*Selman Ozdan**

IMMUNITY VS. IMPUNITY IN INTERNATIONAL LAW: A HUMAN RIGHTS APPROACH**

Abstract

The concept of immunity does not imply protection for States, Heads of State, and diplomatic agents by any means; at its core, immunity is designed to facilitate the smooth functioning of relations among States, State organs, and their representatives. Although the international community has tended to abolish impunity in cases involving the violation of human rights, this movement is not yet fully fledged and the abolition of impunity is far from assured. Be that as it may, equating immunity with impunity in cases of fundamental human rights violations presents a major handicap against the establishment of justice and the promotion of human rights. This article aimed to develop the distinction between immunity and impunity in terms of the adverse impact of impunity in respect of fundamental human rights. Further, it aimed to demonstrate that tolerating impunity threatens the future and development of human rights; consequently, it argued that the contradiction between immunity and human rights cannot be resolved unless impunity and immunity are clearly differentiated.

Annotasiya

İmmunitet konsepsiyası hər hansı bir vasitə ilə dövlətlər, dövlət başçıları və diplomatik nümayəndələr üçün müdafiəni nəzərdə tutmur; onun nüvəsində immunitet dövlətlər, dövlət orqanları və onların nümayəndələri arasında əlaqələrin hamar fəaliyyətini təmin etmək üçün işlənib hazırlanır. Baxmayaraq ki, beynəlxalq ictimaiyyət cəzasızlığı insan hüquqlarının pozulması ilə bağlı işlər kontekstində ləğv etməyə çalışmışdı, hazırda işlər gözlənilən kimi getmir və cəzasızlığın ləğvi xeyli uzaq görünür. Başqa sözlə immunitet və cəzasızlığı əsas insan hüquqlarının pozulması kontekstində eyniləşdirmək sülhün bərqərar olunması və insan hüquqlarının inkişafında əngəl meydana gətirməkdədir. Məqalə immunitet və cəzasızlıq arasındakı müxtəliflik əsas insan hüquqlarına təsir etməyi hədəfləmişdir. Bununla yanaşı məqalədə cəzasızlığa tolerant yanaşmanın insan hüquqlarının gələcəyi və inkişafını təhdid etdiyini nümayiş etdirmək məqsədlənmiş; nəticə etibarilə, cəzasızlıq və immunitetin aydın şəkildə fərqləndirilmədiyi təqdirdə immunitet və insan hüquqları arasında olan ziddiyyətin həllinin mümkünsüzlüyü iddia edilmişdir.

CONTENTS

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Introduction

This article serves as a guide to the concepts of immunity and impunity, offering a descriptive analysis of both terms and the distinctive features of each. It is concerned mainly with the argument that immunity does not always amount to impunity in international law. It offers an in-depth discussion of the difference between immunity and impunity.

The article is organised as follows. A short introduction of sovereign immunity is provided in Section 1, which also seeks to explain the need for sovereign immunity from criminal prosecution, to provide an overview of the history of immunities under international law and to review legal and social descriptions of immunity and the origin of international immunities. Section 2 clarifies the relevant international immunities within the frame of this article. Section 3 explores the question of why impunity should be differentiated from immunity, and analyses the reasons to resist such impunity. This section also provides a brief review of the literature on impunity, and particularly the "culture of impunity", and elucidates the notion of impunity from both social and legal perspectives. Section 4 summarises the most pertinent struggles of international criminal justice to end impunity for those who violate international law. Specifically, the contributions of the International Criminal Tribunals for Rwanda and for the Former Yugoslavia and the International Criminal Court are briefly explained. Section 5 interprets the implications for human rights when impunity is tolerated, and underscores the importance of distinguishing between immunity and impunity. Finally, the last section concludes by re-evaluating the concept of impunity and the consequences of tolerating impunity. The central aim of this article is to explicate that immunity does not always amount to impunity in international law.

I. Sovereign Immunity in International Law: A Short Introduction

International law has launched an instrument which is able to cope with undesirable incompatibilities of jurisdiction: in legal terms, this instrument is known as *immunity*.[1] In order to facilitate international relations, the State, its high-ranking representatives and other high-ranking officials who are charged with diplomatic duties and relations, are provided with immunities and privileges under international law. Robert Cryer describes the origins of immunity as follows:

In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide for inviolability of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.[2]

The question of immunity derives from the sovereignty-oriented approach of international law and provides legal protection for the State and its highest-ranking officials from investigation by foreign governments. The application of foreign State jurisdiction is interrupted by immunities. The jurisdiction is able to be reactivated only if the State that is endowed with immunity rights is willing to waive its immunity. Because of this, immunity has become one of the most remarkable and functional factors in limiting jurisdiction under international law.[3]

International immunities are customarily vested in particular institutions or bodies which are permitted, by law, in order to defend them from foreign intervention and to ensure that foreign governments can perform their duties and effectively maintain international relations.

