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Impact of Human Rights on the Law of Immunities

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Abstract
This paper examines whether the conflict between human rights and the law of immunity has limited the extent of the application of immunity in domestic and international courts in matters involving international crimes. It is argued that immunity is still resisting human rights irrespective of the seriousness of the alleged human right violations because incumbent State officials such as the Head of State, Head of Government enjoy full immunity from criminal jurisdiction. However, immunity of a former State official could be stripped off and where there are waivers or other customary law exception, immunity may be limited.

Keywords: immunity, human rights, international law, international crimes, customary international law

1. Introduction

International law is a system that regulates equality and sovereignty of States, as well as diverse non-state actors. States are restricted from imposing their jurisdiction to proscribe and enforce laws on other States, but allow them the freedom to do so within their territories. However, while imposing or enforcing their laws within their respective territories, States have to concede their jurisdiction over foreign Heads of States and Government, high-ranking government officials and diplomats [1]. Therefore, State officials may become immune to certain court proceeding against them as they seem inviolable. For example, the International Court of Justice (ICJ) ruled in *Arrest Warrant of 11 April (Democratic Republic of Congo v. Belgium)* [2] that a foreign minister was immune from arrest whilst in office.

Although States may remain the chief actors of international law, the introduction of other actors as subjects of international law [3] is influencing some changes in the development of international law. This development is no longer limited to the behaviour of States as against States, but extends to the regulation of States as against their own citizens and within their borders. This development evidenced in international human rights law [4]. Today, the protection of human rights is considered 'a matter of priority for the international community'. This concept of human rights is traced back to the 1215 Magna Carta, the philosophical writings of Locke and Rousseau, and the 1776 United States (US) Constitution and the French *Déclaration des Droits de l'Homme et du Citoyen.* Following the importance of human rights, States are held to have legal interest in their protection giving rise to obligation *erga omnes* 5]

The growing importance and advocacy for the protection of human rights have created tension in the relationship between human rights and the law of immunity in the international community. For instance, employing the normative hierarchy of norms (usually centred on doctrines of *jus cogens*, obligation *erga omnes*, crimes of States, custom and treaty) raises fierce debates and may not be a good forum to establish the importance of human rights in the international community as such debates appear subjective [6]. Rather, that the humanisation of international law no doubt has made some influence in the international community. However, this paper demonstrates that the law of immunity points to the strong dominating nature of the State in international law and its resistance to human rights. The methodology of this argument uses court decisions to state what the law is in the conflict between the rules of immunity and human rights. In this regard, the paper begins by exploring the conflict between immunity and whether the conflict between immunity and human rights created limitations to the extent of the application of immunity. The paper also examined human rights challenges, waiver of immunity and concludes by viewing the tools judges use in arriving at their decisions.

2. Conflicts between Human Rights and Immunities

The jurisprudence of human rights has diverse theories that space will not permit for discussion. These theories have positively influenced the Universal Declaration of Human Rights and views all human beings to be born free and equal in dignity. The United Nations and other bodies have tried

[1] Malanczuk, P. Akehurst's Modern Introduction to International Law (7th edn.). Routledge, London, 1997.
[2] (2002) ICJ Reports 3.
[3] Ochoa, C. The Individual and Customary International Law Formation. Virginia Journal of International Law, 2007, Vol. 48 (No. 1), pp. 119-186.
[4] Jenks, C.W. The Common Law of Mankind (1958) in Alebeek, R. V. The Immunity of States and their Officials in International Criminal Law and International Human Rights Law, Oxford University Press, Oxford, 2008.
[5] Alebeek, R. V. see note 6.
[6] Weiler, J. H. H. and Paulus, A. L. Structure of Change in International Law or Is there a Hierarchy of Norms in International Law? The Symposium: The Changing Structure of International Law Revisited (Part 2), The European Journal of International Law, 1997, Vol. 8, page 545-567; Bianchi, A., Denying State immunity to Violators of Human Rights, Austrian Journal of Public and International law, 1994, Vol. 46, 197.

