

**ACCOUNTABILITY OF HEADS OF STATE BEFORE INTERNATIONAL
CRIMINAL COURT**

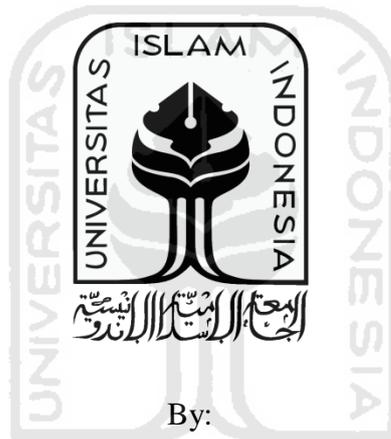
THESIS

Presented as the Partial Fulfillment of the Requirements

to Obtain a Bachelor's Degree at the Faculty of Law

Universitas Islam Indonesia

Yogyakarta



By:

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**INTERNATIONAL PROGRAM
UNDERGRADUATE STUDY
FACULTY OF LAW
UNIVERSITAS ISLAM INDONESIA
YOGYAKARTA**

2020

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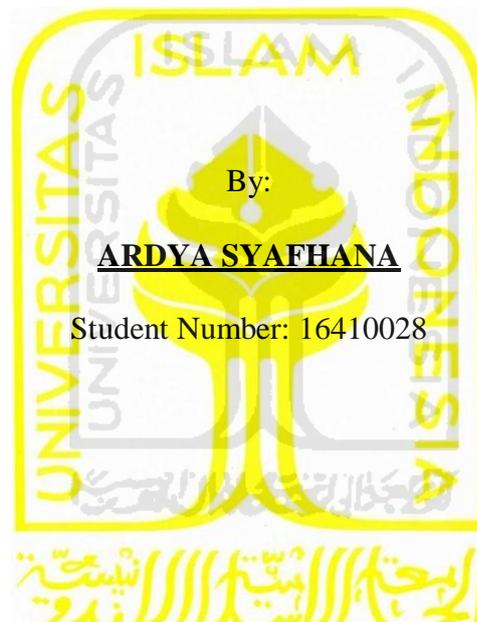
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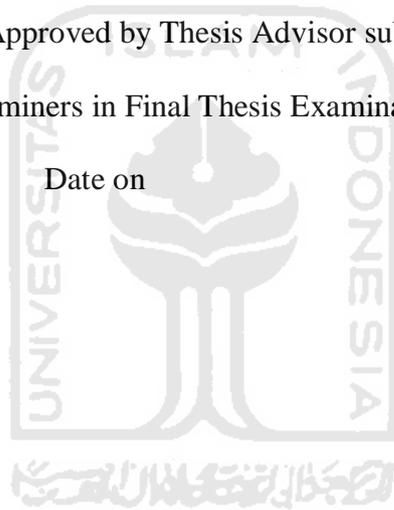
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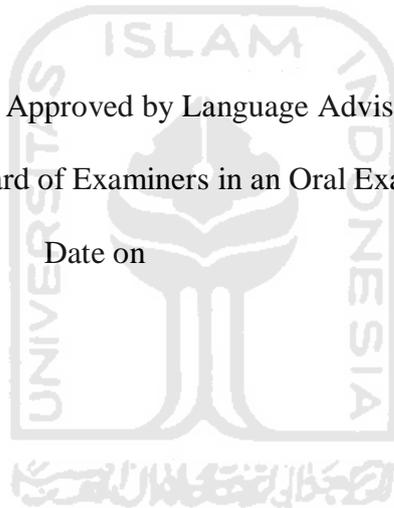
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MOTTO

“Sesungguhnya urusan-Nya apabila Dia menghendaki sesuatu hanyalah berkata kepadanya, Jadilah ! Maka jadilah ia.”(**Yasin: 82**)

“Sometimes it’s the people who no one can imagines anything of, who do things no one can imagine.” (**The Imitation Game**)

“Jadilah seseorang dengan kemampuan tanpa batas, kebijaksanaan tanpa alasan dan menjadi manfaat bagi orang banyak agar ketika kamu mati kamu tau kamu pernah benar- benar hidup dan akan terus hidup melewati batas dimensi waktu, terkenang hingga ratusan abad.” (**Ardya Syafhana**)



DEDICATION

This thesis sincerely dedicated to:

Allah Subhanahu wa ta'ala

The Angels of guiding my life's existence, Ayah Ibu

My Brother, Arya

My best lecture who always inspire me with her kindness and intelligence

Prof. Dr. Sefriani, S.H., M.Hum.

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I realize that this thesis is still far from perfect and there are still many short comings due to all my limitations, therefore, I certainly open for suggestion and criticisms. This thesis will never finish without assistance and support from all of my families, lectures, and friends. All grateful and thanks also belongs to:

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ABSTRACT

International Criminal Court (ICC), an established permanent forum, imposes accountability for anyone commit international crimes based on international criminal law. Anyone means the court is expected to proceed all actor without distinction not to mention someone with high status e.g. Heads of State. Other than personally engaged, as a superior, someone must be responsible for the commission of crime by subordinates including as civilian superior. By the time this research conducted, there have been three examples of heads of state proceeded before international criminal court. Laurent Gbagbo, Omar Al-Bashir and Uhuru Kenyatta are the only presidents who have been brought to ICC because their involvement in international crimes.

Discussing accountability needs first and foremost, applicable law in international criminal court covering issues of accountability such as general principles, offence, knowledge, and jurisdiction. Aside from the general concept, this includes special feature of liability for civilian superior and its application while considering relevant issues of head of state. Lastly, there will be a completion theory of leadership and accountability by another dimension, Islamic Law. As the second chapter use statutory and history approach, subsequent chapter conceive case approach with specific legal and non-legal issues in the case of Laurent Gbagbo, Omar Al-Bashir and Uhuru Kenyatta.

At the end of discussion, in fact ICC had shown unwavering commitment to even bring heads of state before the court yet with upcoming challenges, the court could take a step forward to impose accountability against heads of state. Starting with comprehensive legal statute and legacy from other international tribunals, the court also gave advancement in the creation of non-immunity rule. Despite being unclear in some instances, ICC brought a new understanding of immunity for third party of Rome Statute which was enlightened in *Omar Al-Bashir* decision. In *Uhuru Kenyatta*, ICC ruled about admissibility and complementary issue even though well written in the Statute, the court invested in demanding interpretation that the state must establish progressive domestic proceeding. Finally, still eventhough superior responsibility is possible to be attached at heads of state, the court decided to put it aside after direct responsibility in *Laurent Gbagbo* decision.

Thereafter, the court could be more refined in study and collaboration with other international body in making interpretation for Rome statute. Other than that, state party is the only element who can be relied upon for the betterment of the court's law enforcement in upholding international criminal justice.

Keywords: Accoutability, International Criminal Court, Heads of State, Superior responsibility.

CHAPTER I

INTRODUCTION

A. Context of Study

In a broad sense, accountability means the determination of individual's action and possible consequences based on required standard, it also covers assessment about legal consequences of breaches of law.¹ International criminal law, a branch of public international law, governs to outlaw international crimes and impose state obligation in proceeding the accused of those crimes.² This set of rules contain both substantive and procedural law. Substantive law deals with material provisions to determine possible circumstances on acts constitute international crimes. Meanwhile, procedural law dictates the international proceeding on prosecutions and the various stages of international trials.³ In short, International Criminal law is designated for accountability which imposes individual responsibility and punishes its breaches through international forums.⁴ International Criminal Court, one of the forums, deals with breaches of international criminal law or the commission of international crimes.⁵

Prior to that definition, International Criminal Law (ICL) was described similar to Transnational Criminal law or international aspects of national criminal

¹ Jutta Brunne, "International Legal Accountability Through Lens of The Law of State Responsibility" in Netherlands Yearbook of International Law, Vol. XXXVI, (The Hague: T.M.C. Asser Press, 2005), 4.

² Antonio Cassese, *International Criminal Law*, 1st Ed.(United States: Oxford University Press, , 2003), 15.

³ *Ibid.*

⁴ Robert Cryer, and others, *An Introduction to International Criminal Law and Procedure*, 2nd Ed. (Cambridge: Cambridge University Press, 2010), 3.

⁵ "Rome Statute of The International Criminal Court" opened for signature July 17, 1998, United Nations, Treaty Series, registration No. 38544, Art. 8(2)(b)(viii), [https://legal.un.org/icc/statute/english/rome_statute\(e\).pdf](https://legal.un.org/icc/statute/english/rome_statute(e).pdf),

law which concerned with legal issues that arise when prosecuting cross-border crime.⁶ Over decades, ICL embraced various sources of core crimes, for instances War crimes derives from law and customs of war which protects individuals in armed conflict, others in genocide and crimes against humanity which condemns gross violation of human rights and crimes which are the substantial concern of international community as a whole.⁷

Another attempt to define ICL is by looking at the values protected, international crimes essentially include acts which infringe a fundamental interest of international law.⁸ Regardless as individual or agents of state, ICL contends liability of individual with the exception to the crime of aggression.⁹ International military tribunal in Nuremberg noted that,

“Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced . . . individuals have international duties which transcend the national obligations of obedience imposed by the individual state.”¹⁰

This statement implies individual responsibility in front of ICL going beyond national obedience or someone cannot be exempted from their responsibility only because their national authorities told to do so.

⁶ Sarah Joseph and Adam McBeth, *Research Handbook on International Human Rights Law*, 1st Ed.(Cheltenham :Edward Elgar Publishing Inc., 2010), 241.

⁷ *Ibid.*

⁸ Robert Cryer, and others, *Op.cit.*, 6.

⁹ Rome Statute, Art. 8(2)(b)(viii).

¹⁰ *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal*, 22 IMT 203, 223, (1946), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

As criminal law adopts dynamic understandings of purported goals.¹¹ Yet international criminal justice system believes on the idea of deterrence, both specific and general deterrence. General deterrence present punishment to all subject of law so that they circumvent in the criminal act,¹² while specific deterrence concerns to deter only particular offender from committing the same crime in advance.¹³

Nonetheless, some experts might argue that philosophical foundation of ICL is disputably standing on the concept of deterrence with common interest and political power to restructure international system.¹⁴ Enforcing such mandate, representative on powerful states tries to control other states sovereignty by fighting against injustice of adversaries while preserving impunity from prosecution for themselves.¹⁵ That being said, ICL tends to reflect power rather than seriously confronting atrocities or injustice.¹⁶ This phenomenon will be better to be discussed with actual practice in ICL justice system like International Criminal Court.

Enforcing international criminal law is in accordance with the existence of international court such as International Criminal Court (ICC), International

¹¹ Alice Ristroph, “The Definitive Article”, *University of Toronto Law Journal* Vol. 68, No. 1, (2015): 144.

¹² Mark C. Stafford and Mark Warr, “A Reconceptualization of General and Specific Deterrence”, *Journal of Research in Crime and Delinquency* Vol. 30, no. 2, (1993): 123– 135.

¹³ *Ibid.*

¹⁴ Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, (Cambridge: Cambridge University Press, 2012), 3.

¹⁵ *Ibid.*

¹⁶ Christopher B. Mahony, “The Prince and The people: Sovereignty in International Criminal Law’s Philosophical Foundations” in *Philosophical Foundations of International Criminal Law: Foundational Concepts* edited by Morten Bergsmo and Emiliano J. Buis, 23-44 (Brussels: Torkel Opsahl Academic Epublisher, 2019), 44.

Criminal Tribunal for the former Yugoslavia (ICTY), etc.¹⁷ These forums are having a mandate to consider legal accountability of actors who committed International Crimes.¹⁸

Commonly, establishing ground for criminal liability of a person needs material (*actus reus*), mental (*mens rea*) and defences elements.¹⁹ Article 25 ICC Statute regulates responsibility for type of perpetration and participation in international crimes and attempts, leaving state responsibility. Article 25 ICC statute states,²⁰

“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;

¹⁷ Mangai Natarajan, *Kejahatan dan Pengadilan Internasional*, (Bandung: Nusa Media, 2015), 364.

¹⁸ Rome Statute, Art. 5.

¹⁹ Gerhard Werle, “Fundamentals of International Criminal Law, General Principles of International Criminal Law” in *The Oxford Companion to International Criminal Justice*, edited by Antonia Cassese, 54-63 (Oxford: Oxford University Press, 2009), 56.

²⁰ Rome Statute, Art. 25.

- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.”

Such Modes of liability characterize system criminality focusing on those who are the most responsible for international crimes.²¹ Since mostly, the defendants did not commit the crimes physically then it must emphasize modes of participations that can tie leaders and high rank offender.²²

Article 28(a), a very common type of responsibility, imposes legal consequences for military leaders for his failure to prevent and punish subordinates wrongdoing.²³ Superior responsibility, by virtue of article 28(b) was designed to respond the situation of a civilian leader who neither directed nor committed nor aided the commission of crimes but because of standing legal relationship.²⁴ Article 28(b) includes responsibility non-military components of government and political parties such as mayors, party leaders, Heads of State that are not at the same time the commander-in-chief, business leaders as well as senior civil servants.²⁵ Article

²¹ Kai Ambos, "Modes of Criminal Responsibility" in *Max Planck Encyclopedias of International Law*, edited by Rüdiger Wolfrum, (Oxford: Oxford University Press, 2013), 8.

²² *Ibid.*

²³ Rome Statute, Art. 28(a).

²⁴ Alexander Zahar, "Command Responsibility of Civilian Superiors for Genocide", *Leiden Journal of International Law* No.14, (2001): 591.

²⁵ Linnea Kortfält, "Responsibility of Commander and other Superiors" in *Commentary on the Law of the International Criminal Court* edited by Mark Klamberg, 278-305 (Brussels: Torkel Opsahl Academic E-Publisher, 2017), 301.

28 (b) particularly regards non-military superior responsibility in which civilian leader might possess required control and fail to exercise his/her control to prevent the crime.²⁶ Commentary of ICC statute mentions head of state could be included in this category and added specific condition on commander-in-chief, which will falls under article 28(a).²⁷ Legal issues in this article might be arisen by either the person directly engaged with the commission crime (individually, ordering or through another person) or there is insufficient evidence to bring leader for mere improper control.²⁸ ICC statute also provides,²⁹

“In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective

²⁶ Rome Statute, Art. 28 (b); *The Prosecutor v. Naser Orić*, ICTY Case No. IT-03-68-T, 125 (2006) <https://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf>; *The Prosecutor v. Delčić*, ICTY Case No. IT-96-21-T, 122-123 (1998) https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

²⁷ Linnea Kortfält, *Op.cit.*, 283.

²⁸ Yaol Ronen, “Superior Responsibility of civilian for international crimes in civilian setting,” *Vanderbilt Journal of Transnational law* vol 43 no.313 (2010): 355.

²⁹ Rome Statute, Art. 28(a), (b).

authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

Differently with other types of responsibilities which highlight direct engagement of the actors towards the commission of crime, article 28(a) and (b) only needs the improper control of the superior so that commission of crimes can be happened. It is undisputed that article 28(b) of ICC statute even set a higher standard for effective control, and knowledge. Effective control for civilian leader needs de facto authority³⁰ and causality from superior-subordinates responsibility only limited on work-related activity.³¹ This article also implies new standard on knowledge with the term “actual knowledge” or “consciously disregard”.³² Thus, prosecutor not only dealing with immunity issues, they shall be highly confidence with sufficient evidence to charge head of state with article 28(b).