Immunity, as a legal term, establishes a right for a sovereign State. This right provides an "exemption from the exercise of the power to adjudicate as well as to the non-exercise of all other administrative and executive powers by whatever measures or procedures by another sovereign State".[4] It may be said that sovereign immunity means that "the sovereign or government is

[1] Bruno Simma & Andreas Th. Muller, *Exercise and Limits of Jurisdiction*, *in* The Cambridge Companion to International Law 134, 151 (James Crawford & Martti Koskenniemi eds. 2012).
[2] Robert Cryer, Hakan Friman, Darryl Robinson & Elizabeth Wilmshurst, An Introduction to International Criminal Law and Procedure, 531 (2nd ed. 2010).
[3] *See generally* Simma & Muller, *supra* note 1; Ramona Pedretti, Immunity of Heads of State and State Officials for International Crimes (2014).
[4] Sompong Sucharitkul (Special Rapporteur on Jurisdictional Immunities of States and Their Property), *Preliminary Report on the Topic of Jurisdictional Immunities of States and Their Property*, [1979] 2 Y.B. INT'L. L. COMM'N., at 238, A/CN.4/323; Roger O'Keefe & Christian J. Tams, *Article 1*, *in* The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary 35, 38 (Roger O'Keefe & Christian J. Tams eds. 2013).

immune from lawsuits or other legal actions except when it consents to them".[5] In this sense, sovereign immunity can be deemed as legal immunity; in other words, it provides, as a judicial doctrine, legal protection for certain entities and people in specific circumstances. Sovereign immunity fundamentally shields those who benefit from it from legal proceedings. The sovereign equality doctrine has been regarded as one of the essential principles of international law, by virtue of which one sovereign cannot exercise authority over another. The "practical application of the doctrine means that the many activities carried out by a foreign state cannot be the subject of" municipal court proceedings.[6] This doctrine stems from the premise on which ancient English law is based, that "the King can do no wrong".[7]

There are two basic categories of legal immunity: international and national. While the first category includes those immunities which are designed to enable representatives of States to carry out their commitments under international law, the second category includes such immunities which are vested in *de jure* (lawful) institutions or people at a national level. State immunity, diplomatic immunity, Head of State immunity and immunity of international organisations, are recognised as international immunities under public international law. Immunities of judges, police, member of parliaments etc. are identified as domestic immunities.[8] The focus of this article is on international immunities, and specifically cases in which human rights have been used to challenge sovereign immunity under public international law.

The legal basis of these forms of immunity lies deep in human history, emerging whenever a ruler has been assigned a duty to rule in accordance with international law. Even before the invention of the modern States, it was recognised that if State-like institutions were to communicate effectively in diplomatic, commercial, political and other fields, it would be necessary to create a settlement bestowing freedom from suit or arrest on their representatives in the hosting State. Although reciprocal in nature, the bestowing of sovereign immunity can be read as both limiting the sovereign rights of the granting State and conferring an advantage on the receiving State in terms of its foreign relations.[9]

[5] Sovereign Immunity, Legal Information Institute, Cornell University Law School (CULS), http://www.law.cornell.edu/wex/sovereign_immunity (last visited Feb 6, 2018). *See also* Henry C. Black, Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 1396 (6th ed. 1990).

[6] Tim Hillier, Sourcebook on Public International Law 222 (1998).

[7] *See* James F. Stephen, II A History of the Criminal Law of England 3 (2014).

[8] *See generally* Matthias Kloth, Immunities and the Right of Access to Court Under Article 6 of the European Convention on Human Rights (2010).

[9] *See generally* Ilias Bantekas & Susan Nash, International Criminal Law (3rd ed. 2007); Cryer et al., *supra* note 2; Linda S. Frey & Marsha L. Frey, The History of Diplomatic Immunity (1999).

Immunities are "exceptions to a state's jurisdiction by virtue of which international law acknowledges the primordial interests of another state to deal with the matter in question".[10] Sovereign immunity, in international law, is customarily recognised as a demand to be exempted from any restrictions embraced by a foreign State.[11] Consequently, it is seen as a kind of armour plating that protects the State and certain of its representatives from scrutiny by foreign authorities. The main purpose of this protection is to create a suitable environment for the development of relations between States and their representatives, within legal and reasonable bounds. Indeed, sovereign immunity exists to endorse and reinforce strong relationships between States and to promote non-intervention by States in other States' affairs.[12]

The origin of the concept of absolute immunity can be found in the principle of *par in parem non habet imperium* (equals do not have authority over one another). According to the Oxford Dictionary of Law, this Latin phrase implies that in public international law "one sovereign power cannot exercise jurisdiction over another sovereign power. It is the basis of the act of state doctrine and sovereign immunity".[13] Considered in light of this principle, the importance of the words of Lord Wilberforce in the decision of the House of Lords *I Congreso del Partido* becomes clear: "The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of *par in parem* which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other state will adjudicate".[14] Let us now consider relevant international immunities for this article.