to encourage and require all governments to treat their citizens equally with dignity [7]. However, the implementation of this requirement in international law has been greatly challenged by culture [8], religion [9], lack of effective enforcement of international law [10], uncertainty as to the applicability of laws [11] and other factors [12]. Although the traditional international law is more concerned with the protection of the values and interests of States, the rapidly increasing corpus of international human rights law (including international humanitarian law and international criminal law) increasingly challenges the basic tenets of general international law [13]. One of such basic international value is immunity of State agents and it is a rule of law that is acknowledged and respected by States, flowing from the sovereign equality of States to promote comity and good relations among themselves [14].

In discussing the conflicts between human rights and immunities, this paper shall examine some cases as space would allow. Both international and domestic courts acknowledge the need for the protection of human rights and frown at their serious violations but they are still sceptical to deny immunity to States and their incumbent agents. In *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* [15], the ICJ ruled on the dispute between Belgium and the Democratic Republic of the Congo (DRC) about a warrant of arrest issued by Belgian authorities for the arrest of the DRC's Foreign Minister, by rejecting the jurisdiction of Belgium and declared the warrant illegal. The court observed that in international law, it is firmly established that diplomatic and consular agents, certain high-ranking officers in the State such as Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. In the present case, it is only the immunity of criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs. The court notes that various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction. This obligation, however, does not affect immunities under customary international law, including those of Ministers for Foreign Affairs. However, the court stated that the immunity from jurisdiction enjoyed by incumbent Minister for Foreign Affairs does not mean impunity from crimes they have committed irrespective of their gravity. That there are circumstances they are tried by their national courts where the State waives such immunity.

This judgement has been criticised for its poor motivation in acknowledging the existence of a rule of customary international law that provides for absolute inviolability and immunity for incumbent Ministers and the theoretical manner in which the court asserts that immunity does not amount to impunity [16]. The DRC's argument on functional analysis seemed to have convinced the court to extend the immunity of Heads of States to Foreign Ministers which raise the danger of appointing wanted criminals to high offices to provide immunity [17] and also increase the scope of those officers entitled to immunity. The ruling of the warrant as illegal and retention of immunity by the ICJ makes no impact on the scholarly desires for accountability and punishment for the serious violations of fundamental human rights.

In *Siderman de Blake v. Republic of Argentina*, [18] the plaintiffs sued *inter alia*, for injuries suffered from unlawful detention and torture. Although it was recognised by the Ninth Circuit Court of Appeals that torture is a *jus cogens* rule, it was only treated as a matter of international law. The court demanded strict adherence to domestic issues within the limits of the Foreign Sovereign Immunities Act (FSIA). It is observed that a plain reading of the FSIA does not permit suits against foreign sovereigns in cases of massive violation of human rights. Although the FSIA contains specific exceptions to the general rule of immunity which are mostly on commercial activities, it contains no specific exception for infractions of human rights [19]. Therefore, exception may be derived from general international law as earlier stated.

In *Princz v. Federal Republic of Germany (FRG)* [20], a typical example of the clash of these set of rules was illustrated. In this case, Princz, an American citizen and a Jew, had filed claims in the District Court for the D.C Circuit against the FRG for false imprisonment, assault and battery; negligent and intentional infliction of emotional distress, and recovery for *quantum meruit* for value of his labour during the second world war. It was considered whether the FRG is entitled to immunity in United States (US) either under the FSIA or, if it should apply retrospectively. The court applying the FSIA granted immunity to Germany holding that the particular violations of *jus cogens* did not evidence the FRG's amenability and did not arise as an implied waiver under the FSIA.

Although the above case is consistent with the views of the Supreme Court, it has been severally criticized for the US

[7] Petersmann, E., The 'Human Rights Approach' Advocate by the UN High Commission for Human Rights and by the International Labour Organisation: Is it Relevant for WTO Law and Policy? Journal of International Economic Law, (2004) Vol. 7, No. 3, p. 605.

