

Presidential Immunity from prosecution

Immunity before the Permanent International Criminal Law and
the Criminal Responsibility pertaining to the President

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The Criminal International Jurisdiction has passed several evolutionary stages after the foundation of the Criminal International Court on the steps of establishing the principle of the Individual Criminal Responsibility in general and the Presidential Criminal Responsibility in particular. Also, the issue of immunities pertaining to the Presidents was no longer an obstacle in the process of their prosecution given that the most fundamental principle of the International Criminal Law included in the texts and the international documents is the eviscerating the immunity - pertained by an external or internal law - of the perpetrator of the international crime. History has witnessed several attempts at the prosecuting of Government Leaders in front of the International Jurisdiction. The efforts of

the International Groups were aimed at a principle which will allow the prosecution of Government Leaders Perpetrators of International Crimes. The first efforts were faltered after the failure of the prosecution of the German Emperor Guillaume II pursuant to Article 227 of The Treaty of Versailles.

The major turning point in the evolution of the International Criminal Law was considered in Nuremberg Tribunal which provided for the possibility of prosecuting Government Leaders without pertaining the official attributes which they carry. Also the International Court of Former Yugoslavia adopted this principle as well as the Rwanda Trial and lastly the principle was stipulated in the Charter of the International Criminal Court.

The Government Leader can no longer uphold his immunity whether bestowed pursuant to an International Law or Internal Law where committing an International Crime inevitably entails the responsibility and penalty upon the President where the official attribute of the position does not exempt or immune him/her from prosecution nor from the penalty.

The UN Security Council has the jurisdiction to forward which ever case to the International Court, as in the case where the Council used this privilege for the first time in the case of Sudanese President Omar Ahmad Al Basheer.

The Evolution of immunity following the Second World War

In the year of 1945 and after the termination of the warring actions committed during the Second World War which witnessed the scourge and tragedies never seen before, the Alliance were motivated to discuss the obligation to prosecute and punish major war criminals of the European Axis powers. This discussion resulted in the upholding of The Special London Treaty on 8/8/1945¹ to establish an International Military Court to prosecute the major war criminals leading to the foundation of Nuremberg Trials. Consequently, another committee was also established to look into the war crimes committed by the Japanese Forces in the Far East later known as the Tokyo Trials. Following, two Juridical International Courts were formed pursuant to a decision by the Security Council, one specializing in the disputes occurring in Former Yugoslavia, and the other regarding the disputes which arose in Rwanda.

¹In the course of World War II the Allied Governments issued several declarations concerning the punishment of war criminals. On 7 October 1942 it was announced that a United Nations War Crimes Commission would be set up for the investigation of war crimes. It was not, however, until 20 October 1943, that the actual establishment of the Commission took place. In the Moscow Declaration of 30 October 1943, the Three main Allied Powers (United Kingdom, United States, USSR.) issued a joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that, "the major criminals, whose offences have no particular geographical localization," would be punished " by the joint decision of the Governments of the Allies." The Agreement was drafted at a conference held in London from 26 June to 8 August 1945 - <https://www.icrc.org/ihl>.

First Chapter: Immunity vs. Nuremberg Trials²

After the termination of the Second World War, the Germans signed the surrender documents on 8/5/1945, following a declaration of defeat enabling the United States of America, England and France to take over power. The Allies convened in London on 26/6/1945 to discuss what was approved upon at the Moscow Convention regarding the prosecution of the Second World War Criminals.

The London Convention on 08/August/1945 was the result and it decided the establishment of a Higher International Military Tribunal to trial the War Criminals - whose crimes did not fall under a certain geographical location - whether as representatives to their official attributes or as members of terrorist organizations or both⁴. Article 65 of the Convention

²The Historical Venue -The Trial of Major War Criminals was held before the International Military Tribunal in Nuremberg from November 20, 1945, to October 1, 1946. After protracted negotiations, the Allies agreed that Berlin would be the permanent seat of the court, but that the first trial would be held in Nuremberg. This decision reached by the Allies at the London Conference in August 1945 was motivated primarily by infrastructural reasons. The Palace of Justice on Fürther Strasse, which was hardly damaged, offered sufficient space for the numerous participants from four nations. And the prison, adjacent to the Palace of Justice on the north side, simplified the custody and protection of the accused. Nuremberg's historical role as the "City of the Nazi Party Rallies" and as the place from which the Nuremberg Race Laws were proclaimed was not a decisive factor in choosing the city as the venue for the trials, but it did provide a certain symbolic importance.