II. Relevant International Immunities

International immunities have not evolved for the benefit of any particular person or group of people. International immunities are vested only for the benefit of the State or its representatives such as presidents, foreign ministers, or diplomats in the international arena.[15] Three types of immunity have been subject to human rights challenges to date; they are: State immunity, Head of State immunity and diplomatic immunity.

[10] Simma & Muller, *supra* note 1, at 151.

[11] *See generally* Pedretti, *supra* note 3.

[12] *See generally* Sean D. Murphy, *Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?*, *in* The Role of Domestic Courts in Treaty Enforcement: A Comparative Study 61 (David Sloss ed. 2009).

[13] Elizabeth A Martin, A Dictionary of Law 393 (2009).

[14] I Congreso del Partido [1983] 1 A.C. 244, at 262; Elihu Lauterpacht & C.J. Greenwood, 64 International Law Reports, 313 (1983).

[15] *See generally* Chanaka Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organizations*, *in* International Law 395 (Malcolm D. Evans ed., 2nd ed. 2006).

State immunity imbues "the legal person of the state as well as its property with immunity (according to the venerable principle of *par in parem non habet jurisdictionem*)".[16] Almost all major countries adopt a form of restrictive immunity with regard to other States.[17] That is, on the one hand, the doctrine allows the assertion of immunity in respect of the actions of those serving in the capacity of sovereign authority (*acta jure imperii*); on the other hand, the doctrine does not prevent a State from being brought before a foreign State's court if commercial transactions are involved (*acta jure gestionis*).[18]

The second configuration of immunities that presents a challenge to international human rights is the immunity enjoyed by Heads of State. Individuals in this critical position enjoy absolute immunity as long as they remain in office. When they leave office, their immunity endures only in relation to official acts.[19] The debate over whether State officials who violate fundamental human rights should be held responsible and liable to punishment in public international law is informed "by the basic tension that exists between the desire to protect human rights and calls to respect state sovereignty".[20]

The third configuration is comprised of the legal immunities of consular and diplomatic representatives, in other words, diplomatic immunities;

[16] Simma & Muller, *supra* note 1, at 151.

[17] China is exceptional in this regard, in that China has reservations about applying a restrictive doctrine in respect of State immunity. For further details *see generally* Sompong Sucharitkul, *Jurisdictional Immunities in Contemporary International Law from Asian Perspectives*, 4 CHIN. J. INT. LAW 1 (2005).

[18] *See generally* Hazel Fox QC & Philippa Webb, The Law of State Immunity (3rd ed. 2013). *Acta jure imperii* refers sovereignty of a foreign State and constitute its official acts; *acta jure gestionis*, by contrast, do "not raise any question of the exercise of public power […] [T]he question which must be decided is whether or not the foreign State acted as a private person or on the basis of its *imperium*". Elihu Lauterpacht & C.J. Greenwood, 82 International Law Reports INTERNATIONAL LAW REPORTS, 102 (1990); *see generally* George Kahale & Matias A. Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUMBIA J. TRANSNATL. LAW 211 (1980); Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, 7 INT. ORGAN. LAW REV. 121 (2010); Carlo Focarelli, *Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision*, 54 INT. COMP. LAW Q. 951 (2005). *See also* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Att'y. Gen. (May 19, 1952), *reprinted in* 26 DEP'T. ST. BULL. 984, 984 (1952).

[19] However, in recent cases, 'while the general principle of granting immunity to states and their high-ranking representatives is uncontroversial, there is an ongoing debate on the precise limits of such immunities, notably with respect to gross violations of human rights'. Simma & Muller, *supra* note 1, at 152.

[20] Dapo Akande, *The Application of International Law Immunities in Prosecutions for International Crimes*, *in* Bringing Power to Justice?: The Prospects of the International Criminal Court 47, 47 (Michael Milde, Richard Vernon & Joanna Harrington eds. 2006).

which continue even after the diplomatic agent's duty in office ends, as it relates to official acts.[21]

Adopted on 18 April 1961, the Vienna Convention on Diplomatic Relations, which came into force after 24 April 1964, was mentioned by the International Court of Justice in the *United States Diplomatic and Consular Staff in Tehran* case, stating that the Vienna Conventions, "codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and [is] accepted throughout the world by nations of all creeds, cultures and political complexions".[22] The principle of immunity, as enshrined and set out in the 1963 Vienna Convention on Consular Relations and the 1961 Vienna Convention on Diplomatic Relations, is a demonstration of the sovereign equality of States, and this principle enables States and their representatives to embark on international relations.[23]