From 1990 until 2009, around sixty seven heads of state had been proceeded in both domestic and/or international tribunal for serious cases.³³ Later, prosecution and indictment increased in several states like Egypt, Tunisia and Guatemala while

³⁰*The Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, 18 (2002), http://www.worldcourts.com/ictt/eng/decisions/2002.07.03_Prosecutor_v_Bagilishema_2.pdf

³¹ Kai Ambos, “Superior Responsibility”, in *The Rome Statute of the International Criminal Court – A Commentary* edited by Antonio Cassese, Paola Gaeta and John R.W.D. Jones , 805-854 (Oxford: Oxford University Press, 2002), 858.

³² Rome Statute, Art. 28.

³³ Ellen L. Lutz, and Caitlin Reiger, *Prosecuting Heads of State*, 1st Ed. (Cambridge: Cambridge University Press, 2009), 295.

ICC proceeded case of Qaddafi also Omar Al-Bahir, Uhuru Kenyatta, and the latest case, Laurent Gbagbo in 2019.³⁴ It needs to be noted, those leaders were sentenced for at least directly involved in the commission of crime and in most of cases the leaders were exempted from criminal proceeding because of insufficient evidence. That being said, the situation will be worse when prosecutor imposing liability to heads of state only based on legal relationship with the offender and improper control of the heads of state to prevent and punish the crime.

The key points of this research are accountability of heads of state as leaders and heads of state issues in contemplating the required legal consequences in international criminal court. Furthermore, *Laurent Gbagbo*,³⁵ *Omar Al-bashir*,³⁶ and *Uhuru Kenyatta*³⁷ are relevant cases of sitting heads of state who were indicted by the prosecutor of International Criminal Court. These cases will then adversely answer the procedures and factors of accountability of Heads of state within International Criminal Court (ICC) system.

B. Problem Formulation

Based on context of study, the problem formulation of this research are:

³⁴ Claire Felter, Brianna Lee, Kevin Lizarazo, and Jeremy Sherlick, “leaders facing justice”, Council on Foreign Relations, firstly published in May 1, 2017. Accessed June 8, 2020. <https://www.cfr.org/timeline/leaders-facing-justice>

³⁵ *Ibid.*

³⁶ *The Prosecutor v. Omar Al-Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, (2010), https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF.

³⁷ *The Prosecutor v. Uhuru Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, (2012), https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF.

1. How is concept of accountability of head of state and their liability as civilian superior in ICC ?
2. What are the considerations of ICC in Laurent Gbagbo, Uhuru Kenyatta and Omar Al-Bashir in imposing their accountability?

C. Objectives of Research

The objectives of this research are:

1. To analyze the concept of accountability for crimes by head of state and liability as the civilian superior through the ICC judicial system.
2. To analyze the implementation of ICC rule of law against heads of state based on specific legal and non-legal issue covering case of Laurent Gbagbo, Uhuru Kenyatta, Omar Al-Bashir.

D. Originality of Research

This research focuses on the matter of accountability of head of state in civilian setting or superior responsibility under article 28 (b) of ICC Statute. There are several researches discussing Head of State and International Criminal Court and the writer will compare to this research in order to prove its originality.

Firstly, Leila Nadya Sadat in her essay analyses head of state immunity and its applicability in ICC. It further discusses on how controversies of article 27 of ICC statute upholding non-immunity rule and article 98 requiring cooperation of non-state party to waive immunity. Mainly concerns with cooperation regime in ICC with its state party, the writer suggest political and diplomatic solution to prevent another issue in ICC's law enforcement.

Second, Jelena Pejic tries to outline major developments of legal proceedings in fighting against impunity and arising challenges during the journey. Piece by piece, Jelena scrutinize the work of ICTY in *Milosevic*, International Tribunal i.e. Special Court of Sierra Leone, and International Criminal Court in exercising jurisdiction against actor of international crimes. The writer also take into account practice of universal jurisdiction in case of Pinochet and Hissene Habre. At last, in conclusion, accountability of international crimes started in the willingness of each state to uphold justice in its national legal system and fulfillment of fair trial rights.

Third, the writer criticize issue of impunity and development of international justice to prosecute or to try most senior leader, heads of state. Focusing on mandate of International Criminal Court to end impunity and upholding individual responsibility, Steven put serious precedent of ad-hoc tribunals in prosecuting head of state so that must be continued and improved by ICC. In brief, despite the fact of inefficiency within ICC as the predecessor of ad-hoc tribunals, the past practices show growing and undeniable trend of accountability of head of state in international level.

Fourth, the writer take the closest approach with this research, defining superior responsibility for civilian leader. Even before adoption of article 28(b), the writer provides settled practice in ICTR, ICTY and other military tribunal to expand responsibility of civilian leader. However, Ronen also criticize legal issue in the application of the superior doctrine in civilian settings, particularly in the relationship between superior and subordinate. Accordingly, leaves the head of

state issue, the writer conclude that there would be difficult in practice to impose article 28(b).

Last, Elies van Sliedregt enlightens complete theory of individual criminal responsibility with reference to ICC statute. One of the topic is commander responsibility which by virtue of ICC statute separating into two distinct layer. The writer concerns on the nature of article 28 mode of liability and separate crime of negligence. In brief, article 28 was drafted in order to punish superior for lack supervision under their authority and article 28(b) indeed set stricter standard in proposing civilian leader responsibility.

No.	Previous Research Details (Name of Author, Title, and Year of Publication)	Outcome of the Research	Main Differences with this Research
1.	Leila Nadya Sadat, James Carr, The Uneasy Revolution Continue, January 2019 ³⁸	Perhaps the best solution for the issue of accountability of head of state depends on state cooperation by either prevent the commission of atrocity crimes altogether, or punish the perpetrators of those crimes which are committed in their own national courts.	This essay provides the most similar approach with case analysis in ICC towards Head of State. It includes immunity, non-state cooperation and question but still excluding the concept of responsibility of head of state as civilian superior or referral to

³⁸ Leila Nadya Sadat, "Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continue", *Washington University in St. Louis Legal Studies Research Paper* No. 19-01-12 (2019).

			article 28 (b) of ICC Statute.
2.	Jelena Pejic, <i>Accountability for international crimes: From conjecture to reality</i> , 2002 ³⁹	Two challenges of movement to fight against impunity lies on the role of national criminal justice systems and the other is fair trial right. The international and third-State mechanisms outlined above came into being precisely because States fail to fulfill what is their primary duty — to bring to justice the perpetrators of serious crimes	Analysis on phenomenon of impunity by looking at the practice of national court and international tribunals. Besides it does not specify practice and system in International Criminal Court, this article also put aside concept of superior responsibility.
3.	Steven Freeland, <i>A Prosecution Too Far? Reflections On The Accountability Of Heads Of State Under International Criminal Law</i> , 2009 ⁴⁰	Historical, legal and political dimension had associated to the practice of imposing accountability on head of state. As an existing independent international judicial body, International Criminal Court shall play the role appropriately, in accordance with its mandate.	Study on the issues associated with prosecuting heads of state by also considering some dimensions that will affect the enforcement. This article criticize the effort on proceeding head of state by only depending on the theory in ICC and practice of other international

³⁹ Jelena Pejic, “Accountability for international crimes: From conjecture to reality”, *International Review of The Redcross* Vol. 84 (2002).

⁴⁰ Steven Freeland, “A Prosecution Too Far? Reflections On The Accountability Of Heads Of State Under International Criminal Law”, *Victoria University of Wellington Law Review* No.41 (2010).

			tribunals without by looking at what is happening in case of ICC (Except <i>Omar Al-Bashir</i>)
4.	Yaël Ronen, <i>Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings</i> , 2009 ⁴¹	Civilian have been transposed by superior responsibility even before the establishment of International Criminal Court. It took complicated to measure normative definition of civilian leader responsibility in ICTY and ICTR. Either because of undecided status of offender as civilian or overlapping convictions with direct participation by the leader. Then, in the present time, applying article 28 might not necessary nor possible.	This article stands in negative argumentation of article 28(b) ICC statute while this study seeks to conceptualize accountability of head of state under ICC competence.
5.	Elies van Sliedregt, <i>Individual Criminal Responsibility in International Law</i> , 2015 ⁴²	Military or non - military superior is held responsible for a failure to act. Instead of separating military and non-military leader, this article would have been promising if it was drafted by clear cut in the mode of liability or crime of negligence.	Becoming sub-topic in this book, limits the discussion of article 28(b) under ICC jurisprudence. Differently, this research will try to not only identify superior responsibility of head of state in ICC but also through other legal provision and 3 cases.

⁴¹ Yaël Ronen, *Loc.cit.*

⁴² Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, (Oxford: Oxford University Press, 2015).

In conclusion this research stresses out special feature of head of state in relations to accountability in ICC and criminal liability of civilian superior under article 28 (b). Needless to say, head of state is the most senior leader in the hierarchy of most countries also possessing rights and privileges that are not owned by an ordinary civilian superior. In addition, the writer also enlarges the research with well-known president proceedings before international criminal court. Working to uphold international criminal law, ICC has several unique aspects in its system to hold accountable the person including heads of state. Among others, Laurent Gbagbo, Omar Al-Bashir and Uhuru Kenyatta are, the only Heads of state proceeded before ICC, needed for discussing topic of accountability of heads of state in the the context of ICC's mandate in fighting against impunity and upholding justice for everyone.

E. Literature Review

This part will mention the theories used for this research proposal, which are taken from various literatures and journals.

1. Sovereign Equality Theory and The Necessity of Immunity

United Nations (UN) depends on sovereign equality rule, one of fundamental principle of the UN Charter that state must adhere with sovereign equality of all its members.⁴³ Principle of *maxim par in parem non habet imperium* means that one State cannot exercise its authority over

⁴³ "United Nations Charter", opened for signature on 26 June 1945, United Nations, Treaty Series, Registration No.I UNTX XVI, 2(1), <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

another State.⁴⁴ Even if still disputable,⁴⁵ majority state believes in the concept of immunity which derives from the equality, independence and dignity of States within the international community.⁴⁶ Since states are acting as primary subjects of international law and has equal position, yet it is not impossible for them to have diverse ability in economic, politics or military forces.⁴⁷ In covering these gaps, immunity works as aftermath of sovereignty internationally.⁴⁸ Then, immunity is intended to ensure stability and effectiveness in international relations including for those who represent their state in international stage.⁴⁹ International Court of Justice (ICJ) has emphasized this view precisely, “no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies.”⁵⁰ Conclusively, necessity of immunity is to maintain peaceful cooperation and relation among states.

Immunity is supported by two basis, symbolic sovereignty and principle of non-intervention. Status of Head of state immunity represents the

⁴⁴ Antonio Cassese, *op. cit.*, 98.

⁴⁵ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, (Leiden: Brill Publisher, 2015), 7.

⁴⁶ Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 679.

⁴⁷ Ramona Pedretti, *Op.cit.*, 8.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *United States Of America v. Iran, Case Concerning United States Diplomatic And Consular Staff In Tehran*, 1.C.J. Rep 3, 42-43 (1980), <https://www.icj-cij.org/files/case-related/64/064-19800524-jud-01-00-en.pdf>

sovereign quality of the state⁵¹ and the immunity entitled to them is sort of respect for dignity to his/her state.⁵² Secondly, it implies corollary of the principle of sovereign equality,⁵³ specifically, arresting or detaining leader of a sovereignty state would bring significant impact to such state's government or in other words interfering its autonomy and independence.⁵⁴

2. Immunity Rule in Customary Law and its exceptions

Immunity, a rule of international law, deems certain state officials to be immune from criminal and civil prosecutions initiated in foreign States.⁵⁵ In international law, immunity attaches special legal protection to certain state officials, this immunity called as personal immunity or *ratione personae*.⁵⁶ Such immunity protects serving Heads of State,⁵⁷ Heads of Government,⁵⁸ and extended to foreign minister even for private visit in

⁵¹Zhour Lulu, "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law", in *State Sovereignty and International Criminal Law*, edited by Morten Bergsmo, 21-51 (Brussels: Torkel Opsahl Academic E-Publisher, 2012), 46.

⁵² Dapo Akande, Sangeeta Shah, *op. cit.*, 824.

⁵³ *Nicaragua v. United States, Military and Para-military Activities in and against Nicaragua*, ICJ Rep 14, 96-97 (1986), <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>

⁵⁴ Dapo Akande, Sangeeta Shah, *loc. cit.*

⁵⁵ Selman Ozdan, "Immunity Vs. Impunity In International Law: A Human Rights Approach", *Baku State University Law Review*, Vol. 4 No.1 (2018): 41.

⁵⁶ Dapo Akande, Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", *The European Journal of International Law* Vol. 21 No. 4 (2010), 818.

⁵⁷ *Djibouti v. France, Case Concerning Certain Questions of Mutual Assistance in Criminal Matters*, I.C.J. Rep 177, 63-64 (2008), <https://www.icj-cij.org/files/case-related/136/136-20080604-JUD-01-00-EN.pdf>.

⁵⁸ *Democratic Republic of the Congo v. Belgium, Arrest Warrant of 11 April 2000*, I.C.J. Reports p.3, 21-23 (2002), <https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>.

foreign country.⁵⁹ Thus, arresting or prosecuting these persons would violate the rule of immunity.⁶⁰

In contrast, Impunity is an exemption from penalty or punishment⁶¹ and portrayed as a beneficial protection to do further crimes and hampering to uphold sustainable peace.⁶² Further, UN General Assembly provides a common understanding on the Principle of International cooperation which serves as a pretext for the impunity noting that none of official status shall be accepted to exempt criminal responsibility for international crimes.⁶³ The Report of the former UN Sub-commission of Human Rights on Impunity by El Hadji Guisse, defines Impunity as “The absence or inadequacy of penalties and/or compensation for massive and grave violations of the human rights of individuals of groups of individuals.”⁶⁴

ICJ in *arrest warrant* decision pointed out some exceptions of immunity including case before international criminal court.⁶⁵ This conclusion in theory was known as *obiter dictum* that the Court did not adduce state practice based on supporting *opinio juris* and further

⁵⁹ *Ibid.*

⁶⁰ *Ibid*; *Djibouti v. France, loc. cit.*

⁶¹ Selman Ozdan, *Op.cit*, 41.

⁶² Transitional Justice Institute, “The Belfast Guidelines on Amnesty and Accountability with Explanatory Guidance”, Guidance Book, University of Ulster, 2013, .
https://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.

⁶³ *Ibid*; United Nation High Commissioner of Human Rights, “Principles of International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity”, General Assembly resolution 3074 (XXVIII), 1, 3 December 1973, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/PersonsGuilty.aspx>.

⁶⁴ UN Sub-Commission on the Promotion and Protection of Human Rights, “Question of the impunity of perpetrators of human rights violations (civil and political)”, E/CN.4/Sub.2/1997/20, 26 June 1997, <https://www.refworld.org/docid/3b00f1a124>.

⁶⁵ *Democratic Republic of the Congo v. Belgium, Op.cit*, 23-24.

justification for the contents.⁶⁶ Instead, international criminal tribunals such as Special Court of Sierra Leone and ICTY insisted the customary status of non-immunity in international court which has no relevance with sovereign equality principle since it derives mandate from international community.⁶⁷ International Law Commission (ILC) is still working on the agreement of state toward the exceptions and its customary character.⁶⁸

3. Criminal Justice System in ICC

International law borne state, as the primary subject of the law, legal accountability for attributed breach of international obligation.⁶⁹ Attribution might arise in situation of organ of state, corporation exercising governmental authority or individual controlled by state.⁷⁰ Whereas, International Military Tribunal of Nuremberg defined criminal responsibility only relevant in a situation of natural person who committed or engaged international crimes not state as entity.⁷¹

⁶⁶ Claus Kieß, "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute" in *State Sovereignty and International Criminal Law* edited by Morten Bergsmo, Ling Yan, 223-262 (Brussels: Torkel Opsahl Academic EPublisher, 2012), 244.

