CHAPTER 5

EXTRADITION: EMERGING ISSUES, CHALLENGES & CASES

5.1. INTRODUCTION & METHODOLOGY:

In the light of the discussion in the previous chapters, I would now look specifically in the challenges and issues that arise in successful implementation of the age old principle *ADAJ*, especially in relation to acts of terrorism as under treaty law or under GC. In the backdrop of the emerging jurisprudence from case laws under ICL, one can definitely conclude that member states have at least theoretically challenged certain age old principles international law, like immunity of sitting head of states and other officials, non-intervening sovereignty of states. With the passage of time, extradition is said to have moved from the sole domain of state relations to international organizations. But the researcher wishes to show that even in the age of increasing number of indictments, States are still active in delaying or stalling processes of surrendering individuals to face trials, irrespective of the nature of the forum. The obstacles come in the nature of immunities, impunity agreements, exile arrangements, and amnesties, declining requests citing political offence or death penalty. The examination of the following issues is significant, given the objective of ICL to bring an end to impunity.

The methodology would be involving reference to both primary and secondary materials, in the form of laws, judgments, journal articles, and reports.

5.2. EMERGING ISSUES AND CHALLENGES:

Under this section the researcher will be limiting herself to only examining the issues of universal jurisdiction as understood, and further inquire if ‘terrorism’ has achieved the status of crime conferring universal jurisdiction on nations. The other important issue that will be inquired is that if there is a positive CIL, which binds nations to extradite individuals accused of committing acts of terrorism.
5.2.1. TERRORISM AND PRINCIPLE OF UNIVERSAL JURISDICTION:

Before we go into the issue of terrorism as a crime inviting universal jurisdiction, the researcher wishes to understand the concept of universal jurisdiction, followed by the concept of international and transnational offences, under international law.

Jurisdiction, which may be both civil and criminal, refers to the power of each state under international law to prescribe and enforce its municipal laws with regard to persons and property. The jurisdictional principles contained in criminal treaties are product of national criminal practice, like principles of territoriality, active personality (or nationality), passive personality, universality and protective principle.\(^\text{738}\) However issues of criminal jurisdiction remain a highly contentious area of international relations, as not only state parties might oppose the said rule, but at times states parties may even disagree over its ambit, execution, or hierarchical status. However the application of universal jurisdiction to a particular offence does not require any links and it enables any state to assert its authority over offences that are subject to universal jurisdiction. The types of crimes falling under universal jurisdiction are acts considered to be so repugnant to society that all states have an interest and the authority to arrest and prosecute the perpetrators of that specific heinous act. Any state that can get custody over these individuals can prosecute them.\(^\text{739}\)

**Crimes under international law have customarily attracted universal jurisdiction in two independent ways:** (a) based on the heinous, repugnant nature and scale of the offence, as is the case with grave breaches of humanitarian law and crimes against humanity, or (b) on the basis of the inadequacy of national enforcement legislation with regard to offences committed in locations not subject to the authority of any state, such as the high seas.\(^\text{740}\)

Any such crime which may become subject to universal jurisdiction would also require unequivocal consent of the international community. As for non-parties to these Conventions, the *jus cogens* character of the offences involved precludes even persistent

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\(^{738}\) All require some kind of link or connection with the prosecuting State, whether that link is based on the territory where the offence took place, the nationality of the perpetrator or the victim, or involving a threat to the interests of the State concerned.

\(^{739}\) *Supra* Note. 69.

\(^{740}\) Bantekas, *Supra* note 175, at 85-86.; see Art. 105 of UNCLOS Seizure of a pirate ship or aircraft.; Art. 99; see also Princeton Principles of Universal Jurisdiction [Principle 2 (1) Serious Crimes Under International Law (available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf visited on 2.05.2014]
The application of universal jurisdiction has been applied to sea piracy, WCs, CAH (through Nuremburg and Tokyo tribunal), and has further expanded to include slave trading, drug trafficking, and torture. Such jurisdiction has also been adopted by several European nations, like Belgium, which has applied universal jurisdiction to indict Ariel Sharon, Yasser Arafat, Henry Kissinger, Ali Akbar Hashemi-Rafsanjani, Fidel Castro, Saddam Hussein, Hissen Habre, and AbdulayeYerodiaNdombasi. Therefore it is essential, when a national court exercises such jurisdiction, that the municipal law must enable it to do so, unless the judge is applying unimplemented treaty obligations; or that customary law is automatically incorporated in the internal law of that country, that the offence in question is subject to universal jurisdiction, and that the court was applying that rule.

Therefore given the fact that universal jurisdiction is limited to only few crimes which have proven over time to have shocked the collective conscience, the issue that needs to be dealt with is if acts of terrorism has been able to have the same effect or not. Over the last few decades, there have been some activities like hostage crises, bombing of aero planes and other kinds, which have shocked the international community and resulted in adopting Conventions covering specific kinds of acts, collectively referred as terrorism conventions. But however, these conventions are limited only to the member states with respect to exercising jurisdiction, and in the process they have clearly steered away from bestowing universal jurisdiction to prevent and punish such offences. Therefore the authority to punish individuals committing acts of terrorism under these conventions come from domestic legislations, whereas ICL creates individual criminal responsibility under international law regardless of whether or not individual nations criminalized such conduct under its domestic law.

742 See Michael P. Scharf, Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States, 35 NEW ENG. L. REV. 372–373; Supra Note. 69.
743 Supra Note. 740
744 Supra Note 99.
At the same time due to lack of any accepted definition for terrorism, except the description that we find under Financing Terror Convention, and elements thereof, has led States to define and identify standards differently, under their municipal laws. Such different standards of defining ‘terrorism’, has prevented nations from treating it in the same manner as violations of humanitarian law or piracy, i.e. less than international crime. While in some Conventions, the offences as defined are beyond the scope of these Conventions when committed in armed conflict situations, but on the other hand financing of certain acts which may be committed in situations of armed conflict is within the scope of the Terrorist Financing Convention.

Under international law, there are two broad classes of crimes, i.e., ‘international’ and ‘transnational’. Transnational crimes address private injuries, while international crimes focus on injury to the international community as a whole, so, in the former case states ought to establish a link between the crime and the state in order to exercise that territorial jurisdiction, whereas in the latter, there is no need for that specific link. There is a need to emphasize that international crime threatens international values and harms international order, while transnational crimes only affect individual states. In addition, unlike in international crimes, the interests imperilled by transnational crimes, and the possible effects that such crimes may have on peace and security, do not justify a legitimate intrusion on nations’ sovereignty. However, terrorism does not fall within transnational crime as the motivation for the latter is personal aggrandizement, while the terrorist act is fundamentally altruistic. An act of terrorism at times involves transnational crimes as well as international crimes. On the other hand, the U.N. Security Council, in Resolution 1377, has declared that “acts of international terrorism constitute one of the most serious threats

746 Supra Note 530.
747 Supra Note 508.
748 Id.; also see Supra Note 745.
750 Art. 2 (1) (b) of the Terror Financing Convention.
751 Supra note 745, at p 346.
752 Id.
753 Id.
to international peace and security in the twenty-first century.”

In contrast, the commission of any international crime, i.e. genocide, CAH, torture, WCs, *per se* comprise direct danger to international amity and to the safety of mankind regardless of intensity, expansion, depth of violence, damage, and impact on a nation’s security, leading the U.N. Security Council to form forums like ICTY and ICTR. Therefore it can be fairly said that crimes eliciting universal repudiation share certain elements like being precisely defined, globally accepted as such, and the jurisdiction for trying such crimes may reside in international tribunals of supranational character or domestic tribunals having universal jurisdiction.

Therefore unless acts of terrorism is expressly made a crime in ICL statutes or implied to be within the existing international crimes, it can’t be considered as inviting universal jurisdiction. *The other problem would arise with respect to ‘domestic terrorism’ which is beyond the scope of terror conventions. However such acts are still considered as grave breaches of GC or customary international humanitarian law even if they are confined in the territory of one State only.*

It is said that the main merit of international criminal tribunals have been to identify terrorism and their qualification as international crimes subject to universal jurisdiction. The ICTY through its decisions confirmed that acts of terrorism are often resorted as an unlawful warfare strategy in armed conflicts and thereby qualified them as WCs entailing individual criminal responsibility under customary law. It is interesting to note, that notwithstanding the existence of precedents such as Galić, in which acts of terrorism were clearly identified as specific-intent WCs under the laws of armed conflict and customary

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757 See, *Supra* Note 413
758 *Supra* Note 756.
law, in Balgojevic, the prosecution opted for the charge under crimes against humanity, which posed more difficulties, as it required proof of widespread and systematic attack with discriminatory intent. In Galić decision, it was held, the offence of terror targeting civilians as stated in charge sheet comprises of ingredients similar as crimes under Art 3 of Statute, also certain definite elements. It also clarified that “acts of violence” is related to only unlawful attacks against civilians. It also held “primary purpose” to be the mens rea, wherein the accused must be shown to have been known of the consequences that such terror would cause, as precisely desired by him. Bench also accepted the term “terror” to mean “extreme fear”. In Balgojevic, the trial chamber found the act of “terrorising the civil population” in spite of its absence from the ICTY Statute, to be similar to “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population” prohibited under Art 51(2) & Art 13(2) of AP I &II of GCs. The Trial Chamber made a finding that “primary” had to understood as principal object and not the only objective. Trial Chamber observed, exposing an individual to fear would be considered as denying him of his fundamental right to safety as documented in majority legal systems, including Art 9 and Art 5 of ICCPR and ECHR respectively.

