

**Addis Ababa University**  
**School of Graduate Studies**  
**Faculty of Law**  
**Approval Sheet**

**Immunity from Prosecution of Head of State for Crimes of Genocide,  
Crime against Humanity and War Crimes: with Particular Reference to  
the Red Terror Trials in Ethiopia (*Special Prosecutor's Office v. Colonel  
Mengistu Hailmariam et al*)**

Prepared by: Robel Tarekegn

\_\_\_\_\_

Signature

\_\_\_\_\_

Advisor's Name

\_\_\_\_\_

Signature

\_\_\_\_\_

Examiner's Name

\_\_\_\_\_

Signature

\_\_\_\_\_

Examiner's Name

\_\_\_\_\_

Signature



## Acronyms

Civil Code	Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960
Constitution	The Revised Constitution of 1955 of Ethiopia.
EPC	The Ethiopian criminal code of 1957
EPRDF	Ethiopian Peoples Revolutionary Democratic Front
EPLF	Eritrean Liberation Front
FDRE	Federal Democratic Republic of Ethiopia
FISA	Federal State Immunity Act
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Yugoslavia
OLF	Oromo Liberation Front
SPO	Special Prosecutor Office
TGE	Transitional Government of Ethiopia
TPLF	Tigrean People's Liberation Front
UK	United Kingdom
U.S	United States
WPE	Workers Party of Ethiopia

## Chapter One

### Research Proposal of the Study

#### 1.1 Background to the Study

Normally, state enjoys jurisdiction over persons or property situated in its territory. Consequently, the competent authority of a state can prosecute and punish when crime committed under its jurisdiction. It should, however, be noted that not all crimes has got similar consideration by the international community.

Persons suspected of committing serious crime under international law is thought as so serious to threaten the international order. <sup>1</sup> Some commentators categorized crimes like piracy and war crimes as oldest form which belongs to universal jurisdiction irrespective of any link like active or passive nationality or other grounds recognized by international law.<sup>2</sup> Recently, there has been strong opinion that genocide, crimes against humanity, and war crime as constituting international crime and equally important with the above mentioned offences.<sup>3</sup>

---

<sup>1</sup> Nehal. B; How shall we punish the perpetrators? Human rights, Alien wrong and the march of international criminal law; (2003) 10 *Melbourne university law review*, P. 5

<sup>2</sup> Malcolm N. shaw ; International Law, (6<sup>th</sup> ed Cambridge university press New York 2008), p-668.

<sup>3</sup> George W. Mugwanya: Criminal Justice through International Criminal Tribunals ;Reflecting on some Lessons for National Criminal Justice, (2006) 6 *African Human Right LawJjournal*, p-28

Because of its international nature states are obliged to prosecute and punish perpetrators.<sup>4</sup> However, there are instances which undermine this rule and good examples of these are amnesty and immunity of Head of state and government officials.

The question when head of state of a country may be brought to foreign court or tribunals to stand for such offences remains controversial under international law. This has provoked several writers to argue if there is head of state immunity as such; its meanings and scope.<sup>5</sup>

Immunity from jurisdiction means that a court of one state can't entertain the validity of the suit.<sup>6</sup> This doesn't mean that the defendant is immune from criminal liability altogether.<sup>7</sup> Immunity from criminal responsibilities has been established to foster international relations.<sup>8</sup> Thus, head of state immunity has been considered as an attributes of state function.<sup>9</sup>

Under international law there are two types of immunity enjoyed by state officials which are functional and personal immunity.<sup>10</sup> Personal immunity attaches to head of states

---

<sup>4</sup> The Rome Statute of International Criminal Court, July 17 1998, UN Doc.A/CONF.183/9,37 ILM 1002(1998), *Corrected through Jan.16.2002*, article 11

<sup>5</sup> Michael A Tunks, "Diplomats or defendants? Defining the Future of Head of State Immunity" (20002) 52 *Duke Law Journal* , p.651

<sup>6</sup> Ilias Bantakas and Susan Nash; *International criminal law*, (2<sup>nd</sup> ed Cavendish pub. Ltd London 2003), p 168

<sup>7</sup> Ibid

<sup>8</sup> Ilias Bantekas; *Head of state immunity in the light of multiple legal regimes and non-self-contained system theories: theoretical analysis of ICC third party Jurisdiction against the background of the 2003 Iraq war*, (2005) 10 *Journal of Conflict and Security Law* 1, p. 28

<sup>9</sup> Ronald.S, *Immunities and Amnesties in Max du Plessis(ed) African guide to International Criminal Justice*, ( Institute for Security Studies, Pretoria 2008) p 182.

<sup>10</sup> Ibid

irrespective of the nature of act committed.<sup>11</sup> Functional immunity on the other hand arises from customary and treaty laws and confers immunity for officials performing acts of state.<sup>12</sup> From this doctrine we can infer that a person who performs an act of state is immune from prosecution.

Both personal and functional immunities have the effect of barring prosecution before a court.<sup>13</sup> There is a difference between international tribunals and national courts in the application of immunity of head of state.<sup>14</sup> It is argued that before national court head of state enjoys strong immunity.<sup>15</sup> However, under international tribunal immunity of head of state is getting highly eroded from time to time.<sup>16</sup>

Recently, prosecuting head of state has been an emerging trend in international law. However, there is no uniformity and consensus as to the decision of different foreign courts. In Pinochet; the former Chilean head of state, the UK court denies immunity and proceeded to extradite affirming that crimes of torture couldn't constitute an act of state doctrine.<sup>17</sup> However; in *Marcoses*; the US appellate court argued that the president possess immunity unless revoked by Philippines government.<sup>18</sup> Lastly, the ICC also issued an arrest warrant against the Sudanese head of state which still is in term of his office. Thus, from the above decision the writer noted that there is divergent state practice in according immunity to head of states.

---

<sup>11</sup> Antonia Cassese, *International Criminal Law* (Oxford university press, 2003) p 272.

<sup>12</sup> Ilias Bantekas and Susan N ( n 8 above) p, 25

<sup>13</sup> Ibid.

<sup>14</sup> Ronald.Slye ( n 9 above)

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Malcolm N .Shaw ( n 2 above) , p-718

<sup>18</sup> Ibid.

In Ethiopia too, the Derg officials have been arrested and prosecuted for crimes of genocide, war-crimes and crimes against humanity among other things.<sup>19</sup> What makes the trial special is that the suspected have been charged domestically by Ethiopian court.<sup>20</sup> It resembles with Cambodian tribunal for Khmer Rouge officials in that the country established extra-ordinary chamber. Compared to Ethiopia, the Cambodian trial is different for it accommodates representative of UN to form the panel of court.<sup>21</sup>

To prosecute the Derg officials Special Public Prosecutor Office has been established by proclamation no. 22/1992. As stipulated in the preamble of the proclamation, its main objective which is relevant to this topic is to put on trial the then officials for deprivation of human and political rights of Ethiopian peoples.

By virtue of the above proclamation the Special Public Prosecutor had charged them for serious violation of human right and the defendants in their preliminary objection raised the defense of immunity from prosecution.

## **1.2 Statement of the Problem**

The writer will try to address the following issues in the study:

Under international law there are practices which confer on heads of states immunity from criminal prosecution, however, the recent practices of states have witnessed the erosion of this norm. Thus, the study will critically examine the legal basis and practices which entitled immunity for head of state. To address this issue, the writer will indirectly touch up on the status of immunity under international law i.e. is it a simple custom or

---

<sup>19</sup> Girmachew. Alemu .Aneme , Apology and Trial: The case of Red Terror in Ethiopia ; (2006)6 *African Human Rights Law Journal*, p 74.

<sup>20</sup> Ibid, p 64

<sup>21</sup> Malcolm N. shaw ( n 2 above),p 421.

attained the *jus-cogens* norm or is it a privilege accorded as a matter of political consideration.

The study will also deal with the scope of immunity. Under this the writer will try to demonstrate the restrictive v. broader approach concerning immunity of head of state. Moreover, the writer will discuss whether immunity serves till the end term of the office of head of state or serves beyond that?

As shown earlier genocide, crimes against humanity and war crimes have given states the ground to prosecute perpetrators of such crimes. And recent approaches of international tribunals nullify immunity for head of state. Thus, the writer will evaluate whether such emerging trends give rise to customary norm.

In case of Ethiopia the defense of head of state immunity had been raised during the court proceeding of the Derg officials. In rendering its decision the Federal High Court has introduced the concept of collective responsibility which calls for the punishment or prosecution of all higher officials in the same manner without making any distinction in their hierarchy. Having considered the court analysis; the writer will assess as to who is the head of state? i.e. is it the then president colonel Mengistu Haile-mariam or the council members of the Derg as a whole?

Lastly, the writer will critically evaluate the argument raised by the special public prosecutor and the defendants on the defense of sovereign immunity.

### **1.3 Objective of the Study**

The over all aim of this study is to explore the rationale behind granting immunity to head of states and how the doctrine been practiced in different periods in international arena. The writer will also show how courts interpreted the principle of immunity for incumbent and former head of sates and whether they reached at the same conclusion.

Furthermore; the writer will examine the Red Terror trials and demonstrate whether there had been specific laws which confer head of state immunity.

The specific objectives of the study are:-

- To illustrate the positivist and contemporary understanding of immunity for Head of state.
- Examine the position of international instrument on the issue of immunity to head of state i.e., whether it exonerates from liability or serves as mitigating circumstances.
- The validity of Federal High Court reasoning in rejecting the defense of immunity presented by the Derg officials.

#### **1.4 Significance of the Study**

The research paper is intended to make contributions on the ongoing debate on how to grant immunity to head of states and to clarify the link between the understandings of international tribunals with the domestic court of the red terror trials.

Since few researches have been made on the Derg trial; this study would give brief picture on the contentious issue of the court proceeding concerning immunity. It also tries to:-

- Raise awareness on the place of immunity under the Derg trials.
- The finding of this study will provide as reference for further research on the archives related to head of states immunity.

## **1.5 Research Methodology**

It is largely based on case analysis and literature review which includes both relevant primary and secondary sources. In satisfying the objective of this study issues pertaining to immunity will be dealt in detail. Moreover, the writer will utilize cases decided on national and international level dealing with immunity. In addition to cases the writer will use books, articles, law journal, internet and international instrument like Nuremberg charter, ICTR, ICTY, ICC and complementary state courts.

The writer will heavily rely on Federal High Court ruling on the Red terror trials case on the issue of immunity. When appropriate the writer will conduct interview with some personalities involved in the preparation of the charge.

## **1.6 Limitation of the Study**

The study of this paper focused on international tribunal decision on immunity of head of governments and the existing state practices. The study is limited to prominent cases, and hence it can not be claimed to exhaust all cases.

The study is confined to serious crimes which have international character. When the writer deals with the proceeding of Derg trial; the issue whether the defendants had committed genocide; war-crimes and crime against humanity will not be entertained. Rather the study will proceed with the assumption that if head of state is proven to commit or is prosecuted with such crime whether the defense of immunity serves to exempt them from liability. Since different issues have been raised in the Red terror trial the writer focused on issues relating to immunity only.

<b>CHAPTER ONE .....</b>	<b>1</b>
<b>INTRODUCTION.....</b>	<b>Error! Bookmark not defined.</b>
<b>1.1 Background to the Study .....</b>	<b>1</b>
<b>1.2 Statement of the Problem.....</b>	<b>4</b>
<b>1.3 Objective of the Study .....</b>	<b>5</b>
<b>1.4 Significance of the Study .....</b>	<b>6</b>
<b>1.5 Research Methodology .....</b>	<b>7</b>
<b>1.6 Limitation of the Study.....</b>	<b>7</b>

## Chapter Two

### Serious Crimes under International Law (Genocide, Crimes against Humanity and War-crimes)

#### 2.1 Introduction

The concept of international crime is not a recent phenomenon; rather known for centuries and was considered as offences whose suppression demands international cooperation.<sup>1</sup>

At international level among the offences labeled as serious ones include genocide, crime against humanity, and war-crimes. Besides, piracy and crime of slavery were considered as oldest form of international crime which provides states universal jurisdiction to prosecute.<sup>2</sup> Such crimes have been out-lawed by numerous multi-lateral conventions, which have significant effect in the crystallization of customary law.

While domestic crime where prosecutor at national level indict (bring in to court) on day to day basis, international crime takes different form both in scale and nature.<sup>3</sup> However, it should be noted that the need for international cooperation by it self doesn't make the

---

<sup>1</sup> William A. Schabas ; An Introduction to the International Criminal Court, (2<sup>nd</sup> ed Cambridge university press ,UK 2004)p-26

<sup>2</sup> Bruce Broomhall, International Justice and International Criminal Court: Between Sovereignty and the Rule of Law ( Oxford University Press 2003) accessed on [http/ www.books.google.com](http://www.books.google.com). Visited on march 4/2010 10:09 am, p 23 and 24.He further noted piracy on high seas since 17<sup>th</sup> century till codified on the law of Seas permitted universal jurisdiction. Similarly, Slavery, slave trading and practices were prohibited late 19<sup>th</sup> century and made punishable under national and international law.

<sup>3</sup> Salim A .N; 'International Crimes' in Max du-plessis (ed),African Guide to International Criminal Justice ( Institute for Security Studies Pretoria 2008),p-55

offence to be an international crime; rather it was the heinous and systematic in nature which elevates to a degree or became concern of international community.<sup>4</sup>

Because of an increase in the atrocities of such crimes, it necessitated for responding through criminal prosecution. Mostly, the idea of individual criminal responsibility under international scenario is associated with war crimes, crimes against humanity and genocide. Such crimes have been incorporated in various international instruments; so as to show the seriousness of these offences. The main features of international crimes as provided by Antonio.cassese are:-<sup>5</sup>

1. Violation of international rules or treaty provision which codifies custom.
2. The rules they intended to protect are values of international community.
3. It shows universal interest in repressing such offence and hence perpetrators can't go unpunished.
4. Perpetrators who acted in official capacity are precluded from claiming immunity, because of implied waiver.

Thus, since the title of this paper is all about the defense of head of state immunity in relation to international crimes, it is paramount to deal with the nature and meaning of such offence. Otherwise it would be difficult to compare the value of repressing such crime with the doctrine of head of state immunity.

Moreover, since the 'Derg' trial was mainly includes such offences it is crucial to discuss it. Furthermore, dealing with the meaning and scope of such offence would help to appreciate the uniqueness of Ethiopian Penal Code in such respect.

---

<sup>4</sup> Schabas (n 1 above)

<sup>5</sup> Antonia Cassese; International Criminal Law,( Oxford university press2003,p- 23 and 24.

## 2.2 Genocide

Genocide is one of the serious offences under international criminal law. It is mainly committed against certain group not in their own individual capacity rather, because they share something in common. Genocide is termed as the gravest of all offences that is why it is labeled as crimes of all crimes.<sup>6</sup>

### 2.2.1 Meaning

The mass killing by Nazi Germany had been a decisive moment for coining the crime of genocide.<sup>7</sup> The word “Genocide” was a hybrid of the Greek word ‘*genos*’ which means (race or tribe) and suffix ‘*cide*’ denotes killing.<sup>8</sup>

The term genocide was first described by a polish lawyer, Raphael Lemkin, in 1944 to refer for systematic plan of Nazi persecution of Jews and Gypsies.<sup>9</sup> For him genocide:

*“...doesn’t necessarily mean a destruction of a nation except when accomplished by mass killing of all members of a nation. It is intended to signify a coordinated plan of different actions aiming at the destruction of essential foundations of a national group with the aim of annihilating themselves... Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as a member of the national group.”<sup>10</sup>*

---

<sup>6</sup> Prosecutor v. Kambanda ( Appeal Judgement and Sentence) Case No. ICTR-97-23-5, Para 16.

<sup>7</sup> John.Q ; The Genocide Convention : An International Law Analysis, (Ashgate pub.Ltd, USA 2006) P-6

<sup>8</sup> Adam. J; Genocide: A comprehensive Analysis, ( Rout ledge Taylor and Francis, London and New York 2006) p-10

<sup>9</sup> Ibid, p-11.

<sup>10</sup> Ibid

Lemkin has carefully depicted genocide in that it doesn't essentially demand destruction of a nation as a whole instead systematic killing of persons belonging to a specific group with a view of wiping out the targeted group in total also constitute genocide. His classification has been reflected on subsequent laws and literature.

Another scholar by the name of Drost defined Genocide as:

“Deliberate destruction of physical life of individual human being by reason of their membership of any human collectively as such”<sup>11</sup>

Though this definition is similar with what Lemkin has described above its scope, however, seems broader because membership can be formed on various grounds like political or social consideration which didn't fall within the genocide Convention.

The authoritative definition of genocide as incorporated in both the Genocide Convention<sup>12</sup> and ICC Statute is:<sup>13</sup> “an act committed with intent to destroy, in whole or in part, national, ethnical, racial or religious groups” such as:-

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the groups;

---

<sup>11</sup> Adam. J (n 8 above) , p-14

<sup>12</sup>Convention on the Prevention and Punishment of the Crime of Genocide(adopted 9 Dec 1948, Art 2, G.A Res 260 A(III) ,U.N.T.S. 227(entered in to force 12 Jan .1951)

<sup>13</sup>The Rome statute of International Criminal Court, July 17 1998, UN Doc.A/CONF.183/9,37 ILM 1002(1998), *Corrected through Jan.16.2002*, Art 6.

- Forcibly transferring children of the group to another group;

Besides the aforementioned instances of genocide, there are similar punishable acts which fall within this category like public incitement to commit genocide, attempts, conspiracy and complicity.<sup>14</sup>

Other than the Genocide Convention, both the ICTY and ICTR instruments incorporate the above mentioned condemned acts. However, Article 6 of the ICC statute deals only with acts of genocide that actually materialized like physical and biological destruction. This raises an issue which is whether attempts to commit genocide, aiding and abetting are tacitly excluded from the statute. However, according to article 25 (3) c and f of the statute it seems to encompass such inchoate crimes. Though the heading of this provision deals with individual criminal responsibility it stipulated that facilitating or contributing, providing a means commit crime, aiding and abetting as grounds which give rise to prosecution. Thus, since the wording of the provision stated in general form, it could be interpreted as referring to genocide, crime against humanity and war-crime which are subject matter of the ICC Statute. Moreover, the ICC statute also accommodates 'direct' and 'public incitement' to commit genocide as separate offences having distinct provision<sup>15</sup>. The wording of both 'direct' and 'public incitement' creates confusion i.e. whether the phrase 'direct' by itself stands to constitute an act of genocide or refers to the nature of incitement? In order to appreciate this issue it is important to refer to the ICTR trial chamber decision in *Akayesu* case, which declared that:

“...the direct incitement to commit genocide implies that the incitement assumes a direct form (emphasis added) and specifically provokes another to engage in criminal act.”<sup>16</sup>

---

<sup>14</sup> Genocide Convention (n 12 above) article 3.

<sup>15</sup> The Rome statute (n 13 above) article 25(3) (e)

<sup>16</sup> Prosecutor v .Jean-paul Akayesu (Trial Judgment), case No-ICTR-96-4-T,2 Sept 1998,para 556-557

Thus, from the Trial Chamber interpretation the word ‘direct’ seems to refer to the kind of incitement which normally carried out through explicit declaration or inducement to commit genocide.

### **2.2.2 The Requirement of Intent**

One of the peculiarities of genocide is its ‘*dolus-specialis*’ or ‘Special intent.’<sup>17</sup> As the ICTR Trial Chamber noted special intent is deemed to exist when the offender clearly seeks to produce the result out of his act.<sup>18</sup> In other words, in committing the offence the perpetrator should have the requisite intent to wipe out the protected group either in whole or in part. Thus, logically speaking killing members of a group without having a motive of destroying the group at large to whom the victim belongs wouldn’t constitute genocide. Inferring ‘intent to destroy’ is a cumbersome exercise because perpetrators rarely signal their intention in explicit manner like what the Hutu extremist did in the Rwandans genocide.<sup>19</sup>

### **2.2.3 Protected Groups**

As discussed in the above section, the protected groups under genocide convention are based on race, nationality, ethnicity, and religion. Thus, the genocide convention as well as other international instruments doesn’t extend protection to members of a political party. As some literature revealed, during the drafting stage of the convention political

---

<sup>17</sup> Schabas;( n 1 above),p-38

<sup>18</sup> Akayesu case; (n 16 above ),Para 498

<sup>19</sup>.Barbara. H, No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1995, (Feb.2003) 97 *The American Political Science Review*,p-58.

group was included, however, the rejection of this idea by USSR and its allies causes to be strike from the convention.<sup>20</sup>

Besides political group, psychological and cultural harm resulted to a group which consequently lost their cohesion and identity but not their lives failed to be covered by the convention.<sup>21</sup> The crime of genocide includes only physical and biological destruction of the protected group,<sup>22</sup> but incase of cultural genocide no such harm can actually be realized. During the drafting stage, cultural genocide which is aimed at destruction of libraries, museums, schools, historical monuments and religious edifices were included but later on abrogated.<sup>23</sup> However, it should be noted that though “cultural genocide” alone doesn’t give rise to a crime of genocide, it is an important indicator to infer the intent of perpetrators.<sup>24</sup> In *kristic* case the ICTY Trial Chamber affirmed that attacks on cultural, religious and symbols of targeted group would legitimately be considered as evidence of intent to physically destroy the group.<sup>25</sup>

It should be noted that for a perpetrator to be accused of genocide, the protected group need not vanish in whole rather the perceived intention implies a lot. In the above cited case the accused was charged with genocide for killing almost one-fifth of Bosnian Muslims in area of Srebrenica.<sup>26</sup> According to the ICTY Trial Chamber, such figure represents a significant part of the group which falls with in the ambit of genocide.<sup>27</sup>

---

<sup>20</sup> Ibid.

<sup>21</sup> Ibid

<sup>22</sup> ....A Commentary on the Genocide Convention,(Jun.. 1949) 58 *Yale Law Journal* 7 ,p-1145.

<sup>23</sup> Ibid

<sup>24</sup> Prosecutor v. Radovan Karadzic and Ratko Mladic; Case No.ICTY-95-5-R61 and ICTY-IT-95-18-R61,11 July 1996,prra 98. see also Schabas( no 1 above),p-38.