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[13] Kamminga, M. T. and Scheinin, M. (Eds.), The Impact of Human Rights Law on General International Law. Oxford University Press, Oxford, 2009.

[14] Ledgerwood, B. The Antagonistic Relationship between Sovereignty and Human Rights, available at https://atlismta.org/online-journals/human-security/the-antagonistic-relationship-between-sovereignty-and-human-rights/#_ftn2. 24 February 2019. See also, Donnelly, J., State Sovereignty and Human Rights, Ethics and International Affairs, 2014, Vol. 28, (No. 2), pp. 225-238.

[15] ICJ Reports 2002, p. 3.

[16] Wouters, J., The Judgement of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks, Leiden Journal of International Law, (2003), Vol. 16, pp. 253-267.

[17] Dissenting judgement of Judge Van Den Wyngaert, para 21.

[18] 965 F.2d 699 (9th Cir. 1992).

[19] Reimann, M., A human rights exception to sovereign immunity: Some thoughts on Princz v. Federal Republic of Germany, Michigan Journal of International Law, (1994-1995), Vol. 16, 403.

[20] 26 F.3d 1166 (D.C. Cir. 1994)

reluctance and shortcomings on policies of international human rights. It is believed that the recognition of American jurisdiction over foreign States that violate peremptory norms of international law would be an important step in the direction of bringing American law on sovereign immunity into line with the rest of international community. This is very important because it is only national courts that can grant remedies to individuals for human rights violations since they have no *locus standi* in the ICJ [21].

In further criticism, Reimann states that the *Princz case* sends a strong and troubling signal because the case seems to forcefully illustrate how much protection even barbaric foreign governments enjoy in American courts and how little access to justice their victims have, even if they are American citizens in their own land [22]. The court again in this case could not see the influence of human rights on the law of immunity.

In *Al-Adsani v. Government of Kuwait and others* [23], the claimant, was kidnapped and taken to a Kuwaiti prison where he was falsely imprisoned and beaten for being in possession of a video tape showing a relative of the Emir of Kuwait in compromising activities. The issue of whether there is an implied *jus cogens* exception to the immunity enjoyed by a foreign State under the United Kingdom Sovereign Immunity Act (UK SIA.) was denied. This is because the court did not find the establishment of denial of immunity to a State in respect of civil claims for damages for alleged torture in international law. Although the court saw it as an inconceivable that there is an intention to protect the actual commission of torture prohibited in international law, the court was not able to convince critics who saw the decision as an encouragement for the perpetuation of torture [24] and pointed out the new era of accountability for the crime of torture in international law [25].

However, in *Al- Adsani v. United Kingdom* [26], (ECtHR's appeal case by Al-Adsani over his defeat in the UK), the appellant brought a complaint alleging the violation of his access to court. The ECtHR exploring the proportionality technique in its decision in the above case, had stressed that the right of access to court is not absolute, but may be subject to some limitations which may be imposed in pursuit of certain legitimate aim. The court considered that the granting of jurisdictional immunity to Kuwait by the British courts in civil proceedings like this, resulting from an act of torture pursued a legitimate aim based on the international law rule *par in parem non habet imperium.* The court held further that the granting of jurisdictional immunity was proportionate to the aim sought to be achieved, as it is still impossible to assert that international law permits the removal of civil jurisdictional immunity in claims relating to torture committed in the territory of the violating State. The reason or the method applied by the court in this decision did not solve the controversy resulting from recognising state immunity in proceeding relating to the violations of fundamental human rights, and was severely criticised for taking a timid posture in the evolution of international law protecting human rights [27].

In *Kalogeropoulou and others v. Greece and Germany [28]*, the German authorities refused to comply with the trial court's award of compensation for the massacre committed by Germany. In an effort to enforce the award against German property in Greece, the plaintiffs sued to compel the Minister of Justice of Greece to provide his consent, but the Court of Appeal of Athens held that Article 923 of the Greek Code of Civil Procedure was a proportionate means of pursuing the legitimate public aim of avoiding disturbances in international relations. Secondly, that Article 923 did not violate Article 6 of the European Convention on Human Rights and Fundamental Freedoms (European Convention) because it did not constitute a prohibition of enforcement, but rather a requirement for prior government.