⁶⁷*The Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction*, Special Court for Sierra Leone Appeals Chamber, Case Number SCSL-2003-1-AR72(E), 24 (2004), http://www.worldcourts.com/scsl/eng/decisions/2004.05.31_Prosecutor_v_Taylor.pdf; *The Prosecutor v. Anton Furundzija*, ICTY case no. IT-95-17/1-T, 54 (1998), <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>; *The Prosecutor v. Slobodan Milosevic, Decision on Preliminary Motions*, ICTY Case no. IT-99-37-PT, (2001), https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm.

⁶⁸ United Nations General Assembly, "7th report of special rapporteur on immunity of state officials in foreign criminal jurisdiction", UN Doc. A/CN.4/729, 18 April 2019, 4-7, <https://undocs.org/pdf?symbol=en/A/CN.4/729>

⁶⁹ United Nations International Law Commission, "Responsibility of States for Internationally Wrongful Acts", UNGA A/RES/56/83, 12 December 2001, Art.2 https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

⁷⁰ *Ibid*, Art. 4,5,8.

⁷¹ Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes*, 1st Ed. (Berlin: Springer, 2008), 12.

Criminal Justice system is established with the aim of enforcing the criminal law while providing punishment and learning for the accused and the community.⁷² Starting with investigation, prosecution, pre-trial, court process until execution.⁷³

As Preliminary stage, any state party may refer a situation to prosecutor in which it falls under the jurisdiction of ICC.⁷⁴ If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation.⁷⁵ Investigation will gather the accused and evidence, until it is sufficient then prosecutor request for Arrest Warrant to Pre-Trial Chamber.⁷⁶ Pre-Trial Chamber will only grant Arrest Warrant , if such evidence establish that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.⁷⁷

Afterwards, Confirmation of Charges in Pre-trial chamber is intended to establish substantial ground to believe the person committed the crime charged.⁷⁸ Accordingly, the Prosecutor has to prove that the accused committed all crimes charged, based of such standard that must be tangible, factual, and concrete to go beyond “mere theory or suspicion.”⁷⁹

⁷² Aristo Pangaribuan, Arsa Mufti, and Ichsan Zikry, *Pengantar Hukum Acara Pidana di Indonesia*, (Jakarta: Rajawali Press, 2016), 1.

⁷³ *Ibid*

⁷⁴ *Ibid.*, Art.14

⁷⁵ *Ibid.*, Art.15

⁷⁶ *Ibid*, Art.54

⁷⁷ *Ibid.*, Art.58

⁷⁸ *Ibid.*, Art.61

⁷⁹ *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*, ICC-01/04-01/06 A 5, 16-17 (2014), <https://www.icc->

Then, Trial Chamber will continue to facilitate the proceedings of admission of guilt and punishment.⁸⁰ Lastly, if there has been found any error or misapplication of law in the previous procedure, the accused or prosecutor may apply to hold the appeal proceedings.⁸¹

The most controversial issues in the enforcement of International Criminal Court is that this judicial principal body does not have legal enforcer such as police, prosecutor or military. ICC relies on the cooperation of state parties. Pursuant to article 86,⁸² general requirement is supplemented by further articles of the Rome Statute and the ICC's Rules of Procedure and Evidence that govern specific aspects of cooperation in such contexts as the arrest and surrender of individuals and the collection of evidence.⁸³

Fundamental value of international criminal law, principle of complementarity, borne national courts as an integral and essential part of the enforcement of international criminal law.⁸⁴ Such factors in the Criminal Justice System within ICC will influence the consideration and implementation of ICC jurisdiction in enforcing International Criminal

[cpi.int/CourtRecords/CR2014_09844.PDF](https://www.cpi.int/CourtRecords/CR2014_09844.PDF); *The Prosecutor v. Callixte Mbarushimana, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges"*, ICC-01/04-01/10-514, 16 (2012), https://www.icc-cpi.int/CourtRecords/CR2012_06457.PDF .

⁸⁰ Rome Statute, Art. 65.

⁸¹ *Ibid.*, Art.81

⁸² *Ibid.*, Art.86

⁸³ "Rules of Procedure and Evidence", *UN Doc. PCNICC/2000/INF/3/Add.1 of 12 July 2000*, art 88., <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

⁸⁴ Rome Statute, Art.1.

Law. In the end, the question of accountability will be answered by the actual practice in the Criminal Justice System of ICC

F. Operational Definition

1. Accountability, Responsibility and liability

Accountability is the process of holding an actor to account against a benchmark in which by legal perspective is the law.⁸⁵ Accountability in this research used to describe the whole context of question and answer between ICC and alleged person and possible responsibility or legal consequences for heads of state who are indicted by the prosecutor under ICC'S legal system. In legal theory, responsibility denotes the legal consequences of the person's performance based on the applicable law.⁸⁶ In criminal law, responsibility is simply defined as the answerability of law.⁸⁷ ICC focuses on criminal approach of responsibility for the perpetration or participation of crimes by natural person.⁸⁸ Lastly, liability serves as predicates to connect criminal offence, mental element and attendant circumstances.⁸⁹ Grounds of criminal responsibility lies on the modes of liability, the person can be held accountable when she/he personally perpetrated a crime, participated in a crime or even by the legal

⁸⁵ Anne Peters, "International Organizations and International Law" in *The Oxford Handbook of International Organizations* edited by Jacob Katz Cogan, Ian Hurd Ian, and Johnstone, 33-58 (New York: Oxford University Press, 2016), 47; Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework," *European Law Journal* No.13 (2007): 450.

⁸⁶ Jutta Brunne, *loc. cit.*

⁸⁷ Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary*, 2009, 9th Ed. (St. Paul: West, 2009).

⁸⁸ Rome Statute, Art. 25 (1), (2).

⁸⁹ J. D. Ohlin, "Second-Order Linking Principles – Combining Vertical and Horizontal Modes of Liability", *Leiden Journal of International Law* Vol. 25 No.3 (2012): 772.

relationship with the perpetrator.⁹⁰ This research also adduce specific modes of liability under article 28(b) called as “superior responsibility” in which heads of state as non-military leader to be responsible due to his/her improper control on subordinates’ wrongdoing or failure to prevent and punish the commission of the crime. Accordingly, discussing accountability of heads of state in international criminal court will involve the relationship of respected heads of state with ICC during the assessment over his/her performance against applicable law in ICC and legal consequences imposed by the Court to the actor.

2. Head of State

The highest representative of the State, the Head of State has the competence to act on the State’s behalf in international relations. The so-called *ius repraesentationis omnimodae* is incumbent upon the State’s leader.⁹¹ In this research will be regarded as *de facto* and *de jure* President.

G. Research Methods

This research would be conducted with the specifications as follow:

1. Type of Research

⁹⁰ Rome Statute, Art. 25 (3), 28 (a), (b).

⁹¹ *Bosnia & Herzegovina v. Yugoslavia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objection ICJ Rep 595, 30-31 (1996), <https://www.icj-cij.org/files/case-related/91/091-19960711-JUD-01-00-EN.pdf>; *Democratic Republic Of The Congo V. Rwanda, Case Concerning Armed Activities On The Territory Of The Congo (New Application: 2002)*, Jurisdiction Of The Court And Admissibility Of The Application, ICJ Rep.6, 25 (2006), <https://www.icj-cij.org/files/case-related/126/126-20060203-JUD-01-00-EN.pdf>.

This research is a Normative Legal Research since it would be mostly done by reviewing prevailing laws and regulations, and also legal theories or doctrines.

2. Focus of Research

The focus of this research will analyze the concept of individual accountability for crimes by head of state based on applicable rule in ICC also liability for heads of state as civilian superior and discussion of implementation of such concept of accountability with consideration of ICC toward head of state in *Laurent Gbagbo, Uhuru Kenyatta, Omar Al-Bashir*.

3. Research Approach

The research approach that will be used in this research are:

a. Statutory Approach

In enforcing its jurisdiction, ICC should referred to applicable law of ICC statute.⁹² ICC exercised hierarchy of law in its system which the Statute placed in the first place along with the Elements of Crime and Rules of Procedure and Evidence. Then, the writer will use some other regulations for instances:

- i. Rome Statute 1998, Elements of Crime, and Rules of Procedure and Evidence;
- ii. Geneva Conventions 1949 and Additional Protocol 1977;

⁹² Rome Statute, Art. 21.

- iii. Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), 1993; and
- iv. Statute of the International Criminal Tribunal for Rwanda (ICTY), 1994.

b. Case Approach

This paper will deal with consideration of Chamber in ICC towards head of state. Jurisprudence in international criminal Court have been maintained as the actual practice of the legal substances itself and for some conditions it can turns into customary law. It means, the researcher needs to take into account of all the specific circumstances in case of Laurent Gbagbo, Uhuru Kenyatta and Omar Al-Bashir.

c. History Approach

History approach will accompany the others, to also include several circumstance (Political or Social factors) that influence the law enforcement including preparatory work of Rome statute.

4. Sources of Research Data

This research use secondary data that consist of:

a. Primary Sources

The researcher will examine the document of treaties, legal rules and codification of law including but not limited to Rome Statute, ICC, ICTY, ICTR Jurisprudence and General Principles in criminal law.

b. Secondary Sources

Secondary Sources provide summary and interpretation of law in narrative format. Printed law books will help the researchers to discover the primary sources by providing the relevant references for the research. Specifically, researcher will investigate Handbook of international customary law, journal and legal articles that are relevant for the references of this research.

c. Tertiary Source

Tertiary legal materials is other materials in supporting primary in this research, the writer use Black's Law Dictionary.

d. Data Collection Techniques

The writer will be studying the written materials or all data which are needed in the paper (Secondary data). This method consist of existing data in form of written document, databases, reports, newsletter, etc.

5. Data Analysis

The writer leans toward qualitative methods which implies processing information, not grounded in statistics, by legal regulation, cases and researcher point of view.

6. Structure of Writing

Chapter I

This chapter introduces general idea of the research consisting background of study, problem formulation, research's objective, literature review, research methodology and also structure of writing.

Chapter II

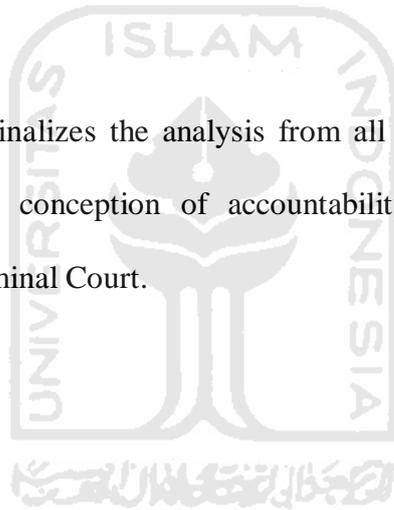
This chapter analyzes main theory of the research of accountability in international criminal court and liability of superior responsibility for heads of state based on ICC statute and its commentary, practices in ICTY, ICTR and other related rules in international criminal law.

Chapter III

This chapter continues explanation in the previous chapter by assessment in ICC decision case of *Omar Al-Bashir*, *Uhuru Kenyatta*, and *Laurent Gbagbo*.

Chapter IV

This chapter finalizes the analysis from all chapters into conclusion about the actual conception of accountability of heads of state in International Criminal Court.



CHAPTER II

GENERAL OVERVIEW OF SUPERIOR RESPONSIBILITY FOR HEADS OF STATE

A. Legal Accountability in International Criminal Court

Accountability in its literal meaning covers the relationship between an actor and forum, a standard that the actor has to meet upon his/her conduct, and the forum that must assess such performance against the standard in order to impose consequences by the failure to meet the standard.⁹³ International criminal court as a forum which is authorized to hold accountable person in question whether his/her action constitute international crime,⁹⁴ starting with arrest warrant, then confirmation of charges until the assessment of guilt and sentences.⁹⁵ Within this process, the court must adhere to some principles and rules to determine the criminal responsibility of someone in line with applicable standard or International criminal law.⁹⁶

1. The General Principle of International Criminal Law

The general principle in criminal law refers to some principles that universally adopted in international realm, which are:

- a. Principle of Culpability or attributability

⁹³ Mathias Koenig Archibugi, “Accountability” in *The Oxford Handbook of International Organizations*, edited by Jacob Katz Cogan, Ian Hurd Ian, and Johnstone, 1146-1169 (New York: Oxford University Press, 2016), 1147-1148.

⁹⁴ Rome Statute, Art. 5.

⁹⁵ *Ibid*, Art. 58, 61, 63; Mark Bovens, “Analysing and Assessing Accountability: A Conceptual Framework,” *European Law Journal* No.13, (2007): 450.

⁹⁶ *Ibid*, Art. 21.

This principle has been recognized since Nuremberg, in Latin called as *nulla poena sine culpa*, imposing criminal responsibility for acts or transactions in which the person personally engaged in some other way participated (Individual guilt).⁹⁷ Individual guilt is not explicitly regulated in ICC Statute but it is applicable by its customary status under article 21(1)(b) ICC statute.⁹⁸

Other than blameworthiness, this principle acknowledges sanction resulted by the crime must be equivalent with the degree of offender responsibility.⁹⁹ Whereby, doctrine of superior responsibility was firstly initiated by doctrine someone's guilty over crime which he/she is able and bound to prevent and fails.¹⁰⁰ Thereafter, it was developed by *Halilovic* chamber that superior is deemed liable for the crimes of his subordinate.¹⁰¹

b. Principle of Fair labelling

Accompanying the first principle, this principle lays against different levels of blameworthiness under one label (type of liability). As revealed by *Stakic*, *Čelebići*, and *Blaškić*, it is not unnecessary to convict someone by both direct participation (i.e planned, order or

⁹⁷ Gerhard Werle, *Loc.cit.*

⁹⁸ *The Prosecutor v. Duško Tadic*, ICTY Case No. IT-94-1-A, 80-81 (1999), <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

⁹⁹ Gerhard Werle, *Loc.cit.*

¹⁰⁰ James Graham Stewart, "The End Of "Modes Of Liability" For International Crimes ", *Leiden Journal Of International Law* (2012): 19. See Also Hugo Grotius Et Al., "Hugonis Grotii De Jure Belli Ac Pacis Libri Tres" In *Quibus Jus Naturae & Gentium, Item Juris Publici Præcipua Explicantur* 523 (1925).

¹⁰¹ *The Prosecutor v. Sefer Halilović*, ICTY Case No. IT-01-48-T, 22-23 (2005), <https://www.icty.org/x/cases/halilovic/tjug/en/tcj051116e.pdf>

committed) and superior responsibility instead the status of offender as superior must be added as aggravating factor of sentence.¹⁰² In the other side, ICC Statute article 78 and Rule 145 of Rules of Procedure and Evidence govern the sentences to consider all relevant factors including gravity of crime and individual circumstances.¹⁰³ The rule also unlocks the reference of degree of participation, instead of single factor.¹⁰⁴

Fair labelling conceives normative approach to distinct culpability for those acted as principal and as accessories, making it easier to be understood by the victims and international community the mastermind or the real culprit.¹⁰⁵ Fair labelling is not an attempt to narrow down criminal responsibility, instead all types of principle and accessory are liable over the crimes. Then, in a situation of different types of liability grounded by the same fact, the prosecutor must prove all those diverse elements.

c. Principle of Presumption of Innocence and Burden of Proof

Presumption of innocence proposes the right of everyone, including persons covered in the investigation phase or accused, must be

¹⁰² *The Prosecutor v. Milomir Stakić*, ICTY Case No. IT-97-24-T, 131-132 (2003), <https://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>; *The Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "PAVO"), Hazim Delic and Esad Landzo (aka "ZENGA") or Čelebići Case*, ICTY Case No: IT-96-21-A, 264-265 (2001), <https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; *The Prosecutor v. Tihomir Blaškić*, ICTY Case No. IT-95-14-A, 32-33 (2004), <https://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>.