<sup>25</sup> Prosecutor v. Radislav Krstic (ICTY Trial Judgement) Case No -IT-98-33-T,2 August 2001,para 580.

<sup>26</sup> Krstic,(n 25 above), Para 590.

<sup>27</sup> Ibid.

Recently, through interpretation, the scope of genocide seems extended. In *kristic case* the Trial Chamber held that execution of military aged men and women having a lasting effect on disappearance of two or three generation constitutes genocide.<sup>28</sup>

Furthermore, killing of persons deemed significant to their community such as leaders could also be taken as instance of genocide.<sup>29</sup> The approach of the ICTY Trial Chamber is based on the importance of such persons to the continued existence of ethnic or community group to which they belong. However, the writer of this paper believes that such interpretation contradicts with the Genocide Convention because it explicitly rejects leaders of political party.

### **2.3 Crime against Humanity**

Another category of core crime which has been the subject matter of the charter of various tribunal and ICC Statute is crime against humanity. Unlike genocide, there is no specific convention dealing with this crime but from the Nuremberg trial on wards it has been incorporated in various international tribunals.<sup>30</sup> Prior to the Nuremberg Charter, the idea of humanity had been reflected in the Hague convention and declaration of 1899 and 1907 which is known as Marten's clause.<sup>31</sup>

The Hague convention (II) of 1899 and (IV) of 1907 describes humanity in the following manner:

---

<sup>28</sup> Ibid, Para 595.

<sup>29</sup> Prosecutor v Sikirica et al, Judgment on Defense Motion to Acquit ( Case No. IT -95-8-I) 3 September 2001, Para 80. See also Schabas ( no 2 above)p-39 and 40.

<sup>30</sup> M Cherif Bassiouni, Introduction to International Criminal Law,(Transitional pub. Inc New York 2003),p-139.

<sup>31</sup>Faustin Z. N, Amnesty for Crimes Against Humanity under International Law, (Martinus Nijhoff pub.Boston 2007) p-42

“Prisoners of war are in the power of hostile government, but in that of the individual or corps who captured them. They must be treated humanely (emphasis added). All their personal belongings, except arms, horses, and military paper remain their property.”<sup>32</sup>

The notion of humanness was dictated by public conscience and civilization.<sup>33</sup> Soon after the massacre of 1.5 Armenian civilian by officials of Turkish Empire, the governments of Great Britain, France and Russia declared the atrocities as ‘Crime against humanity and civilization.’<sup>34</sup> Inspired by allied power, the 1919 Commission on Responsibility of War and Enforcement of Penalties defines crime against humanity as massacre of minority population.<sup>35</sup>

Though the 1920 peace treaty of Sevres was intended at making the officials of (Turkish Empire) responsible, it didn’t make explicit mention to crime against humanity as such.<sup>36</sup> Similarly, even if crime against humanity has been inculcated in almost all the charter of the tribunal, they didn’t begin with defining what it means other than listing instances which constitute such crime. In the absence of authoritative definition, we can resort to other subsidiary instrument. For instance, the international inquiry for Darfur defines it as:

---

<sup>32</sup> J.B Scott, The Hague Convention and Declaration of 1899 and 1907(1915); as cited in Fautin. Z N ( n 29 above) p-42.

<sup>33</sup> Faustin .Z. N ( n 31 above ),p-42.

<sup>34</sup> Ilias Bantikas and Susan Nash ; International Criminal Law, (2<sup>nd</sup> ed Cavendish pub. Ltd) London 2003, p-353.

<sup>35</sup> Lyal S.S, Individual Responsibility in International Law for Serious Human Rights Violation, (Martinus Nijhoff Publishers Boston), Vol.21, 1992,p-42.

<sup>36</sup> Ilias Banikas and Susan Nash (n 34 above)

“Odious offences constituting a serious attack on human dignity or a grave humiliation or degradation on one or more human beings”.<sup>37</sup>

Similarly the Secretary General of United Nation interpreted it as:

“...inhumane acts of very serious nature, such as willful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic or religious grounds.”<sup>38</sup>

Both definitions underlie the graveness of the offence, however, the latter one implies that crime against humanity can be committed when directed against civilians. With respect to its scope, significant change has undertaken to include members of resistance movement, and former combatants, to the extent they were no longer taking part in the hostilities or carrying arms.<sup>39</sup>

### **2.3.1 Nexus with Armed Attack**

There has been divergent views on the nature of crime against humanity i.e. are there a possibility of such crime be committed in time of peace or only exists when there is an armed attack? As mentioned earlier it was the Nuremberg Charter which gave recognition of such inhumane acts as punishable from which the subsequent tribunal applied similar suit. A good example of such includes, the ICTR decision on *prosecutor v Kambanda*

---

<sup>37</sup> International Commission of Inquiry on Violation of International Humanitarian Law and Human right in Darfur (report) UN.Doc.S/2005/60; Para 178.

<sup>38</sup> Security council Res 808 S/25704 , Para-91.

<sup>39</sup> Prosecutor v. Tihomir Blaskic (ICTY Trial judgment), Case No. IT-95-14-T, 3 March 2000, Para 214.

confirmed that crime against humanity as stipulated in Nuremberg tribunal constitute violation of international law.<sup>40</sup>

The weakness of the Nuremberg charter is mainly such crime can only exist when associated with war crimes.<sup>41</sup> The jurisprudence of the Nuremberg tribunal is that crime against humanity alone wouldn't give rise to prosecution rather there should be nexus with armed conflict. This approach was later on abandoned by the ICTY Chamber stating that customary international law doesn't require a connection between crime against humanity and war crime.<sup>42</sup> Similarly, Schabas argued that customary international law covers atrocities committed during peace time,<sup>43</sup> even though he fails to indicate the presence of such practices.

### **2.3.2 The Characteristics of the Crime**

The objective criterion of crime against humanity is that the attack must either be 'widespread or systematic' in nature. The idea of widespread can be seen in terms of being massive, frequent, large scale action carried out together with considerable degree of seriousness and causes multiplicity of damage on victims.<sup>44</sup> The systematic nature; however, refers to a pattern of an organized nature and its improbability or non-accidental occurrence.<sup>45</sup> Thus, crimes against humanity required quantitative dimension i.e. usually

---

<sup>40</sup> Prosecutor v. Kambanda (ICTR Appeal Judgment and Sentence), Case No ICTR-97-23-S, 4 Sept 1998, Para 15.

<sup>41</sup> Schabas ( n 1 above),p-42.

<sup>42</sup> Prosecutor V. Dario Kordic and Mario Cerkez (ICTY Trial Judgment), Case No IT-95-14/2-T, 26 Feb 2001, Para 23.

<sup>43</sup>Schabas ( n 1 above ) p-43.

<sup>44</sup> Akayesu ,( n 16 above ) Para 579.

<sup>45</sup> Ibid, Para 580.

practiced with preparation in advance made and committed in large scale.<sup>46</sup> Consequently, if the perpetrator didn't have knowledge or unaware of his action to be widespread or systematic nature he/she wouldn't be convicted from crime against humanity.<sup>47</sup>

One interesting point worth mentioning is that contrary to Genocide Convention political groups are protected under crime against humanity. For instance the ICC Statute<sup>48</sup> and the charter which established the Tokyo Tribunal<sup>49</sup> incorporate killing of identifiable group on political basis. From this it can be implied that the incorporation of political group under crime against humanity seems to give less emphasis than other groups protected by genocide convention. However, the mere fact that political group excluded from Genocide convention doesn't mean persecution of members remains un-punished by law.

## **2.4 War Crimes**

War crime is viewed as oldest forms of crime compared to other offences mentioned above.<sup>50</sup> It is committed in contravention to international humanitarian law. Both Hague Convention and Geneva Convention laid down rules concerning behavior prohibited during armed conflict.<sup>51</sup> The judgment for Nuremberg tribunal recognized that war crime as stated in the Charter emanates from Hague Convention of 1907 and Geneva

---

<sup>46</sup> Ibid. See also Schabas (n 1 above) p- 192.

<sup>47</sup> Schabas (n 1 above), p 29-30.

<sup>48</sup> The Rome statute (n 13 above), article 7 (1) (h)

<sup>49</sup> Charter of the International Military Tribunal for Far East, 1946, article 5(c).

<sup>50</sup> Schabas (n 1 above) p-51.

<sup>51</sup> Salim. A (n 3 above) p-73.

Convention of 1929.<sup>52</sup> For an act to constitute war crime the following conditions have to be met. These are provided as follows:<sup>53</sup>

- i. It infringes a rule of international humanitarian law;
- ii. The breached rule of customary in nature or treaty law;
- iii. The violation should be 'serious' which breaches an important value or must involve grave consequence;
- iv. Such contravention entails individual criminal responsibility.

The requirement envisaged in no. i and iii has to be seen altogether because the latter one intends to clarify the nature of violation which has to be serious one or undermines the core values of humanity. Moreover, the above pre-conditions implied that not all violations of humanitarian law give rise to war-crime. Further more; committing such offence incurs criminal responsibility with out making any exception on its application.

The category of war-crime as stipulated in article 6(b) of the Nuremberg Tribunal comprises 'murder, ill-treatment of prisoner of war or on the sea, plunder of public and private property, wanton destruction of cities, towns and villages or devastation not justified by military necessities.' These types of offences have been accommodated in the subsequent ad-hoc tribunal as well as in the ICC statute in detailed manner.<sup>54</sup>

What makes war crime distinct from genocide and crime against humanity is that the latter two envisage jurisdictional threshold or qualitative restriction which is absent in the

---

<sup>52</sup> William. A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press UK 2006), P-227.

<sup>53</sup> *Prosecutor v. Dusko Tadic (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)* ICTY-IT-94-1, 2 Oct 1995, Para 94.

<sup>54</sup> The Rome statute (n 13 above), article 8(2) (a)(iv),( b) (ii) and (v).

former one.<sup>55</sup> As seen in section 2.3.2 crimes against humanity has to be ‘widespread and systematic’. Similarly; genocide demands specific intent to destroy the protected group. However; in case of war crime even an isolated act committed by a soldier could constitute war crime.<sup>56</sup>

Further more; the existence of armed conflict is a pre-requisite in case of war crime.<sup>57</sup> This is one peculiarity of war crime when seen in relation to genocide and crime against humanity because in the latter two cases mass atrocity can happen during peace time. With respect to the scope of application, war crime is not confined to international armed conflict only; rather it can also be applied to internal armed conflict.<sup>58</sup>

## **2.5 Conclusion**

International crimes are those categorized as serious offences which offend human dignity and demand international cooperation in repressing it. More over; it entails international accountability, and hence persons who acted in official capacity deemed as impliedly waived their immunity from prosecution. Most of the multi-lateral conventions dealing with such offences envisage state parties to prosecute offenders; irrespective of any link or to extradite to other states.<sup>59</sup> Among these offences the main ones are: genocide, crimes against humanity and war-crimes.

---

<sup>55</sup>Schabas (n 1 above) , p- 54.

<sup>56</sup> Ibid, p-55.

<sup>57</sup>Schabas (n 52 above),p 229.

<sup>58</sup>. Prosecutor v. Miroslav Kvočka et al (ICTY Trial Judgement) IT-98-30/1-T, Para 123.

<sup>59</sup> Claire Mitchell, *Aute Dedure, aut Judicare: The Extradite or Prosecute Clause in International Law*, The Graduate of Institute/ Geneva Pub, no.2, 2009,p-5

Genocide is the crime of all crimes because it aimed at wiping up in part or in whole of particular groups. Besides; what make genocides unique from other categories of crime is it requires specific intent or '*dolus specialis*'. Other than the genocide convention, all the charter which established the specific tribunal accommodates it as distinct crime. Under genocide the specific groups protected are mainly on basis of race, nationality, ethnic and religion. And hence; political groups has been tacitly excluded from the scope of protection.

Another category of crime similar with genocide is crime against humanity. Unlike genocide; political groups are protected by virtue crime-against humanity. For an act to be termed as crime against humanity it has to be committed wide spread and systematic in nature.

War crime is part of international crimes which originated from the Hague convention. Normally war crimes have been committed against protected person during armed attack. However, its scope has been broadened to include areas beyond the specific place where by hostilities exists.

<b>CHAPTER TWO</b> .....	8
<b>Serious Crimes Under International Law (Genocide, Crime against humanity and War-crimes)</b> .....	8
<b>2.1 Introduction</b> .....	8
<b>2.2 Genocide</b> .....	10
<b>2.2.1 Meaning</b> .....	10
<b>2.2.2 The Requirement of Intent</b> .....	13
<b>2.2.3 Protected groups</b> .....	13
<b>2.3 Crime Against Humanity</b> .....	15
<b>2.3.1 Nexus with Armed Attack</b> .....	17
<b>2.3.2 The Characteristics of the Crime</b> .....	18
<b>2.4 War Crimes</b> .....	19
<b>2.5 Conclusion</b> .....	21

## Chapter Three

### The Doctrine of Head of State Immunity under International Law and its Applicability against Criminal Prosecution.

#### 3.1 Introduction

Head of the state immunity is a privilege accorded to a representative (ruler) of a state for a purpose of discharging official acts. It refers to avoidance of exercise of jurisdiction and refusal to assure enforceable claim.<sup>1</sup> Originally; head of state assumed absolute immunity; however, later on states tend to make distinction between personal acts and *acts-jure imperii*. The rationales of granting immunity are:-<sup>2</sup>

- i) Extraterritoriality which is conferred on diplomats in fulfilling their mission free of any control,
- ii) Representative theory pre-supposes a leader as personifying the sending state,
- iii) Functional immunity to enable representative discharges their official duties.

The doctrine of immunity was recognized in the Vienna-Convention on Diplomatic Relations. Moreover, the concept has been impliedly in article 2(1) and 2(4) of UN charter which affirm for sovereign equality and prohibition of interference on the affairs of a state. It is on basis of such notion; head of state immunity is founded. However; the scope of immunity and the duration where by head of state enjoys immunity remains unsettled area in international law.

---

<sup>1</sup> International Law Commission on Immunities of State Official from Foreign Criminal Jurisdiction (report), UNGA, A/CN.4/596, March 31/ 2008, Para 14.

<sup>2</sup> Ibid, Para 20-23.

Moreover, there is conflict of interest between preserving societal norms by prosecuting those committed international crimes such as genocide; crime-against humanity and war crime vis-à-vis the doctrine of immunity.

Other than international law, there are domestic cases and laws which provide head of state immunity, but, this cases and laws are based on political and policy considerations. Thus, there is divergent practice on granting immunity for head of state at domestic level; but at international sphere it weighs little.

This chapter provides a brief illustration on the concept and rationale of head of state immunity; and the existence of limitation if any. Moreover, its application both at domestic and international level will be evaluated.

### **3.2 Meaning**

The origin of head of state immunity has developed from the notion of state sovereign immunity which traditionally was conceived both as indivisible.<sup>3</sup> The term ‘immunity’ is used in different ways connoting similar meaning. Black’s law Dictionary defines it as:-

“Any exemption from a duty, liability, or service of process especially, such an exemption granted to a public official.”<sup>4</sup>

From this definition we can infer that the beneficiary of such privilege became natural persons (officials) excluding legal entities such as state. However, state as a distinct entity enjoyed absolute territorial immunity from civil and criminal suit.<sup>5</sup>

---

<sup>3</sup> Michael A. T; Diplomats or Defendants? Defining the Future of Head of state Immunity (Dec., 2002)52 *Duke Law Journal* 3, p 652. See also Peter E.Bass ,Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy (Dec.,1987) 97 *The Yale Law Journal* 2, p-300. The writer conveys similar idea with Michael. A. T in that state immunity and Head of state immunity was taken as one and the same.

<sup>4</sup> Bryan A Garmer, Black’s Law Dictionary( 7<sup>th</sup> ed 1997) p-752 and 3

It can also be defined in terms of rights i.e. legal rules and principles used to determine conditions by which a state may claim freedom from jurisdictions (the legislative, judicial and administrative power of another state.)<sup>6</sup> This definition provides a state with broader rights for it exonerates not-only before a court suit but also from legislative and administrative entities.

Furthermore, Lord-Browne Wilkinson in the *Pinochet case* affirmed that state immunity is:-

“A basic principle of international law that one sovereign state (the forum state) doesn’t adjudicate on the conduct of another state.”<sup>7</sup>

According to him the concept of immunity has been extended both to civil liability and criminal prosecution without any restriction to be imposed. Similarly, the ILC Rap porter defines it as:-

“Legal relationship which confers a right for the state officials not to be subject to foreign criminal jurisdiction and corresponding obligation upon foreign state”<sup>8</sup>

From this statement, one can deduce that immunity encompasses both negative and positive obligation. By negative duty it means that states should refrain from exercising

---

<sup>5</sup> Ilias Bantikas and Susan Nash ; International Criminal Law, (2<sup>nd</sup> ed Cavendish pub. Ltd) London 2003, p-165

<sup>6</sup> Akehurst’s; Modern Introduction to International Law, (17<sup>th</sup> ed) (Rout ledge Taylor and Francis group, London 1997,p-118

<sup>7</sup> Lord Brown-Witkinson as cited in Craig F; De-Immunizing Torture: Reconciling Human Right and State Immunity (2007)52 *Mcgill Law Journal*, p-132.

<sup>8</sup> Immunity of State Officials from Foreign Criminal Jurisdiction, fifty-ninth session, 2007 accessed on untreaty.org, visited on August 25/2009 at 2:40 pm, Para 284.

jurisdiction where as positive obligation required states to take measures to prevent breaches of immunity.<sup>9</sup>

Practically speaking, the word immunity can be equated with privilege because when a diplomats or head of state conferred with immunities, it implied that he/she is privileged from being subject to a prosecution in foreign court.

### **3.3 Justification**

Normally, immunity was accorded for head of state to achieve certain goals. The basic ones are:-<sup>10</sup>

- I. To give respect for foreign leaders as a symbol of their states.
- II. To ensure that they are not inhibited in performing their diplomatic function.

As discussed in the introductory part of this chapter, the legal basis for granting head of state immunity is both the Vienna Convention for Diplomatic Relations and the UN Charter. Besides, the Vienna convention on Consular Relation<sup>11</sup> and New York Convention on Special mission<sup>12</sup> gives a clue on the customary nature of extending immunity and privileges for diplomats or persons in charge of special mission. Traditionally, granting immunity to a sitting head of state is recognized principle of international law.<sup>13</sup>

In this respect the Vienna Convention reads as follows:-

---

<sup>9</sup> Ibid.

<sup>10</sup>Michael A.Tunks ( n 3 above),p-654.

<sup>11</sup> Vienna Convention on Consular Relations, adopted on 24 April 1963, UNTS Vol.596.p-261,(entered in to force on 19 March 1967.

<sup>12</sup> New York Convention on Special Mission, adopted Dec 1969 G.A, UNTS 1400,P 231,entered in to force 21 June 1985.

<sup>13</sup> ...;Head of State Immunity for Former Chinese President Jiang Zemin ,(oct.,2003)97 *American Journal of International Law* 4,p-976

“ A diplomatic agent shall enjoy immunity from criminal jurisdiction of the receiving state.”<sup>14</sup> Similar idea was inserted on article 31, Para 1 of convention on Special Mission.

Further more the New York Convention reiterates that head of government, minister for foreign affairs, ambassadors and other high ranking officials when they are in special mission, the receiving state as well as the third state are required to provide facilities, privilege and immunities.<sup>15</sup>

Though most of the convention referred above mainly applies for ministers or high ranking officials, the privilege contained can also extended to head of states. The writer of this paper believes that immunity of an ambassador could be taken as lower set for head of state which have more representative character of a state than the ambassador in terms of subject matter, time, and geographical sphere. In this regard Sir Arthur Watts declared that:

“The consideration that a legal position of a state’s ambassador affords at least a minimum standard for that of the head of state is weighty; in many respects of the head of is an a fortiori case.”<sup>16</sup>

Similarly, in view of the ILC’s position the above statement could mutatis mutandis apply for head of state.<sup>17</sup> Thus, head of states by representing or being a symbol of his state it becomes justified to confer immunity as provided in various conventions.

---

<sup>14</sup> Vienna Convention on Diplomatic Relations, adopted on 18 April 1961, Art 31(1) UNTS Vol. 500, p-95, entered in to force on 24 April 1964.

<sup>15</sup> New York Convention on Special Mission ( n 12 above), article 21.

<sup>16</sup> Watts as cited in J. Craig; The Future of Former Head of state Immunity after Ex-parte Pinochet (Oct., 1998 )48 *The International and Comparative Law Quarterly* 4,P 939.

<sup>17</sup> ILC report on Immunities from Criminal Jurisdiction ( n 1 above), Para 183. Arrest warrat case ( n 27 below) the court noted immunity of the ministers for foreign affairs could easily extended to head of states,

The second stated goal corresponds with the principle of non-intervention. The doctrine of non-intervention is reflected in both the UN Charter of article 2(4) and the UN General Assembly Declaration on principles of International law concerning friendly relation and co-operation. Scholar like Illias Bantikas and Susan Nash hold extreme position arguing that non-intervention precludes states from consideration of criminal liability even for gross violation of human right.<sup>18</sup>

The notion of immunity underlies respect for nation's sovereign equality and prevents other state from invoking their judiciaries to influence other state's legitimate political matter.<sup>19</sup> States policy demand that head of state to be exonerated from "harassment through litigation" in forum courts.<sup>20</sup> Thus, it would be in an inverse of this principle, if court of one state adjudicates the liability of other state officials.

Denying head of state immunity may restrict presidential or head of state responsibilities to discharge its constitutional responsibility and undermine the dignity of the state he represented.<sup>21</sup> Though the principle of sovereignty and state equality directly refer to the state as an entity, its effect goes to the head of state or diplomats who acts on its behalf. In this respect sir Arthur Watts pointed out that:

"In many respects the state could almost seen as the property of its ruler and to considerable degree the rulers personal attributes of sovereignty

---

because his representative character is not conditioned to accreditation by any receiving state and is opposable to all third state.

<sup>18</sup> Illias Bantikas and Susan Nash (no 5 above),170.

<sup>19</sup> Craig F ( no 7 above). See also I.Bantikas and S. Nash (no 5 above), p-165 stated that adjudication of a case by domestic court would raise policy involvement on other state.