III. Reasons to Combat Impunity: Why a Distinction Should Be Made Between Immunity and Impunity

Immunity is a general rule of international law whereby certain State officials are deemed to be endowed with immunity from criminal prosecution and civil suits initiated in foreign States.[24] Impunity can be described as exemption from penalty or punishment. When the sovereign immunity principle is applied to the practice of sovereign impunity, individuals, who have administrated and participated in fundamental human rights violations, are often beyond the capacity of the law to provide a remedy.[25]

Fundamentally, impunity alludes to a situation where perpetrators circumvent punishment for violations that inflicted suffering upon someone and, a failure to bring such perpetrators of human rights violations to justice.[26]

Raul Molina Mejia and Patrice McSherry identify three different types of impunity: structural impunity, strategic impunity, and political or psychological impunity.[27] Structural impunity includes institutional and legal mechanisms which aim to protect individuals who abuse the power of the State. The second method, strategic impunity, applies to "the active measures

[21] *See generally* Simma & Muller, *supra* note 1.

[22] Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, at 24 (May 24).

[23] *See generally* Jacques Fomerand, Historical Dictionary of Human Rights (2014).

[24] *Ibid.*

[25] *See generally* Kingsley Chiedu Moghalu, *Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions*, *in* From Sovereign Impunity to International Accountability: The Search for Justice in a World of States 197 (Ramesh C. Thakur & Petrus A.M. Malcontent eds. 2004).

[26] *See generally* Fomerand, *supra* note 23.

[27] *See generally* J. Patrice McSherry & Raúl M. Mejía, *Confronting the Question of Justice in Guatemala*, 19 SOC. JUSTICE 1 (1992).

taken by state officials at specific moments, including laws, decrees, amnesties, or pardons to derail processes of, or demands for, truth and justice".[28] The main purpose of these kinds of specific action is to protect people from punishment for the crimes already committed. For this reason, the Belfast Guidelines state that "rather than protecting human rights, the impunity created by amnesties may embolden beneficiaries to commit further crimes and destabilise efforts to achieve sustainable peace".[29] Diane Orentlicher contends that:

we would do well to resist the tendency to address the wisdom of amnesties in terms of stark dichotomies, such as "punish or pardon" and "amnesty or accountability". These dichotomies present unduly narrow options, detracting from more constructive efforts to balance the demands of justice against those of reconciliation and, ultimately, to promote reconciliation within a framework of accountability.[30]

Finally, political or psychological impunity emanates from the fear and manipulation generated by actors who violate international law. This form of impunity can cause eternal terror.[31]

By ending impunity, a significant enabling element of fundamental human rights violations can be notably chipped away. According to a 1997 report of the former UN Sub-commission of Human Rights on Impunity by El Hadji Guisse, impunity means "the absence or inadequacy of penalties and/or compensation for massive and grave violations of the human rights of individuals of groups of individuals".[32] Immunity has been proven "to be not only a living anachronism, but one which often leads to impunity for the worst kinds of rights violations. It was precisely real and feared impunity that led to changes in the way in which state immunity was understood and applied".[33] It is for this reason that the international society requires that a distinction be drawn between impunity and immunity.

Impunity transpires when perpetrators of violations of human rights are exempted from punishment for their deeds. According to the *Brussels Principles against Impunity and for International Justice*, impunity results from

[28] Raúl M. Mejía, *The Struggle Against Impunity in Guatemala*, 26 SOC. JUSTICE 55, 58 (1999).

[29] The Belfast Guidelines on Amnesty and Accountability with Explanatory Guidance (2013), http://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.pdf (last visited Feb 6, 2018) at 26.

[30] Diane F. Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT. COMP. LAW 713, 714 (1997).

[31] *See generally* Mejía, *supra* note 28.

[32] El Hadji Guissé (Special Rapporteur on the Impunity of Perpetrators of Human Rights Violations), *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights) pursuant to Sub-Commission Resolution 1996/24*, 49th Sess., E/CN.4/Sub.2/1997/8, at para. 20-21 (June 27, 1997).

[33] Greta L. Rios & Edward P. Flaherty, *Mr. Ban - Tear Down the U.N.'s Wall of Immunity/Impunity (Before a National Court Does)!!*, 18 ILSA J. INT. COMP. LAW 439, 439 (2012).