759 Supra Note 756, the war crime of acts of terrorism was qualified as a specific intent crime, meaning that the acts need only to have the potential to instigate terror
760 Supra Note 756.
761 Supra Note 551, at p. 277.
762 Supra Note 756, ¶133: 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.
763 Supra Note 756, para 135.
764 Supra Note 756, para 136.
765 Id.; Also see Blagojevic, ¶ 590.
766 Id., ¶ 589.; “the Trial Chamber defines the elements of “terrorising the civilian population” as follows:
Acts or threats of violence; The offender wilfully made the civilian population or individual civilians not taking part in hostilities the object of those acts or threats of violence; and The acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population.”
767 Id., para 591.
768 Id., para 592.
The SCSL seems to have adopted a broader interpretation of Article 3 (d) of SCSL Statute as covering all the antiterrorism provisions contained in the GC and their Additional Protocols, keeping in mind that it concerned NIAC.\textsuperscript{769} In the Brima case\textsuperscript{770}, contrary to Galić, the acts were considered as a specific breach of the fundamental guarantee of humane treatment (Art 4 AP II) and not as other serious violations of IHL (Art 4 of SCSL Statute)\textsuperscript{771} in determining jurisdiction and the applicability of Art 3(d), SCSL, trial chamber restated the criteria set forth in the CDF\textsuperscript{772} case, including the nexus requirement.\textsuperscript{773} The court concurred with the findings of the CDF case, and concurred with Galić in concluding that this prohibition amounts to customary law\textsuperscript{774} the chamber endorsed the following requirements before applying Art 3 of the SCSL Statute, i.e., there must have been an armed conflict whether international or not at the time the offences were allegedly committed; there must be a nexus between the armed conflict and the alleged offence; the victims weren’t directly participating in the hostilities during the alleged violation\textsuperscript{775}. The trial chamber referred to the jurisprudence as developed after First World War, Second World War, the ICTY judgements, and concluded that CIL imposed individual criminal liability for violations of the prohibition of terror against the civilian population at the time relevant to the Indictment.\textsuperscript{776} In the light of mentioned sources the trial chamber adopted the following as elements of the crime for acts of terrorism, i.e., acts or threats of violence directed against persons or their property; the perpetrator wilfully made persons or their

\textsuperscript{769}Prosecutor v. MoininaFofana and AllieuKondewa, Case No. SCSL-04-14-T, Trial Judgment (Special Court for Sierra Leone August 2, 2007) ; Prosecutor v. MoininaFofana and AllieuKondewa, Case No. SCSL-04-14-A, Appeal Judgment (Special Court for Sierra Leone May 28, 2008).

\textsuperscript{770}The Prosecutor vs. Alex TambaBrima, BrimaBazzyKamara and SantigieBorborKanu (the AFRC Accused), Case No. SCSL-04-16-T, (Special Court for Sierra Leone 20 June 2007) http://www.refworld.org/docid/467fba742.html [accessed 5 May 2014]

\textsuperscript{771}Supra Note 551

\textsuperscript{772}Prosecutor v. MoininaFofana and AllieuKondewa, Trial Judgment, Case No. SCSL-04-14-T (August 2, 2007)

\textsuperscript{773}Supra Note. 551

\textsuperscript{774}The Prosecutor vs. Alex Tamba Brima, BrimaBazzyKamara and SantigieBorborKanu (the AFRC Accused), Case No. SCSL-04-16-T, (Special Court for Sierra Leone 20 June 2007) http://www.refworld.org/docid/467fba742.html [accessed 5 May 2014], para 662.

\textsuperscript{776}Id., Para 241-248

\textsuperscript{776}Id., para 660- 666.
property the object of those acts and threats of violence; and the acts or threats of violence were committed with the primary purpose of spreading terror among those persons.\textsuperscript{777}

In the light of the above discussion, it can be concluded that ‘terrorism’, \textit{per se}, during peace-time, has still not become an offence inviting universal jurisdiction under international law. However, going by the emerging jurisprudence from criminal tribunals, which have referred to the vast literature of humanitarian law, it is abundantly clear that ‘acts of terrorism’ in an armed conflict situation definitely empowers nations to exercise universal jurisdiction.\textsuperscript{778} Yet, the ICC has not explicitly claimed jurisdiction over this offense.\textsuperscript{779}

5.2.2. DEBATE ON STATUS OF EXTRADITION UNDER CUSTOMARY INTERNATIONAL LAW WITH RESPECT TO ACTS OF TERRORISM

As evident from the earlier discussion, an idea of terrorism exists for the contracting States through the terrorism related convention as adopted by the UN, which can be even supplemented by their internal laws as well. On the other hand terrorism has been at times been included into the ICL statutes either as ‘crimes against humanity’ or ‘violations of common Article 3 and of Additional Protocol II’. It has been suggested by scholars, to interpret terrorism as a crime within the definition of crimes against humanity or WCs, who advocate it to be made a crime under such international criminal statutes. Extradition plays a vital role in prosecuting suspected individuals. The obligation to extradite arises from the sources of international law. Therefore a nation’s obligation to extradite is also governed by these sources of international law.

The duty to extradite or prosecute has since long been established by treaties, both multilateral, and regional. These treaties have been either specific to extradition

\textsuperscript{777}Id., para 667; see also Prosecutor v. Norman et al., Case No. SCSL-2004-14-T-473, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98,¶ 112 (Special Court for Sierra Leone 21 October 2005)
\textsuperscript{779}HaydarKaraman, \textit{Terrorism As A Crime Against Humanity} strategicoutlook.org/.../terrorism_as_a_crime_against_humanity.pdf
arrangements or dealing with international\textsuperscript{780} or transnational crimes with some provisions dealing with the duty of extraditing.

\textbf{a. ITS STATUS IN RELATION TO INTERNATIONAL CRIMES:}

Over the passage of time, some of the crimes have been considered to be so repugnant in nature, that any country, irrespective of being a member of the specific treaty or not, can exercise universal jurisdiction.\textsuperscript{781} The rationale behind it is broader: ‘it is based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim’.\textsuperscript{782} It can be represented as having multiple international and national law aspects that can create either an obligation or an ability to prosecute.\textsuperscript{783} The other class of treaties has been the terror related conventions, criminalizing several kinds of acts, like bombing, hijacking, hostage-taking, financing of terrorist activities, which seem to regulate the law of extradition between the member states, only with respect to those crimes. These treaties have not bestowed universal jurisdiction with respect to these treaty offences. While a wide array of international criminal offences is subject to extradite or prosecute requirement, it is noteworthy that these treaties do not cover all crimes like, ‘crimes against humanity’ or ‘crime of aggression’. In such situations, the UN Security Council has the ability to require States to surrender individuals accused of crimes against humanity to ad-hoc criminal tribunals or to ICC\textsuperscript{784}.

\textsuperscript{780} Principle 2 of The Princeton Principles on Universal Jurisdiction.
\textsuperscript{781} Supra Note 178;
\textsuperscript{783} Xavier Philippe, The principles of universal jurisdiction and complementarity: how do the two principles intermesh?, International Review of the Red Cross, Number 862 June 2006 at 379.
\textsuperscript{784} To the Security Council has referred the situation in Darfur, Sudan, and the situation in Libya – both non-States Parties. After a thorough analysis of available information, the Prosecutor has opened and is conducting investigations in all of the above-mentioned situations. [http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx] (UNSC Res 1593 [2005] [31 March 2005]) Darfur, Sudan; S/RES/1970 (2011) Libya; the obligation of states to comply with such UNSC resolutions arises out of Art. 25 of the United Nations Charter.
As per complementarity principle\textsuperscript{785}, States that are member states of ICC St are under treaty obligation either to prosecute or surrender indicted individuals to the ICC upon the request of the ICC. It can also exercise jurisdiction over individuals accused of crimes mentioned in the Statute, when according to Article 12 (2) of the Rome Statute, such crimes are committed in the territory or by an individual having nationality of any member to ICC St.

b. ITS STATUS RELATED TO UN TERROR SPECIFIC TREATIES:

In the 1970s a new generation of conventions incorporating the \textit{ADAJ} principle took form, following the structures of the first of these conventions, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft.\textsuperscript{786} It seems clear, however, that such a definition or some common elements could never bind states to a duty of \textit{ADAJ} included in one of the conventions or, even less so, in the totality, or “commonality” of a number of conventions which they have not signed.\textsuperscript{787} Given the inconsistency among the treaties, it becomes difficult to derive any generalized obligation towards international crimes.\textsuperscript{788} Therefore, being unable to identify the contours of the so called obligation to “extradite or prosecute” under CIL, make lawyers hesitant to declare the inclusion this new norm.\textsuperscript{789}

The other element of CIL is domestic legislations, which can implement the duty of surrendering or prosecuting. To this extent countries use following techniques to permit any foreigners trial for such crimes: separate pieces of Legislation directly implementing particular conventions or treaties\textsuperscript{790}; having “blanket” norm\textsuperscript{791} or relevant sections in the

\textsuperscript{785}The principle of complementarity is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction. It attributes primacy of jurisdiction to national courts, but allows the ICC to review the exercise of jurisdiction if the conditions specified by the Statute are met. See Art. 17 of ICC Statute.

\textsuperscript{786}Art. 7: “[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, to submit the case to its competent authorities for the purpose of prosecution”; also see Supra Note, 48


\textsuperscript{788}Claire Mitchell, \textit{Autdedere, autjudicare: the extradite or prosecute clause in international law}, Graduate Institute of International and Development Studies, 26 (2009).

\textsuperscript{789}Id..

\textsuperscript{790}Common Law nations: U.K, Australia, New Zealand, Canada and the U.S.A.
nations criminal statute, which may not link to specific treaty offence but founds extra-territorial jurisdiction on certain offences; when any country by its constitution allow straight inclusion of international law, enabling them to prosecute in default of extradition under an ADAJ obligation.\(^\text{792}\) Each of the above mentioned methods suffer from their own shortcomings, which is not within the scope of this chapter.\(^\text{793}\) Irrespective of the form of incorporation used by a State, prosecuting alien for offences so studied is by no means universal. Countries’ implementing their criminal laws to prosecute individuals for violations of GCs is by no means universal.\(^\text{794}\) In its complete reassess of CIL of IHL, ICRC finds state practice to have established their entitlement to implement universal jurisdiction over WCs as a norm of CIL with respect to WCs, both IAC & NIACs.\(^\text{795}\) It also finds numerous states to have given effect to their obligation to establish universal jurisdiction in their legislation and even several suspected war criminals have been prosecuted for grave breaches on the basis of universal jurisdiction.\(^\text{796}\) While finding that most States implement the obligation to investigate WCs and prosecute the suspects by providing jurisdiction for such crimes in their national legislation, and there have been numerous national investigations and prosecutions of suspected war criminals, it is not sure if it is due to an obligation or merely a right.\(^\text{797}\)


\(^{792}\) *Supra* Note 788p 27-33.