While applying the general norm of customary international law that rendered inadmissible any claim against a foreign State for torts committed by its armed forces, the court considered whether there was an exception to state immunity for civil proceedings arising out of alleged crimes against humanity. The court relying on *Al-Adsani case* held that there was no exception to state immunity in this case.

The final case to be looked at in this conflict between human rights and immunities is the celebrated case of *Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No.3)* [29]. The main issue here is whether to extradite Pinochet to Spain for crimes committed (primarily in Chile) during the time he headed the government of Chile. The House of Lords were faced with which of the charged offences constituted extradition offences and whether Pinochet was entitled to sovereign immunity with respect to those offences. There was no controversy as on the issue of absolute immunity which attaches to the office of serving Head of State as provided by the State Immunity Act of 1978 (that is immunity *ratione personae*), but the Act was silent on the position of the former Head of State, except for reference to the Diplomatic Privileges Act 1964 which incorporates, in part, the Vienna Convention on Diplomatic Relations of 1961. The majority of Law Lords stated that torture cannot constitute official act of a Head of State, therefore, a former Head of State cannot successfully claim immunity. The holding of the court that torture is not an official act to base its decision has raised some controversies [30] because most acts of torture are done by the State through its agents [31].

[21] International Law. Foreign Sovereign Immunities Act- D.C. Circuit Holds that violation of peremptory norms of international law does not constitute an implied waiver of sovereign immunity under the Foreign Immunities Act- Princz v. Federal Republic of Germany, 26 F. 3d 1166 (D.C. Cir. 1994)", Harvard Law Review, 1994, Vol. 108, (No. 2), pp. 513-518.

[22] Reimann, M., A human rights exception to sovereign immunity: Some thoughts on Princz v. Federal Republic of Germany, Michigan Journal of International Law, (1994-1995), Vol. 16, 403.

[23] (1996) 107 ILR 536

[24] Orakhelashvili, A., State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong, The European Journal of International Law, 2008, Vol. 18, (No. 5), p. 955.

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[28] (2002) 129 ILR 537.

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[30] Akande, D. and Shah, S. Immunities of State Officials, International Crimes, and Foreign Domestic Courts, (2010) EJIL, Vol. 21, No. 4, pp. 815-825.

[31] Green, P. and Ward, T. State Crime, Governments, Violence and Corruption, London: Pluto Press, London, 2004. See also O'Sullivan, M. L. Shrewd Sanctions: State craft and State sponsored terrorism, The Brookings Institution, Washington D. C., 2003.

The decision by the court that there is no immunity for a former Head of State against the prosecution for certain international crime, was welcomed by many especially by the human rights activities and was described as 'surprising' [32]. The denial of the immunity *ratione materiae* for the alleged torture in this case is further described as a representation of two visions in international law namely: 'a horizontal system based upon the sovereign equality of States and vertical system that upholds norms of *jus cogens* such as those guaranteeing fundamental human rights' [33]. There was application of universal jurisdiction and the enforcement of obligation of human rights treaties which foresees the possibility of global enforcement of human rights [34]. Although this case has been greatly applauded, further tolling of this line of decision has not been so prominent. International courts have always tried to distinguish the situation in this case from other cases as exemplified in *Arrest Warrant Case*. Here, the ICJ states that there is no exception in the legal instruments of international criminal tribunals to change its conclusion on the matter, therefore rejected the belief that there may exist any rule of custom establishing international accountability [35].