"failing to investigate, prosecute and try natural and legal persons guilty of serious violations of human rights and international humanitarian law". The Brussels Principles emphasised that impunity has disastrous consequences in that it allows the perpetrators to believe that their actions are not subject to legal challenge. Also, according to the Brussels Principles, impunity "ignores the distress of the victims and serves to perpetuate crime. Impunity also weakens state institutions; it denies human values and debases the whole of humanity".[34]

The most authoritative definition of impunity has been provided by the UN Sub-Commission on Human Rights: impunity makes it impossible, either practically or legally (*de facto* or *de jure*), to call the people who perpetrate human rights violations to account, "whether in criminal, civil, administrative or disciplinary proceedings, *because they cannot be held accountable to any investigation which might conduce to detention, allegation, trial, conviction with appropriate penalties or reparations to victims*".[35] With regards to *de facto* impunity, Nigel Rodley states that *de facto* impunity "is the usual form: the state's judicial machinery is simply manipulated to ignore the crime". By contrast, in regard to *de jure* impunity, Rodley notes that it is "the more notorious form: the state adopts formal legal means of exempting those concerned from legal liability, for example, through an amnesty".[36]

Impunity, therefore, leads to a social and political environment in which laws established to preclude human rights violations are either brushed aside or inadequately redressed by the State. Two types of impunity can be identified in the literature. The first is legal impunity (*de jure* impunity), which occurs when regulations or laws bestowing immunity create a legal bar to bringing perpetrators to justice and prosecuting them for human rights violations or abuses. The second kind of impunity is functional (*de facto* impunity) and occurs when the failure to prosecute or investigate is deliberate; when the law does not apply any sanction or when a legal regime is incapable of meeting its commitments to investigate and prosecute.[37] *De*

[34] Brussels Principles against Impunity and for International Justice, Adopted by the Brussels Group for International Justice Following on from the Colloquium 'The Fights Against Impunity: Stakes and Perspectives' (2002), https://www.iccnow.org/documents/BrusselsPrinciples6Nov02_En.pdf (last visited Feb 6, 2018).

[35] *The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) Revised Final Report Prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119*, 49th Sess., E/CN.4/Sub.2/1997/20/Rev.1, at 26 (Oct 2, 1997) [emphasis added].

[36] Nigel S. Rodley, *Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective*, 69 NORD. J. INT. LAW 11, 14 (2000).

[37] *See generally* Mahmoud C. Bassiouni, *The Permanent International Criminal Court*, *in* Justice for Crimes Against Humanity 173 (Mark Lattimer & Philippe Sands eds. 2003); Mahmoud C. Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW

facto impunity arises from weaknesses in the legal system and from the actions of officials which prevent the course of justice. Both types of impunity conduce toward more violations of human rights and erode confidence in the government; *de jure* impunity conveys a negative message to victims about State apathy and connivance in their suffering.[38]

The updated version of the United Nations Commission on Human Rights Report on the *Promotion and Protection of Human Rights*[39] released in 2005 outlines a clear mission for States with regards to their essential responsibilities and the steps that they must take to combat impunity. Principle 19 of this Report establishes a decisive and explicit framework for action. It points out that States have an obligation to "undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished".[40] The Report also notes that when States fail to comply with their obligations to investigate infringements and to develop proper policies or take measures to punish the perpetrators, impunity occurs in both the domestic and the international realm. The Preamble to the UN Report of 2005 includes an unequivocal expectation that States accept "that the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity".[41] Immunity and impunity, therefore, should be distinguished. While immunity is a necessary instrument to maintaining smooth international, social, political and legal relations, impunity may enable perpetrators who violate fundamental human rights to escape punishment.

CONTEMP. PROBL. 9 (1996); Mahmoud C. Bassiouni, Introduction to International Criminal Law (2nd rev. ed. 2012).

[38] *See generally* Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir, 18 Human Rights Watch (2006), https://www.hrw.org/report/2006/09/11/everyone-lives-fear/patterns-impunity-jammu-and-kashmir (last visited Feb 6, 2018).

[39] *Promotion and Protection of Human Rights: Impunity - Report of the Independent Expert to Update the Set of Principles to Combat Impunity by Diane Orentlicher: Addendum - Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,* 61st Sess., E/CN.4/2005/102/Add.1 (Feb 8, 2005).

[40] *Ibid.*, Principle 19.

[41] *Ibid.,* Preamble.

IV. The Efforts by the International Courts to End the Culture of Impunity

Before discussing the vital measures taken by the international community to combat impunity, a distinction should first be drawn between impunity and sovereign immunity. As Eli Rosenbaum, the Director of the United States Department of Justice Office of Special Investigation, has pointed out, the Twentieth Century has been termed *The Age of Atrocity* and also *The Age of Impunity*. It isn't hard to see why. Between 1900 and 1987 alone, it is estimated that governments and government-like organizations murdered fully 169 million civilians. That deeply shocking statistics speaks volumes about the urgent need for systematic and aggressive law enforcement action to apprehend and bring to justice the perpetrators of *fundamental human rights violations*.[42]

The international community has established a number of institutions/organisations for the purpose of ending impunity. The International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court are prominent examples. Martha Minow states that it is difficult not to notice "the enormous gap in time between the Nuremberg trials and any comparable effort to prosecute war crimes in international settings".[43] This omission was addressed decisively in 1993, when the United Nations established the International Criminal Tribunal for the Former Yugoslavia, and shortly thereafter the International Criminal Tribunal for Rwanda. These two *ad hoc* institutions and the "unspeakable tragedies that culminated in their creation, provided the necessary catalyst for the long-awaited" creation of a permanent International Criminal Court.[44] The establishment of international institutions such the International Criminal Court, the International Criminal Tribunal for Rwanda, and the International Criminal Tribunal for the Former Yugoslavia demonstrates that there is a commitment to putting an end to impunity for human rights violations which amount to war crimes.