\(^{793}\) *Id.*, p 1-156.

\(^{794}\) *Id.*, p. 55; eg. United States still lacks the capacity to prosecute alleged war criminals who are not their citizens in respect of crimes where the victim is not a citizen.; The Appeals Chamber of the ICTY in Prosecutor v. TihomirBlaskic, Case No.IT-95-14-A (Int’l Crim. Trib. for the Former Yugoslavia 29 July 2004) considered that there is a customary extradite or prosecute obligation in respect of grave breaches of the Geneva Conventions.; The ICTY in the case of Prosecutor v. AntoFurundzija, Case No. IT-95-17-T, (10 December 1998) spoke of a customary right, not a customary obligation, of States to extradite or prosecute those accused of committing torture.


\(^{796}\) *Id.*, p. 606-607.

\(^{797}\) *Id.*, Rule 158, at p. 608.
The researcher is of the opinion that there is severe lack of practice by states to support the claim of existence of an international obligation opinion juris to surrender or prosecute for international offences.798

c. THE JUS COGENS PERSPECTIVE:

The customary nature of the obligation to extradite can be examined also in the light of the jus cogens nature of a particular prohibition implies that there exists a duty on all States to obligate or extradite. Some commentators, such as Bassiouni, C Ford, L Sadat, Goodwin-Gill799, and A D’ Amato, have suggested that the international law concept of jus cogens (peremptory norms) may also create a duty to extradite or prosecute.800 Violations of international crimes as jus cogens giving way to obligation erga omnes to surrender or try are widely disputed.801 It is codified in Article 53 of VCLT.802 It is suggested by scholars that pursuant to jus cogens concept, states are prohibited from committing serious international crimes and any international agreement between states to facilitate commission of such crimes would be void ab initio.803 Academically it seems that the lines between jus cogens/ erga omnes are getting blurred.804 Apparently the practices of the Security Council, of asking nations to extradite individuals, when they are willing and obligated under respective governing treaties to prosecute individuals, is contrary to jus cogens norms.805 Want for evidence of State practice and opinio juris, does not substantiate the claim of CIL rule to surrender or prosecute.

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800 MICHAEL P SCHAFER, AUTODETEREAUTJUDICARE, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW AT 752 (2008).
801 Supra Note 788 at p 60.
802 Art. 5(3)
803 Supra’ Note 800.
Therefore the researcher holds that duty to surrender or hold trial has still not attained the status of CIL in respect of terrorist acts whether peacetime or war. Researcher would further consolidate her finding in the following discussion which would specifically deal with the various impediments in the path of extradition.

5.3. IMPEDIMENTS IN THE PATH OF EXTRADITION:
Under the following sub-headings, the researcher would show how the existence of certain age old concepts in international law coupled with state practices in granting amnesties, and exile arrangements have to very large extent defeated the main objective of ICL, i.e., to end impunity for the perpetrators of atrocities.

5.3.1. IMMUNITY TO HEAD OF STATES

The concept of ‘immunity’ is not defined in international instruments, leaving its scope to be determined through an analysis of practice and, State practice. The concept has been dealt in relation to immunities of the State and its officials or agents, in UN Convention on Jurisdictional Immunities of States and Their Property, the VCDR and the Convention on Special Missions. As a general rule, a State enjoys absolute and complete authority over persons and property situated on its territory and for effective interaction in commercial, diplomatic and other fields, the receiving State voluntarily waives jurisdiction by granting privileges and immunities. This State practice of granting immunity has now evolved to a legal obligation on the part of the receiving State. The rule of absolute immunity applied regardless of the function served in each case, but, with passage of time, it has been restricted to only public nature of the act (acts jure imperii), thus excluding those acts serving private functions (acts jure gestionis).

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806 Infra note 605 [A/CN.4/661].
807 Second report on the immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur[A/CN.4/661] http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.4/661&Lang=E (4th May, 2014) “To this extent, the ILC has summarized the characteristics of ‘immunity’, as follows: (a) Immunity prevents a State from exercising its criminal jurisdiction even though its courts would, in principle, be competent to prosecute a given misdemeanour or crime; (b) Immunity arises only as a result of the existence of a foreign component, referred to generically as an “official” of another State; (c) Immunity from foreign criminal jurisdiction is, by nature, eminently procedural and has no affect on the substantive criminal law of the State that has jurisdiction or on the individual criminal responsibility of the person who enjoys immunity.”
808 Bantekas, Supra note 175, at 96-97.
can be granted immunity from criminal prosecution, either for the official status of the person concerned (ratione personae\textsuperscript{809}), or if it is based on subject-matter immunity (ratione materiae\textsuperscript{810}).\textsuperscript{811} These immunities have emerged from State practice in the form of domestic immunity, statutes, and case law. However, all such immunities fail with respect to jurisdiction of international criminal tribunals.

In this respect the ILC, has come up with its Second report on the immunity of State officials from foreign criminal jurisdiction\textsuperscript{812}. It lays down that a State’s criminal jurisdiction may be based on territorial jurisdiction, personality (active or passive), the protection principle or universal jurisdiction and any of them may give rise to the exercise of criminal jurisdiction in respect of an alien who might be categorized as an official and could therefore invoke immunity.\textsuperscript{813} The Special Rapporteur finds that the subjective scope of immunity from foreign criminal jurisdiction \textit{ratione personae} should be limited to individuals occupying high offices. Agreeing with arguments so placed by the ICJ\textsuperscript{814}, the ILC concludes that the immunity from foreign criminal jurisdiction \textit{ratione personae} is full immunity including all acts, whether private or official, that is performed by such persons prior to ordering their term of office. On considering the temporal scope of this type of immunity, there was a broad consensus that an immunity \textit{ratione persona} begins when the person who enjoys it takes office and ends when that person leaves office.\textsuperscript{815} While

\textsuperscript{809}Immunity \textit{ratione personae} has the following characteristics: (a) It is granted only to certain State officials who play a prominent role in that State and who, by virtue of their functions, represent it in international relations automatically under the rules of international law; (b) It applies to all acts, whether private or official, that are performed by the representatives of a State; (c) It is clearly temporary in nature and is limited to the term of office of the person who enjoys immunity. [A/CN.4/661, para 50]

\textsuperscript{810}Id.


\textsuperscript{812}\textit{Supra} Note 809

\textsuperscript{813}\textit{Supra} Note 809 Para 40.

\textsuperscript{814}\textit{Supra} Note 429 ¶ 55.

determining the temporal scope of immunity \textit{ratione personae}, the ILC proposes that it is generally limited to the term of office and expires when the term comes to an end, however such individual might still continue enjoying the immunity \textit{ratione materiae} (functional immunity) in respect of official acts performed while in office, even after leaving the office.\textsuperscript{816}

Based on such immunity a number of cases have decided both before domestic and international criminal tribunals, mostly ending in failure. The researcher here wishes to showcase the efforts to prosecute and punish such government officials, by referring to a significant number of cases, however, limited by scarcity of space. The obligation to extradite or prosecute often is challenged as most of the crimes on which domestic courts exercise their jurisdiction, are usually committed by high ranking State officials. It is in such situation the law on immunity acts as a real hurdle to end impunity. The ICJ in Arrest Warrants Case\textsuperscript{817} is very relevant as it stated that extending jurisdiction doesn’t affect immunity within CIL. Germany v. Italy, the ICJ described this sovereign equality of states as ‘one of the fundamental principles of the international legal order.’\textsuperscript{818} In the \textit{Pinochet} case, the decision by the UK House of Lords to refuse immunity for alleged torturous acts rested on existence of an ‘extradite or prosecute’ obligation and the establishment of a system of universal jurisdiction under the Torture Convention.\textsuperscript{819} Following the Arrest Warrant Case, few municipal courts have been found to have dismissing matters concerning doing of international offences by individuals not holding higher offices, taking defence that \textit{ration personae} precludes trial.\textsuperscript{820} It is notable that with respect to Heads of government and foreign ministers, have been escaping liability on basis of diplomatic or special mission immunity.\textsuperscript{821} In the absence of any legislation granting immunity on heads

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\item \textsuperscript{816} Supra Note. 809 Draft Art. 6.
\item \textsuperscript{817} Supra Note 429
\item \textsuperscript{818} Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), ICJ Reports 2012, ¶. 57.
\item \textsuperscript{819} Supra Note 82 at p.14
\item \textsuperscript{820} Re Sharon &Yaron, 42 ILM (2003) 596; Mugabe (2004) 53 (ICLQ) 769; and Kagame, Auto del Juzgado Central InstruccionNo. 4
\item \textsuperscript{821} Chong Boon Kim v Kim Yong Shik and David Kim, Circuit Court (First Circuit, State of Hawaii 1963) (1964) AJIL 58, at 186.
\end{itemize}
\end{footnotesize}
of government and other officials, the common law countries are governed by CIL, for e.g. in Re Mofaz and Re Bo Xilai, a minister of defence and minister of commerce and international trade, respectively. However, recently the Divisional Court held that the secretary of the executive office of the National Security Council of Mongolia didn’t come within the scope of high officials enjoying such immunity. The process of granting immunity often requires the opinion of the government, given the absence of internationally approved process to help any municipal court to agree. The government forms its opinion based in its constitution structure and the kind of State official with an evaluation of the nature of duties involved. Difficulties arise when there is an issue regarding the existence of the State concerned, or the person claiming immunity is only a de facto leader, or where the leader is known to have intentionally not taken charge of high offices, or is known to have given up the office, but while hanging on to influence, which may become problematic.

