

1.4 Justification and rationale of the study

In increasingly polarized world, many states have alignments and strategic diplomatic relations outside the United Nations. This means that there are often competing interests and obligations such that when ICC issues an arrest warrant against a head of state, they may have allies who are Rome Statute signatories, but who will not effect these arrest warrants. A recent example is Russia's president Vladamir Putin against whom arrest warrants were issued over the Ukranian war. Despite these warrants, in 2023, he was planning to attend a BRICS conference in South Africa, a Rome Statute member. While he did not do so eventually, it goes to show that ICC's universal jurisdiction is increasingly harder and harder to apply to sitting heads of state.

Therefore, should these sitting heads of state remain in power, they will likely never face criminal trials before ICC. It is therefore important to revisit the issue of ICC's universal jurisdiction and whether it retains its efficacy in bringing sitting heads of state to trial. This discussion will help establish whether the principle is still effective or if there is a need for a better mechanism to bring sitting heads of state to trial for crimes prescribed by the Rome Statute.

1.5 Significance of the study

The study aims to assist states in understanding and criticizing the doctrine of universal Jurisdiction while simultaneously exploring the ICC's mandate of punishing *jus cogens* crimes

1.6 Research questions

(a) What is the universal jurisdiction of the ICC?
(b) To what extent is the doctrine of universal jurisdiction practical in punishing crimes under the Rome Statute?
(c) Using Sudan as a case study, how can the universal jurisdiction doctrine be better enforced to bring to trial suspects wanted by the ICC?

1.7 Research methodology

The research methodology used in this paper will be library-based, using academic sources. In this research, the focus will be on a qualitative method of study with sources from different fields. Textbooks and treaties, academic journals, relevant websites, academic theses and dissertations, and articles from various authors will form part of the authorities used in the paper. Case law shall be the guiding source as they have established the universality principle to the core.

1.8 Limitations

This study will delve into the universality principle in the prosecution of international crimes with a particular focus on Sudan as a non-member of the ICC Statute and the place of state sovereignty. The political tension between the ICC, the United Nations Security Council, and other States will be examined only briefly.

1.9 Chapter outline

The research will be divided into five chapters and discussed as follows:

Chapter one will be the proposal and introduces the contents of the entire research by illustrating the background behind the choice of topic, how the study will be conducted, the problem the research intends to cover, the limitation of the research, and the literature review of how other scholars who have tried discussing the application of the international criminal jurisdiction have argued. The Chapter will also, as indicate, outline the divisions of the whole research.

Chapter two dwells on the doctrine of universal jurisdiction. It will harmonize the historical evolution of the same and its provisions as derived from the Rome Statute.

Chapter three will then focus on the practical application of the universality principle by delving into the case of *Pinochet* and *Hissène Habré,* respectively. This will show how despite the application of the universality principle to prosecuting crimes of international concern, the same has not received the attention it deserves as it is hindered by the interplay between the place of state sovereignty and accounting for international crimes committed by its agents.

Chapter four will analyze the case of former Sudan President Omar Al- Bashir regarding the application and enforcement of the universality principle and the challenges it has occasioned. Some comparisons will be drawn from *Pinochet* and *Habre* cases. This will have fulfilled the research question completely.

Chapter five will be the conclusions and recommendations. This Chapter will give the findings and recommendations of what has been the subject of discussion.

CHAPTER 2: THE UNIVERSAL JURISDICTION UNDER INTERNATIONAL LAW

2.1 Introduction

The ICC exercises and derives its powers from the Rome Statute and the United Nations Charter and is tasked with the jurisdiction for punishing crimes brought before it. This is either through state referral or referral by the Security Council. The said power is governed by the doctrine of universal jurisdiction. Therefore, it is important to understand what amounts to universal jurisdiction and how the same came into existence.

Scharf M has argued that the doctrine of universal jurisdiction emanated from the Nuremberg trial in 1945 and considered it the first instance when the said doctrine was brought into play.[39] He further stated that the doctrine of universal jurisdiction was codified by the UN in its Charter in respect of the crime of aggression in 1974 and considered it another milestone when the doctrine of universal jurisdiction was brought into light in the international arena.[40] Studies were conducted, and the first starting point was an inquiry into what motivated the Nuremberg drafters to inculcate the doctrine of universal jurisdiction in the Charter. The drafters stated they were not bringing new things since the universal jurisdiction doctrine has existed since immemorial. They gave examples of when the universal jurisdiction doctrine was employed, comprising piracy and high seas crimes.[41]

In furtherance to what entails universal Jurisdiction, Beth Van Schaack argued that the judgment of the International Military Tribunal convened at Nuremberg and the subsequent calls to punish war criminals led to the conclusion that those crimes are considered evil and must be punished by the international community. There was a need to have universal jurisdiction where the same could be employed.[42] The above position taken by Beth Van Schaack on the origin of the universal jurisdiction doctrine is similar to the position taken by Michael P. Scharf on the origin of the universal jurisdiction doctrine. The above discussion thus leads to the conclusion that the international community has affirmed the need to have perpetrators of the most serious crimes being prosecuted, whether using local means or international discussion herein leads to the conclusion that anyone who perpetrates crimes that are of global concern must be held to account notwithstanding their ranks or persuasion both in the national and international arena. This position saw Augusto Pinochet, Hissen Habre, and Omar Al- Bashir, who were influential in their countries and had global connections, being held to account for their acts. The same will be discussed in detail in the next chapters.

[33] Scharf M 'Universal Jurisdiction and the Crime of Aggression' (2012) 360.
[34] Scharf M 'Universal Jurisdiction and the Crime of Aggression' (2012) 360.
[35] Scharf M 'Universal Jurisdiction and the Crime of Aggression' (2012) 360.
[36] Schaack B 'Negotiating at the Interface of Power & Law: The Crime of Aggression' (2011) 510.

The universality principle is thus applicable to crimes committed in a given territory and is considered of international concern and will only be applicable in instances where the national courts have failed to exercise the primary Jurisdiction as is expected of them to hear such crimes.[43] As illustrated above and expounded in detail in the next chapters, the universal jurisdiction doctrine is rooted in customary international criminal law and was first applied to suppress piracy on the high seas.[44] The universality principle also embraces crimes recognized and appreciated by the international community through treaties or customary laws, and perpetrators should not be allowed to walk freely.[45]

Without attempting to define the concept, Zagaris Bruce states that the principle of universal jurisdiction enables a state to exercise jurisdiction to prescribe for a class of offenses known as *delicta juris gentium* or certain crimes under international law.[46]

Various treaties have been passed that codify the doctrine of universal jurisdiction and are comprised of but not limited to the European Convention on Human Rights and the Convention of Prevention and Punishment for the Crime of Genocide. The treaties, as mentioned earlier, have illustrated the steps that have been put in place by the international community on the need to prosecute perpetrators of the most serious crimes, and this demonstrates the willingness of the international community not to turn a blind eye to mass atrocities that have been committed in a given territory.

Over the past years, the implementations of universal Jurisdiction and the need to have an institution to hear perpetrators of those crimes were first evidenced by the establishment of the Ad hoc tribunals that took place in Rwanda and Yugoslavia to hear and determine disputes that had been committed by the senior government officials who would not have been prosecuted effectively in their respective territories. Because the United Nations Security Council created the said institution, all states were mandated to comply with the request for cooperation to enable the said institutions to have the matters before were heard and determined.[47]

In *Prosecutor v Tadic*, the court was called upon to decide on the issue of the doctrine of the sovereignty of the accused person. The court believed it would be a travesty of law and a betrayal of the universal need if the perpetrators of the mass atrocities were allowed to benefit from the sovereignty doctrine. It would further allow perpetrators to go freely, yet they had committed serious crimes in the eyes of the international community and the victims at large.[48] The Court went ahead and stated that borders should not be used as a shield against the reach of the law, especially those who commit crimes that are of international concern, and that the

[43] Hovell D 'The Authority of Universal Jurisdiction' (2018) 428.
[44] Yoram D 'The Universality Principle and War Crimes' (1998) 19.
[45] Yoram D 'The Universality Principle and War Crimes' (1998) 19.
[46] Zagaris B *International White collar crimes: Cases and Materials* (2010) 239.
[47] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).
[48] *Prosecutor v Dusko Tadic* T-94-1-AR72 (1995).

international community needs to be allowed to have a say in ensuring that justice prevails for victims of the most serious crimes and that only come into play in instances where national courts fail to exercise their primary jurisdiction.[49] The crimes that international tribunals and courts are called upon to try are crimes that are not purely domestic but are instead crimes that are universal and are well recognized in International law as serious breaches of international humanitarian law and transcending the interest of any one State.[50]

Equally, the Appeals Chamber in the Special Court for Sierra Leone, trying Charles Taylor's case, had a chance to rule on the immunity of incumbent heads of state from the jurisdiction of the Court.[51] In this case, Charles Taylor, the former Liberian dictator had ICC issue arrest warrants against him. The prosecution attempted to serve the warrants and too have him arrested through Ghana leading to Taylor's application to have them dismissed. Rejecting Taylor's allegations of head of state immunity, the Court noted that its jurisdiction was international and exercised to the person as opposed to the position Taylor occupied.

The Court noted further that the Nuremburg Charter, the predecessor to the Rome Statute had affirmed under article 7 that "The fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible official does not relieve him from responsibility under international law."[52] Further taking note of ILC's 1950 report, the court found that it had become an established principle of customary international law that heads of state enjoyed no immunity from proceedings in an international tribunal. Charles Taylor's application to dismiss the arrest warrants was thus dismissed.

The ICC was created according to the provisions of the Rome Statute in 2002 and was to be an international court with jurisdiction to hear crimes specifically provided in the treaty, which were mostly crimes of international concern.[53] Article 5 of the Rome Statutes has listed the nature of the crimes that fall within the ambit of the ICC being: genocide, crimes against humanity, war crimes, and crime of aggression.[54] ICC's jurisdiction can be triggered either by state referral or referral by the UN Security Council. Most states were concerned with how the ICC would exercise its mandate that saw most states were reluctant to be bound by it at the first instance.

Regardless, there was a need for accountability of leaders, which led to a compromise being that the Rome Statute would classify all crimes which the Court would try. Primarily, the list of offenses indicated as punishable under the gist of international criminal law was based on the fact that these crimes, once committed, constituted unimaginable atrocities that deeply shock the conscience of humanity. Further these acts threatened the peace, security, and well-being of the

[49] *Prosecutor v Dusko Tadic* T-94-1-AR72 (1995).
[50] See generally Dinstein Y 'The Universality Principle and War Crimes' (1998).
[51] *Prosecutor v. Charles Taylor Decision on Immunity from Jurisdiction*, (31 May 2004)
[52] Charter of the International Military Tribunal, article 7.
[53] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).
[54] Article 5 of the Statute establishing the International Criminal Court.

world.[55] The applicability of international criminal law and universality principle to such crimes is because such crimes are not committed against one state but notionally against the entire international community.

The territory under which the said offenses were committed is given the mandate to first try those offenses. Once they fail, the international community will step in and prosecute the offenders of those crimes.[56] The reason why the international community is more concerned with the said offenses is based on the reasons that the nature of those crimes is considered so grave, and the need to have the perpetrators punished is to bring justice to the victims and to not only deter the convicted perpetrator of the offenses they are charged with but to also deter those who might be contemplating or might contemplate committing such offenses. The above goal of punishment to offenders and deterrence of potential perpetrators will ensure that the commission of such crimes will not go unpunished since redress is readily available under the umbrella of universal jurisdiction.[57]

The next part deals with the Concept of Universal Jurisdiction, how it came into existence, and the reason for its appreciation.

2.2 The Doctrine of Universal Jurisdiction

2.2.1 Conceptualizing Universal Jurisdiction

The universal jurisdiction principle has been defined to encompass the legal principle where individuals are prosecuted for crimes committed in a given territory of international concern. The same has met the elements provided in various treaties and precedents.[58]

Sondra Anton has written on the doctrine of universal jurisdiction, where she has observed that the same can be defined to mean the idea that the most serious crimes may potentially be prosecuted in any court, anywhere, at any time.[59] On top of the definition of what amounts to universal Jurisdiction, she gave the motivation behind the use of universal jurisdiction where she stated that there are three motivations behind the use of universal jurisdiction comprising of; first is the aspect of sovereignty and preference for the local courts to prosecute the most serious crimes that have been committed in its territory since the said forum is deemed to have all the

[56] Nsereko D 'The Evolution Of International Criminal Law And The International Criminal Court In Context' available at https://www.pgaction.org/pdf/The-Evolution-of-Internation al-Crimin al-Law.pdf (Accessed on 12 December 2021).
[57] Nsereko D ' The Evolution Of International Criminal Law And The International Criminal Court In Context' available at https://www.pgaction.org/pdf/The-Evolution-of-Internation al-Crimin al-Law.pdf (Accessed on 12 December 2021).
[58] Philippe X 'The principles of universal jurisdiction and complementarity: How do the two principles intermesh?' (2006) 380.
[59] Anton S 'Examining Universal Jurisdiction' (2006) 2.

required mechanisms to hear those cases.[60] Secondly is based on the assumptions that the doctrine of universal jurisdiction draws much of its energy from the phenomenon of mass atrocities which is in respect of the severity of the offense which converts the said heinous transgressions across all sovereign borders and, as a result, the interests of the international are violated if the offenders are not brought to book.[61] Thirdly is the issue of judicial inaction to hear and determine cases involving a given offender due to their status, and the only remedy that is the use of universal jurisdiction to bring them to book and is effected by taking them to the internationally established institutions to answer to the charges that have been preferred by the prosecutor, in this case, being that ICC has failed to exercise the primary jurisdiction.[62]

Scholars have been, however, left discerning the interplay between the doctrine of universal Jurisdiction and the ability of national courts to decide on the matters that arose within their territory and has bred a defense that has now been considered to be the concept of sovereignty. It has been further argued that the discussion on the doctrine of universal Jurisdiction and the principle of sovereignty was clearly illustrated in the *Lotus Case,* which was a principle on the law of the sea but has gained appreciation when the doctrine of universal is being discussed.[63] The sovereignty doctrine has thus gained recognition and is said to be only applicable in a manner consistent with international law. The position mentioned above was aptly captured by B. Morten when he stated that states can conduct their activities as they wish but where the interests of the international community are at stake, the same will not go unpunished as the same will be monitored keenly to avert injustice.[64]