3. Has the conflict between immunity and human rights created limitations to the extent of the application of immunity?

The conflicts in international law are unending with constant development and adjustment. For instance, there has been a trend from absolute to restrictive concept of immunity over the past decades. Whether the conflict between human rights and immunity has created human rights exceptions limiting the extent of the application of immunity is not so much of a yes or no response, but a matter of changing practice and argument [36]. In this regard, there arises a question of whether human rights exception has sufficient and convincing reasons to further limit or restrict immunity in the modern international law. The cases examined above had shown that sometimes the courts have accepted or rejected the position of denying immunity in serious violation of human rights. An example of the proposition that human rights is an exception is based on the conception that they fall under *jus cogens* and therefore, by definition is unconditionally binding on States following the proposition of the Nuremberg International Tribunal's denial of immunity to the Nazi defendants for their crimes against humanity. Arising from this proposition also is the creation of hierarchy of norms which has controversial consequences and acceptance [37].

The denial of immunity from criminal jurisdiction in *Pinochet case* [38] which was hailed as a landmark case paving way for the acceptance of human rights exception to the traditional immunities granted to foreign states and their officials does not seem to have been realised. For example, the ECtHR in the *Al-Adsani case* [39] by a very narrow majority refused to extend the human rights exception tort proceedings against foreign States. Also, in the *Arrest Warrant case*, [40] the International Court of Justice refused to recognise human rights exception to immunity by creating a demarcation between this case and *Pinochet case*. The Court stated that the decision in the *Pinochet case* was strictly limited to former Heads of States, but that incumbent Heads of States, Heads of Government and Foreign Ministers are immune from criminal proceedings abroad even if they were accused of having perpetuated war crimes and crimes against humanity. Some national courts such as Canada [41], France [42], United States [43], Germany [44], and Greece [45] have also shown reluctance in the extension of the position in *Pinochet* decision. Furthermore, the decision by the House of Lords in *Jones v. Saudi Arabia* [46] dashed the hopes raised in *Pinochet case* when it unequivocally endorsed the *Al-Adsani decision* and maintained that state immunity barred British courts from hearing tort claims against foreign States and their officials [47].

Although the above decisions may be disappointing for the human rights advocates, it must be noted that most of these 'disappointing' decisions were narrowly made with a small majority difference, suggesting that human rights could be playing a significant role through gradual transformation from an absolute to today's restrictive understanding of immunity [48]. National and international courts are now faced with the challenge that the ambit of immunities should be restricted in view of the progressive development of international law and providing a case study of interaction between international human rights law and general international law. The understanding of this interaction provides a basis for predicting the future development of the law of immunity and offers a conceptual framework for devising realistic strategies for overcoming the obstacles created by traditional immunities to the effective realisation of human rights [49].

However, specific human rights violations amounting to crimes against humanity or war crimes with regard to criminal proceeding can only exist before some international and internationalised criminal tribunals. Paust illustrates that in ICTR case of Prosecutor v. Kambanda [50], international law does not permit immunity of a person accused of international customary crime [51]. The former Prime

[32] Fox, H., The First Pinochet Case: Immunity of a Former Head of State, ICLQ, 1998, Vol. 48, p. 207 at 208.
[33] Chinkin, C. M., Immunity of former Head of State from prosecution by foreign State for acts committed while in office- effect of Torture Convention on immunity- extradition- application of dual criminality requirement to extraterritorial offenses, AJIL, 1999, Vol. 93, 703 at p. 711.
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[36] Reimann, M., see note 22.
[37] Ibid.
[38] *R., ex parte Pinochet v Bartle and Ors, Appeal*, [1999] UKHL 17.
[39] *Al-Adsani v. UK.* 34 EHRR (2002) 11 at paras 60-61.
[40] (2002) ICJ Reports 3.
[41] *Bouzari v. Islamic Republic of Iran* (2004) 234 OR (4th) 406
[42] French Court of Cassation, Judgement of 13 March 2001, Clunet 2001, 804 (*Gaddafi case)*
[43] *Pricz v. Federal Republic of Germany,* 26 F.3d 1166
[44] *Pricz v. Federal Republic of Germany,* 26 F.3d 1166
[45] *Margellos v. Federal Republic of Germany*, (2007) 129 525.
[46] (2007) 1 AC 270.
[47] Rensmann, T., Impact on the Immunity of States and their Officials in Menno, K. T. and Scheinin, M. (Eds.), see note 13.
[48] Alebeek, V. The Immunities of States and Their Officials in International Criminal Law and International Human Rights Law, Oxford University Press, Oxford, 2008.
[49] Rensmann, T. see note 13.
[50] IT-97-23-S
[51] Paust, Jordan J., The Reach of ICC Jurisdiction Over Non-Signatory Nationals, Vanderbilt Journal of Transnational Law (2000), Vol. 33, p.1.