¹⁰³ Rome Statute, Art. 78; Rules of Procedure and Evidence, Rule 145.

¹⁰⁴ *The Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute*, Separate Opinion of Judge Adrian Fulford, Lubanga Trial Judgment, ICC-01/04-01/06, 598-599 (2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

¹⁰⁵ Elies van Sliedregt, "Perpetration and Participation in Article 25(3)" in *The Law and Practice of the International Criminal Court*, edited by Carsten Stahn, 499-516 (Oxford: Oxford University Press, 2015) 511.

presumed innocent until proven guilty according to the law.¹⁰⁶ Accordingly, the defendant will never be ended up to provide evidence of his or her innocence in the absence of direct evidence of his or her guilt.¹⁰⁷ The prosecutor is the one who bears the burden to prove every element of the crime beyond reasonable doubt otherwise the accused must be found not guilty.¹⁰⁸ Along with the statutory power the court may also played its truth-finding role if it will not harm the fairness and impartiality of the trial and the rights of the accused.¹⁰⁹

Although essentially this principle applies in any situation and without exceptions, ICTY had decided differently in the matter of reversal. In *Čelebići*, when an accused claimed plea of mental capacity or insanity the Trial Chamber considered that the accused must be presumed to be sane unless was established the contrary by the accused.¹¹⁰ ICC statute clearly outlaws the reversal of the burden of proof or where the accused is required to produce evidence to counter the charge.¹¹¹ Nevertheless, the provisions will signify the criminal

¹⁰⁶ Rome Statute, Art. 66 (1).

¹⁰⁷ Björn Elberling, “Presumption of Innocence” in *Commentary on the Law of the International Criminal Court*, edited by Mark Klamberg, 482-483 (Brussels: Torkel Opsahl Academic E-Publisher, 2017), 482-483.

¹⁰⁸ Rome Statute, Art. 66 (2); Robert Cryer, and others, *Op.cit.*, 433-434.

¹⁰⁹ *The Prosecutor v. Lubanga, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008*, ICC-01/04-01/06, 32 (2008), https://www.icc-cpi.int/CourtRecords/CR2008_03972.PDF; William A. Schabas, Yvonne McDermott, “Presumption of Innocence” in *The Rome Statute of the International Criminal Court: A Commentary*, edited by Otto Triffterer, Kai Ambos, 1635-1649 (Munich/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2016), 1641.

¹¹⁰ *The Prosecutor v. Delalić et al.*, ICTY Case no. IT-96-21-T, Judgment, 400 (1998), https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

¹¹¹ Rome Statute, Art. 67(1)(i).

responsibility under article 28 of ICC statute, even though requires highest level of mental element. Since it is the responsibility over subordinates crimes when she/he knew, should have known or consciously disregard the fact that they were committing or about to commit the crime.¹¹² The issue is when the commission of the crime by subordinates has been established, then it forces the superior to concede in order to rebut the necessary and reasonable measure they had taken.¹¹³

Reasonable doubt laid down in article 67 must be understood as the standard of proof only to establish the accused's guilty. This term is undefined, leaving to the judge's discretion to analyze each cases with different types of probabilities. The common understanding of reasonable doubt is used in common law system implying situation of after full consideration of all the evidence, would leave unbiased¹¹⁴ also ICTY find it is in contrast to suspicions even in the gravest form.¹¹⁵ There are some less demanding rule for arrest warrant and confirmation of charges using the term of "substantial grounds to believe" or "reasonable grounds to believe".¹¹⁶ Those might only demand a

¹¹² *Ibid*, Art. 28(a),(b).

¹¹³ William A. Schabas, Yvonne McDermott, *Op.cit.*, 1642-1643.

¹¹⁴ *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal, Nuremberg International Military Tribunal 22 IMT, 965 (1946), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf*

¹¹⁵ *The Prosecutor v. Simic' et al., Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, ICC IT-95-9-R77, 34 (2000), https://www.icty.org/x/cases/contempt_avramovic_simic/tjug/en/000630_1.pdf.*

¹¹⁶ Rome Statute, Art. 58, 61.

balance of probabilities or *onus* of establishing has been described as “satisfaction that, more probably than not, what is asserted is true.”¹¹⁷

d. *In absentia*

Among others procedure, right to presence only explicitly stands in the Trial. Prior to that, the issue of *in absentia* takes place due to the exceptions rule in article 61 for confirmation of charges and article 63 for disruptive behavior.¹¹⁸ On top of that, *in absentia* clearly breaches the right to presence mentioned in article 63 or it is not allowed in the trial stage. Only when the defendant continues to disrupt the trial, this right can be removed but with certain limitation as well.¹¹⁹ A special rule concerning *in absentia* is described by,

“The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has: (a) Waived his or her right to be present; or (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.”¹²⁰

¹¹⁷ *The Prosecutor v. Kvocka et al, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Z’igic’*, ICTY case no. IT-98-30/1-A, (2003), https://www.icty.org/x/file/Legal%20Library/jud_supplement/supp40-e/kvocka.htm.

¹¹⁸ Rome Statute, Art. 61, 63.

¹¹⁹ *Ibid*, Art. 63(2).

¹²⁰ *Ibid*, Art. 61(2).

This provision is compatible with both article 67 (1) rights and Rule of Procedure although in the same time opens possibility of a confirmation hearing *in absentia*.¹²¹

It is noteworthy that Pre-trial chamber of ICC in *Laurent Gbagbo* has said the importance of suspect's presence throughout the session unless the exceptional occasion happens or the person by its own discretion waived his/her right.¹²² The issue got wider when African Union (AU) in 2013 convened a meeting to issue a decision against ICC authority over serving head of state or government.¹²³ This led into some amendments of the rule of 134 *bis, ter, quarter* which provides excuses from presence of trial and video technology procedure.¹²⁴ One of the issue for head of state is that someone can be excused not to attend the trial stage when they are performing "extraordinary public duties at the highest national level".¹²⁵ The application of this rule will be elaborated in depth in the case discussion of Uhuru Kenyatta.

¹²¹ Juan Pablo Pérez-León-Acevedo and Björn Elberling, "Rights of the accused" in *Commentary on the Law of the International Criminal Court*, edited by Mark klamberg, 484-513 (Brussels: Torkel Opsahl Academic E-Publisher, 2017), 496.

¹²² *The Prosecutor v. Laurent Gbagbo, Response of the Common Legal Representative of Victims to the "Requête de la Défense du 7 février 2013 en report de l'audience de confirmation des charges*, ICC-02/11-01/11, 5 (2013), https://www.icc-cpi.int/CourtRecords/CR2015_13716.PDF; Enrique Carnero Rojo, "Confirmation of the charges before trial" in *Commentary on the Law of the International Criminal Court*, edited by Mark klamberg, 440-464 (Brussels: Torkel Opsahl Academic E-Publisher, 2017), 442.

¹²³ African Union, "Decision on Africa's Relationship with the International Criminal Court", Ext/Assembly/AU/Dec.1, 12 October 2013, 2, http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf

¹²⁴ International Criminal Court Assembly of States Parties, "Resolution-ASP/12/Res.7", ICC-ASP/12/20, 27 November 2013, 53-54, https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf

¹²⁵ Rules of Procedure and Evidence, Rule 134^{quarter} (2).

2. Material Elements, Omission and Causality

By its conventional understanding, wrongful acts are divided into two categories.¹²⁶ First in regards to the action *per se* is unlawful for instances rape and fraud. While in the other side, it needs causal link between the person's actions with specific harm to raise the criminal liability.¹²⁷ Liability for omission, even though problematic, may amount to crime under International Criminal Law. ICTY and ICTR have decided numerous cases of accessory liability such as instigation and abetting may include to omissions.¹²⁸ In the context of liability, omission illustrates a failure to act when the offender actually has duty to act and connecting the duty must be grounded by relationship, contractual obligations, statutory provisions and others in general.¹²⁹

The causal link must be substantially convincing, as an example the crime of murder encompasses action to cause victim (circumstances) death (result).¹³⁰ A murder by omission can be seen by parents who lets their child die drowning while he/she can stop such result by rescuing them, if in a condition the parents' present nearby. In the work of Rome Statute, the drafter agreed to remove provision liability by omission and added

¹²⁶ James Graham Stewart, *Op.cit*, 22.

¹²⁷ *Ibid*.

¹²⁸ *The Prosecutor v. Milorad Krnojelac*, ICTY Case No.IT-97-25-A, 33-34 (2003), <https://www.icty.org/x/cases/krnjelac/acjug/en/krn-aj030917e.pdf>; *The Prosecutor v. Fatmir Limaj et. al.*, ICTY Case No. IT-03-66-T, 20-21 (2005), <https://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>.

¹²⁹ Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis*, (Berlin: Springer, 2014), 112. See also Criminal Code of the Russian Federation 1997, art 124-125.

¹³⁰ Iryna Marchuk, *ibid*, 8.

separate responsibility of civilian and military leader.¹³¹ Even if ICC in *Lubanga* decision held that conduct encompasses both acts and omissions, it is a significant conception that omission is out of rule for mental element in article 30 ICC statute.¹³² Thus, only for the wrongful conduct, ICC regards active action not merely ordinary omission.

3. Mental Element

ICC statute became the first authority to separate the requisite *mens rea* standard into knowledge and intent. This provision, stipulated in article 30, is a combination of civil and common law, a scholar once describes,¹³³

“Intent and knowledge are defined in Articles 30(2) and (3) ICC Statute under clear influence of the common law principles, but in a manner that is a compromise and therefore not consistent and not without overlaps, and applies to *dolus eventualis* in the German understanding (awareness that a circumstance exists or a consequence will occur in the ordinary course of events).”

In civil law, culpability considers knowledge/ *Wissen* as the part of intent along with the element of will/ *Wollen* meanwhile common law see knowledge as another form of intent.¹³⁴ Nonetheless, it must be noted that article 30 is default requirement of mental element. Hence, when particular reference is absence in the ICC elements of crime then this article is relevant.¹³⁵

¹³¹ *Ibid.*

¹³² *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges*, ICC-01/04-01/06, 119 (2007), https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF.

¹³³ Mohamed Elewa Badar and Sara Porro, “Article 30- Mental Element” in, *Commentary on the Law of the International Criminal Court*, edited by Mark klamberg, 314-322 (Brussels: Torkel Opsahl Academic E-Publisher, 2017), 314.

¹³⁴ *Ibid*, 314-315.

¹³⁵ Rome Statute, Art. 30(1).

Article 30 set out two forms of intent which are intent relation to conduct and consequences. Intent relation to conduct excludes the idea of unintended action e.g. automatic behavior or accident.¹³⁶ In relation to the consequence, the person must behave that at the time of the act, prohibited consequences will be realized unless extraordinary situation occurs then it is not anticipation of possibility but must be almost certain.¹³⁷ Further, as the additional element, knowledge of the person must be proven by the awareness of person toward occasion or such outcome will come in the ordinary course of event.¹³⁸

4. Jurisdiction, Admissibility and Complementary Principle

International Criminal Court has four determined crimes within its jurisdiction those are Genocide, Crimes against Humanity, War Crimes and Crimes of Agression.¹³⁹ Genocide for the purpose of ICC statute implies certain acts committed with intent to destroy, in whole or in part, certain groups.¹⁴⁰ While Crimes against humanity is a crime when committed directed against civilian, as part of a widespread or systematic attack.¹⁴¹ War Crimes in ICC statute includes numerous violation or breaches of the Geneva Conventions of 12 August 1949, can be understood

¹³⁶ Iryana, *Op.cit*, 128; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford: Oxford University Press, 2010), 477.

¹³⁷ Gerhard Werle and Florian Jeßberger, "Unless Otherwise Provided: Article 30 of the Rome Statute and the Mental Element of Crimes Under International Criminal Law", *Journal of International Criminal Justice* Vol. 3, Issue 1, (2005): 104.

¹³⁸ Rome Statute, Art.30(2)(b).

¹³⁹ *Ibid*, Art.5.

¹⁴⁰ *Ibid*, Art. 6.

¹⁴¹ *Ibid*, Art. 7.

as crimes during armed conflict.¹⁴² Lastly, Crime of aggression covers use of state armed force which is planned, prepared, initiated by a person to harm sovereignty, territorial integrity and political independence of other state or manifest violation to UN Charter.¹⁴³ Article 12 of ICC statute provides limitation on ICC's jurisdiction only for territorial and nationality principle of state party. Territoriality principle means, the crime in question is conducted in the territory of state party or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.¹⁴⁴ While Nationality is covered by situation of the accused is nationals of state party.¹⁴⁵

A person should not be prosecuted more than once for the same criminal conduct or *nebis in idem*, provided by Rome statute in applying the rule against double jeopardy for both prior proceedings by ICC and before national courts for the same action.¹⁴⁶ *Nebis in idem* and admissibility in article 17 work together to implement the complementary nature of ICC.¹⁴⁷ The principle of complementarity point out national court significant part to the International criminal law enforcement. This principle does not

¹⁴² *Ibid*, Art. 8.

¹⁴³ *Ibid*, Art. 8^{bis}.

¹⁴⁴ *Ibid*, Art.12 a.

¹⁴⁵ *Ibid*, Art.12 b.

¹⁴⁶ *Ibid*, Art. 20; Linda E. Carter, "The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem", *Santa Clara Journal of International Law*, (2010): 4.

¹⁴⁷ Gerard Conway, "*nebis in idem*" in *Commentary on the Law of the International Criminal Court*, edited by Mark klamberg, 233-241 (Brussels: Torkel Opsahl Academic E-Publisher, 2017), 233-234.

station in specific article but article 1 of ICC statute mentions that ICC shall be complementary to national criminal jurisdictions.¹⁴⁸

Meanwhile, admissibility is regulated by ICC statute to affirm complementary function of ICC by selecting cases which are¹⁴⁹

- “(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court”.

Conclusively, permanent status of ICC does not affect sovereign rights of state to proceed and investigate its own national which then build other challenge for ICC in imposing accountability for heads of state and this phenomenon will be delivered in *Uhuru Kenyatta*.

5. Prosecution theory

There have been very common cases when the defendants are alleged or convicted by multiple crimes based on the same action in international criminal tribunal. Either because of factual nature of criminal behavior or

¹⁴⁸ Rome Statute, Art. 1.

¹⁴⁹ *Ibid*, Art. 17.

frequent overlapping legal definition in international crimes.¹⁵⁰ This is legally called as *concursum delictorum*, concerning substantive and procedural dimension of legitimacy of cumulative verdict and conviction.¹⁵¹ The issue also relates to situation of several forms of responsibility affirmed but was answered negative by the Appeal chamber in *Kordić*.¹⁵² In the other side, in *Akayesu* and *Popovic*, the chamber agreed in the opposite namely “fairness to accused” that this person may not being guilty for both genocide and complicity to genocide like conspiracy.¹⁵³ Thereby it is highly recommended to avoid entering conviction for inchoate crimes and preparatory acts if the defendant had engaged in substantive offence as principal. Particularly for superior responsibility, ordering crime and planning may accompany other modes of liability in the sentencing process.¹⁵⁴

¹⁵⁰ Carl-Friedrich Stuckenberg, “Cumulative Charges and Cumulative Convictions” in *The Law and Practice of the International Criminal Court* edited by Carsten Stahn 840-858 (Oxford University Press, 2015), 843.