Universal jurisdiction applies to all individuals irrespective of status. The same is to ensure that no perpetrator is to be accorded any favour by ensuring that all perpetrators are punished following the rule of law.[65] The status of the perpetrator is not considered because the crimes committed are against the international community, and the victims are considered more important than the perpetrator's status. To further what amounts to universal Jurisdiction, the *Al-Bashir arrest warrant* case defined universal jurisdiction to mean the assertion of Jurisdiction of any other accepted jurisdictional nexus at the time of the relevant conduct.[66]

In ensuring that all mass atrocities committed within a particular territory do not go unpunished, those crimes the international community has an interest in have now been classified and qualify to be of *erga omnes* character.[67] The act of classifying such crimes as being of *erga omnes* is for the reason that no deviation can be allowed out of it, and the same will be for the benefit of

[60] Anton S 'Examining Universal Jurisdiction' (2006) 2.
[61] Anton S 'Examining Universal Jurisdiction' (2006) 2.
[62] Anton S 'Examining Universal Jurisdiction' (2006) 2.
[63] *France v Turkey* PCIJ (1927).
[64] See generally Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2001).
[65] Anton S 'Examining Universal Jurisdiction' (2006) 2.
[66] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[67] *France v. Turkey* PCIJ (1927).

mankind as all wrongs that are done, and harm mankind must be punished no matter the status of the perpetrator in a given territory.[68] The other reason as to why the classification of such crimes as having *erga omnes* character is that the wrong once committed in a given territory, the same is not only against the victims in a given territory but also against the entire humankind and to which both the local and international community can punish for the same.[69]

Any immunity that may be accorded to the perpetrator of mass atrocities does not apply in international law.[70] The ICC can proceed to prosecute an individual if it is established that the said individual has hacked the national courts so that they do not face prosecutions.[71]

The actualization of the universal jurisdiction is always tested when state parties are obligated to perform the treaty's mandates as is expected of them and the issue of state sovereignty. It has been observed that the need to charge individuals in courts of competent jurisdiction since there are higher chances that the individual might not be effectively prosecuted in their territory.[72] Crimes committed in a state's territory can be punished through either the positive principle of territory, the negative principle, or the protective principle.[73] The positive principle is defined to be where the suspect nationality is considered, and States can use that as a basis and proceed to punish those crimes.[74] The negative principle is defined to be where the victim's nationality is considered, and the States can proceed to punish that crime.[75]

The use of universal jurisdiction has seen the focus being much on policy and normative debate because it intends to bring international peace and security by punishing criminals that inflict harm to the crimes protected by the international community, their status and persuasion notwithstanding.[76] However, it has been argued that the same jurisdiction is a dangerous pliable tool used by hostile nations and parties to institute criminal proceedings against officials of other nations, and this has been regarded as a deviation from the intention of international law as it seems to only target developing and countries below it.[77]

[68] *France v. Turkey* PCIJ (1927).
[69] *France v. Turkey* PCIJ (1927).
[70] See generally Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2001).
[71] Article 5 of the International Criminal Court.
[72] Human Rights Watch 'The Case of Hissène Habré before the Extraordinary African Chambers in Senegal. Questions and Answers' available at https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal (Accessed on 14 June 2022).
[73] Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2001) 628.
[74] Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2001) 628.
[75] Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2001) 628.
[76] Colangelo A 'Legal Limits of Universal Jurisdiction' (2006) 10.
[77] Colangelo A 'Legal Limits of Universal Jurisdiction' (2006) 10.

As evident from this paper, there is eternal debate on the elements of universal jurisdiction, what that universal jurisdiction entails, and the limits the same has towards bringing perpetrators of the most serious crimes to book. The paper will simplify the complexities that have been associated with universal jurisdiction by classifying them into two major categories being; first, the internal factors and, secondly, external factors.

By internal factors, the same will refers to the national legal systems towards punishment of the perpetrators of the most serious crimes and the capacity of the national courts to dispense with the said crime and complexities attached to the prosecution of the perpetrator.[78]

On the other hand, external factors in the application of the doctrine of universal jurisdiction shall comprise the challenges that might arise from a given territory where the perpetrator of the most serious crimes is or are influential people and national figures. The need to prosecute them might lead to dissent from the said state or the affiliate member state.[79] The prosecution of those individuals might hinder the prosecution as the investigations might be affected as the victims, who are the people who would assist the prosecutor in the collection of evidence and giving testimonies, shied by the fact that they might be ridiculed or persecuted and thus fail to turn up. The prosecution of the victims might as well be inhibited by the position that the said state has taken as most states usually protect their citizens, including the perpetrators of those crimes, and any attempts by the prosecutor to have them prosecuted would be considered as being attempts of aggression being perpetuated in that given territory and will thus affect the turn out of the witnesses and cooperation from the state party.[80]

Based on the above discussions, it is clear that the application of universal jurisdiction is thus still a developing idea. Its realization cannot be effected unless state parties to the Rome Statute and the United Nations Security Council, which has played a significant role in ensuring that the officials from non-state parties to the Rome Statute are also brought to account for their acts, are given the guarantee and assurance of cooperation. The other important aspect to note on the need to have universal jurisdiction functional is that once the same is fully recognized and realized, both internal and external peace, security, and stability are guaranteed.

The relevance of applying universal jurisdiction is to ensure that the international community should not be shielded by the claim of sovereignty or immunity of the individual as that is only applicable within its territory. In contrast, the crime committed harms the entire humanity.[81]

[78] Colangelo A 'Legal Limits of Universal Jurisdiction' (2006) 11.
[79] Colangelo A 'Legal Limits of Universal Jurisdiction' (2006) 11.
[80] Colangelo A 'Legal Limits of Universal Jurisdiction' (2006) 11.
[81] Osofsky M 'Domesticating International Criminal Law: Bringing Human Rights Violators to Justice' (1997) 199.

2.2.2 Evolution of Universal Jurisdiction Under International Law

The Nuremberg Charter expounded the doctrine of universal jurisdiction, balancing the need to enhance individuals' accountability and sovereignty.[82] The reasons for disregarding sovereignty have been illustrated in the chapters above, which are motivated by the need to hold the perpetrator accountable for their crimes. Other treaties enacted and which have recognized the doctrine of universal jurisdiction include the European Convention on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and the Universal Declaration of Human Rights of 1948.[83] Through the Conventions, as mentioned earlier, the international community promised that it would not disregard the atrocities that any country would commit.[84] It would hold the suspects accountable for their actions, including heads of states internationally accountable for the crimes they will commit against their citizens or nationals in their territory.

The European Convention of Human Rights obligates all state parties to ensure that there is respect for human rights within their territories and that the same cannot be deviated from.[85] The Convention has further prohibited the violation of fundamental rights and freedoms. It has further mandated state parties not to limit the rights and fundamental freedoms unless the same is justified specifically by a known mechanism.[86] The Convention has also established the European Court of Human Rights, and the same is vested with Jurisdiction to hear cases referred to it by individuals, organizations, or groups within the European Union.[87] The jurisdiction of the European Court of Human Rights is thus not limited to state referral but also encompasses individuals and organizations.

Another treaty with some form of doctrine of universal Jurisdiction is the Convention for the Crime of Genocide. Like the others, it defines war crimes, crimes against humanity, and crimes of aggression as offences punishable under international criminal law. It further added the crime of genocide to the list of universally punishable atrocities falling within its ambit. Article 4 of the Convention for the Crime of Genocide provides that even constitutionally responsible rulers or public officials can be subject to punishment if they were found to have violated the treaty's provisions.[88]

The Genocide Convention, as does the Rome Statute, makes its system complimentary to that of a state that is able to punish violators of the convention. It provides that the defendants can be

[82] Macedo S *The Princeton Principles on Universal Jurisdiction* (2001) 16.
[83] Macedo S *The Princeton Principles on Universal Jurisdiction* (2001) 16.
[84] Macedo S *The Princeton principles on Universal jurisdiction* (2001) 16.
[85] Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 of 1950.
[86] Article 17 of the European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 of 1950.
[87] Article 34 of the European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14of 1950.
[88] Article 4 of the Statute establishing the International Criminal Court.

tried either at an international tribunal or the country where the human rights violations took place.[89]Equally, where a state fails to initiate some form of criminal trial, universal jurisdiction comes into play, and any other international institution is permitted to try and punish the perpetrators.

National courts have also played a big role in punishing human rights abuses besides international conventions and treaties. Most state parties have recognized the primary mandate of punishing perpetrators of the most serious crimes by establishing legal mechanisms to have those individuals prosecuted. The need to have serious crimes prosecuted in a given territory was facilitated by the various conventions comprising the 1956 Convention on the Abolition of Slavery, the Slave Trade, and Institutions and practices similar to those of slavery where it mandated all state parties to have perpetrators of the most serious crimes being criminalized in the given territory and called for the stoppage of the slave trade and the need to have international cooperation regarding the commission and prosecution of slave trade enablers and participants.[90]

The International Convention on the Suppression and punishment of the crime of Apartheid also established universal jurisdiction. It mandated signatories to the said Convention to implement national legislation criminalizing Apartheid.[91] The Convention on the Suppression of Apartheid further mandated all state parties holding a given perpetrator jurisdiction in persona with the power to institute proceedings against the said person using their national jurisdiction.[92]

Other conventions were passed to guarantee national courts with the jurisdiction to hear and determine cases related to terrorism. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft was adopted and provided for protective and territorial jurisdiction by giving the green light for adopting and using the universality principle.[93] The said Convention specifically provided that the universality principle that a given state has exercised towards the prosecution of criminals is not excluded by the Statute.[94] The Montreal Convention for the Suppression of Unlawful of Unlawful Acts Against the Safety for Civil Aviation and the Tokyo Convention on Offenses also provided universal jurisdiction to states to try certain acts committed on board aircraft have the same provisions on the punishment of offenses on aircraft.[95] The said conventions have given the national courts primary jurisdiction to hear and determine cases that are of international concern. Where the same has not been honored, another state can take over the same.

[89] See generally *White* J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).
[90] Article 2 of the Convention to Suppress the Slave Trade and Slavery of 1926.
[91] Article 1(2) of the International Convention on the Suppression and Punishment of the Crime of Apartheid.
[92] Article 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid.
[93] Article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft.
[94] Article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft.
[95] Article 1(1) of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

The jurisdiction of the national courts to handle heinous crimes was broadened in 1984, as the international community focused on putting an end to the use of torture as a tool of destruction among civilian populations. This expansion was reflected in the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatments or Punishments. Article 5 of the Convention Against Torture grants universal jurisdiction to try offenses committed in the territory of a signatory state. This is when the alleged offender is a national of that State and when the victim is a national of that State if that State considers it appropriate.[96] Each state party shall likewise take measures necessary to establish its jurisdiction over such offenses in cases where the alleged offender is present in a territory under its jurisdiction and does not extradite him.[97]

The evolution of the principle of universal jurisdiction was taken to a higher level when the United Nations Security Council, vide its Resolutions No. 808 in 1993 and 955 of 1994, created the International Criminal Tribunals for the former Yugoslavia and Rwanda respectively to hear cases involving crimes that had been committed within the respective territories.[98] The two resolutions not only gave the tribunals the power and the jurisdiction over the crime of genocide and crimes against humanity, but they also expanded the definition and what is precise composition of war crimes.[99] The resolution further required all Rome Statute signatories to ensure they comply with the requests, orders and directives of the tribunals so that it could end complacency and impunity in instances where human rights are violated.[100]

In the case of *Prosecutor v Tadic*, the tribunal's universal jurisdiction was brought into focus when the tribunals affirmed that it would be a disgrace to the legal system and a breach of the universal pursuit of justice if perpetrators go unpunished for the acts that they have committed in a given territory.[101] The tribunal went ahead and stated that the crimes to which the international tribunal had been called upon to hear and determine were not crimes of purely domestic nature and thus need to be heard by an international tribunal established according to the provisions of the United Nations and the Resolutions of the United Nations General Assembly.[102]

Philippe argued that the practice of universal jurisdiction was motivated by two considerations comprising first being based on the fact that the crimes once committed are so grave and to which it harms the entire international community and the second consideration was based on the need to unravel war criminals by making sure that there were no safe havens been accorded to

[96] Article 5 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.
[97] Article 5 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.
[98] United Nations Security Council No 808 of 1993 and United Nations Security Council No 955 of 1994.
[99] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).
[100] See generally White J '*Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*' (1999).
[101] *Prosecutor v Dusko Tadic* T-94-1-AR72(1995).
[102] *Prosecutor v Dusko Tadic* T-94-1-AR72(1995).

any perpetrator who commits serious crimes where the international community has a stake in it.[103]

The other reason why there was a need to have the recognition and subsequent utilization of the doctrine of universal jurisdiction expansion was the need to ensure that accountability was operationalized and perpetrators were even punished, even those who were considered untouchable within their territories were investigated, prosecuted and punished if sufficient reasons were availed. To prosecute the perpetrators, there was a need to have the scope of those crimes clearly defined which was to be done by the International Law Commission. At its 2005 Krakow Session, the 17th Commission of the Institute of International Law, under its Rapporteur Christian Tomuschat, adopted the Resolution on universal criminal jurisdiction concerning genocide, crimes against humanity, and war crimes.[104] The doctrine of universal jurisdiction was to be applied to the crimes that an International Treaty or customs have stipulated by the international community. The same meant that the said offenses were to be tried in a given territory; if the national courts could do so, or in default, an internationally recognized institution or court would assume the jurisdiction within the stated territory as the acts committed in that area were frowned upon by the international community.[105]

The most monumental achievement that saw the doctrine of universal jurisdiction taken to a greater level was evidence when the Rome Statute, which had the jurisdiction to hear cases involving war crimes, crimes against humanity, and genocide.[106]

On top of the Rome Statute being the primary Statute on universal jurisdiction, the Security Council, vide its resolutions has promoted the international community's goal concerning the doctrine of universal jurisdiction. The treaty's provisions, the actions of the United Nations Security Council, and the readiness of states to bring war criminals to justice, have made such offenses gain recognition in the realm of the customary international law of human rights.[107] The reason for the classification of the universal jurisdiction as forming part of customary international law is based on the obligations that the states have allocated themselves the need to prosecute war criminals.[108]

[103] Philippe X 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 384.
[104] Kreb C' Universal Jurisdiction over International Crimes and the Institut de droit International' (2006) 575.
[105] Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2014) 628.
[106] Rome Statute establishing the International Criminal Court.
[107] Article 24 of the United Nations Charter of 1945.
[108] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).