Rwandan ambassador Manzi Bakuramutsa stated at a 1994 Security Council meeting, it is "impossible to build a state of law and arrive at true national reconciliation if we do not eradicate the culture of impunity which has characterized our society".[45] Likewise, the impact of the International

[42] Eli M. Rosenbaum, *Remarks*, 27 CARDOZO LAW REV. 1667, 1667 (2006) [emphasis added].

[43] Martha Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence, 27 (1998).

[44] Mary M. Penrose, *Impunity - Inertia, Inaction, and Invalidity: A Literature Review*, 17 BOSTON UNIV. INT. LAW J. 269, 309 (1999).

[45] *The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the*

Criminal Tribunal for the Former Yugoslavia on ending the culture of impunity should not be overlooked. The main objective of this Tribunal is to put an end to human rights violations by taking powerful measures to bring to justice perpetrators for having committed human rights violations with the aim of contributing to the maintenance and restoration of peace and discouraging possible perpetrators in the future.[46] Most particularly, the adoption the Rome Statute of the International Criminal Court is accepted as a watershed moment in international law. Abolishing impunity for fundamental human rights violations which serve to contribute to the prevention of such violations, constitutes an act of collective willpower on the part of the international community.[47]

Kofi Annan, as UN Secretary-General, called the adoption of the Rome Statute of the International Criminal Court a crucial step forward. At the Diplomatic Conference in Rome in 1998, the Secretary-General highlighted that:

People all over the world want to know that humanity can strike back – that whatever and whenever genocide, war crimes or other such violations are committed, there is a court before which the criminal can be held to account; a court that puts an end to a global culture of impunity […].[48]

Since the Second World War, the international community has had a growing tolerance for the impunity of those who commit human rights violations. It is believed that identifying the perpetrators of human rights violations not only helps to satisfy and solace victims, but also promotes reconciliation and the preservation of peace. Additionally, the abolition of impunity becomes a functional deterrence factor and prevents future violations.[49]

These advances reflect a growing awareness within the international community that there is a crucial distinction between immunity and

Territory of Neighbouring States, 49th Sess., 3453rd mtg., U.N. Doc. S/PV.3453, at 14 (Nov 8, 1994); *see also* Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994,* 18 BOSTON UNIV. INT. LAW J. 163, 164 (2000).

[46] *See generally* Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, 2 J. INT. CRIM. JUSTICE 558 (2004); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT. LAW 7 (2001).

[47] Robert C. Johansen, *Peace and Justice? The Contribution of International Judicial Processes to Peacebuilding*, *in* Strategies of Peace: Transforming Conflict in a Violent 189, 199 (Daniel Philpott & Gerard F. Powers eds. 2010).

[48] *UN Secretary-General Declares Overriding Interest of International Criminal Court Conference must be that of Victims and World Community as a Whole*, United Nations Press Release, SG/SM/6597 L/2871 (June 15, 1998), http://www.un.org/press/en/1998/19980615.sgsm6597.html (last visited Feb 6, 2018).

[49] *See generally* Mitsue Inazumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law, 21 (2004).

impunity. The International Court of Justice, for example, distinguishes immunity from impunity as follows:

[T]he immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity […] the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.[50]

In recent years, when human rights violations were at stake, jurisdictional immunities have been reviewed. Furthermore, the related law has been subject to significant re-examination and important revisions. What follows "therefore does not attempt to prescribe what the law ought to be, but simply seeks to describe the law as it is in its current stage of development".[51]

Impunity can be described as "an act of violence"[52] and as "a recipe for continued violence and instability".[53] Impunity emerges when persons who hold sovereign rights on behalf of the State are exempt from punishment for human rights violations. While the main purpose of immunity is to facilitate the activities of States, Heads of State and diplomatic agents, impunity functions to exempt those from punishment by very specific means. There is ultimately no possible sustainable resolution unless the concept of impunity is differentiated from immunity. This differentiation as a means of combating impunity can be seen as a vital step towards preventing fundamental human rights violations.

V. Tolerating Impunity: A Great Threat to the Future of Human Rights in International Law

Living after genocide, mass atrocity, totalitarian terror […] makes remembering and forgetting not just about dealing with the past. The treatment of the past through remembering and forgetting crucially shapes the present and future for individuals and entire societies.[54]

The impact of allowing perpetrators of human rights violations to have impunity has been articulated most strongly by Paz Rojas Baeza, who describes impunity as "a human decision, an intention to disguise and cover up, and even more, an obligation to reach oblivion. But oblivion is *unfeasible*

[50] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. Rep. 3, at paras. 60-61 (February 14).