However, questions have been raised as to if functional immunity can be pleaded even in criminal proceedings. It is interesting to note that in Lozano (Mario Luiz) v Italy, the court justified granting functional immunity to the defendant, while observing that the defendant was charged for offences, falling beyond the scope of international crimes, also noted emergence of CIL of not allowing exemptions in view of such grave crimes. In Pinochet case the court had the opportunity to study if acts of torture as mentioned under Torture Convention, be an exception to functional immunity. The court made a finding that exemptions from prosecution weren’t provided for grave international offences. Such line

\(^{822}\) Re Mofaz, 128 ILR 709(2004).
\(^{823}\) Re Bo Xilai, Bow Street Magistrates Court, 129 ILR 713 (2005). The court also recognized that the minister was entitled to immunity as a member of a special mission.
\(^{824}\) Supra Note. 72
\(^{825}\) Khurts Bat v Investigating Judge of the German Federal Court and others[2011] EWHC 2029 (Admin).
\(^{826}\) United States v. Noriega, 121 ILR 591.
\(^{827}\) “The former Libyan leader Muammar Gaddafi adopted the title ‘Guide of the Revolution’ in 1979, conferring all the formal functions of head of state and government on the secretary general of the General People’s Congress and a prime minister. However, this did not deter the French Cour de Cassation from deciding that he was entitled to head-of-state immunity with regard to criminal charges alleging his complicity in acts of terrorism resulting in the destruction of a French civil aircraft” Gaddafi 125 ILR 490.
\(^{828}\) Lozano (Mario Luiz) v Italy, Case No 31171/2008; ILDC 1085 (IT 2008)
of argument was validated even by Amsterdam Court in Bouterse\textsuperscript{829}. Following Pinochet case, there have quite a few issuances of arrest warrants being issued for individuals holding high offices, like ex-head of Guatemala, Rios Montt and Oscar Mejia Victores.\textsuperscript{830}

However, there have been several more decisions given by domestic courts where they rejected such idea.\textsuperscript{831} There have been efforts to appeal the jure cogens character of the proscription on international crimes including torturous acts, thereby concluding it to override immunities.\textsuperscript{832} However such approach has been strongly criticised and even reversed by the ICJ in Germany v. Italy\textsuperscript{833}, where the court held Germany accused Italy of violating its jurisdictional immunity as under international law. Italy allowed civil claims to be brought against Germany in its courts, seeking reparation for injuries caused by IHL breaches as perpetrated by German Reich during Second World War; that Italy has also violated Germany’s immunity by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory; and that it further breached Germany’s jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts.\textsuperscript{834} The Court notes that as between the Parties, the entitlement to immunity can be derived only from CIL and assess as per Art 38 (1) (b) if state immunity exists and its scope. The Court states that, in accordance with the principle stated in Article 13 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred and thereby examined and applied the law on State immunity as it existed.

\textsuperscript{829} The Bouterse Case’ (2001) Netherlands Yearbook of International Law 32 97–118.
\textsuperscript{830} A Spanish court has also convicted a former Argentinian naval officer, Adolfo Scilingo, for torture and crimes against humanity committed abroad; a second Argentinian naval officer, Ricardo Cavallo, was also prosecuted, following his extradition from Mexico, although he was ultimately extradited to Argentina to face trial there.
\textsuperscript{831} Federal Republic of Germany v Miltiadis Margellos Case 6/17-9-2002, Greece; Aikaterini Kalogeropoulou et al. v Greece and Germany ECHR, Decision on admissibility of individual complaint no. 59021/00 (2002); The Distomo Massacre case (2003) 42 ILM 1030; and Jones v Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26.
\textsuperscript{832} Ferrini v Federal Republic of Germany, 128 ILR 659(2004), “where the Italian Supreme Court of Cassation, relying on the primacy of jure cogens, held that Germany was not entitled to immunity for serious violations of human rights carried out by German occupying forces during the Second World War.”
\textsuperscript{833} Supra Note. 818 at p. 99
\textsuperscript{834} Id. paras 37-51.
at the time of the Italian proceedings, rather than that which existed in 1943-1945. In light of the legal provisions, state practices, decisions of other judicial bodies, the Court concluded that CIL continues to require that a State be accorded immunity in proceedings for torts allegedly done in the territory of another State by the armed forces and other organs of State during war and thereby found decision of Italian courts to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.835 After examining State and international practice, the Court concludes that, under CIL as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of IHR law or jus in bello.836 The Court held that rules of jus cogens, and the rule of customary law which requires one State to accord immunity to another, address different matters and therefore not in conflict with one another. The Court concludes that, even assuming that the proceedings in the Italian courts involved violations of jus cogens rules, the applicability of the CIL on State immunity was not affected.837

The serving high officials enjoy being exempted from trial for alleged international offences, in absence of permission from their own country.838

ILC is yet to propose draft Articles on functional immunity. This immunity has been justified under CIL by the fact that the actions of such persons are imputed to the state.839 The view that state officials are mere instruments of a State and their official action can only be attributed to the State, therefore, they cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called “functional immunity”, has been followed in several cases.840 It is now generally recognized that immunity does not protect state actors from prosecution in

835 Id., paras 62-79
836 Para 81-91.
837 Id., Para 92-97
838 Supra Note 72
840 Id.; Rainbow Warrior case [Ruling of 6 July 1986 of the United Nations Secretary-General, in United Nations Reports of International Arbitral Awards, vol. XIX, p. 213]; in Supra Note 537, the Supreme Court of Israel explained functional immunity, but laid the exception that that the doctrine did not apply to WC and CAH.
international courts for the most serious international offences. This is because such acts can never be considered as part of a state’s legitimate function so that they may not be imputed to it.

However, in November 2007, a French prosecutor refused to indict the former United States Secretary of Defense, Donald Rumsfeld for crimes allegedly committed during the 2003 invasion of Iraq because he was still protected by functional immunity. Even the ICJ’s decision on DRC v. Belgium, the Court struck the arrest warrant issued against AbdulayeYerodiaNdombasi, then the MoFA of the DRC, by Belgium authorities affirming that he benefited from functional immunity and could only be prosecuted for personal acts committed while in office.

But the researcher would like to suggest, that given the exhaustive jurisprudence that has developed around serious international crimes and the efforts to punish individuals for it since Second World War, functional immunity should not be attached to any commission or omission of such crimes.

5.3.2. IMPUNITY AGREEMENTS

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842 http://www.trial-ch.org/en/resources/international-law/amnesty-and-immunity.html (accessed on 20.07.2014); also see In May 2004, the Special Court for Sierra Leone held that sovereign equality did not preclude the prosecution of a sitting head of state by an international tribunal and indicted Charles Taylor. In March 2009, the International Criminal Court also found that functional immunity was not an impenetrable defense when it indicted Sudanese president Omar Al-Bashir.

843 Case of Donald Rumsfeld - triggering contesting the decision of the Paris District Prosecutor (Procureur de la République) to dismiss the case, 16 November 2007 http://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf

The term ‘impunity’ means, “the impossibility, of prosecuting individuals in all kinds of proceedings, because of them not being made amenable to any investigation which might lead to their arrest or getting penalized in any fashion.” It identifies the source of impunity from failures attributed solely to countries for failing in carrying out their duty to inquire about violations of IHL. There can be multiple situations leading to impunity, like, comprehensive amnesty being extended to alleged perpetrators’ of terrorist acts, e.g., Somalia.

After the end of cold war and the following conflicts resulting in genocides, the international community has taken certain concrete steps to put an end to impunity, by forming international criminal tribunals. However, at times, this enthusiasm was not matched in domestic level, courts and legislatures have begun grappling with the issues of impunity and amnesty, for example, amnesty laws in South Africa and Guatemala, requiring individuals to come forward on an individual basis and provide complete testimony about the deeds for which they seek amnesty. The national tribunals have also heard matters related to impunity and came up with mixed results, for e.g., the Honduran Supreme Court found that it was upto courts to decide if an amnesty applied or not; Peruvian higher court reversed an order and said legislative power and the recognition by the American Convention and ICCPR of a right to obtain amnesty; South African Constitutional Court also upheld the constitutionality of the Truth and Reconciliation Commission’s ability to grant amnesty based both on the position of international law in South Africa’s constitutional scheme and on the injunction in Protocol II of the

846 Id., principle 1, p.7.
Conventions to grant “the broadest possible amnesty.” These courts have heavily relied on Article 6(5) of Protocol II to the 1949 Geneva Convention.

In the international front, there has been criticism of the ‘impunity agreements’ (or Article 98 agreements) as entered by U.S.A with the member and non-member states of the Rome International Criminal Court Statute. These bi-lateral treaties aim to preclude investigation and prosecution of US nationals accused of offences falling within the jurisdiction of the ICC. These treaties have been criticised a lot by scholars. The ICC Statute, under Article 12, can exercise its jurisdiction in the following situations, i.e.: either where a situation takes place in the territory of, or by a national of a State party, where the territorial State or the State of the nationality of the accused are parties to the Statute; or where the Security Council refers a situation to the ICC prosecutor. A party to the Statute is subject to automatic jurisdiction of the court, whereas the non-parties can accept ICC jurisdiction with regard to specific case or situation by lodging a declaration to that effect. This had far reaching consequences for the non-parties to the Statute, as under international law, international agreements are capable of binding only contracting parties, and they can’t bind third States without their consent. However, multi-lateral treaties may be on the basis of political or legal reality impose certain constraints on the behaviour of third states, based on the belief that such obligations accrue from the formation of a broad international consensus stemming from multi-lateral agreements that possess a ‘constitutional’ nature. Such interpretation draws a parallel between UN Charter and ICC Statute, which is difficult to accept considering the development of mechanisms to avoid surrendering of individuals to this forum.