<sup>20</sup> Edwin D.D, Waiver of State Immunity, (Jul., 1925) 19 *The American Journal of International Law* 3, p-555.

<sup>21</sup> ( n 12 above).

which gave his state the quality of being a sovereign state, rather than the other way round.”<sup>22</sup>

The above statement implies that immunity for head of state is justified by his/her personification of state which mayn’t be applicable for other state officials. Thus, granting immunity to state in exclusion of head of state would remain in-effective.<sup>23</sup> The logic behind is clear i.e. if a law concerning immunity gave no protection to officials, states could easily circumvent by prosecuting head of state directly instead of state.

Moreover, examining the conduct of official was considered as non-justiciable.<sup>24</sup> Non-justiciable act normally required political consideration and can’t be adjudicated through courts. Thus; when executive branch confers immunity for head of state; courts should decline from assuming jurisdiction.<sup>25</sup>

### **3.4 Types of Immunity**

International law provides two distinct categories of immunity which are functional and personal immunity.<sup>26</sup>This form of dichotomy has been applied in the *arrest warrant case*

---

<sup>22</sup> Craig F ( n 7 above)

<sup>23</sup>Steffen wirth: Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium case (2002)13 *European Journal International Law* 4,P-882. ILC report (no1 above) Para-28, noted that state immunity and head of state or government immunity as closer in meaning by underlying that the former one emanates from the latter. According to ILC, head of state immunity originated in 17<sup>th</sup> century, however, state immunity as developed in 19<sup>th</sup> centuries from the concept head of state immunity i.e. the king personifies his state.

<sup>24</sup> Malcolm N.Shaw, *International Law*, (6<sup>th</sup> ed Cambridge university press New York 2008), p-699.

<sup>25</sup>Ibid.

<sup>26</sup> Antonio Cassese, *International Criminal Law*, (Oxford university press 2003), p265.

(Congo v. Belgium).<sup>27</sup>The rationale for making such distinction is to discourage state official (head of state) from invoking immunity for acts which are personal in nature.

Similarly, various literatures use such classification without making precise meaning or attribution which makes distinct from other category. Discussing both kinds of immunity became crucial for it highlights on the scope of application immunity and delimit acts if any which are exceptions to the rule of immunity.

### **3.4.1 Immunity *rationae personae***

Personal immunity is also known as immunity *rationae personae* or procedural immunity.<sup>28</sup>It is attached to the person and provides him protection from legal process irrespective of the nature of act committed.<sup>29</sup>

Conceptually an immunity *rationae personae* advocate's absolute immunity with no distinction to be applied between private and official acts. In earlier times officials of state like head of state were absolutely immune for all acts they committed; later on states tend to differentiate between private and official act<sup>30</sup>. As pointed out by Cassese the basic peculiarity of personal immunities are:<sup>31</sup>

---

<sup>27</sup> Case concerning the arrest warrant of 11 April 2000(Democratic Republic of Congo v. Belgium) International Court of Justice 14Feb 2002, Para 51.

<sup>28</sup> Ronald Slye; 'Immunities and Amnesties' in Max du-plexis (ed),African Guide to International Criminal Justice ( Institute for Security Studies Pretoria 2008), p-182

<sup>29</sup>Ibid. See also Verhoven, Joe as cited in ( n 2 above),p-92.Verhoven was a "Rapport provisoire" institute de droit international on immunities from jurisdiction and execution of head of State and Government in international law, reflect his view that incumbent head of state enjoy absolute immunity from criminal jurisdiction.

<sup>30</sup>Michael. A. T ( n 3 above), p-655.

<sup>31</sup> Cassese ( n 26 above), p 266.

- i. It relates to procedural law. By procedural law it prevents the state and courts from exercising or having control over officials.
- ii. It grants total inviolabilities because it covers both official and private acts.
- iii. It protects certain categories of persons like head of state, head of governments and foreign ministers.
- iv. It may not be regarded as *erga-omnes*. It means that it binds only the sending and receiving state and the third state through which the official travels.

The main issue raised in relation to such type of immunity is as to what constitutes 'private acts' and to what extent officials can rely on it i.e., is it applicable during his office only or can it be extended before his post?

In most literatures or cases relating to immunity, though immunity *rationae personae* is equated with private acts they failed to indicate instances which could be considered as such. M. Shaw<sup>32</sup> and I. Bantikas<sup>33</sup> pointed out commercial transactions as private act, and hence it wouldn't be considered as attributes of a state. Similarly, the ICJ in the *Arrest Warrant case* seems to envisage that private acts are those done for personal benefit and don't have customary law basis.<sup>34</sup>

Still the issue is not clear because even the views of the above scholars and the decision of the court begs another question i.e. could commission of crime be considered as personal benefit? In other words should a motive to get personal benefit required to be proved so as to conclude the act as private one or a mere commission of a crime suffice as private act?

---

<sup>32</sup> Shaw (n 24 above), p 701.

<sup>33</sup> I. Bantikas and S. Nash (n 5 above), p-170.

<sup>34</sup> Arrest warrant case (n 27 above), Para 53.

Similarly, in *Pinochet case* Lord Steyn contended that to act beyond the power conferred with would constitute ‘private crimes’<sup>35</sup> which is equivalent to private acts done for personal benefits. But the writer of this paper believes that such kind of approach avoids the possibility of drawing a line between acts of crimes for which immunity continues to exist and those which don’t have. If we thought that for head of state to get such privilege it should always act according to his power, theoretically nothing wrong would happen and the issue immunity became insignificant. Consequently, there is no need of extending immunity for acts done with in scope of its power since no state will authorize its head or officials to commit international crime.

With respect to the duration of its applicability the *arrest warrant case* has noted that the act in question should be committed either before or while assumes his/her office.<sup>36</sup>The reason behind inclusion of both before and at the time of office is to enable head of state or diplomats continue to exercise its function at least during the period of his office.

As mentioned in the introductory of this section personal immunity is temporary or procedural in nature, and hence head of state are not totally immune from prosecution. Thus; it logically follows that as soon as the head of state leaves his post he no longer enjoys immunity, rather he would be accountable for what he/she did during his tenure.

### **3.4.2. Immunity *rationae materiae***

Immunity *ratinae materiae* is another form of immunity which is also termed as subject matter of immunity.<sup>37</sup>Unlike the earlier, this one is aimed at protecting government acts of one state from being examined in the other state.<sup>38</sup>Thus, in theory the focal point of protection is the state not individuals, and hence it incidentally confers immunity for head

---

<sup>35</sup>Pinochet Ugrate (Amnesty International and other Intervening), on Appeal from a Divisional Court of the Queen’s Bench , 25 Nov 1998, [accessed on mneumann.tripod.com](http://mneumann.tripod.com), Sept 17/2009, at 3:13 am, p-38

<sup>36</sup>Arrest warrant case (n 27 above), Para 54-55.

<sup>37</sup> I. Bantikas and S .Nash (n 5 above), p-168.

<sup>38</sup> Ibid.

of state.<sup>39</sup> The proper meaning of an ‘official act’ is acts committed for official purpose.<sup>40</sup> Thus, acts done for the benefit of a state could fall within the ambit of official act.

The ICJ in *Djibouti v. France* case defined official act as: “acts within the scope of the duties of officials concerned as organ of state”<sup>41</sup>. Unlike personal immunity, this form of immunity is characterized by:<sup>42</sup>

- i) It relates to substantive law. For any wrong-doing on the part of officials the state would be answerable to it.
- ii) It covers only official acts.
- iii) It continues to exist even after discharge of official functions.
- iv) *Erga-omnes* in nature for it binds all states (it could be invoked towards any other state).

When we scrutinize the above elements it can be deduced that functional immunity confers broad protection on the head of state since it subsists after his post and binds all states not to prosecute. With regard to the duration of protection A. Watts provided that:

“a head of state’s official acts performed in his public capacity as head of state rather than the head of state’s personal acts and he can’t be sued for them even after he ceased to be head.”<sup>43</sup>

Similarly, in the *Arrest Warrant case*; Belgium has accepted the existence of immunity for ministers and head of state concerning official acts.<sup>44</sup> Thus, unlike personal immunity

---

<sup>39</sup> Ibid.

<sup>40</sup> S. Wirth (n 23 above) p -891

<sup>41</sup> Case Concerning Certain Questions of Mutual Assistance in Criminal Matters ( Djibouti v. France), Judgment of 4 June 2008, available at: [www.icj-cij.org](http://www.icj-cij.org), visited on Feb 25/ 2010. 10:23 am, Para 191.

<sup>42</sup> Cassese (n 26 above), p-266.

<sup>43</sup> Watts as cited in J. Craig (n 16 above), p- 940.

<sup>44</sup> Arrest warrant case (n 27 above), Para 57.

there is no controversy on the continuation of immunity *rationae materiae* even after an official leaves from his post. This is one distinguishing feature of functional immunity from the previous type.

Further more, the Vienna Convention on diplomatic relation also affirms the cessation of immunity and privilege during the end of his office except for official acts.<sup>45</sup> In the *Arrest Warrant case* the court declared that no exception can be applied to immunity. However; the prevailing understanding among writers and judicial decision at international and domestic level shows the existence of limitation even in cases functional immunity.<sup>46</sup>

The crucial issue concerning immunity *rationae materiae* is its scope and how to draw a line whether an act falls in *rationae personae* and *rationae materiae* ?

Normally making distinction between the two categories especially by listing instances which fall in either one of them is a cumbersome and there is no consensus among commentators. The Articles on State Responsibility for Wrongful acts failed to indicate the criteria whether conduct of state organ qualifies as state function or not.<sup>47</sup> According to article 7 of the text *ultra-vires* acts would make the state internationally liable.<sup>48</sup> From this it can be inferred, eve wrongful acts are considered as attributes of state. In contrast to the above, the Institute de droit International emphasize on the motive to commit an act.<sup>49</sup> According to article 13 of this instrument acts exclusively performed to satisfy personal interest would be an exception to immunity. Thus, if officials like head of state commit certain act with view of personal benefit, the act would fall as private ones.

---

<sup>45</sup> Vienna Convention on the Diplomatic Relations ( n 14 above) Art 39(2).

<sup>46</sup> Bianchi as cited in S.Zappala ( n 81 below),p-159.

<sup>47</sup> ILC report on Immunities from Criminal Jurisdiction ( n 1 above),Para 153.

<sup>48</sup> Articles on Responsibility of State for Internationally Wrongful acts, with commentaries, in Year book of the International Law Commission, 2001,Vol.II, article 7.

<sup>49</sup> Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, adopted by Institute at its Vancouver Session in 2001,Vol.69(2000-01), article 13-14.

In *Furundzija* case the ICTY trial chamber noted that grave breaches of international law can never be taken as official act to confer immunity.<sup>50</sup> Similarly, in Pinochet case the House of Lord's affirmed that functional immunity didn't include the commission of torture. Thus, on the basis of the above decision it could be argued that core crimes like genocide, crime against humanity and war-crime are beyond purview of immunity *rationae materiae*. Besides, Judge Higgins, Kooijmans and Buergenthal in the *arrest warrant* case argued that grave breaches have international character (*jus-cogens* norms) which prevail over others.<sup>51</sup> Thus, since combating core crimes reflect the interest of international community it wouldn't be considered as official acts.

### **3.5 Immunity of Head of State before National Court**

In both domestic and international level several state officials appeared in trial. Those officials mainly consist of commander in chief, head of state and minister invoked the defense of state immunity. Thus, in this section the writer of this paper discusses with selected cases which have significance to the contemporary understanding of the doctrine. The first section proceeds with the experience of US and UK and other domestic cases dealing with immunity. The second section touches up on international scenario like ICJ and international tribunal facing similar issue.

#### **3.5.1 American Experience**

Countries which adhere to common law system have adopted statute on immunities.<sup>52</sup> A peculiar example of such is United State of America and UK. In U.S until 1952, head of state performing 'official act' enjoys broad immunity.<sup>53</sup> Later on in 1976 the congress

---

<sup>50</sup> Prosecutor v. Furundzija, (ICTY Trial chamber Judgment), Case No.IT-95-17/1-T; Para 148.

<sup>51</sup> Joint Separate Opinion of Judge Higgins, Kooijmans and Buergenthal, arrest warrant case( n 27 above), Para 78.

<sup>52</sup> Akehurst's (n 6 above),p-118.

<sup>53</sup> Peter E.B; Foreign Ex-Head of State Immunity: A Proposed Statutory Tool of Policy, (Dec., 1987)97 *The Yale Law Journal* 2, p-300.

issued Foreign State Immunity Act (FSIA) and provided exceptions like waiver of immunity, commercial and property claim among other thing.<sup>54</sup>

Since the enactment, courts don't solely depend on the instrument rather they consult and adhered to the suggestion of state department.<sup>55</sup> In *Republic of Philippines v. Marcoses*, the ninth circuit ruled that the defendant was not entitled to immunity.<sup>56</sup> During his presidency up to 10,000 Philippines were allegedly tortured, executed and disappeared.<sup>57</sup>

The court noted that immunity should be applied in restricted way and ruled that the act of Marcos's during his incumbency violate basic human right.<sup>58</sup>In light of the court reasoning such acts are private ones, and hence immunity is disallowed. Besides the above, the court also takes in to consideration the revocation of immunity by the Philippines government.<sup>59</sup>

According to the FISA, one exception to the rule of immunity is waiver by the sending state.<sup>60</sup> It is difficult to deduce whether the decision of the court could be different had Philippines revoke its immunity. However, from the stand point of the court the issue of head of state immunity seems over for it declared former head of state couldn't shield from international accountability for violation of human right norm. Thus, the position of Philippines became immaterial. The approach of the court is consistent with the concept of immunity *personae* in that it gives protection until the head of state is in his office.

---

<sup>54</sup> United State Foreign Immunity Act of (1976), 1330, 1602, and 1611.

<sup>55</sup> Peter E.B (n 53 above), p-301.

<sup>56</sup> In re Estate of Ferdinand Marcos, Human right litigation Maximo Hilio and et al v. Marcos,25 F.3d 1467( ninth circuit 1994)

<sup>57</sup> Ibid, Para 2.

<sup>58</sup> Ibid, Para 26.

<sup>59</sup> Ibid, Para 27.

<sup>60</sup>FISA (n 54 above) art 1605

Similarly, in *US v. Noriega*, the Eleventh circuit noted that for head of state to avail immunity it has first to be recognized as legitimate and constitutional ruler of its country.<sup>61</sup> Initially Noriega was de-facto ruler of Panama, but later on ousted by US through invasion of the country.<sup>62</sup> During the proceeding the defendant raised immunity; however, Panama has waived immunity.<sup>63</sup>

From this decision it is implied that had US accepted Noriega as a legitimate leader, the court couldn't assume jurisdiction on him. Moreover; since immunity is an attributes of a state; the relinquishment of such right by Panama government impliedly authorizes the court to examine the case.

Finally, the Zimbabwe president Robert Mugabe on his visit to US for Millennium summit<sup>64</sup> was served with law suit for alleged violation of human right such as torture, and execution of political opponent.<sup>65</sup> The district court upon recommendation the executive branch dismisses the case<sup>66</sup>. The government declared that denying immunity to head of state would be inconsistent with American policy and violates international law<sup>67</sup>. The US government states that leave alone prosecuting head of state issuing a warrant to be circulated by the court invades the jurisdiction of the executive organ.

---

<sup>61</sup>United States v. Noriega, 117 F 3d 1206 (Eleventh Circuit, 1997), Para 10

<sup>62</sup> Ibid, Para 2.

<sup>63</sup> Ibid.

<sup>64</sup>Linda M.K; partial victory for Zimbabwe president Mugabe in U.S litigation for alleged Violation of human Right Violation, (2002) American society of International Law, accessed on [www.asil.org/insigh83.cfm](http://www.asil.org/insigh83.cfm) visited on September 25/2009 5:30 pm, p-1.

<sup>65</sup> Tachiona et al v. Mugabe, 386 F .3d 205 (second circuit 2004), Para 7

<sup>66</sup> Ibid, Para 11.

<sup>67</sup> Ibid, Para 18.

### 3.5.2 U.K

U.K is another common law country which enacted a Foreign Immunity Act. Similar with United State, the immunity Act stipulates instances where foreign state denied of such privilege.<sup>68</sup> Prior to the enactment of 1978 immunity Act, it adopted the 1964 Act concerning immunities of head of state with little modification of the Vienna convention of 1961.<sup>69</sup>

In U.K there was a famous case relating to head of state immunity i.e. the Pinochet case. The decision of court was un-precedent because no head of state was tried in domestic trial of UK. Moreover, the Pinochet case was a land mark because the reasoning applied was taken in later cases at national and international level as evident of state practice.

In October 1998, Augusto Pinochet former general and dictator of Chile was arrested in London at the request of Spain Magistrate.<sup>70</sup> He was alleged of committing or permitting torture, disappearance of Chilean, Spain and other citizens.<sup>71</sup> The divisional court quashed the application and rejects the extradition proceeding believing that the defendant is immune from U.K jurisdiction.<sup>72</sup> The court ruled that the seriousness or gravity of a crime don't bar immunity.<sup>73</sup>

On appeal by the Spanish government the House of Lord by majority vote reversed the decision arguing that ex-head of state enjoys no immunity for acts of torture committed

---

<sup>68</sup>State Immunity Act of UK, 1978, Sec.3.1

<sup>69</sup> J. Craig (n 16 above), p-939.

<sup>70</sup> Michael. Byers, The Law and Politics of the Pinochet Case, (March 2001) 10 *Duke Journal of Comparative and International Law* 2, 415.

<sup>71</sup> In re Pinochet; (House of Lords) opinion of the Lords of Appeal for Judgment in the Cause accessed on [www.parliament.uk](http://www.parliament.uk), visited on Sept 23/2009 5:25 am.,p-2.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

after the torture convention came in to effect<sup>74</sup>. The majority of the House assumed the ratification of the torture convention by Chilean government implies revocation of immunity.<sup>75</sup>

The implication of the judgment is clear i.e. immunity can only exist for official act, but in case of torture and other international crime no protection could be extended. From the House of Lord's interpretation it can implied that if torture deemed to waive immunity, this notion could for stronger reason apply to crime against humanity, war crime and genocide which have an international character. Thus, seeking accountability for head of state doesn't infringe state sovereignty since such act couldn't be justified as function of state.<sup>76</sup>

What makes international crime distinct from official act has been addressed by Lord Steyn in Pinochet case as follows:<sup>77</sup>

“Negatively the development of international law since the second world war justifies the conclusion that by the time of the 1973 coup d’etat, and certainly ever since, international law condemned genocide, torture, hostage taking and crime against humanity (during an armed conflict or in time of peace) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the function of a head of state.”

Similarly, Lord Nicholls advanced the above notion by declaring that international law tolerates wrongful act by head of state as function of state, but conduct of torture isn't

---

<sup>74</sup> Ibid.

<sup>75</sup> Craig F (n 7 above) p-148.

<sup>76</sup> Michael A T (n 3 above) p- 659-660.

<sup>77</sup> Pinochet Ugrate (no 71 above),p-38.

acceptable under international law otherwise it would render mockery of international law.<sup>78</sup> Though the decision was not made effective because of the health condition of the defendant<sup>79</sup>, it gives strong signal for other head of state i.e. the end of impunity era. It has to be noted that the House of Lord doesn't totally abrogate immunity rather it limits the scope of its application to official act only.

In contrast to the above, Lord Millet in his dissenting opinion stated that immunity has to be used in strict sense irrespective of whether the act is illegal, un-constitutional by the forum state because the purpose of the doctrine is to prevent from examining the legality acts of state.<sup>80</sup>

### **3.5.3 Other Countries Experience**

Besides the above cases there are similar issues dealt in various countries, which reveal that the doctrine of immunity for sitting head of state is still alive even in respect of serious crime. On 13 March the French Supreme Court rendered its decision on a charge brought against Libyan president Mouammar Ghaddafi for bombing of a plane (Dc 10) which killed 156 passengers.<sup>81</sup>

The French court ruled customary international law prohibited the exercise of jurisdiction over head of states.<sup>82</sup> As correctly pointed out by S. Zappala the decision of the court lacks clarity for it doesn't make distinction between immunity *rationae personae* and functional immunity.<sup>83</sup> In other words whether immunity granted by the court refers to

---

<sup>78</sup> Ibid, p-34.

<sup>79</sup> M. Byers ( no 70 above),p-425.

<sup>80</sup> Lord Millet as cited in (no 22 above), Para 56

<sup>81</sup> Salvator Zappala; Do Heads of State in office enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French cour de cassation (2001)12, *European Journal International Law*,p-151.

<sup>82</sup> Ibid, p- 154. ,

<sup>83</sup> Ibid.

immunity *rationae personae* or *rationae materiae* became ambiguous. More ever, it fails to indicate whether such privilege lasts indefinitely or exists while the head of state is in office.

The writer of this paper is of the opinion that in so far as the court doesn't make specific reference to the nature of immunity which subsist the alleged act, it seems accepted broader notion of immunity (both functional and personal). It should also be noted that the court has impliedly indicated the existence of exceptions to immunity because it says at the current development of customary international law; terrorism couldn't be taken as exception to immunity.<sup>84</sup> Thus, a *contrario* reading of the judgment envisages the absence of immunity for serious crime like genocide, war-crime.

More ever, the National Court of Spain ruled as if it had no authority to prosecute the Cuban head of state, Fidel Castro for the death of prisoners.<sup>85</sup> The court affirmed the crime with which Castro was accused of didn't constitute act of genocide and terrorism, and hence for other category of offences sitting head of states are immune from prosecution.<sup>86</sup> Similarly, in the *Former Syrian Ambassador to the GDR case*, the German Federal Constitutional Court found no customary international law which bounds the third state other than the receiving one to grant immunity.<sup>87</sup> More over, the court had explicitly affirmed that immunity *ratione materiae* as a higher norm and remains to bind the receiving state even after the termination of diplomatic status.<sup>88</sup>

---

<sup>84</sup> Ibid, p-156.

<sup>85</sup> Michael A T (n 3 above), p- 663.

<sup>86</sup> The Spanish Court dismisses dissident group bid for charges against Castro accessed on [www.highbeam.com](http://www.highbeam.com) ,visited on Feb 25/2010, 3:50 pm.

<sup>87</sup> Ilias Bantikas and Susan.N ,(n 5 above),p-174 -75.