2.3 Application of Universal Jurisdiction

Universal jurisdiction is a development from treaties and practices by states concerning crimes committed in a given territory that might go unpunished, as illustrated above. The application of universal jurisdiction was thus based on treaty law and has been taken a step ahead by its recognition as applicable under customary international law. The paper will illustrate the concept of treaty law, developing the doctrine of universal jurisdiction and the subsequent application under customary Law.

2.3.1 Universal jurisdiction for state members to the Rome Statute

The governing Law on interpreting treaties is the Vienna Convention on the Law of Treaties (VCLT). The said treaty has elaborated the procedures under which treaties are to be signed, ratified, and recognized as operational.[109] As a matter of general knowledge, a treaty only applies to a state which is the signatory and thus not to third parties.[110] For example, the State of Sudan is thus not a party to the Rome Statute, and as such, they are not bound by the Rome Statute per se.

Danilenko has analysed the applicability of treaty law and observed that treaty arrangements usually have legal and political realities that could often be used to create and or advance the 'third-party states' legal and political interests.[111] He further stated that these constraints might result not from the imposition of legal obligations upon the third states but from the fact that a large portion of the international community adopts, in conformity with international Law, a decision to deal with contemporary problems of community concern by creating appropriate institutions and procedures which will be applied to a given territory in respect to a given problem.[112] This was the situation in South Sudan where the Rome Statute was applied despite it not being a member. The other reason why the jurisdiction of the ICC is possible and applicable in the State of Sudan is because of the international nature of the ICC. That means the ICC performs international acts under the status of Sudan, having breached international obligations.[113]

The VCLT has elaborated on instances under which a country is bound by the treaty and includes a signature.[114] The treaty states provide that a state party agrees to be bound by a treaty if it signs and which will be interpreted to mean intention to be bound by it and can also give its intention to be bound by it during the negotiation process.[115]

[109] Part II of the Vienna Convention on the Law of Treaties 1969.
[110] Article 1 of the Vienna Convention on the Law of Treaties.
[111] See generally Danilenko G 'The Statute of the International Criminal Court and the Third States' (2000).
[112] See generally Danilenko G 'The Statute of the International Criminal Court and the Third States' (2000).
[113] Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2001) 628.
[114] Article 12 of the Vienna Convention on the Law of Treaties.
[115] Article 12 of the Vienna Convention on the Law of Treaties (1) (a), (b), and (c).

The need for a state party to be a signatory to the Rome Statute before the Court assumes jurisdiction to punish for the crimes committed in a given territory is an essential aspect of this paper for the reason that the Rome Statute was applied to Sudan despite not having been a party to the Rome Statute. The subsequent discussion on the doctrine of universal jurisdiction is applicable according to customary international law because the said crimes are against the entire humankind. The ICC thus usually assumes jurisdiction based on either treaty law or pursuant to customary international Law.

Morton and Yan have stated that before the ICC assumes jurisdiction to hear crimes according to the doctrine of universal jurisdiction, the following requirements must be met.[116] The first is that the Court should be acting within the provisions of an international treaty and to the crimes that have been precisely defined to be within its jurisdictions. The second is that the territory which the suspect is based has the options of either prosecuting the suspect, or if the issue of sovereignty comes in, the State where the suspect is found is willing to extradite the suspect for prosecution by the ICC. The third is the respect for the principle of complementarity, and in this, the national courts should have assumed the role of bringing the suspect to prosecution or is willing to prosecute the suspect.

Finally, they aver that no immunity is accorded to the suspect no matter what status the suspect holds within that territory.[117] The reason for not according to the suspect any form of immunity is premised on the provisions of article 27 of the Rome Statute, which does not recognize immunity as a defence for crimes that have gained international recognition as being of concern.[118] In furtherance to the need to surrender the suspect, article 87 of the Rome Statute calls for state parties to surrender the suspect whenever they step into their territory.[119]

One of the challenges in the enforcement of the Rome Statute under the provisions of the VCLT occurs with regards to determining whether a state party is bound by the provisions of the treaty when they exchange documents that constitute that treaty but which they have not ratified.[120] In exchanging the documents that constitute a treaty, the VCLT provides that the exchange binds the State if the treaty expressly states that that exchange shall bind the State or the states agree that the exchange shall have that effect.[121]

The VCLT has further provided that a treaty can bind a state party if it is consented to under ratification, acceptance, and or approval.[122] A state party becomes obligated by a treaty when it

[116] Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2001) 628.
[117] Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2001) 628.
[118] Article 27 of the Statute Establishing the International Criminal Court.
[119] Article 87 of the Statute Establishing the International Criminal Court.
[120] Article 13 of the Vienna Convention on the Law of Treaties.
[121] Article 13 (a), (b) of the Vienna Convention on the Law of Treaties.
[122] Article 14 of the Vienna Convention on the Law of Treaties.

either ratifies the treaty as outlined in the treaty itself, or agrees to be bound by the treaty through ratification. This can happen if the representative/minister of the state has executed the treaty with the intention of ratification, or if the state's intention to sign the treaty with the intention of ratification is evident from the full authority granted to its representative or minister as expressed during the negotiating process.[123]

On the part of a state under approval or acceptance, the treaty that the above conditions apply in ratification applies.[124] Most state parties have opted to sign but not take further actions to make the treaty operations within their territory. It has been argued that to become a party to a multilateral treaty, a state must demonstrate, through a concrete act or tangible action, its willingness to undertake the legal rights and obligations contained in the treaty.[125] In other words, it must express its consent to be bound by the treaty. A state can demonstrate its support to be bound though the several ways outlined in the final clauses of the treaty.[126] The VCLT further states that a treaty can bind a state party by virtue of accession.[127] Accession is said to apply to a state party by virtue of acquisition if that treaty states that the treaty will apply to a state party by virtue of accession.[128]

The VCLT has gone ahead and stated that where state parties have agreed that a particular form stated above is applicable, then the state party is bound by that treaty upon the needed documents being exchanged between the stated parties; or the documents being deposited with the depository, or there is notification given to the negotiating party or the depository.[129]

As applicable to treaty law, the above provisions are interpreted to mean that if a state meets the above requirements, then the treaty applies to that State. The VCLT has provided for other instances where a state can be bound by some parts of the treaty, whereas some parts do not apply to them.

A state wishing to ratify a given treaty can choose which articles they want to bind them in exclusion of other parts of the treaty.[130] The Convention gives the individual state party right to put the reservations. It can be communicated before the said treaty is said to come into force to avoid the particular state party from frustrating the objects of the treaty and can only be rejected or the stated reservations not being applicable if the stated treaty either if treaty does not allow for any reservations to be placed in it or the treaty provides for the parts that reservations can be placed and does not include those that the stated reservations as submitted by the state party is not among them; or the stated reservations are incompatible with the stated objects and purpose

[123] Article 14 (1)(a), (b), (c) and (d) of the Vienna Convention on the Law of Treaties.
[124] Article 14 (2) of the Vienna Convention on the Law of Treaties.
[125] Aust A *Table of treaties. In Handbook of International Law* (2005) 25.
[126] Aust A *Table of treaties. In Handbook of International Law* (2005) 26.
[127] Article 15 of the Vienna Convention on the Law of Treaties.
[128] Article 15 (a), (b) of the Vienna Convention on the Law of Treaties.
[129] Article 16 (a), (b) of the Vienna Convention on the Law of Treaties of 1969.
[130] Article 17 (1) of the Vienna Convention on the Law of Treaties of 1969.

of the treaty. [131] Usually, when a reservation is formulated, it must be included in the instrument of ratification, acceptance, approval, or accession or be annexed to it and (if annexed) must be separately signed by the Head of State, Head of Government, or Minister for Foreign Affairs or a person having full powers for that purpose issued by one of the above authorities.[132]

For reservations to be applicable in a given scenario, the treaty might have provided for its application in its entirety. Thus, for any reservation to apply, acceptance to the stated reservations shall not be applicable until all the state parties obtain the said consent. [133] But no consent to the said reservations is needed where the reservation is exclusively allowed by the treaty.[134] Consent in the reservation of treaties can also be required when the stated treaty is a project of an international community where consent of the stated organizing is needed.[135]

The VCLT further provides that where a state party puts in reservations, then those reservations have effects in respect to that given State to the reservations set forth and modifies the said reservation to that extent to the other state party and will be applied by the reserving State to the other states or applied by other states to the reserving State.[136] For the non-reserving states, the treaty applies in its entirety.[137] If a state finds out that the reservations they had put in place should no longer be applied to them, they can decide to withdraw from the stated reservations.[138] Where a state party has agreed to be bound by a particular treaty, then it is required of that given State to ensure that those states shall honour the expectation and requirements of the treaty in good faith.[139]

In the application of a treaty, it is required of the stated state parties that they apply the treaty in a non-retroactivity manner;[140] a state party cannot also raise its internal law at the helm of international Law as provided for by the treaty.[141]

On applying successive treaties over the same subject matter, the VCLT requires that the subsequent treaty stipulates that it is, or does not apply to, the instant scenario. The previous treaty is applicable and should not be construed as incompatible.[142] This is also provided under the part of the interpretation of treaties where the VCLT calls for the interpretation of a treaty in good faith.

[131] Article 19 (a), (b), and (c) of the Vienna Convention on the Law of Treaties of 1969.
[132] Aust A *Table of treaties. In Handbook of International Law* (2005) 26.
[133] Article 20(2) of the Vienna Convention on the Law of Treaties of 1969.
[134] Article 20(1) of the Vienna Convention on the Law of Treaties of 1969.
[135] Article 20(3) of the Vienna Convention on the Law of Treaties of 1969.
[136] Article 21 (1) (a) and (b) of the Vienna Convention on the Law of Treaties of 1969.
[137] Article 21(2) of the Vienna Convention on the Law of Treaties of 1969.
[138] Article 22 (1) of the Vienna Convention on the Law of Treaties of 1969.
[139] Article 26 of the Vienna Convention on the Law of Treaties of 1969.
[140] Article 28 of the Vienna Convention on the Law of Treaties of 1969.
[141] Article 27 of the Vienna Convention on the Law of Treaties of 1969.
[142] Article 30 (2) of the Vienna Convention on the Law of Treaties of 1969.

The coming into force of a treaty is also said to be essential and should come into force at the specific time stated in the treaty or upon fulfilling the requirements stated in the treaty. On the part of the reservation of the treaty, it is essential to note that the VCLT on the interpretation of treaties calls for member states to only put in place the reservations as permitted by the stated treaty and not to put in the unnecessary reservations that will defeat the objects and purpose of the treaty. A party can also decide to withdraw the reservations it had put in place at any time.

Where a party decides to put in reservations, the stated party should not be at the same level as those with no reservations about the stated treaty. The treaty and reservations are only interpreted to the disadvantage of the reserving party. On the performance of the obligations of the treaty, the objects and purpose of the treaty should be taken into account, and nothing should be interpreted to defeat it, and no state party is allowed to invoke anything, including its local laws, to defeat the treaty's calls.

The need for state parties to abide by the provisions of the treaty was illustrated by the Pre-Trial Chamber comments on the Republic of Malawi's failure to arrest and surrender Sudan's head of State Omar Al- Bashir when it held that 'the Chamber rejects the argument presented by the Republic of Malawi, with respect to States not parties to the Statute, that international law affords immunity to Heads of States in respect of proceedings before international courts.'[143]

In conclusion, the Vienna Convention on Law of Treaties mandates state parties to the Rome Statute to undertake their obligations in accordance with the treaty stipulations.

2.3.2 Universal Jurisdiction under the Rome Statute as Customary International law

The application of universal jurisdiction under the Rome Statute has been seen to be applied to states that are not parties to the Rome Statute and other treaties by virtue of the application of the concept of customary international Law. By virtue of customary international law, the stated universal jurisdiction is applied to non-state parties. Customary international law is a set of established norms and practices that states have come to deem as legally binding over time. It is a collection of customary rules and standards that have been consistently followed and recognized by the international community as a whole.[144]

It is a requirement that before a given set of rules is classified as a custom or customary international law, that is, state practice and *opinio juris.*[145] *Opinio juris,* as a component of

[143] *Prosecutor v. Omar al-Bashir* ICC-02/05-01/09 (2009).
[144] Goldsmith L and Posner E 'A Theory of Customary International Law' (1999) 1114.
[145] Ferreira A, Carvalh C and Machry F 'Formation and Evidence of Customary International Law' (2013) 186 https://legal.un.org/ilc/documentation/english/a_cn4_663.pdf (Accessed on 10 February 2023).

customary international law, is a general practice accepted as law by states.[146] In the case *Military and Paramilitary Activities in and against Nicaragua,* it was stated that for one to state that customary international law requirement of *opinio juris* exists, one must look into and examine the actions of the state and assess whether they view it as a binding obligation or a recognized right to act in a certain manner.[147] The court further went ahead and stated that the *opinio juris* has two components in that it encompasses; first, what underlies the draft conclusions; and secondly, it is widely supported by States.[148]

State practice consists of the conduct of the state, whether in the exercise of its executive, legislative, judicial, or other functions. The decision of the ICC Pre-trial Chamber of 12 December 2012 [149] debated on the enforceability of the arrest warrant against the president of Sudan, Omar Al- Bashir, and whether immunity could be pleaded.[150] The Pre-Trial Chamber gave reasons which showed that the issue of immunity is no longer appreciated by the ICC and included;

a) The Rome Statute has indicated that immunity no longer applies to the head of State.[151]

b) The prosecution of heads of state has gained widespread acceptance. It has formed part of practice under the ICC from 2002 to date, where several heads of state have gained momentum. As a result, parties have accepted that the ICC no longer recognizes the concept of immunity.[152]

c) Over 120 states who are parties to the Rome Statute establishing the ICC and which has existed for over nine years, have accepted that the Court is not bound by any immunity that exists in the national laws over the said state official for those crimes that is of concern to the international community.[153]

d) All the 120 states who are parties to the treaty have entrusted the Court with jurisdiction to punish those crimes within the Court's mandate. Any condition that raises immunity or

[146] Draft conclusions on identification of customary international law, with commentaries. Yearbook of the International Law Commission (2018) vol. II, Part Two available at https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf (Accessed on 10 February 2023).
[147] *Nicaragua v United States of America* Military and Paramilitary Activities in and against Nicaragua (1986).
[148] *Nicaragua v United States of America* Military and Paramilitary Activities in and against Nicaragua (1986).
[149] *The Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[150] Galand A 'State Sovereignty and International Criminal Law' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2001).
[151] Article 27 of the Statute Establishing the International Criminal Court.
[152] Wood M '*Formation and Evidence of Customary International Law, Address to the International Law Commission*' (2012) https://digitallibrary.un.org/record/751888 (Accessed on 20 December 2022).
[153] Wood M '*Formation and Evidence of Customary International Law, Address to the International Law Commission*' (2012) https://digitallibrary.un.org/record/751888 (Accessed on 20 December 2022).

in any way accepts immunity will facially defeat the mandate which has been vested to the Court.'[154]

However, the court noted that since some states are not parties to the Rome Statute, state practices have formed part of customary international law. Thus non-parties are bound under customary international Law, as is the position of the State of Sudan, which is not a party to the Rome Statute.[155]

It is important to note that irrespective of the fact that the Republic of Sudan is not a member of the ICC, this court is recognized as an international institution discharging international responsibilities and thus has jurisdiction over the Republic of Sudan,[156]

2.4 Conclusion

Sovereign immunity is no longer applicable in domestic law as a defence against the commission of international crimes. The character and nature of international crimes do not allow the world to ignore their occurrence. They are seen as grave crimes that demand international attention. Their prosecution acts as deterrence and retribution.