The key to find a solution to this much debated article 98 would begin by attempting to understand the possible interpretation it could have, as follows: 1. Article 98(2) only covers agreements existing before the signing or ratification of the Rome Statute; 2. Article 98(2) should be interpreted narrowly and does only cover two, specific types of agreements such as

849 Id., p.94-95.
850 Article 6(5) of AP II
851 Supra Note 741.
as SOFAs\textsuperscript{853} and special diplomatic mission agreements (including agreements concerning peacekeeping Missions under UN), wherein the subject included in the scope of article 98(2) would be only officials performing in their role as state-sent on foreign ground; and, 3. Article 98(2) only cover such agreements that can assure promises of investigation and, if justified, prosecution.\textsuperscript{854} All the above mentioned interpretation would be in line with the basic objective of the ICC Statute, i.e., to end impunity for certain international crimes. However, contrary to the above-mentioned interpretation to which even U.S.A was consenting, the Bush administration took a fully different approach and started entering into ‘Article 98 Agreements’, which again are of three kinds, as follows: 1. reciprocal agreements when both parties agree not to surrender each other’s nationals, including current and former government officials, military personnel and other employees, to the ICC (without their consent); 2. unilateral agreements when the second state agrees not to hand over Americans to the ICC without the United States consent – but at the same time the United States can do just that to the other state; and 3. Agreements for states that are not a member to the Rome Statute, to the effect that they agree not to cooperate with a third state in efforts to surrender persons to the ICC.\textsuperscript{855} U.S.A has further enacted law to consolidate its position by enacting American Service members' Protection Act (ASPA)\textsuperscript{856} in August 2002, also known as the “Hague Invasion Act” contains provisions restricting US cooperation with the ICC; making US support of peacekeeping missions largely contingent on achieving impunity for all US personnel; and even granting the President permission to use “any means necessary” to free US citizens and allies from ICC custody in The

\textsuperscript{853} The 1951 NATO of Forces Agreement provides in general for the exercise of concurrent jurisdiction over the civilian and military personnel of a NATO visiting force. The sending State enjoys primary criminal jurisdiction over offences and persons falling within the ambit of its military law, as well as over any act while doing official duty, whereas the receiving country has jurisdiction with respect to persons and offences under its own municipal laws.; also see Scheffer, David J., “Original Intent at the Global Criminal Court”, in Wall Street Journal Europe. (2002) found at http://www.iccnow.org/documents/09.20.02-UNAUSA-WSJ-A98OpEd.pdf


\textsuperscript{855} Id. at P. 21.

Hague. Under Article 90 of the Rome Statute, if a state is a member to the ICC, it is obliged to surrender an accused to the ICC if it asks, even if the accused is American, unless they have an Article 98 agreement with the United States. The member States to the ICC Statute are also bound by law regulating treaties, i.e. VCLT. The provisions regarding interpretation of treaties have attained the status of CIL. The member states are bound by Rome Statute and if they fail to surrender a U.S. national pursuant to such bi-lateral agreement, it would definitely be against the Rome Statute’s objective. However, according to Article 30(4) of the Vienna Convention it might be of importance which treaty they signed first – the Rome Statute or the Article 98 agreement. United States is bound by neither the Rome Statute nor the Vienna Convention; they would be able to promote Article 98 agreements legally. States that sign these agreements would breach their obligations under the Rome Statute, the VCLT and possibly their own extradition laws. It is understood that member nations to ICC St shall continue to carry on with all prior obligations related to the ICC and it will be up to the ICC to decide whether or not the so-called Article 98 Agreements proposed by the United States are valid and therefore truly create a conflict of obligations for States Parties.

Till 11 December 2006, the U.S. State Department reported 102 agreements, of which ICC States Parties that have signed a BIA stood at 46. It is important to note that 54 countries had publicly refused signing, and 56 of 104 ICC States Parties have not signed (of which, 24 States Parties lost US aid in Fiscal Year 2005). In recent years, the United States has taken a number of concrete steps to demonstrate its increasing support for the Court, for e.g., the Obama Administration was successful in expanding the War Crimes

857 http://www.iccnow.org/?mod=aspa
858 Supra Note. 854
859 These agreements will breach Art. 27, 86, 87, 89 and 90 of the Statute, which require states to cooperate with and provide assistance to the Court.
860 These states will also violate Art. 18 of the Vienna Convention on the Law of Treaties.
861 US Bilateral Immunity Agreements or so-called “Art. 98” Agreements http://www.iccnow.org/documents/FS-BIAs_Q&A_current.pdf
862 Id.
863 Status of us Bilateral Immunity Agreements (BIAs) http://www.iccnow.org/documents/CICCFS_BIAsstatus_current.pdf
864 Id.
Rewards Program to offer rewards of up to $5 million for information leading to the arrest, transfer, or conviction of wanted war criminals, including ICC indictees Joseph Kony, Dominic Ongwen, Okot Odhiambo, Bosco Ntaganda, and Sylvestre Mudacumura; sending of troops to Mali, where the Obama administration did not demand that Mali sign a BIA before deploying U.S. troops as part of the peacekeeping operation there, which was based on Art 98 Agreement taking its support from pre-existing SOFA with Mali.865

Therefore such agreements disallowing member states from surrendering accused to the ICC, is a hurdle to the process.

5.3.3. AMNESTY AGREEMENTS AND EXILE-ARRANGEMENTS

The term ‘Amnesty’, from the Greek stem amnestia, means to forget; is an act of the legislature whose aim is to erase an accomplished fact which would otherwise be punishable, and so either to prevent or to stop legal action, or, as the case may be, to erase any sentence.866 Amnesty laws are justified by the need to re-establish peace on the one hand or national reconciliation on the other. There are many examples of amnesties being granted in the past, like, amnesty laws in Argentina and Chile in 1970’s; Law Declaring an Expiration of the State’s Punitive Authority, which granted amnesty to acts of repression committed by military and police officers in the period of the dictatorship from 1973 to 1975 in Uruguay; in 1986 Argentinean President Alfonsin introduced a law known as the Full Stop Law, preventing new proceedings from being undertaken against the military beyond a certain date, and in June 1987 a Law of Due Obedience, allowing junior officers to escape legal

866 Shorter Oxford English Dictionary, 1978, at 60 “Amnesty” is described as an act of oblivion, a general pardon of past offences by the ruling authority. Its mode of operation and effect may obviously differ from country to country.” Grand Dictionnaire encyclopedique Larousse, Vol. I, 1982, p. 414, “The French definition (“Amnistie: acte du legislateur qui a pour effet d'eteindre l'action publique ou d'effacer une peine prevue pour une infraction et, en consequence, soit d'empêcher d'arreter les poursuites, soit d'effacer les condamnations.”), as given in the, indicates that it is an act of the legislative whereby the public prosecution of certain offences is ended and the penalty thereon is cancelled, so that no more prosecutions will be instituted, and those already instituted will be discontinued and any convictions for such offences will be quashed.; “William Bourdon, Amnesty, (2011) http://www.crimesofwar.org/a-z-guide/amnesty/
retribution; Brazil, through amnesty law proclaimed in 1979 allowed the military leadership to throw a veil over those crimes committed during the worst period of the dictatorship.\textsuperscript{867} Since 1970s Angola, Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay have each, as part of a peace arrangement, granted amnesty to members of the former regime that committed international crimes within their respective borders.\textsuperscript{868}

In addition to amnesty agreements, exile and asylum in a foreign country\textsuperscript{869} (which puts the perpetrator out of the jurisdictional reach of domestic prosecution) is often used to induce regime change, with the blessing and involvement of significant states and the UN.\textsuperscript{870} In the past we have seen, Ferdinand Marcos fleeing to Philippines for Hawaii; Baby Doc Duvalier fled Haiti for France; Mengisthu Haile Miriam fled Ethiopia for Zimbabwe; Idi Amin fled Uganda for Saudi Arabia; General Raoul Cedras fled Haiti for Panama; and Charles Taylor fled Liberia for exile in Nigeria-a deal negotiated by the United States and U.N. envoy Jacques Klein.\textsuperscript{871}

Both the arrangements have been looked upon with some suspicion, suggesting that trading amnesty or exile for peace is equivalent to the absence of accountability and redress. However, the experience in Haiti and South Africa have proven otherwise, where instead of criminal prosecution other methods have been adopted to bring peace, like the concerned governments have made monetary reparations to the victims and their families, established truth commissions to document the abuses (and sometimes identify perpetrators by name), and have instituted employment bans and purges that keep such perpetrators from positions of public trust.\textsuperscript{872} However there are opposite views also, as by Professor

\textsuperscript{867}Id.; see Supra Note. 6
\textsuperscript{868}Michael P. Scharf, From the eXile Files: An Essay on Trading Justice for Peace, 63 Wash. & Lee L. Rev. 339 (2006), 342 http://scholarlycommons.law.wlu.edu/wlulr/vol63/iss1/8
\textsuperscript{869}See Michael P. Scharf, Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg 5 (1997). [Peace negotiators call this the "Napoleonic Option," in reference to the treatment of French emperor Napoleon Bonaparte who, after his defeat at Waterloo in 1815, was exiled to St. Helena rather than face trial or execution.]
\textsuperscript{870}Supra Note. 868
\textsuperscript{871}Dave Gilson, The Exile Files, http://www.globalpolicy.org(discussing the exile arrangements of more than a dozen individuals)( 2003).
\textsuperscript{872}See NAOMI ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 282-91(1995).
Cherif Bassiouni, who says that “[i]f peace is not intended to be a brief interlude between conflicts,” then it must be accompanied by justice. Such thought has also proven to be correct when the UN in its fact finding report acknowledged that in Chile and El Salvador granting of amnesty or de facto impunity did lead to an increase in abuses in those countries.