<sup>88</sup> Ibid,p-175.

### 3.6 The case of Yerodia before the International Court of Justice

At international level, dispute involving immunity of Foreign Minister for breach of serious crime between Belgium and Congo happened. The cause of the dispute was the circulation of arrest warrant by the Belgian investigating magistrate against the incumbent Minister for foreign affairs of the Democratic Republic of Congo (DRC) Mr Abdulaye Yerodia for alleging breaches of war crime and crimes against humanity.<sup>89</sup>

Belgium has asserted its universal jurisdiction due to the nature of crime.<sup>90</sup> To support its argument it cited Lord Millet statement in the *Pinochet case* which goes as saying:

“International law cannot be supposed to have established a crime having the character of *jus-cogens* and at the same time to have provided immunity ...”<sup>91</sup>

It also mentioned the *Cour de cassation* of France which affirmed the existence of exception to immunity and according to Belgium such instances include grave breaches of the Geneva Convention and crimes against humanity.

On the other hand; Congo challenged the arrest warrant on the basis of sovereign equality and diplomatic immunity as articulated in article 41 of the Vienna convention on Diplomatic immunity.<sup>92</sup> In rendering its decision the Court has focused on the issue of jurisdiction and inviolability of states leaving the substantive content of the charge. Thus, having examined the function of foreign Minister, Ambassadors and Head of state it reached at the following conclusion:

---

<sup>89</sup> Arrest Warrant case (n 27 above) Para 1, p 1.

<sup>90</sup> Ibid, Para 2, p-2

<sup>91</sup> Lord Millet as cited in arrest Warrant case (n 27 above), Para 56

<sup>92</sup> The arrest warrant case (n 27 above), Para 1 page 4.

“...through out the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and inviolability protects the individual concerned against any act of authority of another state which would hinder him or her in the performance of his or her duties.”<sup>93</sup>

From the above statement, we can deduce that the inviolability of the act committed involves both in official and private capacity irrespective being done before or at the time of office in so far as the minister holds his position. Unlike the House of Lords ruling in *Pinochet case*, in *Arrest Warrant case* the court doesn't limit the scope of immunity even in case international crime such as war crime and crime against humanity.<sup>94</sup> Thus, there is an apparent contradiction in the approach of judges concerning the above two cases. In reaching such conclusion the court proceeds not in terms of the existence of state practice which confers immunity for such crime rather it approached negatively i.e. the absence of customarily international law subjecting head of state before a trial. Accordingly, the in-existence of such practice proves the existence of un-restricted immunity.

As pointed out by S.Wirth the court had been influenced by the Statement of Lord Brown-Wilkinson in *Pinochet*, which declares that sitting head of state enjoys complete immunity from all action and the *cour de cassation* of France in Qaddafi saying that head of state may not be prosecuted unless contrary provision exist in international law.<sup>95</sup> The writer of this paper shares similar opinion with the above author in that the court in its judgment has made reference both to the *Pinochet* and *Qaddafi* case. In fact domestic cases can give rise to the formation of custom but in light of this case, however it is difficult to accept the court ruling as evidence of customary law since it heavily relies on two cases.

---

<sup>93</sup> Ibid, Para 54.

<sup>94</sup> Ibid, Para 58.

<sup>95</sup> Wirth (n 23 above) p- 880.

It should be noted; however, the court impliedly makes distinction with respect to the period of protection in that acts done in official capacity couldn't be subject to the jurisdiction of third state even after leaving his post. This notion can be inferred from the ICJ decision itself which declared:

“after a person ceases to hold the office of minister for foreign affairs, he or she will no longer enjoy all of the immunities accorded by international law, in other states. Provided that it has jurisdiction under international law a court of one state may try... in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in private capacity(emphasis added).”<sup>96</sup>

Thus, the express mention of acts done in private capacity is intended to exclude acts of functional nature from being subject to the courts of other state. More ever, the court underlies immunity exists only in relation to the jurisdiction of foreign state. Consequently, the court's ruling doesn't affect the jurisdiction of international criminal court or the various tribunals like ICTY, ICTR.<sup>97</sup> And hence, the ICC and other international tribunals as per their own statute can deny immunity for officials including head of state.

### **3.7 The Status Immunity Post 1945**

As discussed in the above section states through their domestic legislation or at the recommendation of executive branch conferred immunity to head of states and Ministers. After Second World War there are practices (laws and cases) at international level which mitigate the doctrine of head of state immunity. Thus, the writer of this paper identifies and dealt the issues briefly.

---

<sup>96</sup> Arrest Warrant case (n 27 above) Para 61.

<sup>97</sup> Ibid, para 58.

After the Nuremberg tribunal the defense of head of state immunity became in-admissible and express mention to this effect has been made in various statutes. Prior to Nuremberg, article 227 of the Versailles treaty empowered the allied power to prosecute the then German emperor, William II of Hohenzollern, for an offence of international morality. However, the prosecution was not materialized as a result of Dutch refusal to surrender him.<sup>98</sup> Since then the Charter of International tribunal for Nuremberg (article 7), the statute of Yugoslavia tribunal (article 7), the Statute of Rwanda tribunal (article 6), and the Rome Statute of 1998(article 27) specifically reject head of state immunity.

Similarly, the Statute for the establishment of special court for Sierra Leone<sup>99</sup> and the UN regulation for the transitional administration of East Timor<sup>100</sup> envisaged the concept of criminal responsibility with a view of ending impunity. The entire above mentioned instruments declared that the official position of an accused person, whether as head of state or government will not relieve from individual criminal responsibility.

Still now there is no consensus whether these statutes have codified customary practices or set new norms. In this regard two issues can be raised i.e. i) Could it be considered as attaining customary international law at the adoption of Nuremberg charter and ii) since then, Nuremberg trial, more than fifty years has elapsed, and hence whether such period is sufficient for the crystallization of custom. In addressing this issue the writer will confine with the judicial approaches, the existence of soft law and the views of commentators.

---

<sup>98</sup> Lyal S.S, *Individual Responsibility in International Law for Serious Human Rights Violation*, (Martinus Nijhoff Publishers Boston), Vol.21, 1992,p-42

<sup>99</sup> Agreement between the United Nation and the Government of Sierra Leone on the establishment of Special court for Sierra Leone 16 January 2002.

<sup>100</sup> Regulation No.2000/15 of 6 June 2000 on the Establishment of panels with Executive Jurisdiction over Serious Criminal Offences , UN .DOC. UNTAET/REG/2000/15, art 15(1).

### 3.7.1 Judicial Approach before International Tribunals.

The judicial decisions are based on the statute which establishes the tribunal and these can be taken as evidences of state practices. The ICTY in *Blaskic* case stated that:<sup>101</sup>

"...those responsible for (war crimes, crime against humanity and genocide) can not invoke immunity from national or international jurisdiction if they perpetrated such crime while acting in their official capacity."

The decision affirmed the irrelevancy of official capacity both at national and international level for prosecution of serious crimes such as genocide, war-crime and crime against humanity. The Chamber has gone one step further than the ICJ ruling in *Arrest Warrant* case in that it stressed the defense of immunity can be challenged even at domestic level.

Similarly, in *Furundzija* case the ICTY trial chamber declared that prohibition of torture is a *jus-cogens* norm for which states are required to prosecute.<sup>102</sup> Accordingly, it would be illogical on one hand to allow states to indict perpetrators of such act and on the other hand to undermine their duty to prosecute on defense of head of state immunity. If torture is deemed to acquire *jus-cogens* norm, the trial chamber is justified in drawing an apparent contradiction between the duty to prosecute and to grant immunity. Normally, prohibition of torture, genocide and other international crimes are categorized as higher norm (*jus-cogens*), and hence it can not be overruled by a norm of lower status.

---

<sup>101</sup> Prosecutor V. Blaskic (Appeal chamber Judgment) case No. ICTY- IT-95-14, 18 July 1997; Para 41. see also Prosecutor V. Kunarac, Judgment, Case.No (IT-96-23-T and IT-96-23/1-T) ,..... 22/2001, Para 41. The chamber noted after second world war if not before that period no privilege under international law exist which shield state representative or agents from individual criminal responsibility.

<sup>102</sup> Prosecutor v. Antonio Furundzija, Trial Judgement, Case no ICTY-IT-95-17/1-T, 10 December 1998, Para 153.

Besides the above, the former president of the Federal Republic of Yugoslavia Slobodan Milosevic, was also indicted for commission of war crime, crime against humanity....<sup>103</sup> The trial was unique mainly it was for the first time to prosecute head of state at international level.<sup>104</sup>

During the proceeding the defendant stated the tribunal lacks jurisdiction over him.<sup>105</sup> The prosecutor on its part argued article 7(2) of the ICTY statute, which denies immunity, reflects customary international law.<sup>106</sup> On this issue the *amici-curiae* reflects similar view with the prosecution office declaring that the accused has no legal basis to invalidate article 7(2) of the statute in which at that time acquired status of customary international law.<sup>107</sup>

The position of the ICTY trial chamber is clear in that the issue of immunity is no more applicable by now and prosecuting head of state has reached the status of customary international law. According to this ruling, accepting defense of immunity would be contrary to the established rule of convicting head of state.

Similarly, Mr. Charles Taylor; the former president of Liberia has been indicted for offences like crime against humanity and war crime....<sup>108</sup> Mr. Taylor applied for setting

---

<sup>103</sup> Leila. S; The Trial of Slobodan Milosevic, (October 2002) *The American Society of International Law*, accessed on [www.asil.org](http://www.asil.org) visited on Sept 25/ 2009, 3: 30 pm, p-no

<sup>104</sup> Gideon. B, *The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceeding*, (Cambridge University Press New York 2007), p-3.

<sup>105</sup> Prosecutor v. Milosevic; Case No. IT-99-37-PT, Decision on Preliminary Motion; ICTY (IT-99-37-PT) 8 November, 2001, Para 26.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid, Para 28.

<sup>108</sup> Mark A Drumbl; Charles Taylor and the Special Court for Sierra Leone, April 1, 2006 *American Society of International Law* 10, accessed on [www.asil.org](http://www.asil.org) insights 060412.cfm visited on Sept 25/2009 at 3:00 pm, p-no.

aside of the arrest warrant on the ground of immunity from jurisdiction.<sup>109</sup> In resolving such issue the court appointed *amici-curiae* and according to its finding, jurisdiction could be exercised over serving head of state in respect of international crime.<sup>110</sup> The court relying on *amici-curiae* ruled that the official position of the accused as head of state at the time when the proceeding started didn't bar the prosecution.<sup>111</sup>

Another case which reveals the end of immunity era for incumbent president is the Al Bashir case. He was suspected of genocide, crime against humanity and war-crime in the Darfur area.<sup>112</sup> Consequently, the UN Security Council by virtue of Res.1593 referred the matter to the prosecutor of International Criminal Court.<sup>113</sup> According to article 13(b) of the ICC Statute, the court can assume jurisdiction if the Security Council, acting its power under the UN Charter, referred the case to prosecutor office for consideration. This is one way of enforcing the ICC by subjecting to a mandatory jurisdiction mainly for those which are not signatory to the convention. Thus, the mere circulation of arrest warrant indicates head of states in office are not immune especially for international crime.

From the above cases it can be inferred that the practice at international tribunal or special court like Sierra Leone is similar in that it rejects the issue of immunity even for sitting head of state.

---

<sup>109</sup> Prosecutor v. Charles Ghankay Taylor ; Decision on Immunity From Jurisdiction, SCSC-2003-01-I(may 31,2004), Para 1.

<sup>110</sup> Ibid, Para 17(a)

<sup>111</sup> Ibid, Para 53.

<sup>112</sup> Prosecutor v. Omar Hassan Al Bashir, Decision on the Prosecution's for a Warrant of Arrest against Omar Hassan Al Bashir, No.ICC 02/05-01/09 4 March 2009, Para 4.

<sup>113</sup> United Nations Security Council Resolution 1593, S/RES/1593(2005), Issued on 31 March 2005.

### 3.7.2 Reflection of Soft Laws

Other than the judicial decision there are soft laws which reveal the existence of understanding among state concerning the irrelevancy of immunity for serious crime. One of these instruments is the UN General Assembly Resolution 95 which unanimously affirms the principles of Nuremberg tribunal and its judgment.<sup>114</sup> Later on the international law commission issued a report summarizing the Nuremberg principle in various categories among this principle No. III deals with responsibility of head of state or government for international crime.<sup>115</sup>

As stated above the Nuremberg Charter has explicitly reject head of state immunity, thus, unanimous recognition of the charter by members of the UN; implies the existence of intention to be bound by such principles.

Another important indication on the non-application of immunity for core crime can be inferred from the advisory opinion of ICJ on reservation to the Genocide Convention. The court declared the principles underlying in the Genocide Convention has been recognized by civilized nations as binding even with out conventional obligation.<sup>116</sup> It further noted that genocide has universal consequence; and hence making reservation could refute its purpose and objectives.<sup>117</sup> Thus, from the opinion of ICJ it can be inferred that immunity of head of state couldn't subsist over the crime of genocide. Because article 4 of the genocide convention disregards official capacity of an accused,

---

<sup>114</sup>“Affirming of the principles of International Law Recognized by the Charter of Nuremberg Tribunal ” G.A. Res 95(1) U.N GAOR, UN.Doc.A/236(1946)

<sup>115</sup> “Formulation of the principle of International Law Recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal” YBILC,II 374(1950)

<sup>116</sup> Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide; ICJ Advisory opinion, May 28<sup>th</sup> 1951, p-12.

<sup>117</sup>Ibid, P-12.

consequently making reservation to it doesn't relieve head of state from criminal responsibility.

Furthermore, the UN Principles on Effective Prevention and Investigation of Extra-legal Arbitrary and summary Execution required states to bring perpetrators before justice or extradite to other state.<sup>118</sup> The principle applies to all persons alike with out making distinction on official status.<sup>119</sup>

Thus, from the above notion it can be inferred that denouncing head of state immunity with respect to international crimes, could be viewed as indication of *opinio juris* among states.

### 3.7.3 Opinion of Jurists

From scholars' point of view, most argued the principles adopted in Nuremberg at current times forms customary international law<sup>120</sup> and its implication is clear i.e. head of state immunity ceases to exist in cases of international crime. W. Schabas commented crimes like genocide, war crime and crime against humanity as exceptions to immunity.<sup>121</sup> Moreover, A. Cassese declared perpetrators who acted in official capacity are precluded from invoking immunity because of implied waiver.<sup>122</sup> Similarly, commentators like Ian. Brownlie,<sup>123</sup> S. Zappala<sup>124</sup> and Schwazemberger<sup>125</sup> reflect similar opinion.

---

<sup>118</sup> E.S.C Res 6, Effective Prevention and Investigation of Extra- Legal, Arbitrary and Summary Execution, U.N. ESSCOR, 1<sup>ST</sup> Sess., 15<sup>th</sup> Ple. mtg., at 66, U.N. Doc E/RES/1989/65/Ann.18(1989)

<sup>119</sup> Ibid, The cumulative reading of Principle 3 and 19 conveys the irrelevant of official capacity with regard to criminal responsibility.

<sup>120</sup> Lyal S. (n 98 above) p-35.

<sup>121</sup> William. A Schabas, The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone (Cambridge University Press UK 2006), p 155.

<sup>122</sup> Cassese (n 26 above), p 24.

<sup>123</sup> Ian. Brownlie, Principles of Public International Law, (6<sup>th</sup> ed Oxford University press, Inc New York 2003), p-573.

Thus, the position of such publicist is an indicator on the customary nature of lifting immunity in case of core crime. As pointed out by Akanda the proponents of such view had based their argument on two ways:<sup>126</sup>

- i) International crimes are not considered as official acts
- ii) Such crimes constitute violation of *jus-cogens* consequently it prevails over immunity.

Contrary to the above, the ICJ in the *Arrest Warrant* case maintained the *jus-cogens* status of a crime can't over rule immunity of head of state in foreign court.<sup>127</sup> The opinion of the court seems flawed and failed to justify as to why *jus-cogens* norm couldn't prevail over the rule of immunity. According to Vienna Convention, a norm of *jus-cogens* can only be derogated by the same status;<sup>128</sup> and hence the principle of immunity whose status doesn't exceed simple custom to warrant immunity over such core crime.

Opinion of jurists can be taken as reflection of custom in making head of state accountable. The Sierra Leone court in denying head of state immunity to President

---

<sup>124</sup> S. Zappala (n 81 above)p-164.

<sup>125</sup> Schwazemberger as cited in Nehal. B, How shall we Punish the Perpetrators? Human Rights, Alien Wrongs and the March of International Criminal Law, ( 2003) 10 *Melbourne University Law Review*, p-3. See also Ilias.Bantikas , Head of State Immunity in the Regimes and Non-Self –Contained System Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War, (2005)10 *Journal of Conflict and security Law*,p-30. He stated that from IMT onwards denial of immunity was matured to customary rule.

<sup>126</sup> Dapo Akande, International Law Immunities and the International Criminal Court, (July., 2004) 98 *The American Journal of International Law*, no.3,p-417.

<sup>127</sup> Arrest Warrant case (n 27 above), Para 58.

<sup>128</sup> Vienna Convention on the Law of Treaties, opened for signature May 23,1969, Art 53,1155 UNTS 331

Taylor based its decision on state practice and opinion of commentators. The court noted the following statement:<sup>129</sup>

“International practice and majority of academic commentators (emphasis added) supports the view that...serving head of state and that such person is not entitled to claim immunity under customary international in respect of international crimes.”

As evidences revealed during the codification stage of the ICC, the irrelevancy of official capacity has never been challenged.<sup>130</sup> According to S. Zappala , such evidences reflects the existence of *opinion-juris* among states.<sup>131</sup>

Similarly, during the eighth session of preparatory commission on the interpretation of article 19 of the Privileges and Immunity Agreement, the representative of states was of the opinion that immunity for such crime was un-acceptable.<sup>132</sup> Because they argued that since immunity for such crime didn't exist so-far, it would be unreasonable to demand waiver for prosecution.<sup>133</sup>

Contrary to the above, the *Avocat general* suggests that exception to immunity can't apply to head of states.<sup>134</sup> The *Avocat general* justified his view on the absence of implementation though excluding the doctrine of immunity is contained in various

---

<sup>129</sup> Prosecutor v. Charles Ghankay Taylor (no 98 above); Para 17(a). The special court for Sierra Leone has appointed Pro.Sand and pro.Orentlicher as advisor of judge (amicus curiae). Both scholars noted that head of state immunity couldn't serve as defense to escape criminal responsibility and this (according to the court) reflects opinion of commentators as evidence of custom.

<sup>130</sup> S. Zappala(n 81 above) p-164

<sup>131</sup> Ibid.

<sup>132</sup> S. Wirth (n 23 above), p-886.

<sup>133</sup> Ibid.

<sup>134</sup> Avocat's General as cited in S. Zappala (n 81 above)

international instruments.<sup>135</sup> His basis for rejection of restricted approach is on pragmatic point of view not from legal considerations.

The writer of this paper believes the analysis of *Avocat general* is weak; because absence of prosecution for head of state didn't imply un-restricted immunity. More ever, a good number of cases dealing with head of state have been decided by different international tribunal, thus it would be erroneous to conclude as if there was no practice.

### **3.8 The tension between Article 27 and 98 of ICC Statute**

Under the ICC statute both article 27(1) and 98 touché the issue of immunity of state officials. The former provision envisages the irrelevancy of official capacity from prosecution. While article 98 deals with cooperation by states for waiver of immunity and surrender of suspects to ICC. Sub-article 1 of article 98 provides:

“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 waiver of immunity.”

When we scrutinize the above provisions, there seems to be an apparent contradiction because in one way it totally abrogates immunity and in another it tries to maintain if doing so would violate the obligation of requested state towards other state. Thus an issue can be raised if immunity to head of state is really in-applicable at all? To whom does the word third state refers i.e. is it to non-member state or all state including members of ICC?

The effect of article 27(1) is clear, in that it removes immunities to which state officials would other wise be entitled.<sup>136</sup> Consequently, countries which ratify the statute (like

---

<sup>135</sup>Ibid.

Malta, Ireland, Canada and New Zealand) amended their laws so as to arrest and extradite suspected officials.<sup>137</sup>

Since the statute prevents reservation<sup>138</sup> contracting parties are required to comply with, even by revising their constitution if it grants immunity to head of state. To address the main issue raised above we have to see the purpose of the two provisions intended to reflect. The wording of article 98(1) seems to have problems for it allows state to respect their treaty obligation towards other state with out specifying the status of such other state.

Thus, literally the word other state is broad enough to encompass both members and non-member state. In law of treaties the phrase third-state normally refers to non-member state; thus article 98 might be taken as implying states non-party to ICC.<sup>139</sup> But when we look to other parts of the statute non-member states were referred as “non-contracting” or “states not-parties”, thus in light of this premise the above provision can’t be considered as if indicating non-member states.

However, should article 98 taken to include all state in effect the application of article 27 would be very minimal; and this could refute the purpose of statute (accountability for international crime). In other words if member state became free to grant immunity through ratifying of treaties it means that the statute is an optional arrangement rather than obligatory. Thus, balancing the tension is crucial. In this respect Steffen Wirth has pointed out that when parties agreed to the statute they are deemed to be consented to the

---

<sup>136</sup> A. Cassese (n 26 above) p-267.

<sup>137</sup> D.Akande (n 126 above),p-425.

<sup>138</sup> The Rome statute of International Criminal Court, July 17 1998, UN Doc.A/CONF.183/9,37 ILM 1002(1998), *Corrected through Jan.16.2002*,Art 120.

<sup>139</sup> D.Akande (n 126 above) ,p-423.

cooperation parts envisaged in part 9 of the statute.<sup>140</sup> The writer of this paper shares similar opinion with S. Wirth in that since the ICC statute is a continuation of various charters which established different tribunal it would be difficult to maintain the statute as allowing immunity for head of state. Given the fact that among the purpose of the ICC as reflected in the preamble is to end impunity and to prosecute perpetrators of such crime, it would be erroneous to interpret article 98 of the ICC broadly.