In the next Chapter, the thesis will examine two of the most important universal jurisdiction cases. I will look at the case of General Augusto Pinochet and the case of Hissène Habré.

[154] Wood M '*Formation and Evidence of Customary International Law, Address to the International Law Commission*' (2012) https://digitallibrary.un.org/record/751888 (Accessed on 20 December 2022).
[155] Goldsmith L and Posner E '*A Theory of Customary International Law'* (1999) 1115.
[156] Bantekas I and Nash S *International Criminal Law* 2 (2003) 96.

CHAPTER 3: UNIVERSAL JURISDICTION IN PLAY: THE CASE OF AUGUSTO PINOCHET AND HISSENE HABRE

3.1 Introduction

This chapter deals with the case of Augusto Pinochet and Hissene Habre concerning the doctrine of universal jurisdiction. The two cases immensely contributed to the development of universal jurisdiction. A. O'Sullivan argues that the calls to end impunity have seen the concept of universal jurisdiction being advocated for punishing perpetrators and ensuring victims' access to justice.[157]

The application of universal jurisdiction began to develop when victims of the Chadian dictator called for the accountability of their leader Hissene Habre and relied upon customary law principles to support the legality of the said charges.[158] The prosecution was first triggered in Senegal, where Habre had sought refuge after the end of the regime.

The warrant of arrest issued by the Spanish Court for the extradition of General Augusto Pinochet signaled a willingness to prosecute perpetrators of grave human rights violations that saw the international community, including the former UN Secretary General Koffi Annan approving the same.[159] Though turned down by the House of Lords, Pinochet's extradition to Spain gave a signal that perpetrators of grave human rights violations can be arrested and prosecuted by third-party states should national courts fail to ensure that they account for their wrongdoings.[160]

These European efforts led to one in Africa against the former leader of Chad Hissène Habré. The prosecution of Hissene Habre in Portugal did not bear any fruit as its president at the time, Abdoulaye Wade intervened and saw the courts declaring themselves as not being competent to hear the said case, which will be illustrated in detail in this paper.

This chapter will illustrate how universal jurisdiction gained traction and has evolved to being considered customary international law.

[157] O'Sullivan A *Universal Jurisdiction in International Criminal Law. Debate and the Battle for Hegemony* (2017) 2.
[158] See generally Seelinger K, Fenwick N and Alrabe K 'Sexual Violence, the Principle of Legality, and the Trial of Hissène Habré' (2020).
[159] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).
[160] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).

3.2 Prosecution of Augusto Pinochet

The prosecution of Augusto Pinochet was not only criminal law but also covered other areas comprising of; first, human rights; secondly, state immunity; thirdly, jurisdiction; fourthly, extradition and lastly, the relationship between international law and domestic law.[161] Although the case revolved around legal and political reasons, this paper focuses on the legal aspects.[162] The legal aspects that revolved around the Augusto Pinochet case were the international law of the past that guaranteed the heads of state immunity and the international law of the present and the future where the head of state cannot escape accountability for the acts committed to innocent victims.[163] The case of Augusto Pinochet, as will be seen here, indicates that. In contrast, the prosecution relied on the present and future laws on Accountability. On the other hand, Pinochet's defense relied on the law of the past regarding immunity, which complicated his prosecution.

In analyzing the prosecution of Augusto Pinochet, two decisions from the House of Lords shall be the source of facts and analysis.[164] The cases mentioned earlier were decided by the United Kingdom courts, which saw different interpretations given to the obligations of the United Kingdom to third-party states concerning the exercise of universal jurisdiction.

Judicial accountability for human rights violations committed in 1973-1990 in Chile came to a virtual standstill in 1998.[165] The accountability had been hindered by the 1978 self-amnesty law and judicial apathy.[166] The international arrest warrant issued by the Spanish Court against Augusto Pinochet was brought to test in 1998 when he was on a private medical visit in the United Kingdom.[167] The decision by the English Courts indicated that the concept of universal jurisdiction is still far from realization, as most states still doubt its applicability and limits.[168] The said arrest warrant was issued on allegations that he had murdered Spanish citizens in 1973 and was to be charged with having committed genocide and crimes against humanity.[169] The

[161] Byers M 'The Law and Politics of Pinochet Case' (2000) 420.
[162] Byers M 'The Law and Politics of Pinochet Case' (2000) 420.
[163] Byers M 'The Law and Politics of Pinochet Case' (2000) 422.
[164] *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* UKHL (1999).
[165] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet Case' (2016) 1 available at https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).
[166] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet Case' (2016) 1 available at https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).
[167] Bogdandy V, Goldmann A and Venzke I 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2016) 120.
[168] O'Sullivan A *Universal Jurisdiction in International Criminal Law. Debate and the Battle for Hegemony* (2017) 159.
[169] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet Case' (2016) 1 https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).

arrest warrant issued against Augusto Pinochet was to be enforced in accordance with the British Extradition Act of 1989.[170] The arrest warrant asserted that between September 11, 1973, and December 31, 1983, Pinochet murdered 79 Spanish Citizens in Chile.[171] Spain asserted the jurisdiction of punishing Pinochet by virtue of passive personality jurisdiction[172] Under its 1985 Organic Law Judicial Power and its 1971 Code of Military Justice.[173] The House of Lords found that the first warrant of arrest was defective for want of mutuality.[174]

Lord Slynn, while analyzing the interplay between immunity and liability for the offenses committed by heads of state by virtue of international law, appreciated that it was an international treaty that prescribed the limit of immunity, and the Court cannot frown upon it.'[175]

Spain's warrant of arrest against Pinochet saw the eruption of similar requests from at least seven countries.[176] The said requests saw Chile making complaints that claiming breach of its sovereignty was at the crossroad since he had been granted immunity under its Amnesty Law of 1978, and thus no proceedings could be effected against him.[177] Chile further argued that if prosecutions were to be preferred, then the same should be conducted in Chile.[178]

The intention of Britain to honor the warrant of arrest and ensure that Pinochet was deported to Spain was faced with the various defenses that were submitted by Pinochet's lawyers comprising of immunity as head of state and the need to have courts in Chile proceed with the case as that was the best place to proceed with the prosecution. Ruth Wedgwood argues that the defense that ran through Pinochet's case was based on a claim of procedural fairness and historical exception.[179] Pinochet's lawyers submitted that since he was the head of state when the alleged offenses were committed, the international practice of immunity for the head of state should be adopted and that criminal prosecutions in any foreign state be dropped.[180]

[170] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet (2016)1 https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).
[171] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet *Case'* (2016) 1 https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).
[172] McCarthy J 'The Passive Personality Principle and Its Use in Combatting International Terrorism' (1989) 296.
[173] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet Case' (2016) 1 https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).
[174] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).
[175] See generally Byers M 'The Law and Politics of Pinochet Case' (2000).
[176] Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015) 120.
[177] Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015) 120.
[178] Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015) 122.
[179] Wedgwood R 'International Criminal Court, An American View' (2000) 97.
[180] Wedgwood R 'International Criminal Court, An American View' (2000) 97.

The defenses put by the defense lawyers defeat the calls by the international community to ensure that perpetrators of widespread human suffering are punished as mandated by international law.

3.2.1 Proceedings at the Divisional Court

Two arrest warrants were issued against Augusto Pinochet while on his private medical visit in London pursuant to Spain's request, as illustrated above. On October 16, 1998, Mr. Nicholas Evans, a Metropolitan Magistrate, issued a provisional warrant for the arrest of Augusto Pinochet pursuant to the provisions of Section 8(1)(b) of the Extradition Act of 1989 on October 16, 1998.[181]

Mr. Ronald Bartle issued the second arrest warrant against Augusto Pinochet on October 27, 1998, for the same offenses he was accused of having committed against Spanish citizens.[182] On November 3, 1998, General Pinochet was granted a favorable decision in the initial litigation in Britain when the Queen's Bench held that General Pinochet, in his capacity as a former head of state, was entitled to continuing immunity for all acts *jure imperii* he performed during his term as President of Chile.[183]

The holding that the first warrant was defective was based on the fact that Spain's arrest warrant did not satisfy the provisions of the Extradition Act on extradition crimes committed in a foreign state. If the same were committed in England, it would have constituted a crime that is punishable for a period of 12 months or more.[184] The Court further stated that the provisions of the Extradition Act on the location where the crime was committed, the elements of the crime, and the punishment prescribed for that crime must have been met. It noted that the same had not been proved as the allegations that the perpetrator was a Spanish citizen and the victims were Spanish citizens were insufficient.[185] The second warrant of arrest against Augusto Pinochet revived the debate that led to the Court clarifying the scope of immunity that is to be enjoyed by

[181] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet Case' (2016) 1 https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).
[182] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet Case' (2016) 1 https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).
[183] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet Case' (2016) 1 https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).
[184] Sections 2(1)(a) and 2(1)(b) of the 1989 Extradition Act.
[185] Collins C 'Prosecuting Pinochet. Late Accountability in Chile and the Role of the Pinochet Case' (2016) 1https://centers.gmu.edu/globalstudies/publications/hjd/hjd_wp_5.pdf?gmuwrd=sm&gmuw-rdm=ht (Accessed on 10 February 2023).

the sitting heads of state and former heads of state. The said Divisional Court subsequently quashed the second warrant of arrest.[186]

As mentioned earlier, the court relied on the provisions of the State Immunity Act 1978 and Schedule 1 of the Diplomatic Immunities Act 1964. The proceedings before the court took another dimension when the Prosecutor who was conducting the case on behalf of Spain conceded that the heads of state enjoyed immunity while in office and no action could be taken against them until they vacated office, where they could be arrested and prosecuted for the offenses committed while in office.[187] The court believed that the courts in the United Kingdom could not dispense the crimes that Augusto Pinochet was accused of having committed.[188] The court relied on the provisions of the Suppression of Terrorism Law and the European Convention for the Repression of Terrorism, 1977. It concluded that Spain could not apply it retrospectively and that Chile had never been a party to them.[189] The court unanimously quashed the said extradition and observed that Augusto Pinochet was at liberty to return to Chile.[190] The quashing of the second warrant saw the Divisional Court staying its operations pending the appeal before the Lordships.[191]

The court was not persuaded by the argument that the crimes were repugnant to morality and constituted crimes against humanity, for which anyone could be liable.[192] The prosecution submitted that Pinochet should be thus held liable for genocide, torture, and the taking of hostages.[193] The Court dismissed the claims by holding that Britain did not incorporate the provisions of Article 4 of the Genocide Convention[194] when it enacted the Genocide Act 1969.[195]

[186] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[187] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[188] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[189] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[190] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[191] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[192] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[193] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[194] Convention on the prevention and punishment of the crime of genocide.
[195] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).

The Divisional Court quashed the warrant of arrest and affirmed that the concept of immunity, as enjoyed by the head of state, does not cease once they leave office.[196]

The above position taken by the Court above indicates that before a court of law assumes jurisdiction, it must be persuaded that the same is within the ambit of the legal system and cannot be applied blindly.