[51] Wickremasinghe, *supra* note 15, at 413.

[52] *See generally* Paz R. Baeza, *Breaking the Human Link: The Medico-Psychiatric View of Impunity*, *in* Impunity: An Ethical Perspective: Six Case Studies from Latin America 73 (Charles Harper ed. 1996).

[53] Akhavan, *supra* note 46, at 30.

[54] Minow, *supra* note 43, at 119.

in the case of fundamental human rights violations, because these violations will forever remain in the persons directly affected, and also in society, in the collective imagination, which will transmit them for generations".[55]

One of the reasons that human rights violations occur is the prevalence of impunity. Impunity means exemption from punishment in the case of human rights violations, alleviating the perpetrators' fear that they will face judgement. A legitimate mechanism developed by the State has sometimes been used by high-ranking representatives, and thus impunity constitutes the greatest impediment to the full realisation of human rights.[56] Impunity has a significant impact on humanity and the international order because it "knows no territorial bounds and speaks no specific language. It is not unique to any religion or race, and is not limited to any particular geographical region. Impunity therefore remains a universal problem".[57]

As is understood from the United Nations Report on impunity, the term signifies "exemption or freedom from punishment and connotes the lack of effective remedies for victims of crimes". In recognition of "human rights law, impunity implies the lack of or failure to apply remedies for victims of human rights violations".[58] The absence of a remedy for a perpetrator's victims is considered an outcome of impunity, rather than a feature of impunity itself.[59]

As Director of Amnesty International UK, Kate Allen, emphasised the negative aspects of impunity within the context of human rights as follows: "Impunity not only denies justice to victims of human rights abuses and their families, it sends out a message to others that they will not be brought to trial for some of the worst crimes known to humanity. Hence it leads to a climate in which more of these crimes are committed, and where the law is seen to protect the perpetrators of the crimes, not their victims".[60]

The roll-back of impunity for perpetrators of human rights violations and the promotion of human rights are directly connected: these two acts share similar futures. There is a complicated relationship between the battle against impunity and the furtherance of human rights.[61] Articles 91 and 60 of the

[55] Paz R. Baeza, *Impunity: An Impossible Reparation*, 69 NORD. J. INT. LAW 27, 28 (2000) [emphasis added]. "Dr Paz Rojas Baeza is a Chilean psychiatrist who played a leading role in treating the victims of the massive violations committed during the Pinochet dictatorship in Chile".

[56] *See generally* Penrose, *supra* note 44.

[57] *Ibid.*, at 270.

[58] Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENVER J. INT. LAW POLICY 591, 595–96 (1998).

[59] *See generally* Katherine Hooper, *The Ending of Impunity and the Fight for Justice for Victims of Human Rights Violations: A Chasm Too Great To Be Crossed?*, 9 FLINDERS J. LAW REFORM 181 (2006).

[60] Kate Allen, *Impunity - The Good News and The Bad*, 18 THE BARRISTER (2003), http://www.barristermagazine.com/barrister/archivedsite/articles/issue18/impunity.htm (last visited Feb 6, 2018).

[61] *See generally* Hooper, *supra* note 59.

Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, address the impunity problem in relation to human rights. The World Conference viewed "with concern the issue of impunity of perpetrators of human rights violations" and endorsed the view that "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law".[62]

The 2005 Human Rights Resolution on Impunity by the UN Commission on Human Rights acknowledges that impunity prompts violations of human rights. Impunity also encourages future abuses.[63] On this point, the Resolution states that "impunity for violations of human rights and international humanitarian law that constitute crimes encourages such violations and is a fundamental obstacle to the observance and full implementation without discrimination of any kind of human rights".[64] Principle 16 of the Resolution declares that:

policies to combat impunity that are based on broad consultation can contribute significantly to ensuring public accountability and hence in securing lasting justice […] and exposing the truth regarding violations of human rights […] and therefore encourages States to involve, as appropriate, all those concerned, including civil society, victims, human rights defenders and persons belonging to minorities and vulnerable groups.

As Katherine Hooper has observed, when perpetrators can violate fundamental human rights of "their victims without fear of sanction, then those rights become little more than empty words of aspiration". Any society that "wishes to overcome the horrors of past human rights abuses must confront them in the present".[65] Prosecution and punishment of perpetrators of human rights violations are essential for the prevention of future human rights violations. Deterrence is essential to the project of disabling possible future human rights violations.

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[62] *Vienna Declaration and Programme of Action*, World Conference on Human Rights, U.N. Doc. A/CONF.157/23, arts. 60-91 (June 25, 1993).