### 3.9 Conclusion

The principle of head of state immunity is founded on the basis of mutual respect and non interference among sovereign states. The principle serves as jurisdictional impediment to discourage the court of other state from assuming jurisdiction. The existence of head of state immunity is supported by international laws and state practice. This privilege is, however, waive able up on the consent of sending state.

Generally; it can be said that immunity at domestic level still continues to apply; however, it became irrelevant before international tribunal. Dating from Nuremberg trial head of state like Charles Taylor, Slobodan-Milosevic, and Jean-Paul Akayesu....were indicted at international tribunal. Since, the tribunals were mainly established to prosecute higher officials including head of state; the defense of immunity became in-applicable.

At domestic level there are few cases dealing with these issues; however, the practices reveal inconsistent approach. In republic of *Philippines v. Marcoses*; the second circuit affirmed the defendant as violating basic human right norms to claim immunity. However; in Mugabe case; though he was suspected of committing torture and execution political opponents. The defense of immunity was accepted by US government believing that prosecuting would be in-consistent with its policy and international law.

---

<sup>140</sup> Steffen wirth, Immunities, Related problems, and article 98 of the Rome Statute as cited in Dapo. Akande( n 126 above),p-422.

Similarly, in other cases like Ghadafi case; the *cour de cassation* of France declared the existing of exception to immunity. Moreover, in Pinochet case the House of Lords; noted that granting immunity for an act of torture constitute a violation of international law. Thus, from the above facts it can be discerned that crimes like genocide, crime against humanity and war crimes should be viewed as exception to immunity. These offences are prohibited under various laws; and hence such acts couldn't fall with in official acts where by the doctrine of immunity is founded.

Finally; there is an apparent contradiction between article 27(1) and 98(1) of the ICC statute. In one way it totally revokes immunity, while article 98(1) maintained the doctrine by allowing states not to extradite other state officials when they have agreement to this effect. But in light of the purpose of ICC Statute, article 98(1) should be narrowly construed as referring to officials of non-member states, other wise it nullifies the applicability of the Statute.

<b>CHAPTER THREE</b> .....	23
<b>The Doctrine of Head of State Immunity under International Law and its Applicability against Criminal Prosecution.</b> .....	23
<b>3.1 INTRODUCTION</b> .....	23
<b>3.2 Meaning</b> .....	24
<b>3.3 Justification</b> .....	26
<b>3.4 Types of Immunity</b> .....	29
<b>3.4.1 Immunity <i>rationae personae</i></b> .....	30
<b>3.4.2. Immunity <i>rationae materiae</i></b> .....	32
<b>3.5 Immunity of head of state before National Court</b> .....	35
<b>3.5.1 American Experience</b> .....	35
<b>3.5.2 U.K.</b> .....	38
<b>3.5.3 Other Countries Experience</b> .....	40
<b>3.6 The case of Yerodia before the International Court of Justice</b> .....	42
<b>3.7 The Status Immunity Post 1945</b> .....	44

<b>3.7.1 Judicial Approach before International tribunals.....</b>	<b>46</b>
<b>3.7.2 Reflection of Soft Laws.....</b>	<b>49</b>
<b>3.7.3 Opinion of Jurists.....</b>	<b>50</b>
<b>3.8 The tension between article 27 and 98 of ICC Statute .....</b>	<b>53</b>
<b>3.9 Conclusion .....</b>	<b>55</b>

## Chapter Four

### Ethiopian Legal Framework Concerning Serious International Crimes

#### 4.1 Introduction

During the military (Derg) regime Ethiopia exhibited serious violation of human-right.<sup>1</sup> Through out the country thousands of Ethiopian were killed, tortured and un-lawfully detained. The systematic violation was targeted mainly against those thought to be members of opposition group. Such events were un-precedent in Ethiopian history. As one writer commented the country was led by “jungle of laws”,<sup>2</sup> because systematic execution was lawful, and the existing constitution (revised constitution of 1955) was suspended.

After the TGE assumed power, it decided to prosecute the ‘Derg’ official and undertakes measure like the establishment of SPO and issuance of laws pertaining to it. The prosecution was an instance on how to deal with past abuses. Among the offences the defendant charged with include genocide, crimes against humanity and war-crimes. Since, Ethiopia has a modern penal code which accommodates all such crimes; the SPO has been in a better position to choose among international and domestic laws.

However; compared to international convention, the EPC includes political group with in the ambit of protected group under genocide. Thus, since the defendants were accused of committing genocide, such offence would fit with in article 281 of the EPC. What makes the trial unique was not only for the SPO relied on Ethiopia laws, but also the case was

---

<sup>1</sup> Girmachew Alemu Aneme, Apology and trials: The case of the Red Terror trials in Ethiopia, (2006)6 *African Human Rights Law Journal*, p-64.

<sup>2</sup> Yacob H ‘The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopia High Court’ (1999)22 *Hasting International and Comparative Law Review*, 674.

adjudicated domestically by Ethiopian courts.<sup>3</sup> Normally, such types of crimes have been brought before international tribunal or complementary jurisdiction between national and ad-hoc tribunal.

Thus, under this chapter the international crimes would be seen in-light of EPC. Therefore, it would help to draw the uniqueness of EPC compared to international convention. Besides, the Federal High Court approach in evaluating the consistency of EPC with genocide convention will be briefly discussed.

## **4.2 Human Right Violation during Mengistu Regime**

Before the Military government assumed power, Ethiopia was ruled by feudal monarch. However; in 1974 the deep economic crisis and political suppression instigates mass uprising against the feudal regime.<sup>4</sup> At the back of the movement, the Military under the name of derg took the power.<sup>5</sup> The ‘Derg’ or ‘Dergue’ is *Geez* word literally means council<sup>6</sup> drawn from an official army, air force, police force, and militias known as military army.<sup>7</sup> Having ended the feudal order, suspended the constitution and dissolved the parliament, it managed to establish Provisional Military Government.<sup>8</sup> During that era Ethiopia experienced gross human right violation which was un-precedent in the history of the country. Generally, the regime was renowned for brutality and summary execution

---

<sup>3</sup> Kjetil.T and et al (eds) Concluding the main Red Terror Trial: Special Prosecutor v. Colonel Mengistu Hailemariam *et al* in Kjetil T, Charles S and Girmachew A Aneme (eds) *The Ethiopian Red Terror Trial: Transitional Justice Challenged*( Long House, Pub service, UK, 2009,p-136.

<sup>4</sup> Girmachew Alemu Aneme (n 1 above) p-65.

<sup>5</sup> Ibid.

<sup>6</sup> Firew. K.T, *The Mengistu Genocide Trial in Ethiopia*, (2007) *Journal of International Criminal Justice*,Oxford University press,p-3.

<sup>7</sup>Yacob.H ( n 2 above) p 674.

<sup>8</sup> Ibid, p 675.

of large number of people including Emperor Haileselassie and the then 59 officials,<sup>9</sup> killing of members of different political group,<sup>10</sup> bombing of villages and market town.<sup>11</sup> Moreover, systematic execution, torture, disappearance, unlawful detention, abuse of power was Common.<sup>12</sup> Having observed the above, one writer noted from 1975-1988, the country was ruled by “the law of the jungle”.<sup>13</sup> This notion was evidenced in the *Special Prosecutor v. Colonel Mengistu Hailemariam and et al*; in that suspected considered as reactionary and anti-reactionary were detained for long period and killed with out court decision.

The Red-terror campaign which refers to liquidation and counter liquidation of revolutionary group aggravated the systematic violation.<sup>14</sup> As illustrated by G. Aneme and other this campaign took the lives of young generation with out resort to rule of law.<sup>15</sup> The third phase (Qay Sheber Yefafam) the violence reached its peak and the derg acquired broad or un-qualified license to kill its opposition.<sup>16</sup>

---

<sup>9</sup> TS Engelschen ‘Prosecution of War Crimes and Violation of Human Rights in Ethiopia ’(1994)8 *Year book of African Law*,p 43 as cited Girmachew Alemu Aneme(n 1 above) ,p-65.

<sup>10</sup> F Elgesem and Girmachew Alemu Aneme, The Rights of the Accused: A Human Rights Appraisal in Kjetil T, Charles S and Girmachew A (eds) *The Ethiopian Red Terror Trial: Transitional Justice Challenged* ( Long House Pub UK, 2009) p-33.

<sup>11</sup>Human Right Watch, Ethiopia: Reckoning under the Law, available at [http// www. Unhcr.Org/refworld/docid](http://www.Unhcr.Org/refworld/docid) (accessed on October 13/ 2009, at 4:15am), December 1994, p-8.

<sup>12</sup> Alex De Waal, *Evil Days -30 Years of War and Famine in Ethiopia* (1991) as cited in Yacob.H (n 1 above),p-676.

<sup>13</sup> Yacob.H ( n 2 above),677.

<sup>14</sup> Ibid.

<sup>15</sup>Kjetil Tronvoll , Charles Schaefer and Girmachew Alemu Aneme (eds) ,*The Ethiopian Red Terror Trial: Transitional Justice Challenged* , African issues,( Long House pub, UK 2009) p-4.

<sup>16</sup>Bahru Zewde; *The History of the Red Terror: Contexts and Consequences* in Kjetil T, Charles S and Girmachew Alemu Aneme (eds) *The Ethiopian Red Terror Trial: Transitional Justice Challenged* (Long House, Pub service, UK, 2009) , p-28.

To conclude, though the exact figure executed by the then Military Government couldn't be known it is estimated to be 150,000 to 300,000.<sup>17</sup>

### 4.3 Measures Taken by TGE

After the EPRDF seized power it detained a large number of the then officials.<sup>18</sup> It is no wonder that the Transitional government took such measures, since as a government it has to discharge its responsibility of bringing justice to the public. Normally, when countries transited to democracies or a change in government happened it faces challenge i.e. how to deal with atrocities of past regimes.<sup>19</sup> In this case two conflicting issues arise:<sup>20</sup>

- i) The victims and their family demands for justice or to see the perpetrators convicted;
- ii) The perpetrators deny what they did and insist for the government to consolidate democracy and stability by ignoring the past.

Obviously the new government would have two options which is either to proceed prosecution or to give amnesty at the expense of victims. Both have their own positive and negative outcome; leaving aside the legality of granting amnesty through

---

<sup>17</sup> Charles S and et al (n 15 above),p-5. See also Firew. K.T (n 6 above) According to him in between 1977 to 1980's about 1.5 Ethiopian have died, disappeared, or been injured; however he failed to indicate his source.

<sup>18</sup> Human Right Watch (n 11 above), p-14.

<sup>19</sup> Okechukwu. O, Confronting Transgressions of Prior Military Regimes Towards a More Pragmatic Approach, (2003)11 *Cardozo Journal of International and Comparative*, p-93

<sup>20</sup>Ibid.

reconciliation for international crime. The opinion of writers on this issue is diverse.<sup>21</sup> Some argue that failure to punish widespread brutality of the prior regime doesn't guarantee its non-occurrence in the future.<sup>22</sup> Under the 'Van Boven' principles' states have among other thing an obligation to assure the non-repetitiveness of such nature.<sup>23</sup> Moreover, it is argued that international law generally discourages amnesty or non-prosecution for it nullifies the duty to prosecute international crime.<sup>24</sup> Thus, in the absence of deterrence, it would be questionable, if it could warn perpetrators from committing such atrocities. On this respect D. Orentlicher noted that:<sup>25</sup>

“Failure to enforce the law may undermine the legitimacy of a new government and breed cynicism toward civilian institution”

To conclude, though different factors may necessitate limiting prosecution, total impunity or amnesty including key persons or certain categories which bears most refutes

---

<sup>21</sup> Diane F Orentlicher, *Setting Accounts: The Duty to Prosecute Human Rights Violation of a Prior Regime*, (Jun., 2003)100 *The Yale Law Journal*, 8 2541.

<sup>22</sup> Garro and Dahl, as cited in Diane.F. Orentlicher (n 12 above), p-2542. Antonio Cassese as cited in Okechukwu. O (no 19 above), p-115 and 116 contended that prosecution is preferable like the case of Rwanda and Yugoslavia since it fulfill the following requirement: i) the atrocities have been beyond amnesty ii) there was violent nationalism or ethnic hatred which resulted in war.. iii) They are not willing to be reconciled. He further noted that failure to punish perpetrators tantamount to forgetting the victims' trauma which meant insult to their lives.

<sup>23</sup> General Assembly Resolution, A/Res/60/147. See also Girmachew Alemu Aneme, *Beyond Red Terror Trials: Analyzing Guarantees of Non-Repetition in Kjetil.T, Charles.S and Girmachew Alemu Aneme (eds) The Ethiopian Red Terror Trial: Transitional Justice Challenged ( Long House Pub, UK, 2009)*, p-116.

<sup>24</sup> Human Right Watch (n 11 above), p -41.

<sup>25</sup> Orentlicher (n 21 above) p-2543. Richardo.G as cited in Okechukwu O (n 19 above), p-114 stressed that failure to address human right abuse has profound consequence and its price will be paid sooner or later by the society by allowing the incident to happen again.

accountabilities for past atrocities.<sup>26</sup> Besides the above, it could also be taken as injurious to the victim and its family, immoral and ultimately became in violation of international legal norms.<sup>27</sup>

Contrary to the above, countries liberated from dictatorship avoid prosecution so as to secure stability<sup>28</sup> and to consolidate official history of the past regime.<sup>29</sup> Post-apartheid, South Africa adopted legislation conferring amnesty to perpetrators of human right violation.<sup>30</sup> This was justified from practical consideration which is to keep continuity of the new government than risking its fate (fragility). It could achieve short term stability, but its impact is profound, because at the end the people could lost confidence on their government and fell a sense of betrayal.

In different with South Africa and some Latin America states, Ethiopia favored to prosecute officials of the Military regime on basis of Ethiopian penal code. Unlike South Africa, no account was given for reconciliation; and hence it can be claimed that Ethiopia emphasized on prosecution of suspected officials.<sup>31</sup> As noted by some writer the practical situation in Ethiopia is different from the above mentioned states; because the then officials

---

<sup>26</sup> Neil J. Kritz, *Accountability for International Crime and Serious Violation of Fundamental Human Rights: Coming to Terms with Atrocities: A Review of Accountability Mechanism for Mass Violation of Human Right*, (1996)59 *Law and Contemporary problems*,p-130.

<sup>27</sup>Ibid.

<sup>28</sup> Ibid, P- 2544.

<sup>29</sup> Elsa Van Huyssteen, *Building State and Nations: Justice, Reconciliation and Democratization in Ethiopia and south Africa* in Kjetil T, Charles S and Girmachew Alemu A (eds) *The Ethiopian Red Terror Trial: Transitional Justice Challenged*( Long House, Pub service, UK, 2009), p 99. See also Human Right Watch (n 11 above),p-41 it provided that differing level of immunity has been granted in Brazil, Uruguay, Guatemala, and Philippines; Poland ,Hungary Czechoslovakia and so on.

<sup>30</sup> Ibid, p-109.

<sup>31</sup> Ibid, p 101.

could have insignificant economic and political influence on the TGE.<sup>32</sup> Once the TGE decided to prosecute perpetrators of human right, it took positive step by adopting laws and setting institution.

### 4.3.1 The Duty to prosecute

The duty to prosecute those responsible for international crime lies on states. This obligation emanates from the Latin maxim *aut dedere aut judicare* meaning prosecute or extradite.<sup>33</sup> This principle has been enshrined in more than 30 multilateral treaties and 18 regional conventions.<sup>34</sup> The rationale of this maxim is that perpetrators where ever they live or reside would never escape prosecution. It seems to proceed from the assumption that international crimes are subject to universal jurisdiction. Thus, if the domestic law of a state prohibits extradition of its citizen to other state where the offence is committed it should punish as if it occurred in its own state.<sup>35</sup>

The obligation to prosecute has been incorporated in article VI of the Genocide convention. It declared that any person who committed such act should either be prosecuted at national or international level having jurisdiction. Moreover, article VII of the convention imposes an obligation on member state to extradite consistent with their domestic law and international treaties in force. Though article VII of the convention had made reference to member state, it should be interpreted to include non-member states. As mentioned in chapter 3, section 3.7.2 the ICJ advisory opinion on this regard affirmed the convention bounds all states even in the absence of conventional obligation. Consequently, making

---

<sup>32</sup> Mehari Reade, "Revisiting the Ethiopian 'Genocide' Trial: Problem'( 2000)1 *Ethiopian Law Review* 1,p-12.

<sup>33</sup>Claire Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law*, The Graduate of Institute/ Geneva Pub, no.2, 2009,p-5.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid, p-6.

reservation to Genocide Convention became un-acceptable for it affects the main obligation of states enumerated under it. Thus, given the fact that genocide is the crime of all crimes failure to extradite has to be construed as non-compliance to the genocide convention. Further more; the duty to prosecute for grave breaches has been accommodated in the four Geneva Convention.

According to the convention contracting states are required to enact legislations; which punish offenders irrespective of their nationality or to surrender to other member states.<sup>36</sup> Besides to the above mentioned legal instruments; the Inter American Convention on rules of extradition conveys the same meaning.<sup>37</sup> The cumulative reading of both arts 2(3) and (8) envisaged that a state which resists extradition has to prosecute in accordance with its law or treaties governing it.

Coming back to the ‘Derg’ trial, good numbers of the then officials has left the country, and the government was not in a position to compel states to surrender though certain efforts made in this regard. The problem was partly, because the penal code of Ethiopia allows death penalty which could be inconsistent with the domestic law of surrendering state.<sup>38</sup> So far; there is no international consensus on the application of death penalty, but the international tribunal established by the UN has abolished it. Thus, in order to achieve

---

<sup>36</sup> For instance Geneva convention I, The Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art 49. is amongst the other which deals with the duty to prosecute or extradite. See also art 50, of Geneva Convention II, art 129 of Geneva Convention III, art 146 of Geneva Convention IV.

<sup>37</sup> OAS Treaty series, No 60, article 2(3) and 8, opened for signature on 25 Feb/1981 and entered in to force on 28 March/ 1992.

<sup>38</sup> Yacob. H (n 2 above), p-704. See also Mehari. Redae (no 32 above), p-9. According to both of the writers the resistance of Italian government to hand over the three top officials was attributable to the inability of Ethiopian government to assure the non-imposition of death penalty on the suspects. Girmachew A (n 1 above) p-80 also noted that it was the principle of international law, as well as the Italy constitution, prohibited death penalty, which became hindrances for the SPO to get two suspected officials.

extradition of ‘Derg’ officials, the TGE should at least compromise on the maximum punishment to be imposed on them.

### **4.3.2 The Establishment of SPO**

Once the TGE has decided to prosecute the Derg officials, it immediately established the Special prosecutor office (SPO).

The creation of this organ is crucial for ensuring accountability for crimes committed by the prior regime ranging from high government officials up to a lower level who execute the order. Indicting former officials shows policy choice of the TGE as to how to address past abuses; and to create democratic state in the future.<sup>39</sup> This organ was duly established by the proc.22/92.<sup>40</sup>

As stipulated in the preamble its main purpose was historical documentation of past abuses and to prosecute responsible officials for the offence they committed. To accomplish such purposes, especially the latter ones, the SPO was mandated to conduct investigation and to bring perpetrator to trial. As mentioned earlier among the crimes committed during the Military government genocide, crime against humanity and war-crime are serious ones. Normally, such offences are prohibited under customary international law. Thus, Ethiopia being signatory to the Genocide and Geneva Convention, has an obligation to prosecute and punish. To this effect the Ethiopia government through its representative to the UN declared its commitment that:

The Transitional government of Ethiopia is aware of its obligation concerning the duty to prosecute the systematic violation of human rights and the grave breaches

---

<sup>39</sup> SPO report in Kritz as cited in (n 26 above),p-103.

<sup>40</sup> Proclamation 22/92, A Proclamation for the Establishment of the Special Prosecutor’s Office, 1992.

of humanitarian laws. It has also decided to respect and guarantee the rights of the families to know the fate of their relatives and to receive restitution.<sup>41</sup>

On this account the SPO started to investigate and prosecute members of ‘Derg’-WPE (Workers’ party of Ethiopia). Its first charge was filed in 1994, though suspects have been detained since 1991.

The numbers of suspects were reported to be 5198 on charge of killing 8752 persons, causing disappearance of 2611 people, and torturing 1837 others.<sup>42</sup> Depending on their official capacity and the degree of participation suspects had been charged on three levels: policy and decision makers; officials who passed of orders or served as communication channel; and those directly execute the order.<sup>43</sup> The classification of defendants was pointed out in the trials observation project as follows:<sup>44</sup>

*The policy makers:* those who deliberated and designed the plan of genocide and human rights violation (top commanders and administrators, head of police and security forces); *the field commanders:* those who were instrumental in the implementation of the plan by transmitting orders from the policy makers to the material offenders including their additional orders (investigation department, mass organization, committee of revolutionary guard ); and *the material offender:* those involved in the material

---

<sup>41</sup> E/CN 4/1994/103, Commission on Human Right, Fiftieth session, 3 February 1994, p-4. See also Girmachew. Alemu. Aneme (n 1 above) p-75.

<sup>42</sup> F. Elegsem and Gimachew Alemu Aneme (n 10 above), p-37. Both writers stated the number of indicted officials in the Regional Supreme Court and Federal Court of the country.

<sup>43</sup> Firew. K.T, (n 6 above), p-2. Neil J. Kritz (n 26 above), p-135. The latter writer stated that the practice of charging perpetrators of international crimes approached in three categories of hierarchy involved in the commission of crime.

<sup>44</sup> Trial observation and information project (2000) as cited in Girmachew A (n 1 above) p-76.

commission of the crimes in line with the nation wide plan( member of the revolutionary guards, death squads, members of special forces.)

The defendants in their individual capacity and collectively as highest organ of the council of 'Derg' were charged with 209 counts of genocide, aggravated homicide, grave and willful injury, abuse of power and unlawful detention in violation of penal code.<sup>45</sup>For purpose of committing such offences, the defendants were accused of establishing themselves as military government and forming committees and sub-committees in violation of article 32 and 281 of the penal code.

Alternative charge is possible, but one of the contentious issues during the trial was whether aggravated homicide can be invoked in case the public prosecutor failed to prove the existence of genocide. Aggravated homicide under art 522 of the penal code is punishable with rigorous imprisonment for life or death, but in case of genocide it ranges from 5 years imprisonment up to death penalty in exceptional situation. Therefore; the alternative charge would become more severe than indicting in light of genocide by virtue of article 281.