³ Report of Robert H. Jackson United States representative to the International Conference on Military Trials London – 1945 - www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials

⁴ Dr. Hasanien Ibrahim Saleh Ubaid - International Crime - An applied analytical study - Dar Al Nahda Al Arabiyya Cairo - 1999 p.83

stated: “The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;
- (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
- (c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other

⁵ Charter of the Nuremberg Tribunal for 1945 - ARTICLE 6" - law.umkc.edu/faculty/projects/ftrials/nuremberg/Nuremberg

inhumane acts committed against any civilian population, before or during the war,¹⁴ or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

The signing countries chose the Militaristic attribute to the Tribunal since its competence doesn't only limit to specific crimes, but extends to crimes of competence of regular courts without the restriction of a specific geographical location. Lord Simon⁶, Minister of England and senior legislator of the convention, noted that the War Rules allow the prosecution of War Leaders by a Militaristic Tribunal when proven to have committed a criminal act or acts in opposition to the War Rules and its traditions regardless of the place of the crime and not restricted to the regional location⁷. In accordance, the convention signed by the temporary Government of France, the United States of America, the United Kingdoms (Great Britain, North Ireland) and the Soviet Union of the Socialist Republics,

⁶ Dr. Ali Abed Al Kader Al Kahwaji, International Criminal Law - Most Notable International Crimes - International Criminal Courts - Publishings of Legal Halabi 1st Edition - Beirut p.233

⁷ Dr. Ali Abed Al Kader Al Kahwaji, *ibid*, p.233

executed the establishment of the Military International Tribunal in Nuremberg and stated in Article 7⁸.

“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”.

The Nuremberg⁹ Tribunal Charter adjunct to the London Convention of 1945 stated for the first time in the International Law history the Criminal Individual Responsibility of Government Leaders to the state actions and the Criminal Individual Responsibility of crimes against peace and humanity committed by the State Authorities disregarding the official attributes of said position and fully expressed in Article 7¹⁰ above.

“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”. As stated in the merits of the court's rulings, the principle of the International Law which protects Government representatives in specific circumstances shall not be applied on

⁸ Charter of the Nuremberg Tribunal for 1945 - ARTICLE 7 " - law.umkc.edu/faculty/projects/ftrials/nuremberg/Nuremberg

⁹ Dr. Abbas Hashem Al Sa'edi - Criminal Individual Responsibility for International Crimes - Dar University Publications - Alexandria - 1st Edition 2002 - p.240

¹⁰ Charter of the Nuremberg Tribunal for 1945 - ARTICLE 7 " The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment" - law.umkc.edu/faculty/projects/ftrials/Nuremberg/Nuremberg

actions considered by the International Law as criminal acts since the perpetrators cannot be protected by their governmental position to elude punishment¹¹. The German President Karl Dönitz stood trial, prosecuted and sentenced to imprisonment punishment for committing War Crimes. The London Convention and the Nuremberg Tribunal are considered to have had a great influence in the evolution of the International Law and to root the principle of Individual Criminal Responsibility especially to the State Leaders for their government's actions in front of the International Law.

As stated, Nuremberg Tribunal Charter demonstrated the Individual Criminal Responsibility especially to the State Leaders when committing international crimes and hence causing a ripple of evolution in the International Law field. Accordingly, the immunity was no longer a means to shield against the International Criminal Responsibility in international crimes. The Charter attained positive reception by many of the jurists of that era who expressed their desire to ridden the old concept which allowed the Governors to hide behind the concept of supremacy hence eluding punishment. The jurists also vouched that regardless of posture and position, whoever in the future commits and is responsible for an international crime is subject to punishment here for.

¹¹ Dr. Hamed Sultan - International General Law at Peace Time - 6th Ed. - Dar Al Nahda Al Arabiyya Cairo - 1976 p.65

Nuremberg Tribunals started on 20/11/1945 and ended on 01/10/1946 where twenty four major war criminals accused were trialed as their individual attributes in addition to many of the members of some authorities and organization which were considered by the tribunal as criminal such as the Reich Council of Ministers, Authority political leaders of the Nazi Party, Gestapo Commission, War Commission of Army Staff, Higher Authority of the Armed German Forces¹². However, the main protagonist in igniting the flames of the Second World War Hitler was not trialed as he committed suicide on 30/04/1945 which lead some of the jurists to question the efficacy of the removal of Presidential immunity during their committing of international crimes.