Michael P. Scharf, rightly finds that often impunities granted in the form of amnesty or exile arrangements, end up in encouraging other leaders in other parts of the world, to engage in committing grave crimes. Richard Goldstone, the former Prosecutor of ICTY, has concluded that “the failure of the international community to prosecute Pol Pot, Idi Amin, Saddam Hussein and Mohammed Aidid, among others, encouraged the Serbs to launch their policy of ethnic cleansing in the former Yugoslavia with the expectation that they would not be held accountable for their international crimes.”

When a country offers amnesty or exile arrangements, it clearly acts in breach of its treaty obligations, which require them to prosecute or extradite the accused before domestic or international forums. Articles 49-51 of the 1949 GC, prescribe penal sanctions for breaches of the Convention, requiring the contracting States to see that such person is arrested and prosecuted without delay. The accused persons have to be prosecuted and be subject to the same rules of procedure, and should be judged by the same courts, like the nationals. In the event of extradition request, the requested countries are guided by their

874 U.N. Econ. & Soc. Council [ECOSOC], Protection of Human Rights in Chile, 341, U.N. Doc. A/38/385 (Oct. 17, 1983); Charles Taylor, while on exile, orchestrated a failed assassination plot in 2005 against President Lansana Conte of Guinea, a neighbouring country that had backed the rebel movement that forced Taylor from power.
875 Supra Note. 868; Adolf Hitler, Speech to Chief Commanders and Commanding Generals (Aug. 22, 1939), quoted in M. CherifBassiouni, Crimes Against Humanity In International Criminal Law 176 n.96 (1992) [history records that the international amnesty given to the Turkish officials responsible for the massacre of over one million Armenians during World War I encouraged Adolf Hitler some twenty years later to conclude that Germany could pursue his genocidal policies with impunity.]
domestic laws, to decide if there are “sufficient charges”. The Diplomatic Conference chose not to incorporate provisions regarding surrendering individuals to international criminal tribunals, with a view of not hindering the development of international law in that front. Under Art 6 (5), AP II, the objective is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided. In Azanian Peoples Org. v. President of S. Afr. South African Constitutional Court stressed in this provision to find that the amnesties granted by the Truth and Reconciliation Commission did not violate international law. Although there has been recurrent assertions that the principles as laid down in the above-mentioned Conventions have attained the status of CIL, but State practice of entering and often facilitating amnesty agreement proves otherwise. The jurisprudence as developed by the general human rights treaties punishment can be include imposition of fines, removal from office, reduction of rank, forfeiture of government or military pensions, and exile.

878 Commentary on Geneva Convention-I, at p. 366
879 COMMENTARY TO GENEVA CONVENTION PROTOCOLS, PARA 4618, P.1402.
880 1996 (4) SA 671 (CC) 30 (S. Aft.).
882 A state must fulfill five obligations in confronting gross violations of human rights committed by a previous regime: (1) investigate the identity, fate, and whereabouts of victims; (2) investigate the identity of major perpetrators; (3) provide reparation or compensation to victims; (4) take affirmative steps to ensure that human rights abuse does not recur; and (5) punish those guilty of human rights abuse; at p 9
883 See UN Commission on Human Rights, Declaration on the Protection of All Persons from Enforced Disappearance, 28 February 1992, E/CN.4/RES/1992/29, available at: http://www.refworld.org/docid/3b00f0b270.html [accessed 25 October 2014]Art. 18 (1): “Persons who have or are alleged to have committed offences referred to in art. 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.”; UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 25 October 2014]Art. 6(4): “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases”; UN Security Council Resolution 1325 on Women and Peace-Building, UN Document S/RES/1325 (2000) 1 “Emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions”; General Comment No. 20,Art. 7 (Replaces General Comment 7 Concerning Prohibition Of Torture And Cruel Treatment Or Punishment), UN Document HRI/GEN/1\ Rev.1, p. 30 (1994) [15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnestyes are generally incompatible with the duty of States to
Thus in the light of the above discussion it is clear that even though certain offences have attained the status of jus cogens, and nations are required to prosecute such individuals, but State practice suggests otherwise, which precludes us from stating that arrangements like amnesties and exiles, are against international law/ CIL.

In addition to the above-mentioned documents, some international criminal statutes have incorporated provisions related to Amnesty.\(^\text{884}\) However, ICC Statute falls short of including any express provision barring amnesties or exile. Rather it is filled with provisions, which can protect amnesty agreements. For instance, the UNSC is within its authority to defer enquiry or prosecution [article 16]; the Prosecutor may choose not to initiate an investigation [art. 53(l)(c)]; the ICC shall find cases inadmissible under the complementarity principle if a state with appropriate criminal jurisdiction prosecutes that case or investigates it and decides not to prosecute.\(^\text{885}\) In the light of the interpretive declarations given by Colombia, Uganda, and Uruguay, amnesties thus remain a live issue for some states, and it is to be expected that their ratifications of the Rome Statute may be premised on assumptions that amnesties remain permissible in at least some circumstances.\(^\text{886}\)

With relation to terrorism related UN Conventions, none of them include any provision facilitating or protecting the member States in granting amnesties or exile arrangements. However, within Europe, the member States of the FD on European Arrest Warrant, does
allow the executing member State to mandatorily refuse execution of the warrant, on the 
ground that the offence is protected by amnesty in the executing country, having the 
authority to start prosecution under its criminal statutes.  

5.3.4. APPLICATION OF POLITICAL OFFENCE EXCEPTION

The political offense exception-the principle that an individual cannot be extradited to face 
criminal prosecution for a “political” act has long been a staple of extradition law. 
However, the increase in the acts of terrorism, internal conflict, and totalitarian oppression 
has prompted a significant re-examination of the exception’s scope. Essentially the criteria 
for classifying any conduct as “political” have come from the jurisprudence as developed 
by the domestic courts. Originally the purpose of the political offense exception to extradition 
was to protect revolutionaries from being returned to their home countries to face prosecution for 
crimes committed against their governments. Over centuries the Courts have tackled issue of 
political offence exception, involving war criminals, asylum seekers, former government officials, 
and terrorism.

By late 1970s, the move to abolish exemptions based on any crime having political 
colour has started, because of the kind of violence that was practiced to achieve such 
ends. To curb misuse of this protection, range of treaties both multi-lateral and bi-lateral 
defined particular acts, which would gradually go on to become subject to extradition and 
not being considered as political offense. The member parties to these treaties are legally

887 Supra Note. 299 Art. 3 (1).
888 David M. Lieberman, Sorting the Revolutionary from the Terrorist: The Delicate Application of the 
Political Offense Exception in U.S. Extradition Cases, 59 Stan. L. Rev. 181 (2006) Available at: 
http://scholarship.law.berkeley.edu/facpubs/1260
889 Aimee J. Buckland, Offending Officials: Former Government Actors and the Political Offense Exception to 
Extradition, 94 Cal. L. Rev. 423 (2006). Available at: 
http://scholarship.law.berkeley.edu/californialawreview/vol94/iss2/4
890 Id.
891 Supra Note. 37
892 See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16,1970, art. 7, 
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 
(1980), 1316 U.N.T.S. 205 (entered into force June 3, 1980) [hereinafter Hostages Convention];
obliged to enact their domestic laws to comply with the treaty obligations, which do not leave much scope to the members to do otherwise.

Courts have developed various tests, like the Swiss “proportionality” or “predominance” test, the French “objective” test, and the Anglo-American “incidence” test, for determining whether “the nexus between the crime and the political act is sufficiently close for the crime to be deemed not extraditable.” The Swiss “proportionality” test incorporates an independent test of proportionality that includes a balancing between the political and common elements of the crime where, if the crime is violent, “then the common element will outweigh the political motive unless such violence is the only means of achieving the end.”

The Anglo-American “incidence” test requires (1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense, and (2) a charged offense that is ‘incidental to, ‘in the course of,’ or ‘in furtherance of the uprising.” The “incidence” was criticised saying that it did not adequately address the realities of international terrorism. The court quelled the doubts by saying that the test “(a) protects acts of domestic violence in connection with a struggle for political self-determination, but (b) was not intended to and does not protect acts of international terrorism.”

It limited the uprising to a geographical area, effectively excluding international terrorist activities because those actors commit crimes beyond the boundaries of their home nations. Eain v. Wilkes rejected a traditional application of the political offense exception and held that only those actions that “disrupt the political structure of a State and not the social structure that established-the-government” will be recognized as “incidental” to the goal of toppling a


GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW 235(1998).

In re Castioni, I Q.B. 149 (1890); In re Ezeta62 F. 972 (N.D. Cal. 1894); Ornelas v. Ruiz161 U.S. 502 (1896); Eain v. Wilkes, 641 F.2d 504, 507 (7th Cir. 1981); Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986)

Quinn, 783 F.2d at 806 (“The growing problem of international terrorism, serious as it is, does not compel us to reconsider or redefine that test. The test we have used since the 1800's simply does not cover acts of international terrorism.”).
government.\textsuperscript{896} It imported the reasoning from \textit{In re Meunier}\textsuperscript{897}, in anarchists were exempted from the exception because they targeted the social fabric of a State. International efforts to collaborate on suppressing terrorism have focused on extradition agreements that contain the restricted political offense exception. Unlike its original form which protected all political struggles, the present form cannot serve as a tool in suppressing terrorism because it does not differentiate between political activism and terrorism. The universal terrorism-related agreements negotiated since 1997 abolish the political offence exception for crimes defined in those agreements and include a non-discrimination article that protects against discriminatory treatment based on a wide range of impermissible considerations, not just political activity.\textsuperscript{898} These provisions start with the premise that these treaty crimes fall beyond extradition or MLA.\textsuperscript{899}

5.4. CASES: HIGHLIGHTING OTHER CHALLENGES

The simple obligation ‘to extradite or prosecute’ on States, face several other obstacles as depicted through individual cases across domestic forums, shedding light on the existing State practices. Given the fact that, higher municipal courts rarely make any statement related to the principle, but however through the following situations as will be discussed, the researcher would highlight the other challenges and consolidation too, in the path of fulfilling this obligation.