#### **4.4 International Crimes under Ethiopian Law**

The Ethiopian penal code under title II, chapter I, deals with offences against the law of nations. The core crimes discussed in chapter two had been incorporated under the penal code. It can be said that the criminal law of Ethiopia is advanced for it accommodate such offences since its enactment. Thus, the SPO has an option or choice of law for framing its charge either on international laws: like Genocide convention, Geneva Convention of 1949 and other international instruments or on basis of the penal code of Ethiopia.

---

<sup>45</sup> Kjetil.T and et al ( n 3 above), p-13.

Under international law perpetrators who commit such offences are subject to prosecution. In this regard, the Nuremberg principle II which was affirmed by the ILC declared that:

“The fact that international law doesn’t impose a penalty for an act which constitute a crime under international law doesn’t relieve the person who committed the act from responsibility under international law.”<sup>46</sup>

The logic behind this principle is obvious, but when we look at the penal code it not only incorporate international crime but also set the appropriate penalty for these crimes. It could be argued that reliance on international law could promote transparency through the application of accepted standards.<sup>47</sup> However; the weaknesses of international law compared to domestic law is that it failed to proscribe the penalty to be imposed; by leaving such issues for states to come up through specific legislations.<sup>48</sup> The incorporation of international law among other thing avoids lack of precision, and ensures specificity and precision which are essential attributes of international law.<sup>49</sup>

#### **4.4.1 Genocide**

The main charge brought against the top officials is mainly genocide. As mentioned earlier, title II, chapter I of the penal code deals with offences against the law of nations. The heading of article 281 of the penal code puts both genocide and crimes against humanity in one provision.

---

<sup>46</sup> “Formulation of the principle of International Law Recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal” YBILC,II 374(1950).

<sup>47</sup> Human Right Watch (n 11 above), p-34.

<sup>48</sup> Orentlicher (n 21 above) p- 2604.

<sup>49</sup> Mehari Reade, ( n 32 above), p-2

The arrangement of this provision begs an issue i.e. why did it put both crime against humanity and genocide together? Did it really considered as one offence? What was the intent of the drafter? Article 281 applies similar meaning with genocide convention with the exception to its scope of application and its arrangement. The definition reads as follows:

“Whosoever , with the intent to destroy , in whole or in part , a national, religious or political group ( emphasis added), organize, orders or engage in, be it in time of war or in time of peace:

- a) killing, bodily harm or serious injury to the physical or mental of member of the group, in any way what so over; or
- b) measures to prevent the propagation or survival of its member or their progeny; or
- c) the compulsory movement or dispersion of peoples ( emphasis added) or children; or their placing under living conditions calculated to result in their death or disappearance.

Is punishable with rigorous imprisonment from five years to life, or incase of exceptional gravity, with death.

As discussed in chapter 2, section 1 both crimes (genocide and crime against humanity) share similarity, but genocide is the highest of all crime for it demands special intent or ‘*dolous eventualis*’ to eliminate the protected group, which is not mandatory incase of crime against humanity. In actual sense, though making distinction could be a cumbersome exercise, there is an apparent difference between the two offences. Thus, from the arrangement of article 281, it can be deduced that one area of uniqueness of Ethiopian penal code is in treating both offences at the same footing.

Similarly, the intent of the drafter (Jean Gravan) was that both offences overlap that is why he combined in one provision.<sup>50</sup> But, he affirmed genocide as the most serious and most aggravated form of crime against humanity.<sup>51</sup>

Another justification for treating in same way could be for it encompasses certain group which under international instrument covered differently. Normally, political groups and forced relocation of people has been treated under crimes against humanity. This notion can be traced from most of the charters which established the various tribunals<sup>52</sup> as well as the ICC Statute<sup>53</sup>. Thus if such cluster became parcel of genocide there may not be a need for having distinct provision concerning such i.e. crimes against humanity. This notion might convince the drafter to put both offences under a single heading ‘‘Genocide; Crimes against Humanity.’’

The newly enacted penal code accommodates similar element with the 1957 criminal code with minor adjustment like addition of ‘‘nationality’’ ‘‘colour’’ in the scope of protection; however, it avoids putting both crimes under one provision. In the *derg* trial the court, in interpreting genocide it referred to article 269 of the newly enacted penal code, considering it as clearer than article 281 of the repealed penal code.<sup>54</sup> However, it failed to demonstrate in what respect it become clearer than article 281 of the amended penal code.

---

<sup>50</sup> Jean Graven, *Les crimes Contre Humanite, Crimes against Humanity*, Recueil Des Cour 478 (1950) translation in to English by the Secretariate as cited in Yacob H( n 4 above),p-720.

<sup>51</sup> *Ibid.*

<sup>52</sup> For instace Charter of the International Military Tribunal for Far East,1946, article 5(c), Statute of the International Tribunal for Rwanda, article 3(h), Statute of the International Tribunal for the Former Yugoslavia, (adopted 25 mat 1993 by Resolution 827) as amended 30 November 2000 by Resolution 1329),article 5(h).

<sup>53</sup> The Rome statute of International Criminal Court, July 17 1998, UN Doc.A/CONF.183/9,37 ILM 1002(1998), *Corrected through Jan.16.2002*, Art 7(1)(h).

<sup>54</sup> Special Prosecutor v. Col Mengistu Hailemariam *et al*, Supreme Court Appellate Bench, 25 May 2008, File. No 30181,p-169.See also Kjetil.T and et al (eds) ( n 45 above) p-145.

Moreover, in case of EPC the scope of protected group is broader than the genocide convention. The genocide convention purportedly excluded political group from the ambit of protected group, but the EPC become progressive in accommodating political group. In this respect, the EPC is unique because no state has taken similar measures.<sup>55</sup>

The SPO has referred the experience of some countries like Bolivia and France by which their penal code includes massacre and haphazardly targeting any group.<sup>56</sup> During the military regime there was no officially registered and recognized political party. Consequently, demonstrating whether the victims belong to the targeted political group or not become cumbersome exercise.

In the Derg trial the accused challenged the charge claiming that the Ethiopian penal code should only give protection for those included in the genocide convention. They argued the existence of apparent contradiction between EPC and genocide convention. On this respect the Federal high court ruled that:<sup>57</sup>

“Article 281 of the Ethiopian penal code, which was enacted to give wider protection, should not be viewed as if it is in contradiction with genocide convention. As long as Ethiopia does not enact a law that minimizes the protection of rights afforded by the convention, the mere fact that Ethiopia is a party to the convention doesn’t prohibit the government from enacting a law,

---

<sup>55</sup> Yacob H (n 2 above),p-718.

<sup>56</sup> *Special Prosecutor v. Col. Mengistu Hailemariam et al.*, Ruling on the Preliminary Objection, 10 October 1996.,File.no 1/87 , Ethiopian Federal High Court,p-14.

<sup>57</sup> *Special Prosecutor v. Col. Mengistu Hailemariam et al.*, Ruling on the Preliminary Objection, 10 October 1996.,File.no 1/87 , Ethiopian Federal High Court, cited in Daniel.H, Prosecution of Genocide at International and National Courts: A Comparative Analysis of Approaches by ICTY/ ICTR and Ethiopian/Rwanda, a dissertation submitted in partial fulfillment of the requirement of the degree LLM( Human Right and Democratization in Africa),Faculty of Law, University of Makerere, 31 October 2003.

which provides a wide range of protection than the convention. Usually international instruments provide only minimum standards and it is the duty of Ethiopia Government to enact laws that assist their implementation.’’

Normally, international convention set minimum standard, and hence states are encouraged if they provide broader protection than thought by the convention. For instance according to article 1(2) the Torture Convention granting wider protection is possible. Given the fact that both genocide and torture are serious crime, it can be argued that the idea incorporated in the Torture Convention i.e. granting wider protection than envisaged can apply to the issue raised in the Derg trial which is the consistency of EPC with Genocide Convention. In other words the decision of the Federal High Court on this regard became valid.

Similarly, in *SPO v. Colonel Mengistu Hailemariam and etal* the court by majority vote declared the Derg never amended the penal code altogether.<sup>58</sup> However, it failed to indicate if repeal of specific provision of penal code has been prohibited by subsequent laws other than amending the whole penal code.<sup>59</sup> Thus, the approach of the court is flawed.

However, the SPO has made wise approach in favoring Ethiopian law because the systematic abuse of human right was largely carried against those considered as reactionary and anti-people which belong to different political groups. Thus, the verdict of the court could have been different had the SPO’s relied on international instrument.

practically indicting for crime of genocide would render the task of SPO a burdensome exercise for it require to demonstrate the existence of specific intent to destroy members of political group. In the appellate decision, the Supreme Court gave two contradicting statements i.e. in one case it declared the majority killing, injury and disappearance to be an

---

<sup>58</sup> Special Prosecutor v. Col. Mengistu Hailemariam *et al.*, Judgement , 12 December 2006 .,File.no 1/87 , Ethiopian Federal High Court 406, published by Federal Supreme Court in Sept 2007,p-462.

<sup>59</sup> Kjetil.T and et al ( no 45 above),p-138.

indication of genocide, but also underlies the SPO inability to ascertain planned action to eliminate members of political group.<sup>60</sup>

Contrary to the above, in his separate opinion judge Nuru noted that the defendants shouldn't have been convicted on genocide rather in light of aggravated homicide arguing that article 281 was tacitly amended by different legislations enacted by the military government.<sup>61</sup>

According to him Proc.110/1976 and 129/1976 entitled the government authorities to take necessary measures include killing of members of different political group. For him, article 281 of EPC would become inconsistency with article 10 of proc.1/1974 which declares any laws in contradiction with it to be inapplicable. Thus, article 281 would in effect tacitly repeal by virtue of the above laws as well as article 8(9) of proc 110/1976 which empowered the chairman of 'Derg' to take measures against persons found to be "reactionary" or "anti-people". He further contended that the genocide convention only protects certain group in exclusion to political party; and hence international law doesn't shield members of political group should they subjected to elimination.<sup>62</sup>

Consequently, according to judge Nuru the above two proclamations by impliedly allowing the Derg to exterminate opposition group didn't violate international law. Besides, he stated that the military government as per article 14(8), 16(5) and of proclamation.129/76 was entrusted to organize, incite and coordinate the community to take action against those termed "anti-people" and "reactionary".<sup>63</sup> It logically follows that when the main act is not considered as punishable act, an incitement to commit that act wouldn't qualify as a

---

<sup>60</sup> Special Prosecutor v. Col Mengistu Hailemariam (n 54 above)

<sup>61</sup> Special Prosecutor v. Col. Mengistu Hailemariam ( n 58 above), p 462-463.

<sup>62</sup> Ibid, p 463-464.

<sup>63</sup> Ibid.

distinct offence. And hence if killing of political party is allowed, an incitement of the public to commit such act became legally permitted.

Thus, in-light of judge Nuru, the military government is at liberty to issue such types of laws which were not accommodated or prohibited by international convention. His approach is akin to positivist school of law. According to positivist when a formal law enacted by sovereign government; it would bind the citizen irrespective of the content of law. Thus, logically speaking should the defendant were empowered to eliminate their opposition group it follows that they would not only escape prosecution of genocide, but also aggravated homicide ( article 522) for it is justified by law as permitted act.

There fore; the opinion of judge Nuru became fallacious for it ruled that the defendant can only be convicted for homicide first degree even if the military government was legally empowered to do so. The remaining judges, however, affirmed that the above cited proclamations only authorizes the ‘Derg’ to eliminate the political group incase of armed confrontation. Thus, in the absence of war, killing of members belonging to such group would render the act unlawful. Though killing political members could be lawful as per the proclamation, its legality is dubious since deprivation of life with out formal resort to rule of law would render violation of basic rights.<sup>64</sup>

In the appellant case the defendant raises the same issue i.e. the penal code shouldn’t have included political group. In this regard the court affirmed that the defendant never denied article 281 of EPC which provides protection to a members of political group.<sup>65</sup> From this it can be implied that since the EPC in un-equivocal way accommodates political group its scope couldn’t be challenged.

---

<sup>64</sup> International Convention on Civil and Political Rights ( adopted on 6 December 1966) GA.Res 2200A(XXI) entered in to force 23 March 1976, article 6(1)(2) The convention affirmed the right to life can be executed by the final judgment of competent court.

<sup>65</sup> Special Prosecutor v. Col Mengistu Hailemariam (n 54 above), p69.

#### 4.4.2 War crimes

This form of crime has also been incorporated under the penal code of Ethiopia. In defining such crime reference to international instrument and humanitarian convention became imperative.<sup>66</sup> The criminal code has different categories of war-crime i.e. war crimes against civilian population,<sup>67</sup> war crimes against sick, wounded,<sup>68</sup> and prisoners<sup>69</sup> ....all of which have been accommodated under the Geneva Convention.

Some literature revealed that the SPO's reliance on the penal code mitigates the risk of application of war crime whether confined to international armed conflict only or extended to internal conflict too.<sup>70</sup> In other words, should the SPO invoke international instrument the court could be in difficulty in ascertaining whether the situation during military regime would constitute as a war crime of large scale or minor insurrection which don't fall with in the Geneva Convention. In different with the above, K. Tronvoll stated that the trial against higher officials of 'Derg' including Mengistu doesn't hear war-crime charges.<sup>71</sup> His justification is that had it included war-crime charges, the other insurgent group like TPLF, OLF, and EPLF could also be indicted.<sup>72</sup> However, it should be noted that the charge incorporate war-crime, even-though in actual sense the evidence which sufficiently convict

---

<sup>66</sup> Human Right Watch (n 11 above) p-32.

<sup>67</sup> The Penal Code of the Empire of Ethiopia 1957, article 282

<sup>68</sup> Ibid, article 283.

<sup>69</sup> Ibid, article 284.

<sup>70</sup> JV Maysfield, The Prosecution of war crimes and respect for human right: Ethiopia's balancing act (1995)9 *Emory International Law Review*, 573.

<sup>71</sup> Kjetil Tronvoll, The Quest for Justice or the Construction of Political Legitimacy? The Political Anatomy of the Red Terror Trials in Kjetil.T, Charles.S and Girmachew.Alemu.Aneme (eds) *The Ethiopian Red Terror Trial: Transitional Justice Challenged* (Long House Pub UK, 2009),p-91.

<sup>72</sup> Ibid.

the defendant were found to be rare.<sup>73</sup> A typical example of such is the Hawzen Massacre, in which more than 2500 civilian were bombarded in a market place.<sup>74</sup> The instance of war-crimes where by the ‘Derg’ officials were indicted with includes killing, tortures, destruction of cities and towns.... Thus, in the Derg proceeding there was no controversy by both parties on the application of war-crimes because there were rare acts which qualify for prosecution and there was no significant difference between the penal code and international instrument.

Finally, the revised penal code also incorporate similar offences with that of 1957 penal code, but it envisages additional instances stipulated from article 270 (i)-(p). The instances of war-crimes enumerated are too detail and more elaborative than international instrument dealing with this.

#### **4.5 International Crimes in light of the FDRE Constitution**

The FDRE Constitution under Chapter three, part 1 deals with issues pertaining to human right. The serious international crime discussed so-far has been accommodated in general terms. Article 28 of the constitution with the heading of ‘‘Crime against humanity ‘‘ states that:

‘‘Criminal liability of persons who commit crimes against humanity, so defined by international agreement ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary execution, forcible

---

<sup>73</sup> Mekonnen Yimam, ‘‘ Transitional Criminal Justice: The Ethiopian Experience in the Derg/ WPE Trials’’ a dissertation submitted in partial fulfillment of the requirement of the degree LLM( in Public and Constitutional Law) Faculty of Law, Addis Ababa University of , May 2009,p-72.

<sup>74</sup> Ibid.

disappearances or torture shall not be barred by statute of limitation. Such offence may not be commuted by amnesty or pardon ....”<sup>75</sup>

Though the heading of the above provision mainly refers to crimes against humanity only, content wise it includes grave crimes such as genocide, summary execution and torture. The provision affirmed that perpetrators couldn't escape punishment on grounds of period of limitation, amnesty or pardon which might apply in other offences.

The Constitution seems to be inspired by the Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity.<sup>76</sup> The Convention having noted to the various Resolutions and Charter adopted at different occasions declared no statutory limitation would apply irrespective of the date of the commission of such crime. Though the word immunity is not explicitly provide under article 28 of the FDRE constitution, it can be argued that it wouldn't serve as a defense.

As discussed in chapter one, section 1.1 the anomalies which undermine individual criminal responsibility are amnesty and immunity. Having considered the purpose of this provision, which is individual criminal responsibility, making exception on ground of immunity would narrow the scope of its application and refute the objective it intended to achieve. Similarly, if amnesty and pardon is prohibited from being invoked how it wouldn't apply for defense of head of state immunity?

Normally, when some one escapes punishment on the basis of amnesty or pardon the suspected will no more be prosecuted again. And hence, its effect is permanent in that as per article 130 (2) (c) of the criminal procedure instituting similar charge could be

---

<sup>75</sup> The Federal Constitution of the Federal Democratic Republic of Ethiopia, article 28.

<sup>76</sup> Convention on the Non-Applicability of Statutory Limitation to War-Crimes and Crimes against Humanity, (adopted 26 November 1968)G.A.Res 2391(XXIII) entered in to force 16 November 1970,article 1.

challenged. Consequently, since the defense of immunity has similar effect with the above cited instances there is no way to treat differently.

Further more, even-if the FDRE constitution came in to effect later than the crime committed by the ‘Derg’ officials, by virtue of the above mentioned convention and subsidiary instrument perpetrators could no more exploit national laws to escape liability.

## **4.6 Conclusion**

Prosecuting ‘Derge’ officials for the atrocities they committed became Ethiopia’s obligation to prosecute or extradite under international law. The purpose of prosecuting ‘Derg’ officials’ is mainly to render justice not only for victim’s family, but also to Ethiopian people as whole. In view of the purpose of penal code and ‘Van-Boven’ principles prosecution is one way of assuring non-repetition of similar acts in the future.<sup>77</sup>

Compared to Genocide Convention, the EPC which protects political groups is more advanced and progressive. The defendants’ objection as to inconsistency of penal code with international law became un-justified, because international law normally sets minimum standard. Thus; broadening the scope of protection in favor of individual right couldn’t be viewed as contradiction with international law; rather as advancement.

Moreover; the law issued by the ‘Derg’ to take measures against those labeled as ‘reactionary’ ‘anti-people’ shouldn’t be considered as valid ones for it violates basic rights of individuals. As the SPO charge revealed victims were killed with out court ruling; and hence they didn’t get an opportunity to appear and defend their case before court .Thus up-holding proclamation 110/1976 and other as conferring un-reserved right to eliminate political group; would be illogical when seen in terms of modern penal law.

---

<sup>77</sup> (n 41 above)

<b>Chapter 4</b> .....	57
<b>Ethiopian Legal Framework Concerning Serious International Crimes</b> .....	57
<b>4.1 Introduction</b> .....	57
<b>4.2 Human Right Violation during Mengistu Regime</b> .....	58
<b>4.3 Measures taken by TGE</b> .....	60
<b>4.3.1 The Duty to prosecute</b> .....	63
<b>4.3.2 The Establishment of SPO</b> .....	65
<b>4.4 International Crimes under Ethiopian Law</b> .....	67
<b>4.4.1 Genocide</b> .....	68
<b>4.4.2 War crimes</b> .....	75
<b>4.5 Conclusion</b> .....	78

## Chapter Five

### **The Defense of Head of State Immunity under the Derg Trials (SPO v. Colonel Mengistu Hailemariam and *et al*)**

#### **5.1 Introduction**

The ‘Derg’ officials have been accused of establishing themselves as forming ‘provisional military council or government committees and sub-committees to commit among other thing genocide in contravention of the penal code of Ethiopia.

Under the ‘Derg’ trial the number of suspected involved in the proceeding both at Federal and Regional courts were numerous. Depending on the official capacity they possess member of coordinating committee of armed forces (Higher officials) had been indicted at Federal High Court.<sup>1</sup>

The charge was initially brought in October 1994<sup>2</sup> and later amended on November 28/1995.<sup>3</sup> The defendants in the form of preliminary objection invoke the defense of immunity; and the SPO on its side argued on different grounds to refute the objection presented. What makes the trial so interesting was both the defendants and the SPO referred international law, state practices and opinion of distinguished writers.

---

<sup>1</sup> F.Elgesem and Girmachew.A, The Rights of the Accused: A Human Rights Appraisal in Kjetil.T, Charles.S and Girmachew.A (eds) The Ethiopian Red Terror Trial: Transitional Justice Challenged ( Long House, Pub service, UK, 2009),p-37.

<sup>2</sup> Girmachew Alemu Aneme, The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al( 1994-2008), International Journal of Ethiopian Studies, vol.4,no.1 and 2, Loyola Marymount University, 2009.

<sup>3</sup> Special Prosecutor v. Col Mengistu Hailemariam *et al*, Supreme Court Appellate Bench, 25 May 2008, File. No 30181, p-1.

The focal point of this paper is whether the defense of head of state immunity presented by the defendants could exonerate them from prosecution constituting serious crimes. Moreover; in order to appreciate the issue arguments raised by both parties will be critically examined in light of domestic and international law. In doing so the writer tries to co-relate with similar cases dealt in chapter three, section 3.4, and demonstrate its applicability to the case at hand.

## **5.2 The Defendants Arguments**

106 officials including colonel Mengistu were accused of genocide, crime against humanity and other crimes. However, among these significant numbers of defendants were tried in absentia and some of them died while the trial was ongoing. Most of the defendants presented their statement of defense independently, however, content wise there exists similarity. The writer of this paper analysis the major issues which have relevance to the topic of the study.