3.2.2 The Position of the House Of Lords

The House of Lords was called upon to decide the place of immunity and its application to former heads of state. It held that the case for immunity is established for former heads of state, extending to official only acts, public duties, or actions performed in an official capacity.[197] Some acts, therefore, may not warrant immunity or be considered public or official.[198] The argument that can assist in distinguishing the limits of universal jurisdiction is that. In contrast, a person can enjoy immunity for acts they committed while being the head of state and discharging their roles. The same cannot apply to private acts while still the head of state.[199] This was evidenced when the appellant conceded that former heads of state enjoyed and expected immunity when they were in a foreign country.[200] The House of Lords affirmed the position of immunity by holding that Augusto Pinochet enjoyed immunity pursuant to the stipulations of given treaty law and customary international law.[201]

Lord Hope, however, was of the contrary opinion by holding that the claim for immunity by Augusto Pinochet could not stand at the time due to the fact that customary international law was of the contrary view.[202]

Amnesty International argued that the perpetrators of torture, genocide, and/or crimes against humanity should not be allowed to invoke any form of immunity or special privileges as they

[196] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[197] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[198] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[199] International Commission of Jurists (ICJ) 1999.
[200] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[201] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[202] See generally O'Sullivan A *Universal Jurisdiction in International Criminal Law. Debate and the Battle for Hegemony* (2017).

will be avoiding accountability for their acts.[203] Amnesty International has relied on the general rule of international law as recognized in the Treaty of Versailles of June 28, 1919, that immunities of heads of state under international law have limits, particularly when crimes under international law are involved.[204]

3.2.3 Retrial

In March 1999, the House of Lords rendered its decision. It held that the principle of the head of state immunity did not exonerate General Pinochet from prosecution for certain crimes against humanity and acts of torture. As a result he could thus be extradited to Spain.[205] The court prescribed the crimes for which Augusto Pinochet could be prosecuted and extradited under British Laws.[206] It analyzed the doctrine of retroactive and retrospective application of the law and concluded that since the crimes were committed before the UK ratified the same, the same could not be heard by the said court.[207] It found that only three out of the thirty charges levied could be heard as they were committed post-1988 when it had ratified the treaty.[208]

On the application of the doctrine of *ratione materiae*, the Court held that immunity could be enjoyed but excluding acts committed by the head of state for personal gratification and those of *jus cogens* in nature.[209]

Lord Slynn of Hadley further held that Augusto Pinochet was entitled to claim immunity before the Home Secretary and not at the court as it was not within the ambit of the Court to dispense with it.[210] Lord Nicholls followed the position of Lord Slynn of Hadley, which Lord Stayne

[203] Amnesty International Annual Report 'Universal Jurisdiction and the absence of immunity for the Crimes Against Humanity' (1998)13 available at https://www.amnesty.org/en/documents/pol10/0001/1998/en/ (Accessed on 4 August 2022.

[204] Amnesty International Annual Report 'Universal Jurisdiction and the absence of immunity for the Crimes Against Humanity' (1998)13 available at https://www.amnesty.org/en/documents/pol10/0001/1998/en/ (Accessed on 4 August 2022).

[205] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).

[206] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).

[207] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).

[208] See generally White J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).

[209] See generally *White* J 'Nowhere to Run: Augusto Pinochet. Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).

[210] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).

further affirmed on the role of the court in determining the legality of the extradition and affirmed that he would allow the appeal as the same was a political question.[211]

Lord Lloyd of Berwick analyzed the place of UK extradition and immunity of Chile's head of state, where he concluded that they had obligations under international law to ensure that extradition is effected.[212]

Lord Hope of Craighead found that failure to disclose the relationship with Lord Hoffmann rendered his decisions biased, which should be disregarded.[213] Lord Hutton reluctantly had to agree with the other learned judges in setting aside the holding of Lord Hoffmann, although he was of the opinion that no bias was proved.[214]

The House of Lords, by a majority of three to two, held that Pinochet was not entitled to immunity, having committed crimes including torture, hostage-taking and crimes against humanity.[215] The House of Lords further stated that if international law were to be interpreted from the domestic law point of view of immunity, it would thus be a mockery since the same would defeat international law.[216] The House of Lords went further and held that immunity applied to acts that were recognized under international law.[217] Augusto Pinochet was, however, deported to Chile due to his health conditions and stability in Chile.

The above court proceedings show it is clear that universal jurisdiction has formed part of customary international law, which calls for the accountability of world leaders. Perpetrators may be arrested and prosecuted when they enter a given territory, as the House of Lords appreciated.

3.3 Prosecution of Hissene Habre

The prosecution of Hissene Habre was made possible pursuant to the adoption of the Statute of the Extraordinary African Ordinary Chambers on February 8, 2012, to prosecute Hissene Habre for the crimes committed in Chad from 1982 to 1990. The jurisdiction of the Court was to hear and determine all crimes that had been committed in Chad in the period mentioned above.[218]

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[211] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[212] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[213] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[214] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[215] See generally A Bianchi 'Immunity versus Human Rights' (1999).
[216] Bianchi A 'Immunity versus Human Rights' (1999) 40.
[217] Bianchi A 'Immunity versus Human Rights' (1999) 40.
[218] Article 3 of the Statute of the Extraordinary African Ordinary.

3.3.1 Commencement

Delphine Djiraibe, who was a Chadian attorney, requested the assistance of Human Rights Watch to ensure that the victims who suffered under the leadership of Hissene Habré got justice.[219] Senegal was a preferred place as it had already ratified the Convention Against Torture and other major human rights treaties, and the fact that Hissene Habre held also sought refuge there after his tenure.[220] Various organizations were formed to ensure that the victims could be heard. These organizations assured the victims' continuous legal representation, witness protection, and domestic and international public support during the trial of Habre.

The Association of Victims of Political Repression and Crime (AVCRP) accused Habré for having been an accomplice in the commission of crimes comprising of torture, barbarous acts, and crimes against humanity at the Dakar Regional Court in Senegal by virtue of the provisions of the having ratified the CAT where Senegal had ratified the same in 1986 and called for it to assume the doctrine of universal jurisdiction.[221] The Court in Senegal could not proceed to hear the said case, and the same was terminated. The prosecution was stopped at the Court of Appeal in Senegal, as elaborated below.

The actual prosecution of Hissene Habre was thus conducted at the Extraordinary African Chamber and was commenced in 2012.[222] The hearing occurred in 2015 when the prosecution availed 69 victims, 23 witnesses, and ten expert witnesses to testify in support of the prosecution's case.[223] Upon the conclusion of the hearing, Hissene Habre was on 30 May 2016 found guilty of war crimes, crimes against humanity, and torture and was sentenced to life imprisonment.[224]

[219] Sansani I 'The Pinochet Precedence in Africa; Prosecution of Hissène Habré (2001) 33.
[220] Sansani I 'The Pinochet Precedence in Africa; Prosecution of Hissène Habré (2001) 33.
[221] Sansani I 'The Pinochet Precedence in Africa; Prosecution of Hissène Habré (2001) 33.
[222] Bussey E 'Chad: Hissène Habré appeal ruling closes dark chapter for victims 'available at https://www.amnesty.org/en/latest/news/2017/04/chad-hissene-habre-appe al-ruling-closes-dark-chapter-for-victims/ (Accessed on 16 May 2022).
[223] Bussey E 'Chad: Hissène Habré appeal ruling closes dark chapter for victims' available at https://www.amnesty.org/en/latest/news/2017/04/chad-hissene-habre-appe al-ruling-closes-dark-chapter-for-victims/ (Accessed on 16 May 2022).
[224] Bussey E 'Chad: Hissène Habré appeal ruling closes dark chapter for victims https://www.amnesty.org/en/latest/news/2017/04/chad-hissene-habre-appe al-ruling-closes-dark-chapter-for-victims/ (Accessed on 16 May 2022).

The Extraordinary African Chamber further awarded victims of rape and sexual violence USD 33,880 each, while victims of arbitrary detention, torture, prisoners of war, and survivors of the said acts $25,410 each, and indirect victims $16,935 each on 29 July 2016.[225]

3.3.2 Habre's Motion To Dismiss

Habre offered three reasons why he should not be prosecuted as his defense. The first claim was that article 669 of the Senegal Criminal Procedure Code limited the jurisdiction of Senegalese Courts to hear extra-territorial crimes, which are only related to state security and counterfeiting national seals and currency..[226] The second claim was based on the fact that the said crimes were committed before Senegal ratified the treaty and subsequent domestication in 1996 and that three years had since lapsed since the Commission of the said offenses; thus, the limitation of action act was to apply.[227]

3.3.3 Response

The lawyers for the victims argued that Senegal could still try Hissen Habre despite the limits of its legislation so long as they were party to the CAT.[228] On the second claim, the lawyers representing the victims held that article 79 of the Senegalese constitution was applicable in that once a treaty is ratified, the same override the domestic law.[229] On the third claim that the case could not be defeated by the time limitation period, the lawyers submitted that the acts committed by Habre were not affected by the limitation period as proposed by the defense.[230]

3.3.4 Political Interference

The change of leadership in Senegal impacted the case against Habre when president Wade appointed former Attorney General Madicke Niang as his advisor for legal affairs.[231] A conflict of interest emerged when the president's legal advisor also represented Habre for the crimes he

[225] Bussey E 'Chad: Hissène Habré appeal ruling closes dark chapter for victims https://www.amnesty.org/en/latest/news/2017/04/chad-hissene-habre-appe al-ruling-closes-dark-chapter-for-victims/ (Accessed on 16 May 2022).
[226] Section 669 of the Senegal Criminal Procedure Code.
[227] Bussey E 'Chad: Hissène Habré appeal ruling closes dark chapter for victims https://www.amnesty.org/en/latest/news/2017/04/chad-hissene-habre-appe al-ruling-closes-dark-chapter-for-victims/ (Accessed on 16 May 2022).
[228] Article 5 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 1984.
[229] Article 5 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.
[230] Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.
[231] Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

committed in Chad.[232] The case against Habre took a new turn, and the same could not guarantee a fair outcome.

3.3.5 Senegalese Court And The African Extraordinary Chamber

On 4 July 2000, the Court of Appeal in Dakar dismissed the case against Habré by holding that Senegal was an improper venue since the crimes were never committed in Senegal.[233] The Court of Appeal's interpretation was contrary to the doctrine of *aut dedere aut judicare* and the provisions of article 7 of the CAT.

The findings of the Court of Appeal above saw Habre Petition the ECOWAS Court to prevent his prosecution. Still, the same saw the Court stating that Habre was to be prosecuted for his crimes but under an ad hoc tribunal. [234]This led to the establishment of the Extraordinary African Chamber (EAC) by virtue of the intervention of the African Union.[235] EAC was located in Senegal and was made up of four chambers being; the Investigative Chamber, Indicting Chamber, Trial Chamber, and Appeals Chamber.[236]

The Statute establishing the EAC gave jurisdiction to the chamber to prosecute individuals who had committed the most serious crimes in Chad.[237] The Statute further stipulated that no one was to be accorded any leniency for the crimes committed in Chad, no matter the status of the said individual.[238] It further guaranteed the victims the right to participate in the trial.[239] The investigative judges issued an *"ordonnance de renvoi*," presented charges, and recommended the prosecution of Hissene Habre to the Trial Chamber, which commenced in 2015.[240] During the case hearing, civil societies did a letter to the Prosecutor calling for attention to be given to the

[232] Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.
[233] Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.
[234] Boring N 'Chad/Senegal:Former Chad Dictator Hissène Habré Prosecuted'(2015) available at https://www.loc.gov/item/glob al-leg al-monitor/2015-10-08/chadseneg al-former-chad-dictator-hissne-habr-prosecuted/ (Accessed on 5 February 2023).
[235] See generally Høgestøl SEA 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity' (2016).
[236] Human Rights Watch 'The Case of Hissène Habré before the Extraordinary African Chambers in Senegal. Questions and Answers' available at https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal (Accessed on 14 June 2022).
[237] Article 3 of the Statute Establishing the International Criminal Court.
[238] Article 10 of the Statute of the Extra Ordinary African Chamber.
[239] Article 14 of the International Criminal Court.
[240] See generally Seelinger K, Fenwick N and Alrabe K 'Sexual Violence; the Principle of Legality, and the Trial of Hissène Habré' (2020).

sexual crimes. [241] Upon conclusion of the hearings, the Court proceeded to write the judgment and found Habre guilty, as was discussed earlier. Although the Appeals Chamber in April 2017 found Habre not to have been directly involved in direct rape, the sentences imposed as punishment stood.[242]

3.4 Habre And Pinochet Contribution To Customary International Law

The cases mentioned above have contributed to the development of customary international law on former heads of state criminal culpability. The prosecution of Habre and Pinochet did bear fruits by acknowledging universal jurisdiction and the need for domestic laws to ensure that the same is recognized. The recognition of universal jurisdiction, even before ratification, has since guaranteed that perpetrators of crimes of the international community will not escape unpunished, as evidenced in the next chapter. Promoted was expected by the international community under the guidance of universal jurisdiction.

As was discussed in Chapter two, customary international law will only be said to exist if two things are satisfied. First is the subjective element that its adherence is expected from a given state as a matter of law or what has been called *opinion juris.*[243] Secondly is the objective test, which is the constant usage of what has been considered state practice.[244] The offense for which Habre and Pinochet gained momentum has now formed part of customary international law.

The said offenses, having been prosecuted without clear stipulations of treaties, gained traction and were fully codified with the Rome Statute, which established the International Criminal Court.

3.5 Enforcement of Universal Jurisdiction

The evolution of universal jurisdiction as customary international law and subsequent codification has made its enforceability easier. In order to enforce universal jurisdiction, the ICC was established to hear cases that fall within their ambit.

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[241] See generally Seelinger K, Fenwick N and Alrabe K 'Sexual Violence; the Principle of Legality, and the Trial of Hissène Habré' Washington University Journal of Law and Policy (2020).

[242] Boring N 'Chad/Senegal: Former Chad Dictator Hissène Habré Prosecuted'(2015) available at https://www.loc.gov/item/glob al-leg al-monitor/2015-10-08/chadseneg al-former-chad-dictator-hissne-habr-prosecuted/ (Accessed on 5 February 2023).

[243] Ryngaert C 'Universal jurisdiction and international crimes : constraints and best practices : workshop' available at https://op.europa.eu/en/publication-detail/-/publication/78a84377-ccff-11e8-9424-01aa75ed71a1/language-en (Accessed on 5 February 2023).

[244] Robinson M *'The Princeton Principles on Universal Jurisdiction'* Princeton University Press. Princeton' (2001) 187.