Nuremberg Tribunal was subject to scathing criticism for its being the process of the victor prosecuting the defeated and the unavailability of neutrality to its judges in addition to the fact that its hearings¹³ are of retrospective effect in the sense of the crimes committed by the accused were not criminals according to the principles of International Law prevailing back then. Also, the Tribunal prosecuted normal individuals who were not considered under the coverage of International Law and hence it was said that the Tribunal was international only in name.

¹² Dr. Hasanien Ibrahim Saleh Ubaid - International Criminal Jurisdiction, International Criminal Judiciary - Dar Al Nahda Al Arabiyya Cairo 1st Ed. 1977 p.89

¹³ Dr. Rasheed Mohammad Al Anzi "The Prosecution of War Criminals in regards to International Law Principles - Law Magazine - Kuwait - No: 1 - 4 March 1991 - p.327

Second Chapter: Immunity vs. the Tokyo Trials

The launching of the two atomic bombs on Hiroshima on 06/08/1945 and on Nagasaki on 09/08/1945, lead to the unconditional surrender of Japan, the signing on the Surrender Documents on 2/09/1945, and the subjugation to the authority of the Higher Command formed by the Allied Forces¹⁴.

After the signing on the Surrender Documents, a special announcement was made to establish an International Military Tribunal in Japan to prosecute the high commanding Japanese Officers, and was subject to the authority of the High Command of the Allied Forces¹⁵. The Tribunal convicted the guilty 25 accused individuals prosecuted by their individual attributes following the system of the Criminal Leader Responsibility for the International Crimes since the Tokyo Tribunal system resembles acutely that of the Nuremberg Tribunal system.

During the period from 16 to 26 September of the same year, the Ministers of Foreign Affairs of each the United States of America, England and Russia founded a convention in Moscow declaring an announcement that determines the rules of surrender. After about four weeks, the Supreme Commander of the Allied Forces "Mac Arthur" in Japan issued a special announcement to establish an International Military Tribunal to prosecute The War Criminals in the Far East. On the same day,

¹⁴ Dr. Ali Abed Al Kader Al Kahwaji, *ibid.* p. 260

¹⁵ Dr. Ali Abed Al Kader Al Kahwaji, *ibid.* p. 260

the list of criminal organization of the Tribunal was approved, which commenced its activities on 29/04/1946¹⁶.

There is no difference between the Tokyo Tribunal List and the Nuremberg Tribunal List, neither in terms of the principles that both were established upon and executed, nor in terms of competence, nor in terms of the conduct of the Tribunal, nor in terms of the charges against the defendants. However, Tokyo indictment report has disregarded the crimes carried against humanity despite the fact that they were carried in the Far East similar to what Germany has committed in Europe¹⁷. Tokyo Tribunal did not add the criminal attribute to actions of some authorities and organizations hence prosecuted the defendants only in their personal capacity and not as members of terrorist organizations¹⁸. Tokyo Tribunal system was characterized by its leniency regarding the immunity of the individuals who were in official positions. In opposition to Nuremberg system, the Tokyo Tribunal considers the official position of the defendants a cause to lenient punishment when the Tribunal sees that justice requires thereof, as noted by its Article 6, 7, and 8 of its statute¹⁹. However, regardless of the excuse of the official

¹⁶Dr. Ali Abed Al Kader Al Kahwaji, International Criminal Law - ibid. p.91

¹⁷ Dr. Ali Abed Al Kader Al Kahwaji, ibid. p. 261-263

¹⁸Dr. Hasanien Ibrahim Saleh Ubaid - International Criminal Jurisdiction - ibid. p.92

¹⁹Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the

position as a reason for lenient punishment was not carried during the Tokyo Tribunals.

In summary, Ministers and Government Officials do not enjoy their immunity when they commit International Crimes. The Second World War Tribunals applied seriously for the first time the concept of the Criminal International Law on the war criminals each receiving his/her punishment without immunity and procrastination as occurred to the First World War criminals. The merit is of the Allies efforts despite their legal systems so that the world would not face a third international standoff wiping the human race from the face of the earth²⁰. The hesitation existed during that era on the principle of

jurisdiction of the Tribunal for which there shall be individual responsibility:(a)CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;(b)WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;(c)CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment. Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires. - Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal August 8, 1945- avalon.law.yale.edu/imt/imtconst.asp

²⁰Dr.Hasanien Ibrahim SalehUbaid - International Criminal Jurisdiction - ibid. p. 90

disregarding the immunity of the president who still expresses the sovereignty of his/her state, and it was assured and clarified completely during the Tribunals of Former Yugoslavia and that of Rwanda as well.