Minister in this case was charged with Genocide. He could not rely on his status as a government official to avoid prosecution before the ICTR. The position of this case has similarity with the *Pinochet case*, but the ICJ differentiated them. The court stated that although the position of prosecuting a former State official may be permitted, an incumbent Heads of States, Heads of Government and Foreign Ministers are immune to criminal prosecutions.

Despite the initial of nature sovereign immunity, over time the penetration of commercial and trade links into State borders are limiting its effect. Thus creating exceptions to the doctrine of immunity by waiving immunity. For example, the United States and the former USSR agree by treaty to waive immunity in respect of shipping and other commercial activities [52].

4. Waiver of Immunity

This could be done either expressly or impliedly. However, care must be taken while implying waiver of immunity. Where a State institutes, intervenes or take any step in a proceeding, such a State may be deemed to have submitted to the jurisdiction of that State [53]. This is provided for under article 8 of the United Nations Convention on Jurisdictional Immunity. Therefore, where a State waives its immunity in matters affecting the violation of human rights, a foreign court may expressly or impliedly attain jurisdiction [54]. Generally, the UN convention provides exceptions to immunities in matters of commercial transactions [55], employment contracts [56], intellectual property [57], companies [58], shipping [59], personal injuries [60] and some other non-commercial acts [61].

Despite the discussion above, it is necessary to draw attention to the emphasizes of the court in the *Arrest Warrant case*. Here, it was stated that immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crime they might have committed, irrespective of their gravity. Therefore, there are circumstances in which immunity could be limited. Firstly, where such persons do not enjoy criminal immunity under international law in their own States, they could be tried by those countries' courts in accordance with the relevant rules of domestic law. Secondly, where the State which they represent or have represented decides to waive that immunity, such persons will cease to enjoy immunity from foreign jurisdiction. Thirdly, a former Foreign Minister may be tried for his previous acts in office, both official and private acts provided that the State trying the matter has jurisdiction under international law. Finally, a former or an incumbent Foreign Minister may subject to criminal proceedings before certain international criminal courts with jurisdiction [62].

However, in the dissenting opinion of Judge Van De Wyngaert, there is a criticism of the uncertainty of the construction that immunity does not necessarily lead to impunity. He also concluded that immunity should never apply to international crimes, neither before international courts nor national courts [63]. Whether municipal courts are proper forum for prosecuting individual crimes of international law is controversial. It is argued that municipal courts can aptly subrogate for the scant number of enforcement mechanisms at international law; and the extent to which a municipal court can apply international law depends on how international law is incorporated into the State's domestic legal system, especially in the dualist countries [64]. However, there are theoretical and practical reasons supporting the adjudication by the municipal courts such as: international crimes constitute attack against the entire international community; therefore, States are entitled to punish them.

5. Challenges of Human Rights in International Law

It has to be noted that the loose system of international law, lack of effective implementation mechanisms and the protection of States' wills [65] are likely challenges for the achievement of effective human rights practices and protections. In addition, the international courts seem to further protect the States by granting immunity even if there was an alleged grave violation of human rights. In the *Arrest Warrant case,* the court held that current State practice does not support any exemption from immunity on account of serious violations of human rights [66]. Thus, it could be deduced that State practice favouring immunities is a challenge for the development of human rights.