In 1991, the Australian government and high court while upholding the constitutionality of the \textit{War Crimes Amendment Act 1988} held that it had if not an obligation, at least a right to exercise universal jurisdiction in respect of the grave breaches under GC, while dismissing claims that there exists a CIL to do so.\textsuperscript{900} On the other hand in the case of Posada Carriles, a

\textsuperscript{896} Ziyad Abu Eain v. Peter Wilkes, United States Marshal for the Northern District of Illinois [641 F.2d] at p.520-521 (7th Cir. 1981).
\textsuperscript{897} \textit{In re Meunier}, (1894) 2 Q.B. 415
former CIA operative, who was involved in more than one terrorist attacks, like bombing aircraft, hotels, having escaped from captivity two times, was not extradited by U.S.A to Venezuela and Cuba, in spite of the existing treaty obligations to initiate trial if not choosing to extradite. He was not further prosecuted before the US Courts and the government also didn’t classify him as a terrorist.\textsuperscript{901}

In 2002 and 2003, Denmark and U.K respectively refused to extradite Mr. Ahmed Zakayev, a Chechen dissident and the former deputy prime minister and prime minister of the unrecognised Chechen Republic of Ichkeria, to Russia, which accused him of committing series of crimes, including acts of terrorism. He was given political asylum in U.K since 2003 and thereafter he resided in London and even travelled to other nations without being arrested. He was not extradited to Russia on the ground of fear that he might be tortured for his political opinions\textsuperscript{902}, and neither did U.K start any proceeding before its courts.

In 1981, the hijackers of the Pakistan International Airlines aircraft to Afghanistan were given refuge by the afghan regime, in breach of Afghanistan’s legal obligation since 1979 under the Hague Convention.

In 2009 the Thai trial chamber refused a U.S.A extradition request saying that the Thai officials did not recognize the authoritative listing of the terrorist group under the authority of UN Resolution 1267.\textsuperscript{903} Therefore ADAJ principle must operate on an authoritative basis that overcomes technical barriers such as these.\textsuperscript{904}

In the recent years, we have witnessed alternative procedures develop, like lures and expulsions, instead of extradition. Under this alternative system individuals are expelled on national security or immigration grounds, sometimes without any judicial procedure.

\textsuperscript{902} Government of The Russian Federation v. AkhmedZakaev, Bow Street Magistrates Court (Senior District Judge Workman), 13 November 2003 (unreported).
\textsuperscript{903} Supra Note. 194
Courts normally do not inquire into how personal jurisdiction was acquired over a person. However, such cases do encounter rigorous scrutiny if there is any issue with respect to torture, discriminatory treatment or imposition of the death penalty, like in the case of Mohammed v. South Africa. In the said case a deportation of a Tanzanian national was found to be in violation of domestic law and procedurally irregular and in view of the possible death penalty, Mohammed’s waiver of deportation was invalid.

In 2003, the German constitutional court, after examining international authorities and made a finding that no international law extradition when persons have been lured from their home country by deception. In 1992, the U.S. court made a very startling finding that even existence of an extradition treaty did not preclude the acquisition of personal jurisdiction by other means unless expressly prohibited by the treaty. It also maintained that the means by which a person has been brought before a court do not normally affect its jurisdiction so long as torture or other inhumane means were not involved. The U.S. courts also prosecuted Ali Rezak and Ramzi Yusef, who were expelled from Nigeria and Pakistan, respectively for crimes of hijacking and bombing respectively. The European Court of Human Rights, has upheld a number of Controversial expulsions, including the cases of Freda v. Italy, (1980), 21 DR 20; Klaus Altmann (Barbie) v. France (1984) 10689/83; and Sanchez Ramírez v. France ((1996), 95 DR 86-B.

Such expulsions are further safeguarded by the 1984 CAT and the 1951 CSR. The language of 1951 CSR prohibits expulsion to a place where the applicant’s existence is under threat on the basis of his religion, nationality, race, etc. The protections included in these conventions have been included in a form of standard Article in the terrorism related

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906 Id.
907 Digest of Terrorist Cases at p101
909 Id.
910 United States v. Rezaq, 134 F. 3rd 1121 (D.C. Cir. 1998); Youssef v. United States, 327 F. 3d 56 (2nd Cir. 2003).
911 The rejection was based on the absence of an extradition treaty between the two States.[11th December 1974]
912 Supra Note. 898
913 Id, ¶ 278.
conventions since 1997. Similarly pursuant to Article 22 of the Torture Convention, the Committee against Torture can give its opinion to the member state and person concerned. Domestic courts have also reversed denial of asylum orders, finding that the individual had genuine threat of being persecuted. In 2002 Canadian Supreme Court reversed a deportation order of a person affiliated with a violent separatist organization. In Saadi v. Italy, No. 37201/06, decided 28 February 2008, the European Court of Human Rights based its decision that the applicant would be subjected to a risk of torture if deported largely upon published reports, citing three Amnesty International reports, a Human Rights Watch report and a resolution of the European Parliament. In 2008, in the Ntawukuriryayo case, the France’s Court stated that French authority has the absolute obligation to ensure that, as a result of the transfer, the person’s fundamental rights and judicial guarantees, as established by France’s Constitution and international obligations will not be violated. In 2009, in the Brown case, the England and Wales High Court of Justice (Divisional Court) Lord Justice Laws and Lord Justice Sullivan allowed the appeals by Dr Bajinya and his three co-defendants against the extradition ruling by Home Secretary Jacqui Smith because, the judges said, there was evidence that defence witnesses in Rwanda were afraid to give evidence in the men’s favour.

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914 "Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in (the convention) or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons."

915 Agiza v. Sweden, No. 233/2003, decided 20 May 2005 [the Committee found a risk of torture in the country to which the individual was expelled, citing its own prior reports.]

916 Tantoush v. Refugee Appeal Board, No. 13182/06, S. Africa High Court, 14 August 2007 (Transvaal Provincial Division).


918 Supra Note, 898

919 France’s Court of Cassation (criminal chamber) Ntawukuriryayo case judgment 7th may 2008, pg.2

920 http://news.bbc.co.uk/2/hi/uk_news/7989534.stm
Over the years States have indicated their inclination to abide/ not abide to ADAJ obligation apart from the treaties which they endorse. The seemingly universalized prohibition on terrorist activities, does not automatically lead to convictions, as evidenced by the trial of Khalid al-Yousef, being acquitted due to insufficient evidence, accused of funding Hamas.

5.5. A SUM-UP

In the light of the developments shown in the previous chapter, this chapter has extended its query into unraveling more impediments in the implementation of extradition. The obstacles dealt with in this chapter are immunities, impunity agreements, exile arrangements, and amnesties, and declining requests citing political offence.

a. Terrorism and Principle of Universal Jurisdiction

Universal jurisdiction has been considered of great significance in relation to certain kinds of crimes, because once these crimes are committed any nation can utilise its legal structure in punishing individuals, even without having to establish any connection to the crime or victims. Therefore, over centuries very few crimes have been identified through treaties and CIL, allowing nations to set universal jurisdiction in motion. Such crimes include piracy, WCs, CAH, and has further expanded to include slave trading, drug trafficking, and torture. Time and again there have considerable though being given, if acts comprising terrorism should also be considered to be such heinous in nature that it would invite universal jurisdiction. However collectively the following factors like terrorism lacking a definition under international law; there is no uniformity among the municipal laws with respect to the elements required for criminalising acts of terrorism; existence of different levels of tolerance, among the developed nations and third world nations, with regard to acts of terrorism; burdened by the fact that very often the states themselves are involved into acts of terrorism; terrorism as offence being included only in handful of international criminal tribunals charters, without shedding any light on the elements of the crime; weighed by the

921 Supra Note 788 at p. 44.
fact the suggestion to incorporate within ICC St was not accepted; have only made it more difficult to create a consensus among nations to treat it as a crime inviting universal jurisdiction. The other problem would arise with respect to ‘domestic terrorism’ which is beyond the scope of terror conventions. In the given circumstances, the international tribunals have done a commendable job by holding that acts of terrorism are often resorted as an unlawful warfare strategy in armed conflicts and thereby qualified them as WCs entailing individual criminal responsibility under customary law. The ICTY through its decisions\footnote{Prosecutor v. Stanilav Galic (Trial Judgement and Opinion) Case No.IT-98-29-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 5 December 2003, available at: http://www.refworld.org/docid/4147fb1c4.html [accessed 5 May 2014]; Prosecutor v. Blagojevic and Jokic (Trial Judgment), IT-02-60-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 January 2005, available at: http://www.refworld.org/docid/47fdaf51a.html [accessed 5 May 2014] } confirmed that acts of terrorism are often resorted as an unlawful warfare strategy in armed conflicts and thereby qualified them as WCs entailing individual criminal responsibility under customary law. However difficulties are posed as acts of terrorism are considered as specific-intent WCs under the laws of armed conflict and customary law; or under crimes against humanity, which poses more difficulties, as it requires proof of widespread and systematic attack with discriminatory intent. The SCSL seems to have adopted a broader interpretation of Article 3 (d) of SCSL Statute as covering all the antiterrorism provisions contained in the GC and their additional protocols, keeping in mind that it concerned NIAC. Referring to the above-mentioned following can be considered as ingredients of terrorist acts giving rise to liability, i.e., doing or issuing threat/fear targeting people or property; willfully making them object of such kind of violence; doing such acts with the primary purpose to create fear among individuals.\footnote{See also Prosecutor v. Norman et al., SCSL-2004-14-T-473, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005, para. 112.} In the light of the above discussion, it can be concluded that ‘terrorism’, \textit{per se}, during peacetime, has still not become an offence inviting universal jurisdiction under international law. However, going by the emerging jurisprudence from criminal tribunals, which have referred to the vast literature of humanitarian law, it is abundantly clear that ‘acts of
terrorism’ in an armed conflict situation definitely empowers nations to exercise universal jurisdiction.\(^{924}\)

b. DEBATE ON STATUS OF EXTRADITION UNDER CUSTOMARY INTERNATIONAL LAW WITH RESPECT TO ACTS OF TERRORISM

The duty to extradite or prosecute has since long been established by treaties, both multilateral, and regional. Under this heading the issue of status of extradition has been dealt in perspective of international crimes; terror-specific treaties; and jus cogens perspective.