Third Chapter: Immunity vs. the Tribunal of Former Yugoslavia

Following the fall of the Yugoslav Federation, the six republics: Bosnia and Herzegovina, Serbia, Croatia, Slovenia, Montenegro and Macedonia demanded the secession and independence, which led to the outbreak of the bloody war in Croatia, Bosnia and Herzegovina²¹ leading to the commission of international crimes no less egregious of those of Second World War crimes. Based on a French initiative, the Security Council passed Resolution No. 808/93²² to prevent the commission of further violations of international humanitarian law hence defining the rules of protection of civilians during war and refusing the acceptance of the immunity of planners and perpetrators of these crimes to punishment²³. The Security Council delegated the Secretary General of the United Nations to study all the aspects of this matter and to put a report inclusive of a draft of the Tribunal Statute.

²¹Dr.ZiadItani - The International Criminal Court and the Evolution of the International Criminal Law - Publishings of Legal Halabi 1st Edition 2009 - p.110

²²Dr. Ali Abed Al Kader Al Kahwaji, *ibid.* p.273

²³Dr.ZiadItani, *idib.* p. 113

On February 22, 1993, the United Nations Security Council unanimously adopted Resolution 808, which formally decided that an international tribunal should be established "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"²⁴.

The International Criminal Tribunal was established to prosecute war criminals in Bosnia and Herzegovina under resolution 808 issued by the Security Council dated 22/02/1993 and had taken the Hague²⁵ as its headquarters. On 25/05/1993 the Security Council issued Resolution No. 827 approving the report of the Secretary-General to ensure the Statute of the Court and included "the grave crimes mentioned in the Geneva Conventions of 1949 and the violations of the laws and customs of war, without limitation, pursuant to the Statute of the Court of Nuremberg. Also mentioned the crime of genocide against

²⁴ Professor of International Law, Department of Government, Georgetown University; Ph.D., University of Virginia (Foreign Affairs 1977); M.A., Florida State University (Government 1973); M.A., Florida State University (International Relations 1972); B.A., Florida State University (International Relations 1970).

1. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).
2. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).
3. Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, art. 6, U.N. Doc. S/25704 (1993) [hereinafter Tribunal Statute].

²⁵ Paragraph 1 of Security Council Resolution 808, U.N. SCOR, 48th Sess., Annex, art.6, U.N. Doc. S/25704 (1993) [hereinafter Tribunal Statute].

United Nations (Security Council) S/25704 3 May 1993 - By paragraph 1 of resolution 808 (1993) of 22 February 1993, the security council decided that an international tribunal shall be established for the protection of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991-www.icty.org/x/file/.../Statute/statute_re808_1993_en

ethnic or religious or national groups and the punishment of the crime of genocide in itself, and of the agreement on its commission, incitement, attempt and participation, as well as the punishment of crimes against humanity, including rape "²⁶. The Court's Statute has direct regulations to ensure accountability of individual perpetrators of international crimes²⁷. This Court has exercised its task in the trial of the leaders of those accused of crimes in the former Yugoslavia for violating the rules of International Humanitarian Law such as collective murder, rape, detention, assault and ethnic cleansing. Article 28²⁸ of the Statute of the Court stipulated that " The official position does neither absolve of the accused, whether a head of state or government or a government official, from the criminal responsibility nor mitigate punishment". On the 27th of May 1999, General Prosecutor of the Court Louise Arbour charged the defendant Prior President of Former Yugoslavia (Slobodan Milošević) with crimes against humanity, crimes of

²⁶ Dr. Amer Al Zamali, the Evolution of the Idea of Establishing an International Criminal Court, a research of scientific symposium, (the International Criminal Court, the Challenge of Immunity). Faculty of Law. Damascus University in cooperation with the International Committee of the Red Cross (ICRC), Daoudi Press, May 2002, p. 23

²⁷ *ibid.* p. 66

²⁸ Paragraph 28 of Security Council Resolution 808, U.N. SCOR, 48th Sess., Annex, art. 6, U.N. Doc. S/25704 (1993) [hereinafter Tribunal Statute]. In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of the international peace and security in the territory of the former Yugoslavia, and Security Council decisions related there to...

genocide, war crimes and violations of the Geneva Convention. The defendant at that time was the head of the state and carried out his functions in an official capacity, and thus the attempt to trial (Slobodan Milošević²⁹) was the first historically and one of a kind to accuse the President of the State of committing an international crime to the precedent accusation of Emperor (Guillaume II) and his evading punishment.