The enforcement of universal jurisdiction can be done by states assuming the concept of using an adjudicative or prescriptive application of universal jurisdiction.[245] The ICC usually assumes jurisdiction through referral by state parties or referral by UN Security.[246] When states use the adjudicative mode of universal jurisdiction, procedural requirements are outlined, which must be met before the Court assumes jurisdiction over the said case.[247] The prescriptive application is through either customary or universal application of universal jurisdiction.[248] Conventional jurisdiction is applied courtesy of treaty law. In contrast, customary jurisdiction is out of the development of the law and has been used as part and parcel of day-to-day functioning in a given territory.[249]

The United Nations International Law Commission has taken the position on the limits of sovereign immunity by holding that all government officials, whether in their capacity who either plan or instigate or authorize or order such crimes, not only provide the means and the personnel required for carrying out the crime and the authority for its execution but also ensure that the same is achieved.[250] The Commission stated that the person sanctioning the Commission of that act would be considered the principal perpetrator.[251] It went ahead and found that the perpetrators should not be allowed to claim immunity for their acts and must be held accountable.[252]

The constant procrastination that governments have exhibited in countries that have experienced human rights abuses, either due to the former leader being an ally of the new government or the immunity accorded to the incumbent leader, saw most violations going unanswered. H.M. Osofky contends that offenders of the most egregious crimes have continually escaped justice despite international law transcending the artificial territorial borders of nation-states.[253]

The position taken by the House of Lords in the case of Pinochet on whether crimes against humanity had gained international recognition to warrant it to be considered part of the *jus cogens* norms was answered in the negative and thus affected the appreciation of it in the international arena.[254]

[245] Colangelo A 'Legal Limits of Universal Jurisdiction' (2006) 164.
[246] See Generally Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015).
[247] See Generally Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015).
[248] See Generally Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015).
[249] See Generally Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015).
[250] Amnesty International *'Amnesty International Report 1998 - Afghanistan'* (1998) available at: https://www.refworld.org/docid/3ae6a9fa54.html (Accessed on 28 October 2022).
[251] Amnesty International *'Amnesty International Report 1998 - Afghanistan*' (1998) available at: https://www.refworld.org/docid/3ae6a9fa54.html (Accessed on 28 October 2022).
[252] Amnesty International '*Amnesty International Report 1998 – Afghanistan*' (1998) available at: https://www.refworld.org/docid/3ae6a9fa54.html (Accessed on 28 October 2022).
[253] Osofsky M 'Domesticating International Criminal Law: Bringing Human Rights Violators to Justice' (1997) 194.
[254] O'Sullivan A *Universal Jurisdiction in International Criminal Law. Debate and the Battle for Hegemony* (2017)149.

The claim of reluctance to allow universal jurisdiction to take effect and be applied to the former head of state can be seen by the holding of the Court in the case of Pinochet when it stated that international law was evolving slowly and there was the need to allow it to develop at its own pace. [255] It further found that the position on universal jurisdiction, as anticipated by most countries, is yet to come to fruition since the same is yet to gain full international support.[256] The Court in Re Pinochet elaborated why the concept of universal jurisdiction could not be applied, being the lack of cooperation by states to come out clearly and assert that authority.[257] The Court defined what immunity entailed as being the status accorded to officials of a given State.[258] This position thus affects the functioning of the universal jurisdiction as the more state parties relax on ensuring its adoption, so will the courts, as it will result in fewer prosecutions for the reason that most states will perceive that any slight deviation from the above position might lead to their legitimacy being questioned. They will not enforce any warrant of arrest in force or prosecute individuals who have committed mass atrocities as perceived by the international community.

3.6 Crimes As Jus Cogens

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[255] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[256] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[257] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[258] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[259] Ryngaert C 'Universal jurisdiction and international crimes : constraints and best practices : workshop' available at https://op.europa.eu/en/publication-detail/-/publication/78a84377-ccff-11e8-9424-01aa75ed71a1/language-en (Accessed on 5 February 2023).
[260] Wood M *'Formation and Evidence of Customary International Law'(2013) available at* https://digitallibrary.un.org/record/751888 (Accessed on 31 March 2022).

said offenses, having been prosecuted without clear stipulations of treaties, gained traction and were fully codified with the Rome Statute.

3.7 Enforcement Of Universal Jurisdiction

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[261] Colangelo A 'Legal Limits of Universal Jurisdiction' (2006) 164.
[262] Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015) 50.
[263] ShanyY *Questions of Jurisdiction and Admissibility before International Courts* (2015) 50.
[264] Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015) 51.
[265] Shany Y *Questions of Jurisdiction and Admissibility before International Courts* (2015) 49.
[266] Amnesty International, *Amnesty International Report 1998 – Afghanistan* (1998) available at: https://www.refworld.org/docid/3ae6a9fa54.html (Accessed on 28 October 2022).
[267] Amnesty International, *Amnesty International Report 1998 - Afghanistan*, (1998) available at: https://www.refworld.org/docid/3ae6a9fa54.html (Accessed on 28 October 2022).
[268] Amnesty International, *Amnesty International Report 1998 - Afghanistan*(1998)available at: https://www.refworld.org/docid/3ae6a9fa54.html (Accessed on 28 October 2022).

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[269] See generally Osofsky M 'Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*'* (1997).
[270] O'Sullivan A *Universal Jurisdiction in International Criminal Law. Debate and the Battle for Hegemony* (2017) 149.
[271] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[272] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[273] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).
[274] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* 41UKHL (1999).

CHAPTER 4: ANALYSING THE CASE OF AL- BASHIR AT THE ICC AND THE APPLICATION OF THE UNIVERSAL JURISDICTION PRINCIPLE

4.1 Introduction

The chapter conducts an in-depth review of the case against the former President of Sudan, Omar Al- Bashir, and the concept of universal jurisdiction, as discussed in the previous chapters. It outlines the role of the Security Council and the Prosecutor in ICC trials, specifically with reference to the principle of universal jurisdiction. It then goes ahead to make a brief introduction of Al- Bashir and how he rose to power. It'll detail out the Darfur genocide, Al Bashir's alleged involvement and his subsequent trial at ICC. It highlights the current state of criminal proceedings instituted against Al- Bashir in Sudan. The chapter then focuses on the applicability of the universal jurisdiction principle in the case while drawing comparisons to the prosecution of Habre and Pinochet. In analysing the case, it highlights important aspects that arose in the case, such as presidential immunity and States Party responsibility.

According to the traditional definition, universal jurisdiction entails a legal principle that permits or requires a state to bring criminal procedures in respect of specific crimes regardless of the location of the crime and the nationality of the perpetrator or victim. [275] According to this theory, a territorial or personal connection to the offence, the perpetrator, or the victim is not necessary for criminal jurisdiction.[276] However, the justification is more generality based on the notion that certain crimes too detrimental to international interests that states are entitled - and even obliged - to bring proceedings against the perpetrator, regardless of where the crime was committed and the nationality of the perpetrator or the victim.[277] This chapter will interrogate the application of universal jurisdiction in the prosecution of Omar Al- Bashir as initiated by the UN Security Council.

4.2 The United Nations Security Council and its role in the enforcement of Universal Jurisdiction

The United Nations Security Council is mandated to maintain international peace and security.[278] It comprises 15 members, five permanent members and ten non-permanent. Article 13 of the Rome Statute allows the United Nations to refer matters to the Court.[279] Article 13 allows the

[275] Randall K 'Universal jurisdiction under international law' (1988) 780.
[276] Robinson M 'The Princeton Principles on Universal Jurisdiction' (2001) 16.
[277] See generally Philippe X 'The principles of universal jurisdiction and complementarity: How do the two principles intermesh?' (2006).
[278] Article 24 Charter of the United Nations of 1945.
[279] Article 13 of the Statute Establishing the Rome Statute.

Security Council to refer matters to the Court and their membership to the treaty. [280] The ability of the Security Council to refer the matter to the ICC was enabled pursuant to the 1994 International Law Commission draft on the powers of the said organ.[281]

The Security Council was accorded the power to backdate the jurisdiction *ratione temporis* to any time after the entry of the Rome Statute.[282] Once the prosecutor receives the referral from the United Nations Security Council, they will consider whether there is sufficient evidence to charge the perpetrator with any crimes that fall within the jurisdiction of the Court.[283] The ability of the ICC to hear the case is thus triggered by state referral or Security Council referral. [284]

The Security Council issued a press statement in April 2004 expressing its concern about the deep humanitarian crisis in Sudan and condemned the grave violation of human rights.[285] In July 2004, the Security Council, vide resolution 1556, condemned violence in Sudan and stated that it was contrary to international peace and order. [286] Preliminary investigations established widespread genocide that had been committed in Sudan and was facilitated by the government.[287]

The preliminary report by the US prompted the Security Council to seek a full report from the United Nations Secretary-General (UNSG), who appointed the President of ICTY, Antonio Cassese.[288] On January 25 2005, the Commission of Inquiry came up with a 176 paged report stating that the widespread destruction of villages had displaced a total of 1.65 million civilians. The government facilitated the same in collaboration with Janjaweed.[289]

The Referral of the Situation in Darfur, Western Sudan, to the UNSC was a proposal by the International Commission of Inquiry. [290]In its report, the Commission made its findings and

[280] Elaraby N '*The Role of the Security Council and the Independence of the International Criminal Court: Some reflections*' in Politi M and Nessi G (eds) *The Rome Statute of the International Criminal Court* (2001).
[281] See generally Schabas W *An Introduction to the International Criminal Court* (2020).
[282] See generally Pia A, Cattin D, Marchesi A, Palmisano G and Valeria Santori *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi* (2016).
[283] See generally Lattanzi F Pia A, Cattin D, Marchesi A, Palmisano G and Valeria Santori *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi* (2016).
[284] Bekou O and Cryer R '*The International Criminal Court and Universal Jurisdiction: A Close Encounter?*' (2007).
[285] United Nations Security Council. *Press Statement on Darfur, Sudan.* Security Council President (2004) available at https://press.un.org/en/2004/sc8050.doc.htm (Accessed on 13 July 2022).
[286] United Nations Security Council Resolution 1547 of 2004.
[287] Hamilton R 'Powell Reports Sudan Responsible for Genocide in Darfur' (2004) available at https://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/ (Accessed on 18 February 2022).
[288] See generally Kreb C 'The ICC's first encounter with the crime of genocide: A case against al-Bashir in Carsten Stahn. The Law and Practice of the International Criminal Court' (2006).
[289] International Commission of Inquiry on Darfur, Delivered on January 25, 2005.
[290] Burns L 'Universal Jurisdiction meets complementarity: An approach towards a desirable future codification of Horizontal Complementarity between member states and the International Criminal Court Criminal Law Forum' .

suggested that the ICC was the proper forum to hear the case involving the Situation in Darfur.[291] The first finding was that the appropriate forum to hear the case was ICC and the second was that the international peace and order was best suited if the ICC could hear the case.[292] Thirdly, the Commission opined that the Court's authority would compel leading authorities in Sudan to submit to investigations. Fourthly, the ICC was the only institution that could come up with a verifiable "fair trial". Fifthly, the pre-existing nature of the Court would mean that it would mean that the proceedings would be activated immediately. Sixthly and lastly, the prosecution of the crimes would not impose any financial burden on the international community.

The United States objected to the UN Security Council's decision to refer the matter to the ICC and believed that there were other appropriate forums where investigations could be conducted.[293] The Security Council referred the case to the ICC despite the objection from the United States on March 31[294].

4.3 The Role of the Prosecutor in the International Criminal Court in Omar Al-Bashir's case

Former ICC prosecutor Moreno Ocampo announced in March 2005 that he had received several documents from the Commission of Inquiry that the Secretary General of the United Nations had established. [295]The documents comprised the Commission's final report and an index outlining 51 individuals suspected of committing crimes under the ICC's jurisdiction.

On 1 June 2005, Mr. Ocampo informed the President and ICC's Pre Tri al-Chamber that he had decided to commence investigations. The prosecutor emphasized that the prosecution would focus on people who bore the greatest responsibility for crimes committed in Darfur.[296] The prosecutor then devised an investigation team of about 26 people who commenced operations outside Sudan because the Sudan government had refused to cooperate. The climax of the investigations was the prosecution's issuance of a warrant of arrest to Sudan's former President, Omar Al- Bashir.[297]

[291] Barthe C, Triffterer O and Ambos K 'The Rome Statute of the International Criminal Court: A Commentary' (2016).
[292] Schiff B 'Building the International Criminal Court' (2008).
[293] Schiff B 'Building the International Criminal Court' (2008).
[294] United Nations Security Council Resolution 1593.
[295] ICC 'List of Names of Suspects in Darfur Opened by the ICC OTP' available at https://www.icc-cpi.int/news/icc-list-names-suspects-darfur-opened-icc-otp (Accessed on 5 May 2022).
[296] Second Report of the Prosecutor, Mr Luis Moreno Ocampo, to the Security Council Pursuant to United Nations Security Council Resolution 1593(2005) available at https://reliefweb.int/report/sudan/report-internation al-commission-inquiry-darfur-united-nations-secretary-general (Accessed on 15 November 2021).
[297] Tsilonis V *The Jurisdiction of the International Criminal Court* (2009).

4.4 Omar Al- Bashir and his rise to power

Omar Al- Bashir, also known as Omar Hassan Ahmed Al- Bashir, was born in 1944 to a family in the country's Northern Region.[298] In 1960, Al- Bashir, like the other young men in Sudan, joined the Sudan Armed Forces. Six years later, he graduated from the Sudan Military Academy and was immediately sent to Egypt to fight in the 1973 Arab-Israeli war. Upon his return, Omar al- Bashir continued to serve in various military positions and rose in ranks. Between 1989 and 1993, he was appointed to serve as Sudan's Minister of Defence. [299]

He became the country's leader in 1989 due to a military takeover orchestrated by the National Islamic Front, an Islamic movement that was eventually renamed the National Congress Party in 1998.[300] On June 30, 1989, the people of Sudan woke up with the news that there had been a military coup and that the army had taken power from the then Prime Minister, Sadiq al-Mahdi, and Brigadier General Omar Al- Bashir was announced as the President. He appointed Hassan al-Turabi, an Islamist, as his vice president.

4.5 The Darfur Genocide and Omar Al' Bashir's involvement

The people of Darfur are a region in Sudan which is ethnically, linguistically, and culturally diverse.[301] The battle in Darfur actively involved both state and non-state players.[302] State actors refer to the Sudanese government led at the time by President Omar Al- Bashir.[303] The non-state actors comprise two faction groups; the Sudan Movement Liberation Group and the Janjaweed, armed with military equipment and employed by the government to perpetrate the genocide.[304]

[298] See generally Leung J , Mor M 'Omar al-Bashir: His Governance Crisis and the Outbreak of Revolution in Sudan' (2021) available at http://journal.iag.ir/&url=http:/journal.iag.ir/article_130167.html?lang=fa (Accessed on 17 October 2021).

[299] See generally Van der Vyver J 'The Al' Bashir Debacle' African Human Rights Law Journal (2015).