i. With relation to international crimes, the nations as well as the international criminal tribunals and chambers can seek extradition or surrendering of such accused within its jurisdiction. However, ultimately it’s the States prerogative if they decide to surrender or not. In the light of immunity, impunity agreements and other issues, it can be conclusively said that requested nations still don’t feel the legal compulsion to surrender under CIL status, unless they have treaty obligation to surrender. In such situations, the UN Security Council has the ability to require States to surrender individuals accused of such grave crimes; which is further supplemented by the principle of complementarity when States are under a treaty obligation either to prosecute or surrender indicted individuals to the ICC upon the request of the ICC or exercise jurisdiction over individuals accused of crimes mentioned in the Statute, as per Article 12 (2) of the Rome Statute, when such crimes are committed in the territory or by an individual holding nationality of a member nation to ICC St. While finding that most States implement the obligation to investigate WCs and prosecute the suspects by providing jurisdiction for such crimes in their national legislation, and there have been numerous national

investigations and prosecutions of suspected war criminals, it is not sure if it is due to an obligation or merely a right.  

ii. In relation to terror specific treaties, it is difficult to establish that from numerous treaties including provisions with the commitment of the states to be bound by it, if a widespread duty has come into existence to punish for committing international offences. Irrespective of form of incorporation used by a State, the putting into effect of laws which permits a country to initiate a trial against an alien is still not universal. The researcher holds the view that lack of common practice on behalf of states, point to the fact that they don’t feel obliged to exercise extra-territorial jurisdiction for penalizing international offences.

iii. The customary nature of the obligation to extradite can be examined also in the light of the jus cogens nature of a particular prohibition implies that there exists a duty on all States to obligate or extradite. However in reality the deficient state practice and opinio juris to that end, prove that the obligation to extradite has attained the status of jus cogen. Therefore the researcher is of the opinion that the obligation to extradite or prosecute has still not attained the status of CIL in respect of acts of terrorism whether in peacetime or during war.

c. IMMUNITY TO HEAD OF STATES

The concept of ‘immunity’ is not defined in international instruments, leaving its scope to be determined through an analysis of practice and, State practice. These immunities have emerged from State practice in the form of domestic immunity, statutes, and case law. However, all such immunities fail with respect to jurisdiction of international criminal tribunals. Under CIL a foreign national can be granted immunity from criminal prosecution, either for the official status of the person concerned (ratione personae), or if it is based on subject-matter immunity (ratione materiae). Following the Arrest Warrant Case, many

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925 Supra Note 795.
926 Supra Note 788 at p 58
927 See International Law Commission, A/CN.4/L.814, Immunity of State officials from foreign criminal jurisdiction - Text of draft art. 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth
municipal courts dismissed matters suggesting exemptions/immunity *ration personae* enjoyed by high officials. It is notable that with respect to Heads of government and foreign ministers, when they face trials in municipal courts of other jurisdiction, most of them have been dismissed on the basis of diplomatic or special mission immunity. In the absence of any legislation granting immunity to holders of high offices, the common law countries are governed by CIL, for e.g. in *Re Mofaz* and *Re Bo Xilai*. In the light of the numerous cases discussed, it is clear that high officials enjoying immunity may never be tried for international offences, without approval from their country. Functional immunity has been followed in several cases. However it is generally recognized that immunity does not protect state actors from prosecution in international courts for the most serious international crimes. But ICJs decision on *DRC v. Belgium*, where it struck down the arrest warrant issued against AbdulayeYerodiaNdombasi, then the MoFA of the DRC, by Belgium authorities affirming that he benefited from functional immunity and could only be prosecuted for personal acts committed while in office, is considered a major setback. Given the exhaustive jurisprudence that has developed around serious international crimes and the efforts to punish individuals for it since Second World War, functional immunity should not be attached to any commission or omission of such crimes. Impunity agreements have been another thorn in the path of extradition, by States taking liberty to justify their legality on technical parameters than focusing on the grave nature of the crimes committed.

d. IMPUNITY AGREEMENTS

928 Supra Note 820.
929 Supra Note 821, p. 186.
930 Supra Note 822.
931 Supra Note 823.
932 Id.; Rainbow Warrior case [Ruling of 6 July 1986 of the United Nations Secretary-General, in United Nations Reports of International Arbitral Awards, vol. XIX, p. 213]); in Supra Note 537, the Supreme Court of Israel explained functional immunity, but laid the exception that that the doctrine did not apply to war crimes and crimes against humanity.
933 Art. 7 of Nuremberg Charter, Art. 4 of the Genocide Convention, Art. 7(2) of the Statute of ICTY, Art. 6(2) of the Statute of the ICTR and Art. 27 of the Rome Statute of the International Criminal Court.
Impunity agreements are completely against the basic objective of ICL to end impunity. Post cold war the international community has taken certain concrete steps to put an end to impunity but this enthusiasm was not matched in domestic level, courts and legislatures which grappled with the issues of impunity and amnesty. The national tribunals have also heard matters related to impunity and came up with mixed results. In the international front, there has been criticism of the ‘impunity agreements’ (or Article 98 agreements) as entered by U.S.A with the member and non-member states of the Rome International Criminal Court Statute.\(^{934}\) It is understood that member nations to ICC St shall continue to have all prior obligations related to the ICC and it will be up to the ICC to decide whether or not the so-called Article 98 Agreements proposed by the United States are valid and therefore truly create a conflict of obligations for States Parties.\(^{935}\) Therefore such agreements disallowing member states from surrendering accused to the ICC, is a hurdle to the process.

e. AMNESTY AGREEMENTS AND EXILE-ARRANGEMENTS

Such arrangements are justified in the name of need to re-establish peace on the one hand or national reconciliation on the other. Granting such arrangements has been a long standing practice among nations. Initially such arrangements suggested that trading amnesty or exile for peace is equivalent to the absence of accountability and redress, but experience in Haiti and South Africa have proven otherwise, where instead of criminal prosecution other methods have been adopted to bring peace, like the concerned governments have made monetary reparations to the victims and their families, established truth commissions to document the abuses (and sometimes identify perpetrators by name), and have instituted employment bans and purges that keep such perpetrators from positions of public trust. However caution must be exercised while granting arrangements as at times it might have the effect of encouraging leaders to do heinous crimes and thereafter claim for amnesty or exile. Such agreements are also against the spirit of Articles 49-51 of the 1949 GC, prescribe penal sanctions for breaches of the Convention, which requires the contracting States to see that such person is arrested and prosecuted without delay. However, the biggest setback is, ICC Statute not including any express provision barring amnesties or exile. Thus in the light of

\(^{934}\)Pg 161-162 of my thesis.

\(^{935}\)http://www.iccnow.org/documents/FS-BIAs_Q&A_current.pdf (accessed on 15.042014)
the above discussion it is clear that even though certain offences have attained the status of jus cogens, and nations are required to prosecute such individuals, but State practice suggests otherwise, which precludes us from stating that arrangements like amnesties and exiles, are against international law/ CIL. With respect to amnesty agreements also, the ICC Statute should incorporate provision which would prohibit it.

f. APPLICATION OF POLITICAL OFFENCE EXCEPTION

Over centuries the Courts have tackled issue of political offence exception, involving war criminals, asylum seekers, former government officials, and terrorism. Municipal courts have developed various tests, like the Swiss “proportionality” or “predominance” test, the French “objective” test, and the Anglo-American “incidence” test, for determining whether “the nexus between the crime and the political act is sufficiently close for the crime to be deemed not extraditable.” International efforts to collaborate on suppressing terrorism have focused on extradition agreements that contain the restricted political offense exception. Unlike its original form which protected all political struggles, the present form cannot serve as a tool in suppressing terrorism because it does not differentiate between political activism and terrorism. The universal terrorism-related agreements negotiated since 1997 abolish the political offence exception for crimes defined in those agreements and include a non-discrimination article that protects against discriminatory treatment based on a wide range of impermissible considerations, not just political activity.936 Under the present scenario the determination of political offence exception, therefore lies with the States and the approach that their courts take, in the absence of any uniform test. The political offense exception is marred by the tension between its values of political self-determination and the discomfort in applying its protection to acts committed by terrorists. The focus should be more on ensuring that offenders receive a fair trial if extradited based on regular executive findings evaluating the general fairness of the judicial system of a requesting country.

g. CASES: HIGHLIGHTING OTHER CHALLENGES

The researcher has highlighted the other challenges in realisation of the principle ‘extradite or prosecute’. The cases discussed have highlighted problems like requested country giving

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936 Supra Note. 898
political asylum to the accused; not classifying as ‘terrorist’; refusal caused by apprehension that the accused might be tortured in the requesting nation; sympathetic attitude towards accused by the requested nation; non-recognition of the authoritative listing of terrorist group brought out by the United Nation; practices like lures, expulsion not precluding courts from the acquisition of personal jurisdiction by other means unless expressly prohibited by the treaty. At the same time there have judicial decisions where extradition requests have been refused citing fear of persecution as under Refugee Convention and torture. Over years only in few situations States gave apparent hint on their willingness of being obligated by ADAJ, going past treaty law. 937

States should negotiate for a binding protocol regulating matters to facilitate transfers of terrorist actors, particularly those of a trans-regional nature, as they are precisely to involve difficult facts and emotive cries for revenge that potentially undermine human rights and thereby hinder efficient transfers to face trial. 938