Consequently and according to Security Council Resolution 955 on 08.11.1994, another International Tribunal was established known as the Rwanda Tribunal to prosecute persons responsible for genocide, crimes and other serious violations of International Humanitarian Law that have been committed between the first of January to the 31st of December in 1994, following the legal approach on which its predecessor the Yugoslavia Tribunal³⁰ was established. The Rwanda court has confirmed the same principles in Article 27 of its Statute.

At the suggestion of the Secretary-General, the Court's jurisdiction was limited to the trial of natural persons that is individuals in accordance with Paragraph 1 of Article 7 (A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime).

²⁹Dr. - Mohammad Safi Yusuf - The General Framework of International Criminal Law in Light of the Provisions of the Statute of the International Criminal Court - Dar Al Arab Renaissance - Cairo 1-2002 - p. 87.

³⁰Dr. Essam Al-Attiyah - Public International Law - 5th Edition Baghdad 1992 - p. 291.

In regards to the Tribunal of Former Yugoslavia Statute, the criminal responsibility falls upon all planners for the crimes set forth, or instigated or ordered or committed, or in any other way encouraged or helped to set up, prepare and implement thereof as mentioned in Paragraph 3 Article 7 (The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.) This text refers to that the president is not exempt from responsibility if he knew or had reasons that lead to the conclusion that the subordinate was about to commit such acts or even committed where the president did not take the necessary measures to prevent such acts or to punish the perpetrator.

It seems at first glance that the court of Former Yugoslavia system did not address anything new with respect to the absence of political officials immunity when committing international crimes and was confined to confirm the principles which were intensified in the Nuremberg Tribunal system. However, the embodiment of these principles after nearly 50 years in the statute for an International Tribunal is a great progress in the establishment of the International Criminal

Justice. Furthermore, the text of Article 7 is considered an important development in this area, because it has emphasized for the first time in an International Criminal Court System the unprecedented principle of the responsibility of the leaders and presidents for the crimes of their subordinates not only in regards to the prosecution of said political officials for their actions, but also for their unwillingness to refrain the culprit subordinates.

On 27 May 1999, the Prosecutor of the Tribunal of Former Yugoslav indicted the President (Slobodan Milošević) on the basis of individual criminal responsibility for war crimes and crimes against humanity and violation of the four Geneva Conventions and genocide committed in the Former Yugoslavia³¹.

Forth Chapter: Immunity vs. the Rwanda Tribunal

During the year of 1994, serious crimes occurred in Rwanda, witnessing the wounding and death of thousands. The reasons for the Rwandan armed crisis was due to the disallowance of the participation of all tribes in the system of government, particularly the Hutu³² hence armed conflict broke out between

³¹M. Abdul Jalil Assadi, Criminal Responsibility of the Head of the State for International Crime and the Problem of Immunities in International Law, research published in the Journal of the Civilized Dialogue (Al Hiwar Al Mutamadden), No. 2897, dated 24/1/2010, see the following site: <http://www.ahewar.org/debat/showart.asp?aid=200679>

³²D. Ziad Itani, *ibid.*, p. 126

government forces and militias of the Rwandan Patriotic Front(RPF). Following the evidence of the official reports of the United Nations to the occurrence of genocide and other gross violations of International Humanitarian Law in Rwanda, the Security Council decided that this situation constitutes a threat to International Peace and Security, and it has to hold accountable as well as to prosecute the perpetrators of these crimes in order to restore international peace and security. In regards of the seventh Chapter 7 of the United Nations Charter, an International Criminal Tribunal for Rwanda was created by the Security Council Resolution No. 955/94³³.The Tribunal had jurisdiction to prosecute persons accused of committing acts of genocide and gross violations of International Humanitarian Law in the territory of Rwanda, as well as Rwandan citizens accused of committing such acts in the territories of neighboring countries during the year 1994, according to the Statute that the Tribunal adopted by the Board, and the Annex to that resolution³⁴.