The inconsistencies of decisions among national courts, domestic legal order and the international courts also pose as challenges to stripping of the veil immunity, for the development of human rights. Some States, for example, the UK, Canada and the US, where the law of State immunity have been codified, the approach to human rights challenges is largely dependent on the domestic immunity. This could lead to different or inconsistent interpretations that could hinder the protection of human rights or cause a disregarded of the violation of human rights [67]. Also the absence of such codification in some countries may lead to inconsistence, although, it is argued that it could allow for a more activist approach [68]. The issue of different interpretations has been exemplified in the *Pinochet case and Al-Adsani case*. While human rights activists or supporters were applauding the decision of the *Pinochet case* as a triumph for human rights over immunities, this was defeated by the decision in *Al Adsani*, which departed from former by differentiating between an incumbent and a

[52] Brownlie, I., Principles of Public International Law (7th edn.). University Press, Oxford, 2008.
[53] Shaw, M. N. International Law (6th edn.). Cambridge University Press, Cambridge, 2008.
[54] Oxman, B. H. (Ed.), International Decisions, AJIL, 2001, Vol. 95, 162
[55] Article 10
[56] Article 11
[57] Article 14
[58] Article 15
[59] Article 16
[60] Article 12
[61] Article 13, See generally for further discussion, Sucharitukul, S., State Immunities and Trading Activities in International Law. Stevens & Sons Limited, London, 1995 and Fox, H. see note 11.
[62] Article 27, paragraph 2, The Rome Statute of the International Criminal Court, 1998.
[63] Arrest Warrant of 11 April 2000, Dissenting Opinion of Judge Van De Wyngaert, ICJ Reports 2000, 137 at 161.
[64] Bianchi, A., Denying State immunity to Violators of Human Rights, Austrian Journal of Public and International law, 1994, Vol. 46, 197.
[65] Pauwelyn, J., Optimal Protection of International Law, Navigating between European Absolutism and American Voluntarism. Cambridge University Press, Cambridge, 2008. See also, Bolton, J., Is There really "Law" in International Affairs? Trans Law Contemp. Promb. 2000, Vol. 19, p. 1.
[66] *Arrest Warrant*, 2002 ICJ Reports 3, para. 58.
[67] Rensmann, T., see note 13.
[68] Ibid.

former State official. Although this might be a welcome reason, the continuous search or devising of reasons for the protection of immunity or state practice, arguably, is a continuous challenge to human rights.

Furthermore, challenges to the protection of human rights against immunities arise in procedural and institutional terms relating to the effective functioning of the legal assistance. Mechanisms, implementation of Commission and Court decisions, remedies against structural discrimination, as well as the selection process of Commissioners and judges all pose challenges to the success of human rights [69].

6. Attitude of the Courts to the Conflict between Human Rights Violations and Immunities

There is no single method employed by the courts in the resolution of conflicts between human rights and the law of immunities. The courts apply customary international law, *jus cogens*, hierarchy of norms (which generates criticisms), and proportionality to balance desired aim and so on. Most of the decisions examined above showed reluctance of the courts in denying immunity to perpetuators of human rights violations. The courts have insisted on the interpretation that there is no current State practice showing evidence of exception to immunities in serious violations of human rights. The reluctance of the courts in the protection of human rights is shown in its prioritization of State immunity [70]. However, the courts, sometimes have shown some level of brevity by creating new interpretations as evidenced in Viola's case.

7. Conclusion

The continuous conflicts and debates on the superiority of rules of immunity and human rights do not seem close to resolution in the near future. Advocates of international human rights law continue to cry for its protection and the courts and legal order disagree in the interpretation of conflicts before them. There is a continuous problem in the argument that human rights norms have a peremptory status that should automatically prevail against any other conflicting norm.

Although arguments for the protection of human rights have continued to gain momentum in the international community, the cases discussed above show the reluctance of courts to suppress state immunity in the face human rights violations. However, the humanisation of international law suggests more protection of human rights.

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