[300] Sudan Brief, Sudan's popular uprising and the demise of Islamism available at https://www.cmi.no/publications/file/7062-sudans-popular-uprising-and-the-demise-of-islamism.pdf (Accessed on 17 October 2022).

[301] *Human Rights Watch* '*Darfur Destroyed Ethnic Cleansing By Government And Militia Forces In Western Sudan*' available at https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan (Accessed on 19 July 2022).

[302] *Human Rights* 'Watch. Darfur Destroyed Ethnic Cleansing By Government And Militia Forces In Western Sudan' available at https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan (Accessed on 19 July 2022).

[303] *Human Rights Watch* 'Darfur Destroyed Ethnic Cleansing By Government And Militia Forces In Western Sudan' https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan (Accessed on 19 July 2022).

[304] *Human Rights Watch* 'Darfur Destroyed Ethnic Cleansing By Government And Militia Forces In Western Sudan' https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan (Accessed on 19 July 2022).

The Janjaweed participated in the mass atrocities by torching towns, robbing businesses, contaminating water supplies, and killing, raping, and torturing them.[305] The above acts gained international concerns that saw the issuance of the first warrant of arrest against President Omar Al- Bashir on 4 March 2009, and a subsequent warrant of arrest issued in July 2010.[306] Since the warrants were issued, Sudan has experienced significant protests and an uptick in violence.[307]

4.5.1 Presidential Immunity

The International Criminal Court issued a warrant of arrest against Omar Al- Bashir on March 4, 2009.[308] The same Court issued the 2nd warrant on 12 July 2010.[309] Omar Al- Bashir was accused of five counts of crimes against humanity, two counts of war and three counts of genocide.[310]

In issuing the arrest warrant, the Pre-Trial Chamber considered whether the fact that Omar Al-Bashir was President was immune from prosecution and found that the same did not prevent him from being prosecuted.[311] The Pre-Trial chamber further considered whether Sudan was not a party to the Rome Statute, prevented the Court from proceeding with the case, and concluded that it had jurisdiction to proceed with the case.[312]

The warrant of arrest against Omar Al- Bashir was accompanied by a request for cooperation in effecting the warrant of arrest.[313] The reason for the warrant of arrest is accompanied by a request for cooperation and is based on the fact that the ICC does not have a police force to enforce the orders of the Court.

The ICC has issued various decisions regarding the failure of state parties to enforce the warrant of arrest in respect of Omar Al- Bashir, which has made it to ensure that his prosecution is fast-tracked.

[305] *Human Rights Watch* 'Darfur Destroyed Ethnic Cleansing By Government And Militia Forces In Western Sudan' https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan (Accessed on 19 July 2022).
[306] Lahdili N '*The Darfur Conflict: The Role of International Intervention in Conflict Resolution*' available at https://www.researchgate.net/publication/340249950_Darfur_Conflict_The_Role_of_International_Intervention_in_the_Conflict_Resolution/citation/download (Accessed on 17 July 2022).
[307] Lahdili N'*The Darfur Conflict: The Role of International Intervention in Conflict Resolution*' available at https://www.researchgate.net/publication/340249950_Darfur_Conflict_The_Role_of_International_Intervention_in_the_Conflict_Resolution/citation/download (Accessed on 17 July 2022).
[308] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC 02/05-01/09 (2009).
[309] *Prosecutor v. Omar Hassan Ahmad al-Bashir* 02/05-01/09 (2009).
[310] *Prosecutor v. Omar Hassan Ahmad al-Bashir* 02/05-01/09 (2009).
[311] Needham J 'Protection or Prosecution for Omar al-Bashir? The Changing State of Immunity in International Criminal Law' (2011) 225.
[312] *Needham* J 'Protection or Prosecution for Omar al-Bashir? The Changing State of Immunity in International Criminal Law' (2011) 225.
[313] *Prosecutor v Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09(2009).

ICC Appeals Chamber issued its decision regarding Jordan's failure to uphold its state obligations under international law by arresting Omar Al- Bashir when he entered its territory. The doctrine of state sovereignty and immunity played a critical role in the discussion, and the Court fully analyzed the same.[314]

The Pre-trial Chamber was called upon to decide, pursuant to Rule 109(4) of the Rules of the Court, Jordan's failure to honour its international obligations to arrest and surrender fulfill its obligations under the Statute in December 2017 by refusing to carry out the Court's request for the arrest of Omar Al- Bashir and his surrender to the Court while he was on Jordanian territory on 29 March 2017".[315] In accordance with Rule 109(4) of the Rules of the Court, the Chamber also resolved to submit the case to the ASP and UNSC.[316]Jordan requested leave to appeal on 18 December 2017, and the Chamber granted it on 21 February 2018.[317]

The Appeals Chamber affirmed the findings of the Pre-trial Chamber, finding Jordan liable for failing to confirm its treaty obligations.[318] The Appeals Chamber found that Jordan failed to hide the Court's request of effecting the warrant of arrest against Omar Al- Bashir when he was in their territory on 29 March 2017."[319] The Court reasoned that the acts employed by Jordan of not effecting the warrant of arrest inhibited the functioning of the Court as it could not discharge its duties conclusively.[320]

When deciding whether or not the immunity for heads of state applied, the Appeals Chamber carefully considered the issue. It concluded that "neither State practice nor *opinio juris* would establish the existence of Head of State immunity under customary international law vis-à-vis an international court." However, "such immunity has never been recognized in international law as a preclusive factor against the jurisdiction of an international court," it continued.[321].

In addition, the Appeals Chamber also considered whether the immunity of heads of state could be applicable in such circumstances, and it found the negative.[322]It found that no immunities under customary international law operate in such a situation to bar an international court in the exercise of its jurisdiction.

The Chamber added that ratifying the Rome Statute states, "States Parties to the Rome Statute have recognized that Head of State immunity cannot prohibit the Court from exercising

[314] *Prosecutor v Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09(2009).
[315]*Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[316]*Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[317] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[318] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/0 (2009).
[319] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[320]. *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[321] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[322] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).

jurisdiction—which is consistent with customary international law."[323] It further analyzed the treaty's provisions of article 27(2). It was of the view that the same should not be interpreted in a way that would permit a State Party to claim Head of State immunity in a horizontal connection if the Court were to order that another State Party request the arrest and surrender of the Head of State.[324] The requested State Party does not seek to detain the Head of State in these circumstances to bring them before its courts; rather, it is only providing help to the Court in its exercise of the Court's jurisdiction. In its conclusion, the Appeals Chamber found that immunity did not apply to the situation in Darfur. Thus Omar Al- Bashir could not benefit from the provisions of article 27 of the Statute.[325]

The "clash" between Articles 27 and 98 has been a common way to frame the immunity dilemma, but the Appeals Chamber justices neatly put this to rest.[326] The official capacity is irrelevant because this Statute applies equally to everyone without making any distinctions based on official capacity. In particular, a person's official status as the Head of State or Government shall under no circumstances absolve them of their criminal liability under this Statute or, standing alone, constitute a defence to a sentence reduction. They clarified that "Article 98(1) of the Statute does not stipulate, recognize, or protect any privileges." It is a procedural rule establishing how the Court will proceed in cases when immunity could prevent an individual from cooperating.

The judgment has received both praise and harsh criticism. For instance, Dapo Akande described the judge's handling of customary international law as "shocking" and said it "appears to be severely misplaced.[327]." Regardless, the ruling does make one thing very clear: in the eyes of the ICC's judges, sitting heads of State cannot be granted immunity before an international court, and member states acting at the Court's direction must detain wanted persons in accordance with the Rome Statute.

4.5.2 State Party Responsibility

The AU's request for an advisory opinion from the ICJ may have been affected by the Appeals Chamber's decision's promptness. To resolve what they perceive to be a "dispute" over the relationship between the head of state immunity and state party obligations under the Rome Statute, the AU formed a working group to formulate a question that would be brought before the ICJ. The place of state responsibility and immunity gained widespread confusion that saw the

[323] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[324] Article 27(2) of the Statute Establishing the Rome Statute.
[325] *Prosecutor v. Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09 (2009).
[326] Art. 27 of the Rome Statute.
[327] See generally Sadat's LN 'Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continues' In DeGuzman M and Oosterveld (eds)*The Elgar Companion to the International Criminal* (2008).

African union requesting its advisory on the same courtesy of Kenya, which was to be considered at the UN General Assembly. The same faced challenges when Omar Al- Bashir was removed from office in 2019.[328]

In a Q & session on whether the ICJ could dispense matters before it, the ICC held that judicial duties must be resolved by the ICC and cannot be taken before another body, according to Article 119(1) of the Rome Statute. This article is consistent with the *kompetenz kompetenz* principle of international law, which states that each Court must define the boundaries of its jurisdiction. No international court may attempt to limit the exercise of jurisdiction by another international court. In the end, it is still true that neither the ICJ nor the ICC is subject to the decisions of the ICC.

All that international law can aspire for is that the body of jurisprudence that best serves its objectives will be a supplement of persuasive case law, to which each international Court must attempt to contribute from its perspective and is created by each Court's exercise of its specific authority.

The ability of the ICJ to dispense with the issue of an advisory opinion is a complicated process that must be adhered to.[329] The AU approach is a lengthy process that must be completed before the immunity question is taken to the ICJ. The UN General Assembly must first be persuaded to request an advisory opinion from the Court. The AU may or may not be satisfied by the ICJ's advisory opinion. Still, the organization's continuous pursuit of the ICJ's decisions demonstrates their significant dissatisfaction with the Appeals Chamber's decision.[330]

It is particularly important that a large number of amici curiae were admitted to the Appeals Chamber hearings for the first time. Academics and regional groups submitted 13 amici curiae comments.[331] This positive development shows the Chamber's interest in the vast array of perspectives outside the bounds of the parties. According to Claus Kreß, the Court "truly dealt with these difficulties over a full legal discussion in open Court.[332]"

[328] Lederer E 'Africa Asks UN to Seek Court Opinion on Immunity for Leaders' available at https://apnews.com/article/2af4da235eb14a238e6ddff23981bb00 (Accessed on 16 December 2022).
[329] *Immunity, Accountability, and Politics*: The AU's Request for an Advisory Opinion from the ICJ, grojil blog, June 25, 2018, available at: https://grojil.org/2018/06/25/immunity-accountability-and-politics-the-aus-request-for-an- advisory-opinion/#more-2190 (Accessed on 17 December 2022).
[330] ICC-PIOS-Q&A-SUD-02-01/19, available at https://www.icc-cpi.int/itemsDocuments/190515- al-Bashir-qa-eng.pdf (Accessed 17 December 2022).
[331] *Immunity, Accountability, and Politics*: The AU's Request for an Advisory Opinion from the ICJ, grojil blog, June 25, 2018, available at: https://grojil.org/2018/06/25/immunity-accountability-and-politics-the-aus-request-for-an- advisory-opinion/#more-2190 (Accessed on 16 December 2022).
[332] *Immunity, Accountability, and Politics*: The AU's Request for an Advisory Opinion from the ICJ, grojil blog, June 25, 2018, available at: https://grojil.org/2018/06/25/immunity-accountability-and-politics-the-aus-request-for-an- advisory-opinion/#more-2190 (Accessed on 16 December 2022).

The various perspectives and arguments made to the Appeals Chamber left the judges with plenty to consider. The participation of numerous amici curiae is beneficial even though it lengthens the processes. Perhaps the ICC will follow suit, enabling more people to have their views on matters relating to the International criminal justice system.

Another intriguing fact is that states only "lend assistance" to the Court when they detain those who are wanted by the ICC so that they might be transported to The Hague. Given that the ICC relies on the assistance of state parties and lacks the police force, this conclusion has great practical significance.[333] It is not "totally outside the mainstream legal language" to say that heads of State have no immunity once they appear before an international court.[334] The Appeals Chamber's judgment is reasonable and in line with the goals of an international criminal court because it is the only way such a person may come before the Court through government "assistance.[335]" In the truest meaning of the word, how else would an incumbent Head of State be prosecuted at the ICC without a member state cooperating?

Failed detention of Al- Bashir has resulted in substantial legal analysis from the ICC. Eight prior Pre-Trial judgments from various judges—from Malawi (2011), Chad (2011), Nigeria (2013), the Democratic Republic of the Congo (2014), South Africa (2015), Uganda (2016), and Djibouti (2016)—took different routes but came to the same conclusion regarding the state parties' obligation to arrest. The judges' consensus is that Al- Bashir must be detained and taken to The Hague to answer the accusations against him.

In the case of There cannot be immunity before international criminal courts that have jurisdiction, according to Barro[336].

The legal defence used by the Appeals Chamber bears a lot of weight and will undoubtedly be cited in all subsequent judgments. Additionally, the ruling will make it much harder for another state party to claim that there is a legal impediment to the arrest of incumbent heads of State charged by the ICC, should there ever be another indictment of this magnitude.

The joint dissenting opinion focuses on the Appeals Chamber's failure to refer Jordan to the UNSC and the ASP. As was already mentioned, the ICC has encountered multiple instances of non-cooperation concerning al-arrest. Bashir's, with the exception of Nigeria, South Africa, and

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[333] Kreß C*'Preliminary Observations on the ICC Appeals Chamber's Judgment of May 6 2019, in the Jordan Referral re al-Bashir Appeal'* (2019) available at https://kress.jura.uni-koeln.de/sites/iipsl/Home/190530_OPS_No._8__Kress_.pdf (Accessed on 5 February 2023).

[334] Kreß C. '*Preliminary Observations on the ICC Appeals Chamber's Judgment of May 6 2019, in the Jordan Referral re al-Bashir Appeal*.' (2019) available at https://kress.jura.uni-koeln.de/sites/iipsl/Home/190530_OPS_No._8__Kress_.pdf (Accessed on 5 February 2023).

[335] Kreß. C '*Preliminary Observations on the ICC Appeals Chamber's Judgment of May 6 2019, in the Jordan Referral re al-Bashir Appeal'*(2019) available at https://kress.jura.uni-koeln.de/sites/iipsl/Home/190530_OPS_No._8__Kress_.pdf (Accessed on 5 February 2023).