### **5.2.1 The Defense of Sovereign Immunity**

The defense of sovereign immunity has been invoked in various cases both at domestic and international level. The core issue of this sub-section is to examine the applicability of sovereign immunity under the 'Derg' trials. In the preliminary objection the defendants challenged the charge arguing that to be head of states which represent the

‘Derg’ government from 1974 till 1991.<sup>4</sup> According to them all acts executed is directly attributable to the state not to the individuals who exercised on behalf of the state.<sup>5</sup>

Their objection proceeds on the notion that laws are issued by a head of state to be complied by citizens to the exclusion of head of state since the laws are proclaimed by it.<sup>6</sup> In support of their claim they cited domestic law, international law and state practices. Moreover to justify their objection they specifically cited article 2137 of the civil code, article 4 and 62 of the revised constitution and different laws proclaimed by the military government such as proc no.1/1974,<sup>7</sup> proc no 2/1974;<sup>8</sup> and proc. no.110/1976.<sup>9</sup> According to them any act committed as per the above laws would fall within the category of ‘official acts’ to be considered as acts of state.

Alternatively, they contended that taking measures against those categorized as “reactionary” and “anti people” were the sole discretion of the chairman of the ‘Derg, and hence they are prohibited from taking such actions.<sup>10</sup> As a result they argued should they found participating in such acts it would only by transferring instruction to a lower

---

<sup>4</sup> *Special Prosecutor v. Col. Mengistu Hailemariam et al.*, Defense by Ato. Yoseph Gebreegziabher on behalf of Lt.Coloniel Fiseha Desta and Lieutenant Ahlilu Belayneh, March 7/ 1995 as cited in Girmachew. A Aneme(n 2 above)15.

<sup>5</sup> *Special Prosecutor v. Col. Mengistu Hailemariam et al.*, Ruling on the Preliminary Objection, 10 October 1996., File.no 1/87,p- 21.

<sup>6</sup> Ibid.

<sup>7</sup> Proclamation No. 1/1974 , A Proclamation to provide for the Establishment of a Provisional Military Government of Ethiopia, 34<sup>TH</sup> Year.

<sup>8</sup>.Proclamation No.2/1974, A Proclamation to define power of the Provisional Military Administration Council and its Chairman, 34<sup>th</sup> Year.

<sup>9</sup> Proclamation No. 110/1976, A Proclamation to redefine the powers and responsibilities of the Provisional Military Administration Council and the Council of Ministers, 36<sup>th</sup> Year.

<sup>10</sup> *Special Prosecutor v. Col. Mengistu Hailemariam et al* (n 5 above),p-22.

officials.<sup>11</sup> Thus; they defended committing an offences beyond the power entrusted with didn't entail criminal responsibility.

### **5.3 The SPO's Counter Argument**

The SPO on its part presented various grounds to invalidate the objections raised by the defendants. The relevant ones are summarized as follows:-

#### **5.3.1 The Defense of Sovereign Immunity Violates the principle of Equality before the Law.**

The approach of the SPO seems to imply the principle of immunity with respect to serious crimes is unfounded and not supported by law. Thus, it challenged the objection claiming that no laws allow or exonerate them from criminal responsibility.<sup>12</sup>

Moreover, it is a settled principle of criminal law i.e. all persons are presumed equal before the law. Accordingly, it contended that the defendants though high officials might be, like any person are responsible for offence they committed.<sup>13</sup> It also stressed the defendant being a higher official's shoulder tremendous responsibility to respect and be abide by the law than any other person. Thus, acting contrary to what the law says or viewing themselves above the law to commit such offence incurs criminal accountability. With respect to the laws invoked by the defendant, the SPO argued that laws proclaimed by tyranny government didn't bar prohibited acts by the penal code.<sup>14</sup>

---

<sup>11</sup> Ibid.

<sup>12</sup> Ibid,p-35.

<sup>13</sup> Ibid,p-37.

<sup>14</sup> Ibid, p-66.

### **5.3.2 Irrelevancy of Immunity under International Law**

The SPO also argued persons accused of genocide are responsible for their acts. It maintained being a head of state or performing in official capacity doesn't make them immune from prosecution.<sup>15</sup> It further cited article 4 of the genocide convention and the experience of some countries which prosecute head of state. A good example of such states includes Mali and Malawi from Africa, Argentina and Bolivia from Latin American, France and Greece among European States.<sup>16</sup> Moreover, it argued under international law the principle of head of state immunity has lost its legal validity starting from 1919.<sup>17</sup>

### **5.3.3 The Defendants don't Qualify as Head of State.**

The SPO also maintained that the defendants were not head of state other than members of the 'Derg' committee. It seems to refer article 8(1) of proc. no. 110/1976 by which the chairman of the military government was the only person conferred with the status of head of state to the exclusion of the defendants. Therefore according to the SPO's approach all the defendants could be viewed as head of state because they were labeled as collectively ruling and on the one hand it argued only the chair person the 'Derg' as qualifying the status of head of state.

---

<sup>15</sup> Ibid,p-23 . The SPO argued that international law don't explicitly provide immunity for head of state, and hence if the defendants want to justify their claim on basis of immunity they should indicate the specific provision which supported them.

<sup>16</sup> Ibid,p-23 and 24.

<sup>17</sup> Ibid.

### **5.3.4 The Suspension of the Revised Constitution**

The 1955 Constitution was suspended by the military government and hence any privileged accorded to head of state couldn't apply to the defendants.<sup>18</sup> Moreover; it alleged the 1955 constitution couldn't be viewed as a reflection or genuine will of citizen. Rather it was ostensibly prepared to mislead the international community as if the country was ready for democratization process.<sup>19</sup> On basis of the above reason, the SPO wants the constitution be declared in admissible should it found to exonerate head of state from prosecution.

### **5.4 The Court's Ruling**

Having examined the above arguments the court proceeds with criticism on the approach of defense lawyer. It declared that such objections shouldn't have been raised at this stage (preliminary stage) arguing that it didn't protect the interest of the defendant; for it amounts to admittance of the charge.<sup>20</sup> However, according to article 130(2) (C) of the Criminal Procedure Code one possible ground of objecting to a charge at preliminary stage is on basis of amnesty and pardon. Thus, even if the doctrine of sovereign immunity is not provided in the code since it shares similarity with both amnesty and pardon, it would be un-justified to undermine its significant. Normally, amnesty and pardon bars prosecution permanently, however, in case of sovereign immunity its effect is temporary. Further more, it pointed out the defendant couldn't rely on article 4 and 62 of the revised

---

<sup>18</sup>Ibid,p 76.

<sup>19</sup>Ibid.

<sup>20</sup> Ibid,p-68 and 69

constitution arguing that the rationale of such provision was mainly to protect members of royal family.<sup>21</sup> And hence, the defendant couldn't rebut the above pre-conditions.

The court failed to address for each of the objection raised by the defendants, may be it thought in-appropriately presented. Thus, according to the approach of the court it seemed that the issue of head of state immunity was a settled concept in that it didn't serve as a defense altogether.

The ruling of the court in rejecting the defendants' objection that the defense of sovereign immunity can't be invoked at preliminary stage is unjustifiable, because the doctrine of head of state immunity, as seen in section chapter 3 section 3.4.1, normally serves as procedural bar or jurisdictional impediment which has to be raised at initial stage of the proceeding. Other wise it would be meaningless to precede the case if at the end of the trial such objection becomes acceptable.

## **5.5 Evaluating the Validity of Arguments presented and the Court Ruling**

So far the arguments of both parties were briefly dealt in the above sections. The writer of this paper analyzes the validity of the defendants objection, SPO response and the court ruling in terms of domestic law and international cases dealt in chapter 3, section 3.5 and 3.6. Before discussing such issues, it is crucial to appreciate as to who qualifies the status of head of state? Could the entire defendant (members of various committees) be considered as head of state? Or the chair man of the 'Derg' only possessed such privilege?

---

<sup>21</sup> Ibid, p 76.

### 5.5.1 Who Qualified as Head of State under the Derg trials?

The charge brought against the defendants regarded them as establishing provisional military council or government, committees and sub-committees to commit genocide and other crimes. In other words it affirmed the defendant as “collectively” ruling the country in the name of Derg.<sup>22</sup> Thus; it can be concluded that the military government was formed as a result of joint will or consent of the defendants.

Traditionally, head of state is conferred to kings or queens whom they were regarded as symbol of their state. It should be noted that even if states are represented through one leader, it can't be ruled out the possibility of being led by group of persons as in the case of defendants charged by the SPO. Similarly, the French *cour de cassation* was doubtful whether Ghaddafi was the constitutionally ruler of Libya other than “leaders of the September 1 revolution.”<sup>23</sup> According to Libyan constitution, most attributes of state like declaring war; ratifying an agreement was entrusted to revolutionary command council ‘as collective head of state’.<sup>24</sup> This is a general trend under socialist countries and states like Switzerland.<sup>25</sup>

In deciding who qualified as head of state the crucial one is to delimit whether the person or group of persons( committee) perform specific power attributable to head of state; as

---

<sup>22</sup> Special Prosecutor v. Col. Mengistu Hailemariam *et al.*, Judgement , 12 December 2006 .,File.no 1/87 , Ethiopian Federal High Court,p-456.

<sup>23</sup> Watts, Head of state, Head of Government and Foreign Ministers , in 247 Rds(1994, III),P-21 as cited in S. Zappala, Do head of state in office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi case before the *French cour de cassation*, 2001(12), European Journal of International Law,p-153.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

reflected by constitution, custom or other laws. Thus, Ethiopia like the above mentioned socialist state was adhering similar trends in conferring head of state collectively.

From the factual as well as legal points of view there are evidences, which show the collective nature of head of state. Factual circumstance can demonstrate as to who possessed head of state. It should be recalled that members of the ‘Derg’ committee were drawn from various sects to decide the fate of the country soon after the removal of emperor Haileselassie. In the minute of “Derg” as recorded and presented in the proceeding, it demonstrates an agreement was reached among members of ‘Derg’ in that the sovereignty of the state was resided on the “Derg” or all members forming the committee. They strongly opposed granting the sovereignty of the state to a single person only.<sup>26</sup> From the stated fact it can be inferred that head of state was conferred to all members’ collectively.

From the legal perspective some of the laws proclaimed by the ‘Derg’ support the above statement. Typical examples of such laws are proc. no. 1/ 1974, proc. no. 2/1974 and proc. no 110/ 1976. According to the military establishment proclamation, it affirmed that ‘His Highness Merid Azmatch Asfa Wossen’ of Ethiopia to be head of state.<sup>27</sup> However, this was thought to be realized should he return to Ethiopia.<sup>28</sup>

Practically speaking ‘His Highness Merid Azmatch Asfa Wossen’ couldn’t be considered as head of state, because he is devoid of administrative and political matters.<sup>29</sup> Thus, if a head of state lacks power to assume leadership or perform functions which traditionally

---

<sup>26</sup> SPO V. Colonel Mengistu et al, High Court Judgment ( n 22 above), p-21.

<sup>27</sup> No 8 above, article 3(a).

<sup>28</sup> Ibid, article 3(b)

<sup>29</sup> Ibid, article 3(c)

became attributes of a state, it wouldn't be viewed as representative of state to get privileges accorded by international law.

Moreover, the subsequent proclamation to the above cited law underscored the collective nature of head of state. This can be inferred from the heading of proc. no 2/1974 which reads the provisional military administration as 'head of state and head of government'. Furthermore, article 3 of this proclamation stipulates the council 'Derg' will assume head of state functions until the people elected its representative. Thus, since the military government continued to rule during the red-terror campaign till disposed, the defendants claim to be regarded as head of state was valid.

Finally, the third law which possibly referred to a collective nature of head of state was proc. no. 110/76. According to this, the provisional military government was composed of three committees, those are:

- i. The congress which consists all council member
- ii. Central committee where by members drawn from the congress
- iii. Standing committee which is elected by the above two committees.

According to article 7(1) of this proclamation, the standing committee on behalf of the remaining committee was empowered to direct affairs of the country on the notion of collective responsibility. Thus, members of the committee can be termed as head of state, because they were mandated to execute act of the state.

Besides to the above mentioned laws; the collective nature of head of state can be inferred from the ruling of the Federal High Court. According to the finding of the court it labeled the defendants as collectively ruling to commit different types of

crimes.<sup>30</sup> Consequently, there is no way to deny them any privilege accorded to head of states under international law. Moreover, the acceptance of the charge brought by the SPO which termed the defendant as collectively ruling the country to commit the offences with which they were charged with indicates them as head of state. However, contrary to the above facts, article 8(1) of the same proclamation empowered the chairman of the council (colonel Mengistu) to direct the country on behalf of 'Derg'.

Thus; being a representative of the provisional government it can be argued that head of state ultimately falls with the leader of the country. However, affirming such interpretation concerning head of state would be against the charge brought by the SPO which indicted the defendant as collectively ruling the country.

The writer of this paper noted an apparent contradiction between article 7(1) and 8(1) of proc. no 110/ 1976, because the former one gave the standing committee to direct the country; where as the latter one took away such duty and entrust to the chairperson only. Thus, if the latter provision is to sustain or prevail, the defendants can't be prosecuted for "establishing provisional government collectively" to rule the country, because joint ruling could mean hierarchically at the same level. However, if the chairman was regarded as head of state or representative of the 'Derg'; the defendant didn't assume the same responsibility with him rather hierarchically below it. Thus; it is difficult to charge all of them as collectively ruling where power is not equally shared.

The approach of the defendant on issues of immunity seems inconsistent. On the one hand they argued that being charged for collectively ruling the state implies "head of state status" which only bound the government (acts of state doctrine). On the other hand they defended by claiming the power of persecuting or eliminating opposition group rested up

---

<sup>30</sup> SPO V. Colonel Mengistu et al, High Court Judgment ( n 22 above),p-439.

on the head of state which is the “chairman of the ‘Derg.’<sup>31</sup> Thus; the later statement refutes the defendant position to be regarded as head of state.

## **5.5.2 Examining the Defense of Immunity of Derg Officials**

So far, the collective nature of head of state was discussed. In this section the writer of this paper examines the validity of defense of immunity as presented by the defendants in light of international law; state practices and prominent cases. In order to appreciate the issues, the writer of this paper apportions this section in to three sub levels which directly address the issues of head of state immunity.

### **5.5.2.1 The Defense of Immunity in light of its purpose**

The purpose of granting immunity for diplomats or head of state is to pave way for effective performance of state officials when exercising their function in foreign state to which they are appointed or when circulate through third state. Thus, whenever state officials are hindered from discharging such functions it would tantamount as domestic interference on the affairs of state or as if it violate the principle of sovereign equality.

Underlying the above objectives of immunity, and had defendants been considered to possess (immunity); such privilege couldn’t be apply to them. As the charge reads almost all of the offences were deemed committed with in Ethiopian territory, while they were publicly performing their task domestically. Thus, the TGE by prosecuting the Derg officials don’t undermine the doctrine of immunity. Because none of them have been serving as diplomats representing their country in other states nor were in official visit conducting state affairs in the third state while they were detained.

---

<sup>31</sup>. Special Prosecutor v. Colonel Mengistu Hailemariam *et al* (n 5 above), p-22.

The situation could be different had they been nationals of other state performing their official duties in Ethiopia. In such cases there could be a possibility of disagreement between Ethiopia on the one hand and the sending state on the other hand. Thus, the defendant being Ethiopian nationals, prosecuting them doesn't affect Ethiopia's policy of conducting its foreign affairs with other countries, because there is no actual controversy which is common in other similar cases. Consequently since they were removed from their official post they are disallowed to claim head of state immunity because of implied waiver. Moreover, prosecuting incumbent ministers or head of state by its own government shows waiver of immunity by the TGE.

Under international law it was thought that ex-head of state or diplomats don't enjoy immunity from prosecution except for official acts.<sup>32</sup> It has to be noted that the claim of head of state immunity is temporal, thus when an official removed from his post there is a possibility of commencing prosecution. Thus, indicting the then officials of Derg (the defendants), became justifiable because they are no more in post.

### **5.5.2.2 Immunity of Head of State in light of Ethiopian Laws**

One area on which the defendant relied on head of state immunity is on basis of the revised constitution and civil code of Ethiopia. Unlike US and UK where they have State Immunity Act, Ethiopia doesn't have the same. Thus, inferring under what circumstance foreign state or their representative (diplomats and head of state) posses immunity became a cumbersome exercise. However, since the defendant invoked various laws the writer will focus on the content of such laws.

---

<sup>32</sup> Case concerning the arrest warrant of 11 april 2000 (Democratic Republic of Congo v. Belgium) International Court of Justice 14Feb 2002, p- 54.

### **5.5.2.2.1 The Legality of Immunity under the 1955 Revised Constitution of Ethiopia.**

Among the provisions cited by defendants to exonerate them from criminal accountability is the revised constitution of Ethiopia. According to article 4 of the revised constitution it provided that:-

“By virtue of His Imperial Blood, as well as by the anointing which he has received, the person of Emperor is sacred, His dignity is inviolable and his power is indisputable. He is consequently, entitled to all honors due to him in accordance with the tradition and the present constitution. Any one so bold as to seek injure the Emperor will be punished”

Since Ethiopia was under a monarchy rule, it is usual to assume the king as a symbol of the country. This provision clearly envisages the power of Emperor as indisputable and unchallenged. However; it remains silent for it doesn't pin point whether the Emperor is immune from prosecution in criminal cases. To owe loyalty and to accept the emperor as revered doesn't amount to view him (the emperor) above the law even in cases of serious international crimes.

Other than the above referred provision, article 62 (a) of the constitution seems to give clue on the immunity of the Emperor from being sued. It under scored the prohibition of bringing law suit against the emperor. Similarly, this provision is general for it doesn't specifically address which claims are prohibited from being invoked against the Emperor.

However, sub-article (b) of the same provision allowed any one to submit its claim against government organ, ministers or department for wrongful act they malicious committed and as a result incurs damage. From the reading of the above provisions, it doesn't seem to refer even to a simple offence let alone to incorporate international

crimes. The Wording of wrongful act normally connotes tortuous act which results in civil claim by plaintiff.

More ever, it is difficult to discern whether such constitutional provision really address to immunity from prosecution for core crimes because the penal code was enacted soon after the adoption of constitution. Thus, it is doubtful if the above articles in advance intended to limit international accountability for head of state should they commit genocide, crime against humanity and war crimes which gets wider international recognition.

On this regard Helen.D touches the practice of some states by demonstrating the constitutional limit in conferring head of state immunity.<sup>33</sup> However, contrary to the above he stipulated countries like Norway, Spain and Belgium grant absolute immunity for their kings even from criminal prosecution.<sup>34</sup>

Others, however, qualify its scope either on basis of the penalty to be imposed or to the utterance of speech in parliament.<sup>35</sup> However, in actual sense the experience of the above mentioned states couldn't be construed as if in contradiction with principle of accountability for international crimes. Because, in such monarchical states, kings don't hold greatest power of the state or in actual control of military command.<sup>36</sup>

---

<sup>33</sup> GRUNDLOV (Constitution) of Norway, article 5; LA CONSTITUTION COORDONNE, title VIII, article 195 (Belgium); as cited in Helen Duffy, National Constitutional Compatibility and the International Criminal Court, (2001) 11 *Duke Journal of Comparative and the International Criminal Court* 5, p-15.

<sup>34</sup> Article 16(2) of the Switzerland Constitution as cited Helen Duffy (n 33 above), p-15.

<sup>35</sup> Helen.D, National Constitutional Compatibility and the International Criminal Court, (2001) 11 *Duke Journal of Comparative and the International Criminal Court* 5, p-15.

<sup>36</sup> Ibid.

Consequently, the possibility of committing the serious crimes under international law is minimal.<sup>37</sup>

Coming back to the defendant objection, it is crucial to ascertain if the above provision could also apply to them.

As noted earlier these provision didn't expressly exonerate the Emperor from prosecution. Should it was taken as conferring the king with such privilege, the defendant couldn't benefit from it because they are required to fulfill the requirement provided. These elements envisaged under article 4 are:

- i. To have an imperial blood and;
- ii. To receive an anointments

It is obvious that the military government took power or government position through force. Such act is un-lawful and became inconsistent with the constitutional provision which they cited to benefit. According to the constitution imperial power was thought to devolve through succession to the nearest line of relationship.<sup>38</sup>

Considering the above stated facts, the defendants didn't meet the specific requirement that is why they kept silent from elaborating such facts; other than claiming on basis of article 4 to be exonerated from prosecution by virtue of possessing head of state.

It has to be reckoned that should the defendant satisfy such requirement; it wouldn't bring any change or bar prosecution because its legality is dubious especially in the

---

<sup>37</sup> Ibid.

<sup>38</sup> The Revised Constitution of Ethiopia,1955, article 5.

contemporary understanding of 'core crime' under international law. Nowadays; such offences are deemed as serious crime whose suppression demands international cooperation.

Moreover, there are numerous multilateral conventions which not-only outlawed such crimes but also imposed an obligation to prosecute on member states. Thus; Ethiopia being a party to these instruments is bound to respect its obligation. Other wise it would be inconsistent if on one hand revokes such privilege through ratification of international convention and on the other hand grant immunity for head of state. To this end Ethiopia not only ratified Genocide Convention, and Geneva Convention; but also accommodates the offences envisaged under its own penal code.

The writer of this paper is of the opinion that since Ethiopia ratified Geneva-convention during the emperor regime; such instrument has equal force with the constitution. Thus; in the absence of specific stipulation which confer head of state immunity by of the constitution; it can be discerned that in accordance with article 4 the Genocide convention the defendant don't have a right to claim sovereign immunity on basis of the constitution.

Furthermore; it should also be noted the time by which the revised constitution was adopted. At that time prosecuting offenders (head of state) for such crime was minimal. Other than the Nuremberg and Tokyo tribunal there was no wide spread practices which indict head of state at international arena.

Similarly, prosecuting such type of offence at domestic level was in-existent (not known). Thus, should states found incorporating immunity under their legislation; it would be hard to blame because at that time such issues was not a big concern as it stands now.

Moreover, it could be argued that in order to give life to the fundamental norms of the constitution, its meaning shouldn't be static.<sup>39</sup> Consequently, according to the evolving interpretation, constructive approach should be pursued so as to make the constitution persistent with international law. In this respect one commentator has noted that:

“The constitution is living document which reflects the aims, aspirations, genesis and thinking of the people. Constitution is not merely an imprisonment of the past, but is also alive to the unfolding of the future. Therefore, the language of the constitution should be interpreted in a broad and liberal spirit.”<sup>40</sup>

In light of the above premises, persistent nullification of international norms or maintaining head of state immunity which is outlawed by the constitutive act of various tribunals; and international instrument like Genocide Convention; Torture Convention; and the Rome statute would be against international law.