¹⁵¹ *Ibid.*

¹⁵² *The Prosecutor v. Dario Kordić and Mario Čerkez*, ICTY case no. IT-95-14/2-A, 278 (2004) https://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf; *The Prosecutor v. Naser Orić*, *Loc.cit.*

¹⁵³ *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, 215, 280, 290 (1998), http://www.worldcourts.com/ictc/eng/decisions/1998.09.02_Prosecutor_v_Akayesu.pdf; *The Prosecutor v. Vujadin Popović et.al*, ICTY Case no.IT-05-88-T, TC, 798-799 (2010), <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>

¹⁵⁴ *The Prosecutor v. Tihomir Blaškić*, *Loc.cit*; *Jean De Dieu Kamuhanda v. The Prosecutor*, Case no. ICTR-99-54A-A, 27 (2005), http://www.worldcourts.com/ictc/eng/decisions/2005.09.19_Kamuhanda_v_Prosecutor.pdf; *The Prosecutor v. Dario Kordić and Mario Čerkez*, ICTY Case no. IT-95-14/2-T, 111-112 (2001) https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf; *The Prosecutor v. Radoslav Brđanin*, ICTY Case no. IT-99-36-T, 115 (2004), <https://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf>

ICC statute does not govern this matter specifically, but the court has shown its stance in *Bemba* that,¹⁵⁵

“[t]he Chamber moreover recalls that in his Application the Prosecutor appears on occasion to have presented the same facts under different legal characterisations. It wishes to make it clear that the Prosecutor should choose the most appropriate characterisation. The Chamber considers that the Prosecutor is risking subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings. It is for the Chamber to characterise the facts put forward by the Prosecutor.¹⁵⁶

[t]he Prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation (p. 856) to one and the same conduct requires at least one additional material element not contained in the other.”

This finding alone certainly cannot be the basic foundation of defense argumentation before ICC but the court can refer to other practice in international criminal tribunal. Other than the fact, superior responsibility has no consequences with right of the accused and conviction theory.

B. Superior Responsibility for Civilian Leader

¹⁵⁵ *The Prosecutor v. Jean Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, 71 (2009), https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF

¹⁵⁶ *The Prosecutor v. Jean Pierre Bemba Gombo, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, PTC III, ICC, 12 (2008), https://www.icc-cpi.int/CourtRecords/CR2008_04180.PDF.

Liability in international criminal law designs the criminal responsibility differently with domestic law that the offenders are commonly give an order, masterminds or in the high level of a plan.¹⁵⁷ Establishing accountability for those leader comprises both for military and non-military status.¹⁵⁸ However, commander and superior responsibility are not crime *per se* instead the leader bears responsibility for his failure to act, not sharing responsibility for the commission of the crime.¹⁵⁹ ICC statute uses the term of “superior” to refer types of leader out of the military hierarchy, with certain limited extension imposing criminal responsibility over civilian who possess effective control over the crimes concerned where they knew or consciously disregarded information about the crimes and then they failed to prevent and punish the crime.¹⁶⁰ Compared to Commander Elements, it has two distinct standards regarding mental element of consciously disregard and effective control within superior-subordinate relationship.¹⁶¹ Such distinctions only exist in ICC statute, not specifically drafted for heads of state in the civilian setting or not as commander in chief but as far as the status of superior concerned, the civilian can be held accountable. Even though ICC had never applied someone guilty based on article 28(b), the court can refer to some practices in ICTY and ICTR in concluding civilian responsibility as the superior convicted by his/her failure to prevent and punish the crime.¹⁶²

¹⁵⁷ Robert Cryer, and others, *Op.cit*, 361.

¹⁵⁸ Elies van Sliedregt, *Op.cit*, 185.

¹⁵⁹ *The Prosecutor v. Sefer Halilović*, *Loc.cit*; Alexander Zahar, *Op.cit*, 596.

¹⁶⁰ Rome Statute, Art. 28(b).

¹⁶¹ *Ibid*, Art. 28(b) (i), (ii).

¹⁶² *Ibid*, Art. 21(1) (b), (2).

1. Historical Background of Civilian Leader Liability

Introduced in 1988, superior responsibility was drafted by International law commission on the Code of Crimes against the Peace and Security of Mankind.¹⁶³ At first, there was no separation between military and civilian leaders. ICTY and ICTR, however, started to emphasize the distinction in the evidence in proving command responsibility in respect of civilian.¹⁶⁴ ICTR had dealt with manager of tea factory,¹⁶⁵ leader of political party,¹⁶⁶ and manager of radio station.¹⁶⁷ It is difficult to interpret the concept involved between civilian and military superiors, including but not limited to discipline levels, obedience, loyalty and responsibility.¹⁶⁸

There are 2 key decisions of ICTR which need to be delivered before going in depth into ICC provision on superior responsibility of civilian. *Juvénal Kajelijeli* is an illustration when the chamber convicted the accused with both direct and superior responsibility. Appeals chamber ruled that, in regards with the same count based on the same facts, direct

¹⁶³ United Nations General Assembly, “Report of the International Law Commission on the work of its fortieth session”, UN Doc. A/43/10, 9 May– 29 July 1988, 70-71, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N88/213/56/IMG/N8821356.pdf?OpenElement>

¹⁶⁴ “Statute of the International Criminal Tribunal for Rwanda”, conclusion date: 8 November 1994, U.N. Doc. S/RES/955, 6(3), https://legal.un.org/avl/pdf/ha/ictr_EF.pdf; ” “Statute of the International Criminal Tribunal for the Former Yugoslavia” conclusion date: 25 May 1993, U.N. Doc. S/RES/827, 7(3), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

¹⁶⁵ *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, 49 (2000), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-13/trial-judgements/en/000127.pdf>

¹⁶⁶ *The Prosecutor v. Ferdinand Nahimana, et al*, Case No. ICTR-99-52-T, 423-325 (2003), http://www.worldcourts.com/ictr/eng/decisions/2003.12.03_Prosecutor_v_Nahimana.pdf

¹⁶⁷ *Ibid*, 322-323.

¹⁶⁸ William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Ed. (Oxford: Oxford University Press, 2016), 614.

responsibility should prevail.¹⁶⁹ For instance, ordering which generates direct separate responsibility also can indicate effective control in attaching superior responsibility.¹⁷⁰ A closer look of superiority in ordering and de facto authority preceding the crime takes criminal responsibility in different understanding.¹⁷¹ Someone shall not become responsible for not preventing the crime, if she/he became a superior exclusively by virtue of actively directing the commission of crime. In *Kajelijeli*, he orders another to commit the crime which amounts to offence in relation to direct responsibility under article 67(1) of ICTR Statute.¹⁷²

Nature of civilian setting was firstly highlighted in the decision of *Nahimana*, since civilian status of superior in preceding cases of ICTR and ICTY were undefined.¹⁷³ He was a member of revolution movement in Rwanda also held position in National University of Rwanda. Nonetheless, in 1993 together with his friends, Nahimana initiated the establishment of Radio *Télévision Libre des Mille Collines* (RTL) radio station.¹⁷⁴ This radio station was known as media who started and spread out propaganda and ethnic hatred in act of violence throughout the country.¹⁷⁵

¹⁶⁹ *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, 16-17, (2003) http://hrlibrary.umn.edu/instree/ICTR/KAJELIJELI_ICTR-98-44A/KAJELIJELI_ICTR-98-44A-T.pdf

¹⁷⁰ Yaol Ronen, *Op.cit.*, 343-344.

¹⁷¹ *Ibid.*

¹⁷² *The Prosecutor v. Juvénal Kajelijeli*, *Op.cit.*, 18.

¹⁷³ Yaol Ronen, *Op.cit.*, 329-330.

¹⁷⁴ *Ibid.*, 344.

¹⁷⁵ *The Prosecutor v. Ferdinand Nahimana, et.al*, *Op.cit.*, 1-2, 342, 117-118.

ICTR found that certain broadcast falls under the offence of directing and publicly inciting to genocide.¹⁷⁶ Nahimana as the superior of RLTM knew or had reason to know that his subordinates were going to engage in the incitement and he did not take reasonable or necessary steps to prevent it.¹⁷⁷ The discussion continued interestingly when Nahimana actually did not possess official function but ICTR insist on the idea of Nahimana being the brain or the boss behind the crimes.¹⁷⁸ Not *de jure*, membership of Nahimana as steering committee gave him certain *de facto* authority to play role and control over RLTM.¹⁷⁹ The appeals chamber recalled that Nahimana was in position to oversee the RLTM program and had specific internal obligation to prevent or punish criminal broadcast.¹⁸⁰ In short, ICTR relied upon pre-existing organizational structure and actual functioning of a private organization, purely civilian nature.

In the draft of Rome statute, delegates accepted the idea of superior responsibility and necessity to distinct military and civilian leader.¹⁸¹ The key issue was equivalence of superior's failure to prevent a crime while had the obligation and its commission, but because of never-ending debate to define omission and its circumstance this article was omitted to the

¹⁷⁶ *Ibid*, 258-259, 280-281.

¹⁷⁷ *Ibid*, para.1044-1045.

¹⁷⁸ *The Prosecutor v. Ferdinand Nahimana, et.al*, Case No. ICTR-99-52-A, 261, 267 (2007), http://www.worldcourts.com/ict/eng/decisions/2007.11.28_Nahimana_v_Prosecutor.pdf

¹⁷⁹ *Ibid*.

¹⁸⁰ *The Prosecutor v. Ferdinand Nahimana, et.al, Op.cit*, 190, 273, (2003).

¹⁸¹ United Nations General Assembly, "Draft Statute for the International Criminal Court", UN doc. A/CONF.183/2/Add.1, 51, April 14, 1998, https://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_3/a_conf183_2.pdf

present version.¹⁸² Civilian leader responsibility was firstly proposed by delegates of United States highlighting the difference of its nature and scope of authority. This can be seen in the discipline system and context of the responsibility whereby military commanders are expected to take responsibility for criminal acts or lethal force by his subordinate's rather than civilian leader which mainly in charge for bureaucracy context.¹⁸³ Jordan criticized yet accepted the idea of independent responsibility for civilian leader due to the fact commander is responsible over his forces at all times and civilian cannot be held accountable for individual capacity of his subordinate then it is necessary to raise disparity of *de jure* and *de facto* authority.¹⁸⁴ Australia, in similar manner, added it is not the intention of rule of superior responsibility to consider civilian bureaucracy but the possibility for some high rank civilian leader who actually engaged and control forces i.e Mr. Karadjic and Mr. Mladic discussion in ICTY.¹⁸⁵ In brief, it is the object of concluding article 28(b) to extend civilian leader responsibility for international crimes but some elements must be described comprehensively.

2. Mental Element

¹⁸² United Nations General Assembly, "Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997, A/CONF.183/C.1/SR.23, July 3, 1998, 264. https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf

¹⁸³ *Ibid*, 136.

¹⁸⁴ *Ibid*, 137.

¹⁸⁵ *Ibid*, 138.

Article 30 of ICC statute specifies “Unless otherwise provided” meaning that default mental element will be irrelevant if certain article provides particular intent and knowledge standard.¹⁸⁶ Article 28(b) set stricter threshold, expecting the prosecutor to establish knowledge of the civilian leader in situation of aware by high possibility of the existence of a fact that commission of crimes occurring or would be happening by subordinate and, yet, he/she decides to turn a blind eye to that.¹⁸⁷

Unlike negligence that can be indicted against military commander, civilian superior by this mental element amounts to a form of recklessness or arguably form of knowledge under customary law “had reason to know”.¹⁸⁸ In such context, the person must be in situation noticing risk of commission of crime and necessity to assure his/her subordinates engagement in international crimes (before, during or after) by sufficient information.¹⁸⁹ Some scholars conclude this element by three indicators, those are existing information which clearly indicated significant risk about the probability, information availability to superior, and awareness with declining to refer toward the information.¹⁹⁰ In sum, Wilful Blindness stands in between default knowledge in article 30 over “awareness of

¹⁸⁶ Rome Statute, Art. 30(1).

¹⁸⁷ Kai Ambos, *Op.cit.*, 870.

¹⁸⁸ Schabas, *op.cit.*, 608.

¹⁸⁹ *The Prosecutor v. Bagilishema, Op.cit.*, 14; *The Prosecutor v. Milan Milutinovic et al.* ICTY Case no. IT-05-87-T, 49-50 (2009), <https://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e1of4.pdf>

¹⁹⁰ Linnea Kortfält, *Op.cit.*, 302; Roberta Arnold, “Responsibility of Commanders and Other Superiors” in *Commentary on the Rome Statute of the International Criminal Court: A Commentary* edited by Otto Triffterer, Kai Ambos, 1056-1106, 3rd Ed. (Munich/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2016), 1102-1103.

crime will be occurring”,¹⁹¹ and recklessness as “consciously disregarding a risk”.¹⁹²

3. Superior-subordinate relationship and control

Effective control, landmark element yet effort-taking in superior responsibility is that link between leaders and superiors that can be blamed for whenever the commission of crimes happened. Article 28 (b) refers that the crimes committed by anyone under a superior who can direct his work or work related activities.¹⁹³ This type of responsibility exist to answer the issue on whether military superior can be held responsible for indirect subordinates mostly civilian population at large who somehow de facto are under the effective control of non-military leader.¹⁹⁴ That being said, article 28(b) limits indirect subordinates by the clause “within effective responsibility and control of the superior“ which is interpreted to *de facto* control to work-related activities.¹⁹⁵

In the earlier practice of ICTR has admitted that effective control can be based on mere material ability of superior to prevent or punish (*de facto* authority)¹⁹⁶ and must be determined case-by-case basis.¹⁹⁷ There has been continuous effort to define effective control in the context of civilian

¹⁹¹ Kai Ambos, *Op.cit*, 852.

¹⁹² *Ibid.*

¹⁹³ Linnea Kortfält, *Op.cit*, 299.

¹⁹⁴ *Ibid.*

¹⁹⁵ Robert Arnold, *op.cit*, 840-841.

¹⁹⁶ *The Prosecutor v. Bagilishema*, *Op.cit*, 27.

¹⁹⁷ *The Prosecutor v. Jean Paul Akayesu*, *Op.cit*, 202-203; *The Prosecutor v. Alfred Musema*, *Op.cit*, 245.

leader, in *Musema* the chamber rejects idea of ordinary influence¹⁹⁸ and chamber in *Baligshema* offers idea “the trappings of the exercise of de jure authority” by examples of chain of command, practice of issuing and obeying order and expectation of disciplinary system.¹⁹⁹

The court added another value in emphasizing material ability or *de facto* authority is sufficient to prove effective control in superior responsibility. At the end, appeal chamber in *Baligshema* confirmed that civilian control shall be similar to that military commander.²⁰⁰ In certain occasions, civilian superiors might have greater authority during armed conflict than they are officially authorized.²⁰¹ Also Chamber in *Brđanin*, indicates capacity to sign order will be determinant authority along with the substance document signed by them and reliance on it.²⁰² In essence the material ability to prevent crime or *De facto* authority is relative factor in every superior case, in *Musema* as director of public enterprise *Gisovu* tea factory.²⁰³ The offender was considered having de facto power over attackers which are also his employees by physical appearance at the location of the crime.²⁰⁴

¹⁹⁸ *The Prosecutor v. Alfred Musema*, 49.

¹⁹⁹ *The Prosecutor v. Bagilishema*, *Op.cit.*, 22-23.

²⁰⁰ *Ibid.*, 27.

²⁰¹ *The Prosecutor v. Radoslav Brđanin*, *Op.cit.*, 120-121.

²⁰² *Ibid.*

²⁰³ *The Prosecutor v. Alfred Musema*, *Op.cit.*, 252-253.