The Statute of the Rwanda Tribunal was based on the same principles of the Former Yugoslavia Tribunal Statute in terms of personal jurisdiction, as it is limited to natural persons, whatever the degree of contribution, and whatever their rank. In the field of responsibility, the Head of States Immunity is not

³³Dr. ThakelSaadAlAjami, Responsibility of Commanders and Superiors for International Crimes Committed by their Subordinates - Journal of Law - Kuwait Issue II - June 2008 p. 104.

³⁴Dr. Ali Abed Kader Al Kahwaji, *ibid.*,p. 301.

accounted, and defense is impermissible as to the issue of orders by presidents to commit crimes.

In terms of qualitative jurisdiction, it differs with respect to war crimes only. The competence of the International Criminal Tribunal for Rwanda (ICTR) was confined to consider war crimes committed against people only that as mentioned specifically in Common Article Three of the 1949 Geneva Conventions on the protection of victims of wartime, also mentioned in the annexed Second Protocol of year 1977 in contrast to the case of the Former Yugoslavia Tribunal whose competence expands to include all war crimes in violation of the laws and customs of war³⁵.

The International Criminal Court handed down two life sentences during the month of September 1998, the first rule on 09/02/1998 against (Jean Paul Akayesu) Mayor of Taba in Rwanda deciding his responsibility as a direct instigator to commit genocide and crimes against humanity, and the second rule on 04/09/1998 against (Jean Kambanda) Prime Minister of Rwanda, who participated in the commission of many massacres (murders and serious physical and psychological assault on the Tutsi tribe) and crimes against humanity (murder and deportation of civilians)³⁶.

The Rwanda Tribunal was subject to the same criticisms that of the Tribunal of Former Yugoslavia regarding that its

³⁵ Dr. Ziad Itani, *ibid.*, p. 130.

³⁶ Dr. Ali Abed Kader Al Kahwaji, *ibid.*, p. 307.

competence does not extend to the crimes occurring after 12/31/1994 and to the International Crimes committed on the borders of neighboring Rwanda states against civilians of not Rwandan Nationality who were forced to flee from the horrors of combat operations and who were suspected to join either of the parties of the Rwandan conflict³⁷.

Fifth Chapter: Immunity According to the International Criminal Court System

The International Criminal Court System adopted the principle of equality of persons before this court regardless of the status enjoyed by any of them, even that of official capacity, meaning that the official capacity is not a reason for distinction between who possess it and those who do not.

Paragraph 1 of Article 27³⁸ of the Rome Statute regarding the International Criminal Court states:

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

³⁷ Dr. ZiadItani, *ibid.*,p. 134.

³⁸ Article 27 Paragraph 1 Rome Statute of the International Criminal Court

The International Criminal Court had the chance to apply the President's Criminal Responsibility when accusing the Sudanese President: Omar Ahmad Al Basheer. The Security Council issued Resolution No. 1593/2005³⁹ stating the decision to refer the situation in Darfur to the Attorney General of the International Criminal Court which had the opportunity to enact the principle of the Criminal Responsibility of the President indicting the Sudanese President Omar Ahmed Al-Basheer. According to Article 13 of the Rome Statute and pursuant to Chapter 7 of the Charter of the United Nations regarding to taking legal action against a head of state even though the state of Sudan headed by AlBasheer was not a party to the Statute of the International Tribunal, the Security Council for the first time in history used its power hence referring the lawsuit. On the 14th of July 2008, the Attorney-General requested the issuance of an arrest warrant for the Sudanese President Omar AlBasheer pursuant to Article 58⁴⁰ for his committing genocide and crimes against humanity and war crimes.

The Court reviewed the prosecution documents and other materials provided by the prosecution which formulated the conviction among the judges of the court that the Sudanese

³⁹Article 4 of the Convention stated ((Persons committing genocide or any of the other acts enumerated in Article III are to be punished whether constitutional rulers or public officials or individuals))

⁴⁰Article 58 Rome Statute of the International Criminal Court.

president bears criminal responsibility under Article (25) (a)⁴¹ of the Statute as an indirect perpetrator, a partner or an indirect partner of war crimes and crimes against humanity and his arrest appeared to be necessary pursuant to Article (58 a and b) of the Statute⁴².

Article 25 Individual Criminal Responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - b. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - c. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its

⁴¹Article 25 Rome Statute of the International Criminal Court - The Court shall have jurisdiction over natural persons pursuant to this Statute.