[336] *Democratic Republic of the Congo v. Belgium* ICJ (2002).

now, as per this ruling, Jordan, all cases have been referred to the ASP and UNSC. Before Nigeria's case, non-compliant states merely argued that the immunity enjoyed by the head of State bound them to non-compliance and that it was inevitable.[337]

In the case regarding April 11 2000, arrest Warrant *Democratic Republic of the Congo v. Belgium,* a Belgium court issued a warrant of arrest against the acting Congolese Minister for Foreign Affairs, Mr. Abdoulaye Yerodia in absentia seeking his detention and subsequent extradition to Belgium for the alleged crimes constituting grave violations of International Humanitarian law in particular Geneva Conventions I–IV (1949); Geneva Conventions Additional Protocol I (1977); Geneva Conventions Additional Protocol II (1977) and crimes against Humanity. The arrest warrant transmitted to all stated through Interpol asked states to arrest, detain and extradite Mr. Yerodia to Belgium at first sight to face the charges brought against him. However, the court ruled that Belgium infringed on Mr. Yerodia's immunity under International law as a Minister of Foreign affairs[338]. In informal discussion it was noted that some of the judges expressed the belief that universal jurisdiction should be allowed in the cases where offenses are considered the most heinous by the international community.[339]

Nigeria offered a more thorough justification for its inability to apprehend Al- Bashir, stating, among other things, that his exit from the nation occurred when the pertinent Nigerian authorities were deliberating their options in response to pressure from local civil society players.[340].

The Pre-Trial Chamber determined that referring to Nigeria was unnecessary in light of the justification offered and taking into account that Article 87(7) gives it the discretion to do so[341](hereinafter Nigeria Cooperation Decision). After considering the fact that South Africa was the first country to request consultations under Article 97, the existence of domestic proceedings there, and whether or not referral was a useful strategy for "achieving" cooperation, the Chamber concluded that it was not warranted in South Africa's case.[342].

The Pre-Trial Chamber determined that a referral in Jordan's case was the proper course of action because Jordan was aware of its responsibilities and "took a very clear position, chose not to execute the Court's request for arrest and surrender of Omar Al- Bashir and did not require or ask for any action."

[337] Lattanzi F '*Concurrent Jurisdiction between Primacy and Complimentary in Roberto Belleli, International criminal justice. Law and practice from the Rome Statute to its review*' (2010).
[338] *Democratic Republic of the Congo v. Belgium* ICJ (2002).
[339]*Democratic Republic of the Congo v. Belgium* ICJ (2002).
[340]Mistry H 'Guest Post: Appeals Chamber's Chastisement of PTC II for Its Article 87(7) Referral Game Playing, available at: https://dovjacobs.com/2019/05/08/guest-post-the-appeals-chambers-chastisement-of-ptc-ii-for-its-article-877-referr al-gameplaying (Accessed on 17 December 2022).
[341] *Prosecutor v. Omar Hassan Ahmad al-Bashir*, ICC-02/05-01/09 (2009).
[342] Article 97 of the statute establishing the Rome Statute.

In its subsequent statement, the Court noted that "at the time of Omar al-presence Bashir's in Jordan in March 2017, the Chamber had already expressed in no uncertain terms that another State Party, the Republic of South Africa, had, in analogous circumstances, the obligation to arrest Omar Al- Bashir and those consultations did not suspend this obligation." While the Chamber has previously ruled that the fact that South Africa was the first State Party to approach the Court with a request for consultations militated against a referral of non-compliance, the Chamber pointed out that this circumstance does not exist in the case at hand and that it differs from the Jordan case. The Pre-Trial sealed the deal on this part of the judgment.

Jordan's legal counsel closed this section of the decision by arguing that the referral was "an abuse of discretion" and drawing attention to what it saw as the disparate treatment of South Africa and Jordan despite what they perceived to be comparable circumstances.[343]. Jordan's efforts to consult were "misconstrued," according to the Appeals Chamber, which concluded that this error "impacted on the reasons it offered for referral Jordan" (Judges Ibáez and Bossa dissented). The Appeals Chamber overturned the referral judgment; as a result, noting the Chamber's "erroneous" use of discretion.

The ICC system will be weakened due to this decision, as another case of non-compliance is likely to go unpunished. What occurs in reality if desirable if a wanted fugitive escapes capture?

The reaction has always been that non-compliance has no consequences, not even the humiliation of being reported to the ASP or UNSC.

Judges Ibáez and Bossa, writing in dissent, went so far as to claim that Jordan's unwillingness to assist the Court in the arrest and surrender of Mr Al- Bashir violated the Rome Statute and that the failure to refer Jordan to the court "might be seen as inaction by the Court[344]." The dissenters contend that a recommendation is intended to promote cooperation rather than serve as a punishment[345]. They mentioned instances where referrals from the prosecutor's office facilitated cooperation.

Even the states that have been referred have not been subjected to any consequences, according to Pre-Trial Chamber II in South Africa non-compliance matter.[346]. Despite recommendations to establish a follow-up mechanism for referred states, referrals to the UNSC or the ASP[347] have

[343] Article 87(7) of the Rome Statute on South Africa's failure to comply with the Court's request for Omar Hassan Ahmad al-arrest Bashir's surrender, ICC-02/05-01/09 (July 6, 2017), available at https://www.icc-cpi.int/CourtRecords/CR2017 04402: (accessed on 16 November 2022).
[344] *Prosecutor v Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09(2009).
[345] Judges Luz del Carmen Ibáez Carranza and Solomy Balungi Bossa's joint dissenting opinion is accessible at https://www.icc-cpi.int/RelatedRecords/CR2019 02622.PDF May 6, 2019 (Accessed on 16 November 2022).
[346] Judges Luz del Carmen Ibáez Carranza and Solomy Balungi Bossa's joint dissenting opinion is accessible at https://www.icc-cpi.int/RelatedRecords/CR2019 02622.PDF (Accessed on 16 November 2022).
[347] Judges Luz del Carmen Ibáez Carranza and Solomy Balungi Bossa's joint dissenting opinion is accessible at https://www.icc-cpi.int/RelatedRecords/CR2019 02622.PDF (Accessed on 16 November 2022).

been met with little or no action. When a state is referred, it is extremely troublesome if no action is taken. However, when an act of non-compliance warrants a referral, doing nothing worsens the situation and leaves the ICC judges open to justified criticism.

4.5.3 Al- Bashir's prosecution before Sudan's national courts

In 2019, the Sudan army ended Al- Bashir's 30-year rule. [348] Al- Bashir and his two other former government officials were arrested and jailed in Kober, Khartoum's highest security prison. Abdel Rahim Mohamed Hussein and Ahmed Haroun, the two ministers, face charges before the ICC. In Sudan, al- Bashir is being charged with several offences, including; corruption, involvement in money laundering, possessing suspicious wealth and killing of protestors. In December 2019, the Court finally rendered a verdict which sentenced Al- Bashir to serve two years in a state-run reform center.[349]

4.6 Applicability of the Universal Jurisdiction principle to the prosecution of Augusto Pinochet

General Augusto Pinochet overthrew President Allende's administration in Chile in 1973. Following his military takeover, Pinochet is thought to have used torture and routinely executed hundreds of Chileans and foreigners who opposed him.[350] In a shocking move on October 16, 1998, Spain asked for the capture and eventual extradition of former Chilean dictator Augusto Pinochet from a London Hospital, where he was recovering from back surgery. Initially based on claims that Spanish nationals were killed during Pinochet's brutal seventeen-year rule in Chile, the arrest warrant and extradition plea quickly changed to stress the pervasiveness of torture, terrorism, and murder.[351] By asserting that a prominent human rights offender should be brought to justice "independent of national jurisdictions or the passage of time," Spain set a precedent.

4.7 Applicability of the Universal Jurisdiction principle in the Habre case

On May 30, 2016, Judges in the Senegalese judicial system's Extraordinary African Chambers rendered their decision in the trial of Hissène Habré, a former tyrant of Chad. The prosecutor requested that the court sentence Habré to life in prison after he was accused of crimes against

[348] *Al Jazeera* Sudan's toppled President Omar al-Bashir charged with corruption June 13, 2019 available at https://www.aljazeera.com/news/2019/6/13/sudans-toppled-president-omar- al-Bashir-charged-with-corruption (Accessed on 5 February 2023).
[349] *Al Jazeera* Sudan's Omar al-Bashir sentenced to two years for corruption December 14 2019 available at https://www.aljazeera.com/news/2019/6/13/sudans-toppled-president-omar- al-Bashir-charged-with-corruption (Accessed on 5 February 2023).
[350] Kelly M 'Case Studies 'ripe' for the International Criminal Court: Practical Applications for the Pinochet, Ocean and Libyan Bomber Trials' (1999).
[351] White J 'Nowhere to run, Nowhere to Run: Augusto Pinochet. Univ of Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State' (1999).

humanity, torture, and war crimes, to bring the "person or individuals" most accountable for international crimes committed in Chad between 1982 and 1990, when Habré was President, to justice. Senegal and the African Union established the chambers in February 2013.[352]

4.8 Conclusion

People in positions of authority frequently commit international crimes. Due to the protection offered by customary law immunities, preventing them from testifying before the Court would seriously jeopardize attempts to uphold justice and accountability. According to the Appeals Chamber, member nations are not detaining a head of State for their purposes but merely "offering their aid" to the ICC. The decision by the ICC regarding the arrest and trial of Al-Bashir and other states contributed yet another significant layer of law aimed at advancing responsibility for fundamental international crimes. Still, it will not end the blazing scholarly and political debate on the ramifications of not protecting immunities in the circumstances like this. This chapter has highlighted the difficulty in enforcing the universal jurisdiction principle in international law due to inadequate international corporation.

[352] Human Rights Watch. The Case of Hissène Habré before the Extraordinary African Chambers in Senegal. Available at https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal (Accessed on 14 October 2022).

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

Chapter five is divided into two main parts. The first part is the conclusions part, and the second part is the recommendations. The conclusion part, the same encompasses the comprehensive summary of the entire paper. On the recommendations part, the same entails the proposals that are necessary for resolving the issues scrutinized in the research paper.

5.1 Conclusion

Chapter one laid the foundation. It comprised of an introduction, background of the study, research questions, research objectives, statement of the problem, hypotheses, research theories, literature review, and the chapter breakdown. It further laid down the foundations of the entire paper by analyzing the cases of Omar Al- Bashir, Augusto Pinochet, and Hissen Habre in respect to the doctrine of universal jurisdiction and international criminal court.

Chapter two, on the other hand, dealt with the doctrine of universal jurisdiction in international law. It further illustrated how universal jurisdiction had developed under international law through various treaty laws and subsequent recognition through international customary law. It further expounded how the doctrine of universal jurisdiction had developed to form part of the *jus cogens* norms and had *erga omnes* character. The chapter had further illustrated how the doctrine of universal jurisdiction was brought to being by illustrating the history and the various stages it took to reach where it was currently recognized. Treaty law and the Vienna Convention on the Law of Treaties were also discussed in relation to the application of the Rome Statute and the ICC. The chapter further illustrated how the United Nations Security Council had promoted the Universal Jurisdiction doctrine.

Chapter three analyzed the case of Augusto Pinochet and Hissen Habre in relation to the development of the doctrine of universal jurisdiction. The chapter commenced by illustrating how the warrants of arrest issued against Augusto Pinochet by the Spanish Court and the subsequent enforcement by the Courts in the United Kingdom contributed to the development of universal jurisdiction. The stages that Augusto Pinochet underwent to stop his surrender to the Spanish Courts were also illustrated. The case of Hissen Habre was also discussed. It illustrated how Hissen Habre's attempts to be tried under the doctrine of universal jurisdiction by the Senegalese Courts never yielded fruits. It further illustrated how the African Union opted to employ the doctrine of universal jurisdiction by establishing the Extra Ordinary Chamber to try Hissen Habre pursuant to the doctrine of universal jurisdiction and its successes.

Chapter four dealt with the case of Omar Al- Bashir in relation to the crimes committed in Sudan during his tenure as president. It illustrated how the doctrine of universal jurisdiction yielded fruits, having been enabled by the classification of such acts as amounting to the grave human rights violation. The chapter further illustrated how the Security Council made

resolutions that granted the prosecutor the power to commence investigations, compile evidence, and subsequently institute criminal proceedings against Omar Al- Bashir. It also elaborated on the various challenges encountered during the course of the investigations in Sudan. The chapter further expounded on the obligation of state parties' obligations with respect to international law and the criminal court and how the continued failure by those states to effect the warrants was in total breach of those obligations.

Chapter five is on the conclusion and recommendations. It has given a summary of all chapters tackled in this paper. It has also given the requisite recommendations that are to be taken into account so as to ensure the doctrine of universal jurisdiction is actualised and put to practice.

5.2 Recommendations

Based on what was discussed in chapters one, two, three, and four, it is clear that the doctrine of universal jurisdiction is yet to be realized and can only be achieved by:

a) The concept of immunity should never be brought as a defense to crimes that the international community has classified as heinous, as exhibited in Augusto Pinochet's case.

b) Domestic laws should never override international law, and countries should appreciate that international law overrides national laws, as was exhibited by Senegal while declining to prosecute Hessen Habre.

c) State parties unwilling to prosecute the perpetrators of widespread human rights violations should exercise their mandates under the Rome Statute by extraditing the perpetrators to the ICC.

d) Counties should perform their treaty obligations with utmost good faith and decline other irrelevant factors, as was exhibited in the case of Augusto Pinochet and Hissene Habre when the United Kingdom and Senegal failed to prosecute the parties despite the existence of various treaty laws.

e) States should understand that technicalities and irrelevant considerations cannot defeat accountability in the international community, as was evidenced by the court in the United Kingdom interpreting the provisions of the CAT and the court in Senegal interpreting the application of the CAT as well.

f) States should avoid politics under international law though not discussed in this paper. It was exhibited in all the cases where the countries concerned opted to refrain from the international demands to prosecute or extradite at the altar of ensuring diplomacy in their respective countries is not affected.

g) The International Community should come together and agree that the ICC is the only institution mandated to prosecute crimes of international concern. The state where the same was committed has not taken any steps toward prosecuting those individuals.

h) The ICC should be allocated Police who will be responsible for enforcing the warrants of arrest whenever issued.

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