²⁰⁴ *Ibid.*

Nevertheless, in the commentary of ICC statute, “superior-subordinate relationship or control” must be limited into some extent of work or work-related activities. This is well explained since civilian superior cannot control his subordinates a whole day as opposed to military commander.²⁰⁵ As illustration, in genocidal activities, the offender was worker in paint factory involving the genocide operation outside working hours, then owner of factory having no control.²⁰⁶ The indictment using article 28(b) was only in *Gbagbo*, which was acquitted, then it is more helpful referring back to the practice of ICTY and ICTR.

4. Prevent and Repress

Non-military superior cannot be expected to exercise disciplinary power as possessed by military commander, instead it could be in other forms including issuing order to stop, dismissal or repatriation.²⁰⁷ Otherwise, in case failed, the superior could submit the situation to the competent authorities i.e. police, military or criminal judicial authorities.²⁰⁸ ICTY in *Aleksovski* decided power of sanction owned by military superior cannot be the obligation of superior responsibility for civilian.²⁰⁹ Explicitly article 28(b) (iii) provides²¹⁰

“The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their

²⁰⁵ Linnea Kortfält, *Op.cit*, 301.

²⁰⁶ Roberta Arnold, *Loc.cit*.

²⁰⁷ Linnea Kortfält, *Loc.cit*.

²⁰⁸ *Ibid*.

²⁰⁹ *The Prosecutor v. Zlatko Aleksovski*, ICTY Case no. IT-95-14/1-T, 30 (1999) <https://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf>

²¹⁰ Rome Statute, Art. 28(b) (iii).

commission or to submit the matter to the competent authorities for investigation and prosecution.”

Then it is not necessarily the obligation of superior to completely prevent the commission of the crime or in other words it is not its responsibility as the leader took necessary and reasonable measure but still the crime happened. Preventing and repressing are alternative means for the superior to take all necessary and reasonable measures within his or her power. The question then arise, what makes it different if it faces head of state authority.

C. Issues of Head of State

1. *Ius Repraesentationis Omnimoda*

Title of heads of state and its function rely upon constitutional decision of each state. Usually led by a president for republic state or king or queen in monarchies government. Head of state may be presumed acted on behalf of state in international relation which certain powers exclusively vested to them e.g. make war and peace.²¹¹ Even though it would be vary for each state, but in common practice the declaration of war falls under heads of state authority like president. Also remarkably acting as the highest organ of state, heads of state, has the general competence to represent state in all aspect of international relations and regarding attributability over such representation.²¹² This was mentioned by ICJ that,²¹³

²¹¹ Joanna Foakes, *The Position of Heads of State and Senior Officials in International Law*, (Oxford: Oxford University Press, 2014), 37.

²¹² *Democratic Republic Of The Congo v.. Rwanda, Loc.cit.*

²¹³ *Ibid.*

“According to international law, there is no doubt that every head of State is presumed to be able to act for it internationally, with all his legally relevant acts being attributable to the State.”

In the meaning of *Ius repraesentationis omnimoda*, heads of state’ action or omission in breaching of international obligation on behalf of state will be attributed to the state.²¹⁴ Thus by this quotation, hypothetically heads of state stand in the highest position to be blamed if there is an occurring international crimes even without their direct engagement. Sudan as the example, its President is empowered by the constitution to exercise *de jure* authority over military forces.²¹⁵ Thereupon, the president exercise effective control over the army *vis-à-vis* direct attribution towards violations of international humanitarian law and human rights law committed by them.²¹⁶

However, only by their status as most senior leader or recognition of other states as heads of state will not automatically prove superior responsibility. Instead, such *de facto* authority must be determined case-by-case basis in relating heads of state control over the commission of crime. Still, the fact that heads of state possessed the highest power over military forces can lead its presumption of *de facto* authority or qualify them as superior having control on military troops whenever atrocities

²¹⁴ Joanna Foakes, *Op.cit*, 41.

²¹⁵ Philipp Kastner, *International Criminal Justice in Bello?: The ICC Between Law and Politics in Darfur and Northern Uganda*, (Leiden: Brill, 2012), 88.

²¹⁶ *Ibid*; Constitution of the Republic of Sudan, 1998, art 42.

arise.²¹⁷ Subsequent issue will then criticize status of heads of state in respected time whether as Commander in chief or Civilian leader.

2. Immunity under ICC Statute

Article 27 of ICC Statute admits, as the extension meaning of sovereignty and states equality principle, international law has granted particular state officials to be immune from prosecution. Furthermore, Commentaries of statute refers to the case where *Ratione Materiae* cannot be invoked to release the actor for criminal responsibility.²¹⁸ This condition certainly does not indicate any consequences to the actor of Immunity *Ratione Personae*. Nevertheless, in becoming parties of ICC, States which give its consent is therefore had waived the immunity *Ratione Personae* for its officials.²¹⁹ By applying this article, State Officials who are being protected by immunity *ratione materiae* or immunity *ratione personae* can be held responsible for committing international crimes.²²⁰ The aim of article 27 is to remove any immunity²²¹ for both comes from national and international law²²²

²¹⁷ Philipp Kastner, *ibid*.

²¹⁸ *The Prosecutor v. Slobodan Milosevic, Loc.cit; The Prosecutor v. Kristić*, ICTY Case no. IT-98-33-A, (2003), <https://www.icty.org/x/cases/krstic/acdec/en/030701.htm>

²¹⁹ Camilla Lind, “Article 27- Irrelevancy of Official” in *Commentary on the Law of the International Criminal Court* edited by Mark klamberg, 275-278 (Brussels: Torkel Opsahl Academic E-Publisher, 2017), 275.

²²⁰ *Ibid*.

²²¹ Paola Gaeta, “Trying Sitting Heads of State: The African Union v. the ICC in the Al-Bashir and Kenyatta Cases”, in *Africa and the International Criminal Court* edited by Charles Chernor Jalloh and Ilias Bantekas, 139-162 (Oxford: Oxford University Press, 2017), 151.

²²² Camilla Lind, *Op.cit*, 276.

On the other side, ICC statute also considers non-obligation for third state and it might affect its sovereign rights and immunity of state officials. Then, in article 98, ICC statute governs two conditions which preclude court authority to request cooperation of state party without consent or waiver of immunity from another state.²²³

First, this article recognizes that there is existing rule on state and diplomatic immunity so then the court has to obtain waiver of immunity of the third state.²²⁴ This article arises controversy in Omar Al-Bashir, when Pre Trial Chamber of ICC request South Africa (state party) to cooperate in arresting him while Omar is incumbent president of Sudan (non-state party). The court affirms that it has extended jurisdiction due to United Nation Security Council (UNSC) referral and Article 98 will not revoke state's duty to act consistently with the request.²²⁵ Further, another occasion in which the state party is bound by international agreement to respect rights of "sending state" and the court must receive consent of that state to cooperate.²²⁶ This article applies on situation when a state settle its forces within territory of another state based on status of force agreement, drafter of ICC agreed this agreement might give kind of immunity.²²⁷ Case

²²³ Rome Statute, Art. 98.

²²⁴ *Ibid*, Art. 98(1).

²²⁵ United Nations Security Council, "Security Council Resolution 1593", S/RES/1593 (2005), 31 March 2005, 1-2, <https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>; *The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, ICC-02/05-01/09-302, 35 (2017), https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF .

²²⁶ Rome Statute, Art. 98(2).

²²⁷ Camelia Lind, *Op.cit*, 667.

analysis on how incumbent head of state proceeding in ICC and how immunity affects the court consideration will be explained in depth in chapter 3 of this paper.

3. Civilian Leader and Commander in Chief

Commander-in chief grants someone (usually heads of state or head of government) to take control over strategic military actions and tactical discretion fully in a state of war.²²⁸ It might be different in each states since hierarchical status is part of domestic affair then state has their own constitution for whom and when commander in chief is given. Poland and United states are two different system in which Poland acquire head of state to appoint someone to be commander-in-chief while United States of America assigns the power to heads of state or the President.²²⁹

Clearly as a part of military forces, responsibility to comply with rule of law is indispensably applied from the highest to the lowest, from commander-in-chief to common soldier.²³⁰ Not necessarily direct superior, superior in the high level might incur responsibility over a much lower units in the chain of command.²³¹ Thus, it shall not be problematic for prosecutor to connect chain of command between Heads of state acting as commander, but Article 28(b) is intended to apply the criminal

²²⁸ Brian Logan Beirne, "George vs. George vs. George: Commander-in-Chief Power", *Yale Law & Policy Review* Vol. 26 No.265 (2007): 293.

²²⁹ Constitution of United States of America, Art. (2)(ii); Constitution of the Republic of Poland, Art. 134(4).

²³⁰ *The Prosecutor v. Jean Pierre Bemba Gombo*, *Op.cit*, 142, (2009)

²³¹ *The Prosecutor v. Naser Orić*, *Op.cit*, 117,125, 188.

responsibility to superiors who are not military commanders or effectively acting as military commanders.²³²

In indicating heads of state not effectively acted as commander-in-chief, martial law and state of war can be very helpful.²³³ In United States of America, practices show that even in the absence of situation of war or application of martial law, the president or head of state had repeatedly engaged US troops in military conflict.²³⁴ Probably, in declaring wartime president needs approval from Parliamentary, then directing US troops is not prohibited claiming Vital National Interest.²³⁵ Thereby, when the president control the troops or apparatus below without inferring to status of Commander-in-chief or in the peace time without invoking martial law, they are civilian superior. Genocide and Crimes against Humanity will be the most relevant crimes convicted in relation to peacetime situation. In any event, even if such points can establish *de jure* authority of heads of state under ICC statute article 28(b), the prosecutor still has a long trip to compel with *de facto* control and mental elements.

D. Islamic Perspective

1. Leadership in Islam

²³² Linnea Kortfält, *Op.cit.*, 297.

²³³ Brian Logan Beirne, *Op.cit.*, 266; Malwina Ewa Kołodziejczak, "The Commander-In-Chief in Command and Control System of The Republic of Poland", *Journal on Baltic Security* Vol.2 No.1, (2016): 89.

²³⁴ Joanna Foakes, *Op.cit.*, 37.

²³⁵ *Ibid.*

In general, Islamic Law recognizes three different terms of leadership those are, *Khalifa*, *Ummah*, and *Ra'i*. In al-Quran, *Khalifa* was mentioned to deliver message of human responsibility over the earth,
Surah Al-Baqarah verse 30

وَإِذْ قَالَ رَبُّكَ لِلْمَلٰٓئِكَةِ اِنِّىْ جَاعِلٌ فِى الْاَرْضِ خَلِيْفَةًۭۙ قَالُوۡۤا اَجْعَلْ فِیْهَا مَنْ یُّفْسِدُ فِیْهَا وَیَسْفِكُ الدِّمَآءَ وَنَحْنُ نُسَبِّحُ بِحَمْدِكَ وَنُقَدِّسُ لَكَۗ قَالَ اِنِّىْۤ اَعْلَمُ مَا لَا تَعْلَمُوۡنَ ﴿ۙ۳۰﴾

“And when (after creating heaven and earth) Allah told the angel that he was about to create a vicegerent (*khalifah*) and to assign him to the earth.”

Surah Al-Baqarah verse 124

﴿ۙ۱۲۴﴾ وَإِذْ اٰتٰنَا اِبْرٰهٖمَ رُبُّهُۙ بِكَلِمٰتٍ فَاَتَمَّتْۙ قَالِ اِنِّىْ جَاعِلُكَ لِلنَّاسِ اِمَامًاۙ قَالِ وَمِنْ ذُرِّيَّتِىْۙ قَالِ لَا يَنَالُ عَهْدِىَ الظَّٰلِمِيۡنَ ﴿ۙ۱۲۴﴾

“And (remember) when his lord tried Abraham with (His) commands and he fulfilled them, He said: Lo! I have appointed thee a leader (*Imam*) for mankind.”

In line with another verse quoting *Imamah* to articulate supreme authority of the Muslim community. Despite the historical meaning, *Khalifa* is now broadly understood as sense of authority which include various type of power and leadership particularly political supremacy over population of muslim while *Imam* is used to represent leader of prayers, religious rituals and spiritual interest. Another term may be cited, *Ra'i* meaning a guardian

or person in charge, or administer. This term was enlightened by Imam Abu Daud, As Sunan, Delhi, Chapter 1089, Hadith 2539 that prophet says,²³⁶

“Each of you is a shepherd and each of you is responsible of his flock. The Amir (ruler) who is over the people is a shepherd and is responsible for his flock; a man is a shepherd in charge of the inhabitants of his household and he is responsible for his flock; a woman is a shepherdess in charge of her husband's house and children and she is responsible for them; and a man's slave is a shepherd in charge of his master's property and he is responsible for it. So each of you is a shepherd and each of you is responsible for his flock.”

Islam obliges leader not only to prioritize interest of group and solve arising problem but also respect to humanity and satisfaction of the God. Leader shall not be selfish disregarding any consequences from the policy he has taken.

2. Accountability of heads of state

Accountability is one of the vital components of a leader that everyone is responsible for their own deed.²³⁷ Above all the values in Islam, equality among human are indisputable not to mention heads of state or leader. Equality before the law once mentioned by Prophet that (Hadith Bukhari No. 6788 and Muslim No. 1688),

“The nations that lived before you were destroyed by God, because they punished the common man for their offences and let their dignitaries go unpunished for their crimes; I swear by Him (God) who holds my life in His hand that

²³⁶ Mustafa Monjur, "Characteristics of Leadership: Islamic perspective" *Journal of Dr. Serajul Haque Islamic Research centre* Vols. 1 & 2, (2010): 227-228.

²³⁷ Mohamed Elewa Badar, "Is There a Place for Islamic Law within the Applicable Law of the International Criminal Court?" in *Islam and International Criminal Law and Justice* edited by Tallyn Gray, 201-230 (Brussels: Torkel Opsahl Academic EPublisher, 2018), 229.

even if Fatima, the daughter of Muḥammad, had committed this crime, then I would have amputated her hand.”²³⁸

This message was stated in response to the phenomenon of Noble woman who was caught for theft but some people recommended to spare her.²³⁹

Leader shall not hide from the responsibility under the shield of his authority in any way. Eventhough God in Islam is essentially the one who control and maintain order in the universe still, God gives human ability of thinking and understanding so that derives criminal responsibility exclusively to individuals.²⁴⁰ Islamic components of responsibility contains three cumulative elements, legal, physical and mental element. Legal element requires the attribution or law-breaking aspect in the wrongful act. Physical element compels direct engagement from the person to criminal conduct and mental element describes state of mind associated with the crime and the person in question.²⁴¹

Accountability in general concept is provided in Al-quran Surah Al-Zalzalah verses 7-8,

²³⁸ *Ibid.* See also in Abul A’la Mawdúdí, *Human Rights in Islam*, (London: Islamic Foundation, 1980), 33.

²³⁹ *Ibid.*, 230.

²⁴⁰ Farhad Malekian, *Principles of Islamic International Criminal Law*, 2nd ed. (Leiden: Brill Publisher, 2011), 389.

²⁴¹ *Ibid.*, 393-394.

فَمَنْ يَعْمَلْ مِثْقَالَ ذَرَّةٍ خَيْرًا يَرَهُ،^٧

وَمَنْ يَعْمَلْ مِثْقَالَ ذَرَّةٍ شَرًّا يَرَهُ،^٨

“... Whosoever does good equal to the weight of an atom shall see it. And whosoever does evil equal to the weight of an atom shall see it.”