⁴²For example many rules contained in various agreements of which ((Anti-Slavery and the Slave Trade Agreements - The Fight Against White Slave - Combating Diseases and Epidemics - Protection of Literary and Industrial Property - The Protection of Children and Attention to Women - The Right of Asylum and Refugee Protection.

- commission or its attempted commission, including providing the means for its commission;
- d. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - ii. Be made in the knowledge of the intention of the group to commit the crime;
 - e. In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - f. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that

person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

The International Criminal Court issued an arrest warrant for Sudanese President Omar Al-Basheer on 4/3/2009. Note worthy to mention is that the complications arise from the fact that the State of Sudan did not sign the International Court Charter and hence was not considered a party in the Statute also no agreement was signed with it. The decision of arrest was issued after the issuance of the Security Council Resolution No. 1593/2005 stating the decision to refer the situation in Darfur to the Attorney General of the International Criminal Court. Pursuant to Article 13 of the Statute, the Security Council can refer to the Attorney General any "Situation" pertaining to the Court's competence where a crime or more have been committed. When the Council decided to refer such "Situation", the Secretary-General of the United Nations shall refer - and immediately - the Security Council written resolution to the Attorney General, together with documents and other materials that are relevant to the decision of the Council. On the other hand, the information provided by the Court are transmitted through the Secretary-General to the Security Council.

The assignment must be subject to the Statute of the Court of the Council who act as a procurator of the state in accordance with the provisions of Article 24 of the Charter of the United Nations.

Albeit the use of the Security Council its authority to refer the law suit pursuant to Chapter 7 of the Charter of the United Nations is problematic considering the principle of the integration of the International Criminal Judiciary considered as complementary to the National Judiciary⁴³; however , remains the fact that it is less problematic than the problem which will arise in the future of the extradition and appearance before the Court of the Sudanese President - the Court does not have the affecting means to apprehend and hence try those responsible for the crimes that fall within its competence pursuant to Article 98 of the Court Statute.

Article 98 Cooperation with respect to waiver of immunity and consent to surrender

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

⁴³Article (6) of the Statute of the Nuremberg Trial.

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

Accordingly, the only way that can enable the Court to compel the accused to appear before it is through international cooperation, as the States Parties are committed to cooperate with the court following the Statute of the International Criminal Court. On the other hand, regarding the States not parties, the court may ask any State not party to the court system to cooperate based on a special agreement or arrangement with said State⁴⁴. It is noteworthy to account for the unjustified refusal of the State to which said person is a citizen as a case of non-cooperation with the International Criminal Court which should be exclusively presented hereby to the States Parties Assembly, even if the case was forwarded by the Security Council to the International Criminal Court. As a result, a decision can be made upon this rejectionist state that it

⁴⁴ Article (6) of the Court Statute entails ((the International Court has jurisdiction over natural persons in accordance with the provisions of this Court Statute)) for more information review Ahmad Ghazi Fakhri Al Hermazi- International Criminal Tribunal of Former Yugoslavia (ICTY) - Masters Letter- Law University - University of Babylon in 1997 p. 116.

is not willing to cooperate with the International Criminal Court.

A defect in the Statute; however, may present itself leading to the loss of definite opportunities in the realization of justice. The contents of the Statute for the means of compulsion were limited to International Cooperation, hence not providing at the present time the surmount possibility of securing justice in particular when the case concerns a Head of State who has the ability to take shelter and cover up as well as put obstacles before the possibility of securing said President before the court using his/her political career, immunity and political importance which the State enjoys.

In conclusion, the International Criminal Judiciary was established and has evolved through history and is now poised to demand ensuring the application of Individual Criminal Responsibility of the State Governors and responsible politicians for committing any of the International Crimes without invoking their immunity regardless of embodying the sovereignty of their countries - a position which prevents prosecution. However, the establishment of temporary courts for crimes that occurred before its inception is unacceptable from the point of justice. Also identifying certain crimes that occurred in a specific time period and on the territory of a particular country leads to the failure of prosecuting all officials who have committed the International Crimes leading to an

incomplete and imperfect justice. It was necessary the emergence of the International Criminal Court, which has comprehensive and approved jurisdiction inclusive of all cases and which avoids the previous mentioned criticism by contributing to the achievement of global justice without distinction and of all International Crimes and contributing to charge the political Presidents, leaders and officials accused of committing such crimes. The Rome Statute adopted said mentioned idea to the establishment of an International Criminal Court which was consequently adopted by the United Nations Diplomatic Conference of Commissioners on the 17th of July 1998.

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