[63] The following statement was made by Corinne Dufka, Associate Director of Human Rights Watch: In 'a quick bid to end the first brutal Liberian civil war and in the face of massive crimes committed against civilians, UN and West African leaders agreed to a peace plan that dispensed with justice and rushed an election that installed warlord Charles Taylor as president in 1997. Not surprisingly, within a short time, the country was back at war. The six years of repressive rule by President Charles Taylor that followed and the next war were characterized by the same egregious abuses against civilians as the earlier war and further set the country back'. Combating War Crimes in Africa: Testimony of Corinne Dufka before the U.S. House International Relations Committee, Africa Subcommittee, Human Rights Watch (2004), http://www.hrw.org/news/2004/06/25/combating-war-crimes-africa (last visited Feb 6, 2018).

[64] *Human Rights Resolution 2005/81: Impunity*, 61st Sess., E/CN.4/RES/2005/81 (Apr 21, 2005).

[65] Hooper, *supra* note 59, at 181.

Fundamental human rights violations while accepted as profoundly immoral, must also be accepted as unlawful. Perpetrators of such violations of the law should be subjected to judgment and not be exempted from punishment.

Conclusion

Louis Joinet summaries this unpleasant situation as follows:

From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity.[66]

Although the distinction between immunity and impunity still requires more concrete and unconditional resolution, there is a good and affirmative signal in the international order to put an end to impunity. The establishment of the Rome Statute of the International Criminal Court and the legal proceedings brought against Augusto Pinochet[67] may be seen as proof of a significant movement in international society to abolish impunity by bringing persons responsible for human rights violations to justice.

Impunity always presents a challenge to those responsible for preventing violations of fundamental human rights and establishing a just society. When impunity is allowed, it may become a significant obstacle to justice and peace. While "immunities are valuable in preventing interference with representatives, and thereby maintaining the conduct of international relations, they can also frustrate prosecutions" for human rights violations, unless a distinction is made between impunity and immunity.[68]

Punishing perpetrators helps to build public confidence that those who exploit the rights of others will not be exempt from punishment. Prosecution and punishment of perpetrators are of vital importance to ensuring the cycle

[66] *The Administration of Justice and the Human Rights of Detainees*, *supra* note 35, at 51.

[67] *See* R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 1) [1998] 4 AII ER; R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2) [1999] 2 W.L.R. 272; R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3) [2000] 1 A.C. 147; Rodley, *supra* note 36; Reed Brody & Michael Ratner eds., The Pinochet Papers: The Case of Augusto Pinochet Ugarte in Spain and Britain (2000); Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT. LAW 237 (1999); Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds That a Former Head of State Is Not Immune for Torture*, 14 TEMPLE INT. COMP. LAW J. 263 (2000).

[68] Cryer et al., *supra* note 2, at 531.

of impunity is abolished.[69] Triumphing over impunity is a prerequisite for enhancing human rights.

Abolishing impunity for perpetrators of fundamental human rights violations is a crucial step towards achieving justice and deterring prospective human rights violations. While the essential objective of ending impunity is to enable investigation of past crimes and the prosecution and punishment of perpetrators, the obligation to end impunity is also relevant for the future. Failure to meet legal obligations to investigate, prosecute and punish such criminals creates an environment in which an impunity culture takes root and thrives. Efforts to address human rights violations have two main objectives: First, the prevention of further human rights violations and second, provision of compensation for victims.

Impunity must be distinguished from immunity; the two terms must not be used interchangeably. Impunity is "the torturer's most relished tool. It is the dictator's greatest and most potent weapon. It is the victim's ultimate injury. And, it is the international community's most conspicuous failure".[70] The right to immunity enjoyed by States and their high-ranking representatives must not turn into impunity. Immunity can rightly create an obstacle to the prosecution of particular persons at a particular time and for particular violations. However, this right to immunity should not acquit such persons who have committed violations of fundamental human rights guaranteed by peremptory norms of general international law.[71]

Showing tolerance toward impunity can perpetuate violence, both by implicitly allowing illegal acts and by creating a culture of vengeance and insecurity that may afterwards be manipulated by rulers or leaders intending to instigate violence for their own political ends. By contrast, "pursuing justice in the long run may help strengthen rule of law by enhancing domestic criminal enforcement mechanisms. Holding trials can help combat revisionist versions of events by those who seek to deny that crimes occurred".[72] An accurate adjustment of the meaning of immunity in both the legal and the political sense can positively influence the future.

[69] *See generally* Hooper, *supra* note 59.

[70] Penrose, *supra* note 44, at 270.

[71] *See generally* Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status (1988); *see also* Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT. COMP. LAW REV. 411 (1989); Alexander Orakhelashvili, Peremptory Norms in International Law (2006).

[72] Sara Darehshori, Selling Justice Short: Why Accountability Matters for Peace 75 (2009).