Islam does not allow privileges or right of leader to be immune from accountability as he is merely deputy of nation.²⁴² Otherwise, scholars urge accountability to take position after justice and *Shurah* principle.²⁴³ Leader shall maintain two levels of accountability which comprising political accountability. This implies, public right to redress the leader for official wrongful act and to overthrow them.²⁴⁴ Someone has noted Abu Bakr’s speech,²⁴⁵

“O people, you choose me to govern you and you must know that I am not the best among you. So as long as you believe that I am right, you must help me. But as soon as you believe that I am wrong, you must correct and advise me. Obey me as long as you believe that I obey Allah in ruling and conducting your affairs. But as soon as you believe that I disobey Him, you must cease obeying me.”

²⁴² Mohamed Abdelaal, “Leadership Accountability in Islam: Islamic Standards for Holding the Executive Accountable for Official Misconduct”, *Global Journal of Comparative Law* No.4 (2015): 171.

²⁴³ *Ibid*, 193.

²⁴⁴ *Ibid*, 203.

²⁴⁵ *Ibid*, 173.

Additionally Imam Al-Ghazaly further agreed by arguing that unjust leader must discontinue his term, someone must overthrow his authority since he is no longer possess such position.²⁴⁶ However impeaching ruler is barely practiced by Islamic government but since leader has the responsibility to commit with his duty then it is not contradicting. However, before that, the follower must also warn and criticize leader if he violates Islamic rules or abuse public interest.

3. Wilful Blindness in Islamic Criminal Law

Specific in the context of crimes against humanity, Islam outlaw anyone to be wilful blindness or situation of the person seeks to exempt criminal responsibility by deliberately avoiding information.²⁴⁷ As promoted in Islamic law, consistently someone must behave in a good manner and take careful means in any permissible and plausible occasion.

Surah Al- A'raf verse 199

خُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَأَعْرِضْ عَنِ الْجَاهِلِينَ

“Hold on to forgiveness, command what is right and avoid from Ignorant”

This then does not eliminate the idea of encouragement of awareness and attenuation of ignorant.²⁴⁸ Islam also acknowledges liability of superior,

²⁴⁶ *Ibid*, 168.

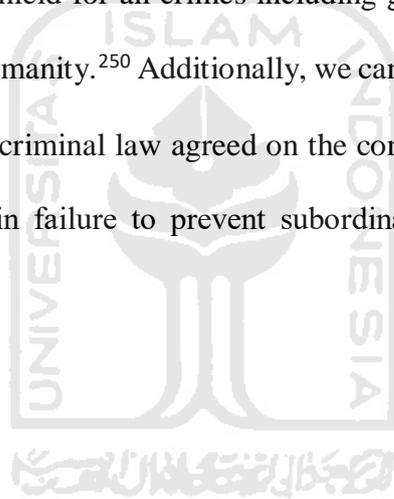
²⁴⁷ Farhad Malekian, *Principles of Islamic International Criminal Law*, 2nd Ed., (Leiden: Brill's Arab and Islamic laws series, 2011), 221.

²⁴⁸ *Ibid*, 222.

commander or even heads of state as prophet ordered his successor (general leader, commander or high rank officials) to continue his life span in respecting custom of war,²⁴⁹

“Fight ye all in the path of God and combat those who do not believe in God. Yet never commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman. This is the pact of God and the conduct of His Messenger for your guidance.”

Though, Islamic criminal law forbids leader defend themselves in their status as sort of shield for all crimes including genocide, war crimes and Crimes against humanity.²⁵⁰ Additionally, we can conclude that both Islam and international criminal law agreed on the concept of non-immunity as well as liability in failure to prevent subordinate’s crimes within their effective control.



CHAPTER III

DISCUSSION ON ACCOUNTABILITY OF HEADS OF STATE IN ICC

10. ²⁴⁹Muhammad Hamidullah, *The Muslim Conduct of State*, (Chicago: Kazi Pubns Inc,1992),

²⁵⁰ *Ibid*, 392.

This section will discuss disputed legal accountability in three heads of state cases which were indicted and proceeded by ICC while still remain in office. By these cases, main issue of accountability of heads of state in ICC will be well-explained through legal and non-legal aspect. Accordingly, it will be excluding mere *de facto* and/or vice president.

A. Omar Al-Bashir

Sudan, one of conflicted countries in Africa, has to confront internal infractions caused by Ethnic Hatred, Oil and Port placement. In 1956, Sudan declared its independence but soon after a few months, there had been a clash between Muslim (North) and Christianity (South).²⁵¹ Unstable development and gap between south and north are undisputed whereas South had significantly developed by economic relations especially oil trade with China (75%).²⁵² Indeed, oil wells are located in South Sudan but the payment and capital city are on the North, so they got the benefit from the transactions.²⁵³ Sudanese had clashed even before its independence in 1956, this country was struggling to manage the political and social disintegration among dominant ethnic and religion elements. In the aftermath of Second Civil War, with the assistance of UNAMIS (United Nations Advance Mission in Sudan) liberation movement in South Sudan and Government of Sudan entered Comprehensive peace agreement.²⁵⁴

²⁵¹ Marina Ottaway, Mai El-Sadany, *Sudan: from conflict to conflict*, (Washington D.C: Carnegie Endowment for International Peace, 2012), 5.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ Markus Böckenförde, "Sudan", in *Max Planck Encyclopedias of International Law*, edited by Rüdiger Wolfrum, 667-675 (Oxford: Oxford University Press, 2012) 670-673.

Darfur is a region attempting to build separatist movement. This conflict which was then depressing government of Sudan under Al-Bashir leadership to trigger ICC initiation in 2008. Darfur conflict involved Sudanese armed forces and Janjaweed (allied militia groups)-Chad, Police of Sudan against Sudan Liberation Movement/Army –which got support from Libya and Justice and Equality Movement.²⁵⁵ As a result probably around 180.000 civilian were killed and huge number refuge.²⁵⁶

Omar Al-Bashir was elected as president of Sudan from 1993 until 2019, starting with coup leader into victory in 2015 election.²⁵⁷ During his term, he fought against liberation movement in the South Sudan and Darfur to consolidate his government. Even when the arrest warrant has been issued in 2009, he could still retain the power for the next 10 years avoiding ICC trial for confirmation of charges. After being overthrown in 2019, government of South Sudan gave a statement to render him to ICC but the court cannot confirm this information until government of Sudan formalize the statement.²⁵⁸ This case is the most breath-taking and inviting endless critics for both ICC and Sudan Government. It comprise issue of immunity and non-state party obligation, cooperation regime and UNSC

²⁵⁵ *Ibid.*

²⁵⁶ "UN's Darfur death estimate soars," BBC News Africa, 14 March 2005. Accessed 17 January 2019. <http://news.bbc.co.uk/2/hi/africa/4349063.stm>

²⁵⁷ Edgar O'balance, *Sudan, Civil War and Terrorism, 1956–99*, (London: Macmillan Press, 2000), 167-180.

²⁵⁸ Ardi Associates, "ICC's first comment on extradition of Sudan's Bashir," Middle East Monitor, 15 February 2020. Accessed 17 January 2019. <https://www.middleeastmonitor.com/20200215-iccs-first-comment-on-extradition-of-sudans-bashir/>

involvement within ICC judicial system only for one head of state or (was) incumbent President of Sudan.

1. Legal Issue

Immunity might be the greatest concern in this particular situation, not only because he's incumbent head of state but most importantly from state which is not party to Rome Statute. Majority believes that article 27 only applies to state party of Rome statute and it is fairly answered by article 98(1) by the necessity of cooperation of third state.²⁵⁹ Indeed, Government of Sudan under Al-Bashir authority rejected to cooperate in waiving his own immunity.

ICC tried in multiple applications to state party and non-state party in corporation regime to arrest him once he resided into their territory. This was not certainly welcomed by requested state to cross the line and endangered its good-relations with Sudan Government. One of the issue repeatedly raised by ICC is that article 98 is not additional duty for requested state nor revoking their obligation.²⁶⁰ However, with the absence of waiver of immunity and demanding mandate of article 27 these states decided to refuse such request. Article 34 of Vienna Convention on Law of Treaties reveals that a treaty does not bind third party without

²⁵⁹ Jadranka Petrovic, Dale Stephens, Vasko Nasteovski, "To Arrest Or Not To Arrest The Incumbent Head Of State: The Bashir Case And The Interplay Between Law And Politics", *Monash University Law Review* Vol 42, No 3 (2017): 750-751.

²⁶⁰ *The Prosecutor v. Omar Al Bashir, Loc.cit; The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir*, ICC-02/05-01/09, 16 (2017), https://www.icc-cpi.int/CourtRecords/CR2017_07156.PDF

consent,²⁶¹ while state also goes into skeptical view that Rome State might constitute customary norm. At least there are seven states who refuse request from ICC to arrest Al-Bashir among others, South Africa and Democratic Republic of Congo. ICC in the other side, provide some controversial finding to respond the refusal.

First, regarding norm creating customary character of non-immunity to remove applicability of article 98(1) the court decided,²⁶²

“[T]he Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes. There is no conflict between Malawi’s obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.”

The court deduces four grounds which arguably demonstrated customary norm in the exception of head of state immunity. At the very beginning, the court started with the rejected claim of immunity of head of state before international courts way back to World War I.²⁶³ Moving on to practice in international prosecutions against well-known leader like Milosevic, Charles Taylor or even Laurent Gbagbo.²⁶⁴ Afterwards, the court also argued on the basis of 120 states parties with more than 9 years of existence

²⁶¹ “Vienna Convention on the Law of Treaties”, conclusion date: 23 May 1969, United Nations, Treaty Series, vol. 1155, 331, Art.34, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

²⁶² *The Prosecutor v. Omar Hassan Ahmad Al Bashir, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 20 (2011), https://www.icc-cpi.int/CourtRecords/CR2011_21750.PDF

²⁶³ *Ibid*, 18-19.

²⁶⁴ *Ibid*.

that they ratified and created recognition toward non-immunity rule under article 27 ICC statute.²⁶⁵ That being said, requested state cannot behave in the contrary to the provision they had agreed on it.

Second, the existence of UNSC resolution which is based on article 25 and 103 UN Charter waives the immunity of Al-Bashir, the court found that

“Accordingly, article 98(1) of the Statute is not applicable to the arrest of Omar AlBashir and his surrender to the Court: no immunity needs to be waived and States Parties can execute the Court’s request for arrest and surrender of Omar Al-Bashir without violating Sudan’s rights under international law. Therefore, States Parties, including Jordan, have the obligation to execute the Court’s request for cooperation and arrest Omar Al-Bashir and surrender him to the Court.”²⁶⁶

“This position stands to be corrected. The Chamber does not consider that such inconsistency arises in the present case. This is so because by issuing Resolution 1593(2005) the SC decided that the “Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”. Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless. Accordingly, the “cooperation of that third State [Sudan] for the waiver of the immunity”, as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities

²⁶⁵ *Ibid.*

²⁶⁶ *The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, Op.cit, 15.*

granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests."²⁶⁷

Not only endorsed novel conception of third state obligation, this decision also found that Al Bashir lost his protection as immunity presenting bar to ICC and by virtue of binding character of UNSC resolution. The resolution told them to cooperate fully which then waives his immunity. To be precise, article 13(b) of ICC statute empower ICC in exercising its jurisdiction when the accused is not nationals of state party nor the crimes committed within its territory. This is a situation triggered by referral of UNSC resolution to adjudicate international crimes over this person.²⁶⁸

It must be noted, proceeding against Omar Al-Bashir was hanging up in the issuance of arrest warrant stage. Something by the nature, did not establish criminal responsibility of the accused but there was enough evidence of reasonable ground the crimes had been committed.²⁶⁹ Pre-trial chamber agrees with prosecutor in the indictment of indirect perpetration or indirect co-perpetration by Omar Al-Bashir as de jure and de facto President of Sudan and Commander-in-Chief of Sudanese armed forces, played an essential role in coordinating the design and implementation of

²⁶⁷ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09, 13-14 (2014), https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF

²⁶⁸ Rome Statute, Art. 13(b).

²⁶⁹ *Ibid*, Art. 58.

the common plan.²⁷⁰ He was charged by crimes against humanity, war crimes and genocide in Darfur conflict.

4. Non-Legal Issue

UN intervention in this conflict becomes dominant attention on how some states contested the finding of ICC in respect to waiver of immunity of third state through of article 25 of UN Charter and UNSC resolution. Referring to Chapter VII of UN Charter, UNSC adopted resolution 1593 to assign situation in Darfur since 2002 to the prosecutor of ICC. By this mandate, UNSC perceive the existence of threat to the international peace in Darfur and order International Commission of inquiry on Darfur to identify violations of international crimes amounting to crimes and who was responsible.²⁷¹

League of Arab States (LAS) and AU stood up in the front line to criticize ICC proceeding based on this stance. Immediately, in July 2009 AU Peace and UNSC designate AU High Level Panel on Darfur (AUPD) to also take part in the investigation process besides ICC.²⁷² In the meantime, AU decided in 13th ordinary session to oppose with ICC on the topic of the arrest and surrender of Omar Al-Bashir.²⁷³ AUPD suggest to

²⁷⁰ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 83 (2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF.

²⁷¹ Security Council Resolution 1593, *Loc.cit.*

²⁷² Markus Böckenförde, *Loc.cit.*

²⁷³ African Union, "Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC)" AU Doc Assembly/AU/Dec.245(XIII) Rev.1, 1 July 2009, 2, https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf.

prioritize national justice system and set up ICC as the last resort.²⁷⁴ In addition to that, along with Arab League, AU contested the claim of widespread practice of non-immunity status as customary law.²⁷⁵

Omar Al-Bashir is valuable and challenging lesson for ICC in initiating justice system or even exposing its competency among international community. Its work on Omar Al-Bashir will be continuing for the time he was surrendered to the court or Sudan's government participate in the enforcement duty.

B. Uhuru Kenyatta

Uhuru Kenyatta is the son of the first president and founding father of Kenya, his indictment deals with responsibility in 2007 when he was only leader of political party. He was known as the right-hand of Mwai Kibaki, since the very beginning of his political career as leader in Kenya African National Union (KANU).²⁷⁶ Failed to become president in 2002, Kibaki take a side in the election of 2007 to support Kibaki as the president which allegedly modified.²⁷⁷ During this period Political system of Kenya was adversely changing from one-single party to multiple types of party resulted into nine candidates in the 2007 election. Other than

²⁷⁴ Markus Böckenförde, *Loc.cit*; African Union. "Report of the African Union High-Level Panel on Darfur (AUPD)", PSC/AHG/2(CCVII), 29 October 2009, 66,91, <https://www.refworld.org/docid/4ccfde402.html>

²⁷⁵ African Union, "Press Release on the decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of President Omar Hassan Al Bashir of The Republic of The Sudan" Press Release No. 002/2012, 9 January 2012, 1-2, <http://www.iccnw.org/documents/PR-002-ICC-English-2012.pdf>

²⁷⁶ Tom Lansford, *Political Handbook of the World 2018-2019*, (London: CQ Press, 2019), 605-806.

²⁷⁷ Peter Kagwanja, Roger Southall, "Introduction: Kenya – A democracy in retreat?," *Journal of Contemporary African Studies* Vol. 27 No. 3, (2009): 263.

political interest in the general election, ethnicity as colonial legacy influenced the outbreak conflict after the announcement of Kibaki's winning. Long time ago, ethnicity called as Kikuyu had privileges given by the colony which was proven in the ownership of land and governmental position for this people.²⁷⁸ At the minimum, around a thousand people have been killed and 350,000 have been displaced as the consequence of the attack and this conflict..²⁷⁹

Supporter of Kibaki and Odinga clashed and attacked the civilian in the city namely Nakuru and Navaisha.²⁸⁰ Odinga and his supporter targeted Kikuyu people and anyone who was suspected vote for Kibaki.²⁸¹ The Kibaki's allies, in spite of their victory, tried to maintain his power with organizing plan against Odinga supporters /the Orange Democratic Movement (ODM).²⁸² They also searched for Non-Kikuyu people and ODM supporters at once in two different places. Kenyatta is the political leader of KANU (party of the former president kibaki) who led his party to join coalition with political party of Kibaki Party of National Unity (PNU).²⁸³ His investigation and confirmation of charges came into conclusion prior to his term as the president in 2013. At the very start, this situation was initiated by *proprio motu* of ICC prosecutor and withdrawn also by Prosecutor.²⁸⁴

²⁷⁸ Maurice Odhiambo Makoloo, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, (London: Minority Rights Group International, 2005), 5-6.