Furthermore, the defendant couldn't invoke the revised constitution for it was made in-operational by the military government. When the ‘Derg’ assumed power it immediately dissolve the parliament<sup>41</sup> and suspended the constitution<sup>42</sup>. From this fact it logically proceeds that the defendant would be precluded from being entitled to any privilege arising out of the constitution for it was made inapplicable.

---

<sup>39</sup> Shaukat Mahmood and Nadeem Shaukat, Constitution of the Islamic Republic of Pakistan 1973, (13 ed ) as cited in Helen Duffy (n 35 above) p-10.

<sup>40</sup> Ibid.

<sup>41</sup> Proclamation No.1/1974 (n 7 above), article 4.

<sup>42</sup> Ibid, article 5(a)

### **5.5.2.2.2 The Legality Immunity in light of the Civil code**

Another provision cited by defendants as possibly conferring immunity to head of state is the civil code of the Empire. Article 2137 of the civil code which deals with legal immunity provides as follows:

“No action for liability based on offence committed by him may be brought against His majesty the Empire of Ethiopia”

This provision only applies to the Emperor, and hence the defendant claim of a defense of immunity on this basis can't be sustained. Extending such provision to the military government is unwarranted for it granted personal immunity only to the Emperor. Moreover, in view of the purpose of civil code it is not justified to interpret the provision as implying or including criminal acts. Had it been intended to bar prosecution, the same provision could be included in to the penal code.

Thus, it should be construed to civil suit relating to compensation be it (wrong-doing) emanates from civil acts or by committing offences. Similarly, the subsequent provision gave legal protection to lower officials like ministers, parliamentarian, and judges from being sued for “official acts”.<sup>43</sup> However, article 2139 stipulates, exception to the above provision i.e., the legal immunity doesn't apply for offences committed.

From this provision it can be deduced that the specific reference made only to article 2138, shows that the emperor is immune from civil proceeding even the act emanates from an offence. However, it should be noted that article 2139 didn't invalidate the possibility of bringing criminal proceeding against the Emperor incase of genocide, crime

---

<sup>43</sup> Proclamation .No 165/1960, A Proclamation to provide the Civil Code of the Empire of Ethiopia, article 2138.

against humanity and war crimes for there is no explicit provision dealing with such. Thus, the above cited provision which didn't even legitimize the Emperor to commit international crime could not apply to the aforementioned defendants.

### 5.5.2.3 Immunity v. *Jus-cogens* Norms

One area of appraising the defendant objection is on basis of the status of *jus-cogens* norms vis-à-vis the doctrine of sovereign immunity. The offences with which the defendant charged with are serious crimes; especially prohibition of genocide has been considered as *jus-cogens* norms,<sup>44</sup> by which the international community as sharing universal objects and moral imperatives.<sup>45</sup> Such rules are deemed to maintain the overriding interest and values of international community. However; there is no consensus on the status of immunity though it was believed to attain as a simple customary law. As discussed in chapter 3, section 3.4 and 3.5 there were wide spread state practices which grant head of state and foreign ministers which seem to elevate it to a customary law status.

As a rule *jus-cogens* norms are non-derogable, unless by norms of the same status.<sup>46</sup> Thus, favoring immunities over *jus-cogen* norms became inconsistent with the interest of international community as well as treaties which provides so. In support of the above

---

<sup>44</sup> The prohibition of Genocide is viewed as *jus-coges* norm because it is internationally condemned and adopted in the work of ILC in affirming the principle of Nuremberg trial. Similarly the ICJ advisory opinion concerning reservation to the Genocide convention underlined that genocide is a universal crime which became binding up on all state even in the absence of conventional obligation.

<sup>45</sup> Nehal. B, How shall we Punish the Perpetrators? Human Rights, Alien Wrongs and the March of International Criminal Law, ( 2003) 10 *Melbourne University Law Review*, p-3.

<sup>46</sup> Vienna Convention on the law of Treaties, opened for signature on 23 May, 1969, entered into force on 27 January 1980, Art 53, 1155 UNTS 331.

statement there is explanation which stipulates an implied waiver of immunity, because committing such crimes is beyond “*acta jure imperii* i.e. normal function of a state.

Contrary to the above, others argued foreign states entitlement to immunity was at the discretion of states.<sup>47</sup> Similarly; the ICJ in the *arrest warrant case* affirmed the absence of exception to immunity for the incumbent ministers or head of state when they commit war crimes and crime against humanity.<sup>48</sup>

When we examine the validity the latter reflection it has short comings. The prevailing understanding on conflicts between the two norms is that immunity can’t subsist over international crimes. As discussed in chapter 3, section 3.5.2 the majority members of House of Lords in Pinochet case contended that international crimes as having a *jus-cogens* norm couldn’t be considered as category of official acts. Because; permitting so would tantamount violation of international law in which the international community has interest to repress.

Moreover, in Ghadafi case the *cour de cassation* of France noted the existence of exceptions to head of state immunity.<sup>49</sup> Since the offence Ghadafi was charged with mainly related to terrorism, the court didn’t seem to view it as having equal status with other category of international crime.

The writer of this paper is of the opinion that the verdict of the court could be different had the indictment include genocide, crime against humanity and war-crime, because

---

<sup>47</sup> Lee.M. Caplan, State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory, (2003) 97 *The American Journal of International Law*, p-775.

<sup>48</sup> The arrest warrant case ( n 32 above) Para 61.

<sup>49</sup> S. Zappala ( n 23 above),p- 158.

such offences are the most serious ones. In support of the above view M. Shaw underlined that though what constitutes an official acts are not clearly specified, it excludes commission of international crimes.<sup>50</sup> Similarly, Antonio Cassese pointed out those perpetrators couldn't escape prosecution and those who acted in official capacity are deemed to have impliedly waived the defense of sovereign immunity.<sup>51</sup>

Theoretically speaking it would be hard to find national policies which contradict with *jus-cogens* norms. Any constitution or laws if it shields rulers from international accountability for crime of genocide, crime against humanity and war-crime it would be deemed as inconsistent with its own basic objectives.<sup>52</sup>

It is obvious that one concern or objective of modern constitution is to ensure respect for human rights. In the current trends; it is difficult to argue states would give priority for immunity over *jus-cogens* norms because these crimes deny basic rights of protected groups for continued survival. Moreover; most countries have signed Genocide convention and ICC statute, and hence it would be inconsistent with their obligation if they favor immunity over core crimes.

Coming back to the 'Derg' trial though the defendant claimed to perform official acts; because of the above mentioned reason it couldn't be treated as such. In other words state policy to exterminate a particular group; killing of civilians or systematic torture don't fall with the function of head of state.

---

<sup>50</sup> Malcolm N. Shaw, *International Law*, (6<sup>th</sup> ed) Cambridge university press New York 2008, p-701.

<sup>51</sup> Antonio cassese; *International Criminal Law*, (Oxford university press 2003), p- 23.

<sup>52</sup> Helen Duffy ( n 35 above) p-11. He further stressed that head of state who commits an international crime couldn't rely on constitutional immunity because permitting so would render the constitution as facilitator of its own demise.

Furthermore; the claim of the 'Derg' officials becomes unacceptable even seen in light of the ICJ ruling on arrest warrant case. The relevance of the ruling towards the 'Derg' trial is minimal because it pre-supposes certain conditions to be met. Which are:-

- i. It deals with incumbent foreign ministers or head of state
- ii. The alleged acts relates to war-crime and crime against humanity
- iii. The dispute involves two states.

The defendant under the Derg trials don't meet requirement of no. i and iii) of the above stated elements. In other words they were not acting as incumbent foreign ministers or head of state in other countries to attract international character involving a dispute between Ethiopia and other state.

Thus, under international law there is no way discourage Ethiopia from prosecuting its officials should they commit such crimes. Moreover, the 1957 EPC treats both genocide and crime against humanity in the same way. Thus, by virtue of EPC both crimes against humanity and genocide could be considered as *jus-cogens* norms which mayn't be disregarded or be justified on basis of immunity to commit such offences.

Moreover, it should be noted that the crime of genocide was not include in the *arrest warrant case*; and hence the court ruling in conferring broader immunity didn't necessarily apply to genocide, rather to an act of war-crime and crime against humanity. Even, with respect to such offences the validity of the court judgment isn't with out critiques, because the absence of state practice doesn't entail immunity from prosecution of incumbent head of state or foreign minister rather the opposite has to be ascertained i.e. whether customary international law as inferred from state practice really prohibit from indicting head of state.

To conclude, even on basis of the arrest warrant case the objection of the defendant became un-justified because of the above stated reasons.

## **5.6 Conclusion**

The defendants being higher official of 'Derg' were prosecuted for sole purpose of establishing a government to commit different counts of genocide, and others. There is no doubt that the defendant were head of state as inferred from various laws enacted by the then government and from the minutes of 'Derg' in which the members agreed head of state to be entrusted to the 'Derg' or (members) as opposed to a single person. Moreover, if for purpose of prosecution the defendants were labeled as collectively ruling, it is usual to extend any privilege accorded by domestic and international law to the defendants too.

The validity of the defense of head of state immunity as claimed by the defendant is unacceptable. The rationale of granting immunity is to facilitate effective performance of state function in other country. Thus prosecuting the 'Derg' officials don't hinder Ethiopia's capacity to conduct its foreign relation.

Moreover, immunity is an attributes of a state; and hence it can be waived by state. Thus; prosecuting the defendant could be seen as waiver of immunity, which is recognized by international law.

Besides the above, indicting the defendants don't amount to interference on foreign policies of third state, because the defendants were not acting as representative of such states. Moreover; the domestic law they cited failed to explicitly grant head of state immunity for international crime. The revised constitution empowered Emperor

Haileselassie with immunity for civil suit; and hence extending such privilege to criminal cases became unjustified.

Moreover, the 1955 constitution is intended to protect royal members and pre-suppose power be devolved through succession to the closest lineal relationship. However, since the defendants didn't claim belonging to the royal families and they assumed power contrary to the spirit of the constitution, they could not avail privileges accorded by the constitution. Furthermore suspension of the constitution amounts in-applicability; and hence claiming immunity on basis of in-operational laws became invalid.

Besides the above, granting immunity for offenders of international crime is inconsistent with states obligation to prosecute the defendant charged with serious crimes. Given the fact that such offences are elevated to *jus-cogens* norms (especially genocide) it would be illogical to be derogated by the doctrine of immunity. Though there is no consensus at the status of immunity under international law, the prevailing understanding is that such rule doesn't goes beyond a simple customary law status.

<b>Chapter 5</b> .....	79
<b>5.0 The Defense of Head of State Immunity Under the Derg Trials (SPO V. Colonel Mengistu Hailemariam and et al)</b> .....	79
<b>5.1 Introduction</b> .....	79

<b>5.1 The Defendants Arguments .....</b>	<b>80</b>
<b>5.1.1 The Defense of Sovereign Immunity .....</b>	<b>80</b>
<b>5.2 The SPO Counter argument .....</b>	<b>82</b>
<b>5.2.1 The Defense of Sovereign Immunity violates the principle of Equality before the Law.....</b>	<b>82</b>
<b>5.2.2 Irrelevancy of Immunity under International Law .....</b>	<b>83</b>
<b>5.2.3 The Defendants don't qualify as Head of State .....</b>	<b>83</b>
<b>5.2.4 The suspension of Revised Constitution.....</b>	<b>84</b>
<b>5.3 The Court ruling .....</b>	<b>84</b>
<b>5.4 Evaluating the Validity of Arguments presented and the Court Ruling .....</b>	<b>85</b>
<b>5.4.2 Examining the Defense of Immunity of Derg Officials.....</b>	<b>90</b>
<b>5.4.2.1 The Defense of Immunity in light of its purpose .....</b>	<b>90</b>
<b>5.4.2.2 Immunity of Head of State in light of Ethiopian laws .....</b>	<b>91</b>
<b>5.4.2.2.1 The Legality of Immunity under the 1955 Revised Constitution of Ethiopia. ....</b>	<b>92</b>
<b>5.4.2.2.2 The Legality immunity in light of the Civil code.....</b>	<b>97</b>
<b>5.4.2.3 Immunity v. Jus-cogens Norms.....</b>	<b>98</b>
<b>5.5 Conclusion .....</b>	<b>102</b>

## CHAPTER SIX

### CONCLUSION

International crimes are those considered as serious offence which international community will not tolerate. Among the categories of offences which have been elevated to a degree of most serious one are genocide, crime against humanity and war crime. Those offences have been out-lawed by different multi-lateral conventions. However; hierarchically such offences are not at the same level.

Genocide is labeled as crimes of all crimes; because it targets elimination of persons not in their individual capacity but by the mere fact that they belong to a certain group like race, ethnicity, nationality and religion. Political group was initially included in the draft Genocide Convention; however, because of opposition by some states later on it became avoided. However, the recent interpretation of ICTY trial chamber in *Jelsic* case affirmed execution of military aged men and women having prolonged effect for the continuation of two or three generation or targeting influential persons belonging to the community was viewed as instance of genocide. Thus, in practice the scope of genocide became extended, through interpretation, than originally thought.

Like genocide, crime against humanity is another category of international offence which was developed after Nuremberg tribunal. Before that; however, there was no specific definition coined for it. From Nuremberg trial onwards the scope of this crime is extended for instance the requirement of nexus with armed attack was abolished.

There is an over-lap between 'genocide' and 'crime against humanity' with exception to the degree of intent. In case of genocide there should be specific intent or '*dolus specialis*' which was not necessary under crime against humanity. Practically, however,

differentiating between the two remains a cumbersome exercise. Moreover; political groups are protected under crime against humanity; and hence killing of members in a systematic way incurs international accountability.

The last category of international crime is war-crime. This is an oldest of all crimes and was accommodated in Hague convention and the charter which established various tribunals. Normally, such offences are mostly committed in large scale that is why it persistently included in various conventions to show its seriousness. Thus, invalidating criminal prosecution (individual accountability) in favor of immunity or to confer personal privilege would be un-justified. Moreover; under international law there exists a duty of state to prosecute or extradite (*Aut Dedere, aut judicare*)

Contrary to the above notion, the doctrine of head of state immunity became a challenge for international accountability. Traditionally, a head of state by signifying or representing his state had been conferred a privilege from being prosecuted on foreign courts. The doctrine was founded on basis of state equality and prohibition of interference on state affairs.

With respect to the status of immunity it takes different forms both at national and international level. Even with in state there are divergent and in-consistent practices; however, it can be deduced that the doctrine is still alive.

In *US v. Noriega* case, the defense of head of state immunity was rejected mainly because U.S didn't recognize him as constitutional ruler of panama and waiver of immunity by his state. Moreover; in *Mugabe* case the US government declared that denying immunity for incumbent head of state would be inconsistent with American policy and international law. The above two cases demonstrate the continuity of head of state immunity in so far it hasn't been revoked by sending state. Similarly, in *Pinochet* case the majority of House of Lords accepted the existence of head of state immunity, however, given the fact

that torture was an international crime (*jus-cogens* norm) it can't be derogated by doctrine of immunity. Thus, had *Pinochet* accused of less serious crime the verdict of the court could be different. Moreover; in *Ghadafi* case the *cour de cassation* of France noted that immunity still continues to apply saves under exceptional circumstances. Furthermore, in the *arrest warrant* case, the *ICJ* declared under customary international law immunity for incumbent foreign ministers and higher officials', includes head of state, may not be subject to prosecution in other state. Furthermore, the Vienna convention on Diplomatic privilege accorded immunity for officials including head of state.

In contrast to the above the charter which established international tribunal like article 7 of the Nuremberg and Yugoslavia tribunal; article 6 of Rwanda tribunal, and article 27 of the ICC statute disallowed immunity for head of state and other high ranking officials. These tribunals were mainly created on basis of individual accountability for international crimes with out making distinction on the status of defendant. To this effect these tribunals affirmed head of state immunity couldn't serve as a defense.

For those cases brought at international level, the defense of head of state immunity was rejected by international tribunals. In *Blaskic* case and *Furundzija* case the appeal chamber of the ICTY chamber rejects the defense of head of state immunity. Similarly in *Charles Taylor* case (the then president of Liberia) and Milosevic (Former head of state of Yugoslavia) the Sierra Leone special court and the ICTY trial chamber respectively didn't take in to account the objection of head of state immunity. Thus, since international tribunals have been established to end impunity, the defense of head of state is totally in-applicable.

Other than these tribunals; there are soft laws which impliedly revoke head of state immunity. Among these GA Res 95 affirmed the Nuremberg principle. Similarly the ILC adopted the Nuremberg rules under principle III as restatement of customary law.

Moreover; the opinion of scholars on this respect revealed that the defense of immunity couldn't subsist over international crimes. Among these writers Antonio.Cassese, Schwazemberger, Malcolm.N.Shaw, Oppenheim and S.zappala are some of them. Similarly, the *ICJ* in its advisory opinion on reservation to genocide convention affirmed that the obligation enshrined in the convention bounds state even in the absence of conventional treaties. Thus, since one of the obligations provided by the convention is to prosecute perpetrators irrespective of their official status, the defense of immunity became irrelevant.

Coming back to the 'Derg' trial higher officials of the Military government were indicted of genocide, crime-against humanity and war-crime among other thing. They were prosecuted on basis of Ethiopia penal code for persecuting civilians and those suspected of members of opposition party. According to article 281 of EPC political party were included as protected group. This makes the penal code unique from other international conventions dealing with genocide. Similarly, both genocide and crime against humanity have been treated in the same way because it was stated in a single provision under the heading of 'genocide; crime against humanity.

The defendant's objection on the inconsistency of article 281 of EPC with international law became un-justified; because states are free in broadening the scope of protection. Moreover; when we examine in light of the ICTY trial in *Jelsic* case killing of influential personalities in the community is taken as evidence of genocide, and hence, the policy of 'Derg' in persecuting leaders of opposition group could also be justified be included under the scope of genocide.

Moreover, the approach of Federal high court in holding article 281 the EPC was not repealed by various laws of the 'Derg' is un-persuasive, because it failed to demonstrate if specific provision of the EPC was tacitly amended or not. Among the laws issued by the Military government proc. no 110/1976 and proc. no 129/1977 empowered the government authorities to take measures against opposition political group. More ever, by virtue of article 10 of proc. no 1/1974, any laws inconsistent with the above proclamations was deemed in-applicable. Thus, since killing of political group was allowed by the above cited laws, it can be claimed that article 281 of the EPC is tacitly repealed. However, the legality of such law's is dubious for it violates basic rights of individual as provided under domestic and international human right law.

With respect to the defense of head of state immunity presented by the defendant (Higher officials of 'Derg'), the Federal High Court is justified to reject it because of the following reasons:-

Firstly; the rationale of granting head of state immunity is to facilitate effective performance of state function. Thus; prosecuting the 'Derg' officials doesn't contradict with the purpose of granting immunity, because it neither affect Ethiopia's ability to conduct foreign relation nor the interest of third-party.

Secondly; immunity is an attribute of a state; and hence the decision to prosecute by TGE implies waiver of its rights. So far, international law doesn't prohibit a state from indicting its officials.

Thirdly, the revised constitution conferred immunity only to the Emperor Haileselassie for civil suit; and hence extending such privilege to criminal case became un-justified. The constitution was intended to protect royal families and presumed power to be devolved though succession. Consequently; the defendant other than invoking immunity

on basis of the constitution failed to indicate whether they satisfy the requirement envisaged under it. Similarly; when the military government assumed power it immediately suspended the constitution. Thus, invoking in-applicable law became illogical.

Fourthly; even the civil code conferred legal immunity to the Emperor, and hence it couldn't be implied as referring to criminal case or be extended to the defendant. Besides; in view of the purpose of the civil-code it only bars civil suit even arising out of criminal act.

Lastly; since most of the serious crimes especially genocide was elevated to a *jus-cogens* norm it would be un-reasonable to confer immunity over such offences. Though immunity applies in some states, hierarchically it is not at the same level with the demand for repressing such international offences. Thus, it would be un-acceptable that such norms (prohibition of international offences) to be over-ruled by a relatively a customary law status. Similarly, the view of scholars immunity is regarded as impliedly waived incases of commission of international crimes.

Thus, on basis of the above reasons there is no ground to criticize the Federal high court ruling in quashing the defendant's because it is consistent with the prevailing understanding of international law, and state practices.

**ADDIS ABABA UNIVERSITY  
FACULTY OF LAW  
INTERNATIONAL LAW STREAM**

**IMMUNITY FROM PROSECUTION OF HEAD OF STATE FOR CRIMES OF  
GENOCIDE, CRIME AGAINST HUMANITY and WAR CRIMES: WITH  
PARTICULAR REFERENCE TO THE RED TERROR TRIALS IN ETHIOPIA**

SUBMITTED BY: ROBEL TAREKEGN

ADVISOR: Dr. GIRMACHEW ALEMU (Assistant Professor)

SUBMITTED TO ADDIS ABABA UNIVERSITY, SCHOOL OF GRADUATE STUDIES IN  
PARTIAL FULFILLMENT OF THE REQUIREMENT OF DEGREE OF MASTERS (LL.M) IN  
INTERNATIONAL LAW

**January, 2010**

## **DECLARATION**

I, the under signed, declared that the thesis is my original work and has not been presented for a degree in any other university and that all sources of material in the thesis have been duly acknowledged.

Declared by Robel Tarekegn

---

Confirmed by Dr Girmachew Alemu.  
(Assistant Professor)

---

## **ACKNOWLEDGEMENTS**

I would like to express my heartfelt gratitude to all my lecturers for their contribution to the course content. In particular, I would like to thank my advisor Dr. Girmachew for whose commitment and dedication as my supervisor went beyond the call of duty to ensure that I not only produce the best possible research study but also that this study was an enjoyable and memorable one.

I am greatly indebted to my friend Billen Girmay and his wife Roza Asmamaw ( Meresiet), Hana Asmamaw, Amha Asmamaw, Workeleul Gidey for their guidance and useful comments. I am also thankful to Senior prosecutor (Special Prosecutor Office) Yosef Kiros for his genuine cooperation in providing me relevant material and information.

Lastly, I wish to express my most sincere gratitude to my whole family, prayers and encouragement. In particular, I would like to thank my friend, Hani Mekonnen whose efforts, commitment and sacrifices enabled me to complete this study.