²⁷⁹ Ted Dagne, *Kenya: Current Condiitons and the Challenges Ahead*, (Washington D.C: Congressional Research Service, 2009), 9.

²⁸⁰ *The Prosecutor v. Francis Kirimi Muthaura, et. al, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* ICC-01/09-02/11, 48-71, (2012), https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF

²⁸¹ Peter Kagwanja, Roger Southall, *Op.cit*, 260.

²⁸² *The Prosecutor v. Francis Kirimi Muthaura, et. al, Op.cit*, 42-43.

²⁸³ Tom Lansford, *Loc.cit*.

²⁸⁴ *The Prosecutor v Uhuru Muigai Kenyatta et. al., Decision on withdrawal of charges against Kenyatta*, ICC-01/0902/11, 4-6 (2015), https://www.icc-cpi.int/CourtRecords/CR2015_02842.PDF

Unsurprisingly, it raised controversy for both timeline of withdrawal and reported death of some witnesses.²⁸⁵

1. Legal Issue

While having charged in pre-trial chamber for Crimes against humanity, Kenyatta prepared a long fight prosecutor for the subsequent procedure in trial. The first strategy is that admissibility and national investigation, defense contested ICC jurisdiction based on complementary principle. Kenya's government insisted it has provided national judicial system for conflict in 2007-2008.

Pre-trial chamber besides the dissenting opinion from Judges Hans-Peter Kaul, otherwise calls the previous finding,²⁸⁶

“In the 31 March 2010 Decision, the Chamber has examined the different facets of jurisdiction in terms of place {ratione loci, i.e. in the Republic of Kenya}, time {ratione temporis, i.e. crimes allegedly committed after 1 June 2005}, and subjectmatter {ratione materiae, i.e. crimes against humanity}. It has also defined the scope of the Prosecutor's investigation with respect to the situation under consideration in view of the above-mentioned three jurisdictional prerequisites, namely the territorial, temporal and material parameters of the situation. It found that all the requirements have been met which led it to authorise the Prosecutor to commence an investigation into the situation in the Republic of Kenya in relation to "crimes

²⁸⁵ Evelynne Asaala, “The Deterrence Effect of the International Criminal Court: A Kenyan Perspective“ in *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* edited by Jennifer Schense and Linda Carter, 252-279 (Nuremberg: International Nuremberg Principles Academy, 2016), 254.

²⁸⁶ *The Prosecutor v Uhuru Muigai Kenyatta et. al, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-1, 5-6, (2011), https://www.icc-cpi.int/CourtRecords/CR2011_02586.PDF

against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009.”

Nevertheless, the game has just started, Kenyan Government filed challenge to the admissibility case of Kenyatta by the claim of on-going domestic proceedings in the present time. Not only Pre-trial chamber, Appeal chamber also shared the same view with it to deny such application based on two reasons.²⁸⁷ The word “is being investigated” under article 17(1)(a) ICC statute means that the same individual with substantially the same action in the stage of being ascertained that they are responsible for that action e.g. interviewing witness or collecting documentary evidence nor simply assert that investigation are on-going.²⁸⁸ The Court further stressed out Kenya is required to deliver “Concrete, progressive investigative steps” in order to take out admissibility issue.²⁸⁹

As opposed to the argumentation of Kenya, there will be a judicial reform and future investigative activities without concrete initiative.²⁹⁰ In fact domestic investigation in question is actually order to police commissioner to institute investigation on post-election violence two weeks after the challenge application submitted.²⁹¹

²⁸⁷ *The Prosecutor v Uhuru Muigai Kenyatta et. al, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute*, ICC-01/09-02/11, 4 (2011), https://www.icc-cpi.int/CourtRecords/CR2011_06779.PDF

²⁸⁸ *Ibid*, 16.

²⁸⁹ *Ibid*, 17.

²⁹⁰ *Ibid*, 19.

²⁹¹ *Ibid*, 22, 25-26; Human Rights Watch, *Turning pebbles: Evading accountability for post-election violence in Kenya*, (New York: Human Rights Watch, 2011), 4, https://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf

Second of all, around three months before the withdrawal of charges, Kenyatta requested to be excused from attending status conference on 8 October 2014. Prosecutor meanwhile is the one who requested adjournment for Trial on 7 October and consequently the chamber re-scheduled status conference on 7 and 8 October 2014.²⁹² Status Conference is a legal procedure in disclosure of evidence or help for defense in preparing trial but can also be trial commencement date.²⁹³ He prevailed upon Summit in Kampala, Uganda which would discuss economic development and regional security interest or as he testifies as extraordinary public duties as highest national level.²⁹⁴ Pursuant to Rule of ICC 134 *quarter*, the rule permits the right to request an excuse to be presented by council only.²⁹⁵ In parallel, Rule of ICC 134 *bis* provides video technology as alternative means to the non-attendance. Both prosecutor and Legal representative of Victim protested to this request, whereas this rules shall be applied after trial had begun since Mr Kenyatta had not been required to appear in person before the Court for three years. The court responded with,²⁹⁶

²⁹² *The Prosecutor v Uhuru Muigai Kenyatta, Decision on Defence request for excusai from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014*, ICC-01/09-02/11, 4, (2014) https://www.icc-cpi.int/CourtRecords/CR2014_08117.PDF

²⁹³ International Criminal Court, “Chambers Practice Manual”, May 2017, 20 , https://www.icc-cpi.int/iccdocs/other/170512-icc-chambers-practice-manual_May_2017_ENG.pdf

²⁹⁴ *The Prosecutor v Uhuru Muigai Kenyatta, Decision on Defence request for excusai from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014*, *Op.cit.*, 5.

²⁹⁵ Rules of Procedure and Evidence, Rule 134 *quarter*.

²⁹⁶ *The Prosecutor v Uhuru Muigai Kenyatta, Decision on Defence request for excusai from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014*, *Op.cit.*, 8-9.

“The Chamber notes that pursuant to the applicable summons conditions the accused is under an obligation to attend 'all required hearings' at the Court. The Chamber considers that the accused's obligation to attend the Status Conference arises from the terms of this summons, which remains in continuing effect.

In this case, the Chamber, having had regard to the matters to be considered, has already indicated that it considers the Status Conference to constitute a 'critical juncture' in the proceedings. The Chamber notes that the matters to be discussed at the Status Conference, arising from the Notice and the responses thereto, directly impact the interests of the accused, of victims and of witnesses. The Chamber, by Majority, finds that the requirements of justice in this case necessitate the physical presence of the accused at the Court.

Moreover, noting that the Status Conference was convened for a date upon which the opening statements of the trial would have been expected to take place, the Chamber does not find merit in the Defence's submission regarding the accused's engagements having been planned prior to the convening of the Status Conference. Therefore, the Chamber is also not persuaded by the alternative request for an adjournment of the Status Conference.”

The court declined the request as status conference is a critical procedure impacting interest of accused, victim and witnesses. Assuming in contrary, applying Rule 134 ^{quarter} in respect to article 27(1) of ICC Statute will be exhausting as Kenyatta defend himself as the Head of state or President of Kenya. In any event, official status of the accused shall not present a bar to procedural of ICC especially Kenya as State party. Precisely Kenyan brought too many enormous challenges to the ICC jurisdiction including but not limited to gravity of Crimes against humanity, procedural defects and competency gap to acquire evidence in national justice procedure.

2. Non-Legal issue

AU showed more demanding behavior in the situation of Kenya mostly because of upcoming election in 2013. AU passed resolution 482 in the mid of 2013, to oppose ICC procedure against Uhuru Kenyatta and William Ruto as it could threaten peace and reconciliation in African Region.²⁹⁷ They also deduced principle of complementarity in a way give exclusive jurisdiction to national Authorities not ICC.²⁹⁸ It is noteworthy when this resolution followed other resolutions to defer situation or conflict in Africa, *Al-Bashir* non-cooperation stance and support to AU in amending its ratification bills. In the last part, AU declared request to ICC trial for Kenyatta and Ruto suspension. This was reasoned that Kenya contribute in essential part of rule of law and stability in the region would be hampered.²⁹⁹

In this sense, for foregoing reasons even if Kenya has different obligation compared to Sudan as State party of ICC but still it does not put him in accountability process. Arguably, maybe because it was supposed to be or it takes endless effort for the prosecutor to fight against incumbent most senior leader, head of state with its privilege and authority. In the middle position, ICC also must ascertain its independency by respecting

²⁹⁷ African Union, “Decision on International Jurisdiction, Justice and The International Criminal Court (ICC)” AU Doc. Assembly/AU/13(XXI), 26-27 May 2013, 1, https://au.int/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*, 2.

right of the accused whether there has been insufficient evidence or adequate submission to close the case.

C. Laurent Gbagbo

Cote d'ivoire has recognized International Criminal Court jurisdiction since 2003, consequently the court continuously supervised this country.³⁰⁰ Cote d'ivoire was known as unstable state which having dispute towards the impartiality of its election. The elected president used to win in a controversial sotry and arose conflict between opposing supporters. Once a person from particular party wins, the opponent party will protest and deny their authority as the president. Prior to Laurent Gbagbo, Cote D'ivoire chose Guéï as their military president.³⁰¹

Laurent Gbagbo as the top leader from one of the powerful party in Cote d'ivoire has successfully won the election in 2000.³⁰² Afterwards, gbagbo still born the burden to maintain the stability of the country and unity among different elements of citizen. Although finally peace agreement had concluded by 2003 as a result of civil war, Cote d'ivoire had to request assistance from UN namely The United Nations Operation in Côte d'Ivoire (UNOCI).³⁰³ This peacekeeping mission held the supervision and maintenance of implementing peace agreement 2003. Gbagbo's electoral term ended in 2005, but under emergency constitutional powers,

³⁰⁰ *Decision Pursuant to article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14, 8 (2011), https://www.icc-cpi.int/CourtRecords/CR2011_18794.PDF

³⁰¹ Freedom House, *Countries at the Crossroads 2010: An Analysis of Democratic Governance*, (Lanham: Rowman & Littlefield Publishers, 2010), 103.

³⁰² Linus Nnabuike Malu, *The International Criminal Court and Peace Processes Côte d'Ivoire, Kenya and Uganda*, (London: Macmillan, 2019), 161.

³⁰³ UN Security Council, "UN Security Council Resolution 1528", UN Doc. S/RES/1528, February 27, 2004, 7, <http://unscr.com/files/2004/01528.pdf>.

underpinned by international community support for the on-going peace process and the formation of a unity government, he retained power and managed to postpone the election.³⁰⁴ Electoral, disarmament, and state reunification processes proceeded slowly due to political disputes. The election was finally held in late 2010, but resulted into a contested outcome and political crisis. In this election Gbagbo claimed his victory even though rejected by international community including but not limited to United Nations.³⁰⁵ At last, supported by UNOCI and French Licorne troops, Elected President Alassane Ouattara arrested and detained Gbagbo in government custody.³⁰⁶

5. Legal Issues

Laurent Gbagbo was charged by alternative four crimes against humanity and three modes of liability. In the stage of confirmation of charges by Pre-trial chamber, he was proven personally engaged in attack and shelling against unarmed civilian population. In that case, as the result of controversy in general election, supporter of Gbagbo's opponent gathered and protested in some public areas. Gbagbo knew this would be happened and arranged an appointment with his supporter/inner circle containing head of youth movement, military commander and ministries

³⁰⁴ Marco Bocchese, "Coercing Compliance With The ICC: Empirical Assessment And Theoretical Implications", *Michigan State International Law Review* Vol. 24 No.2 (2016): 420.

³⁰⁵ UN Security Council, "UN Security Council Resolution 1765" UN Doc. S/RES/1765, 16 July 2007, <http://unscr.com/files/2007/01765.pdf>.

³⁰⁶ UN News Service, "UN forces begin operation in Ivorian city in response to attack by pro-Gbagbo forces", 11 April 2011, <https://news.un.org/en/story/2011/04/371972-un-forces-begin-operation-ivorian-city-response-attack-pro-gbagbo-forces>

in order to prevent the protest in any means necessary i.e use of force.³⁰⁷ These crimes covers incidents on 16 and 19 December 2010 during and after a pro-Ouattara march on the RTI headquarters, on 3 March 2011 at a women's demonstration in Abobo, on 17 March 2011 by shelling a densely populated area in Abobo, and on or around 12 April 2011 in Yopougon.³⁰⁸

The prosecutor chose to indict him with alternative modes of liability in indirect and co-perpetration, ordering, contributing with groups of common purpose and most importantly superior responsibility as commander and civilian leader. However, in the end, pre-trial chamber only accepted direct engagement under article 25 by the fact that he acted as personal capacity to maintain his power at any cost.³⁰⁹ After all, trial chamber acquitted all charges and release Gbagbo from his responsibility.

Among others, Laurent Gbagbo possessed significant power after the election result had published. In the middle of conflict, he was allegedly control over FDS, Youth movement, mercenary, and militias. This control was provided by prosecutor in a form of meeting before attack on 16 December 2010 also consistent reporting system, financing, training non-regular forces (militia and mercenary) which later integrated to FDS.³¹⁰ FDS is unofficial term for configuration of national armed forces of ivory

³⁰⁷ *The Prosecutor v. Laurent Gbagbo, Decision on the confirmation of charges against Laurent Gbagbo*, ICC-02/11-01/11, 14, 46, 58 (2014), https://www.icc-cpi.int/CourtRecords/cr2015_04777.pdf

³⁰⁸ *Ibid*, 13-37.

³⁰⁹ *Ibid*, 129-130.

³¹⁰ *Ibid*, 46-56.

coast, police, republican guard and security operations which all brought by the prosecutor acted on behalf of Laurent Gbagbo and his inner circle.

The first issue of incorporated in the legal context is that decision by pre-trial chamber to dismiss superior responsibility by Laurent Gbagbo for both article 28(a) and (b). Pre-trial chamber rejected the idea of applying the same fact under individual criminal responsibility with superior responsibility. It specifically mentioned

*“Component of the deliberate effort to achieve the purpose of retaining power at any cost, including through the commission of crimes”.*³¹¹

Even though chamber found Gbagbo is responsible for three alternative modes of liability for common plan and essential contribution, joint control through organized and hierarchy structure, ordering or instigating, and contributed under article 25(3)(b)(d) at the same time for crimes against humanity of murder, rape, other inhumane act and persecutions and attempted murder.³¹² This does not necessarily reasonable for the chamber to treat liability for one’s own crimes with liability of violation duties in relation to crimes committed by others. Remarkably, trial chamber decided to dismiss Gbagbo responsibility by the failure of prosecutor to prove “common plan” between Gbagbo and his inner circle, organizational policy within along with aim of furtherance, and public speech of the accused constituted ordering/soliciting alleged crimes. This finding is also

³¹¹ *Ibid*, 124-125.

³¹² *Ibid*, 129-130.

subject of re-consideration by the appeal chamber that will be started on May 2020.³¹³

Second issue is motion of no case to answer submitted by defense in response to prosecutor pleading and requesting full acquittal by the failure of prosecutor.³¹⁴ This motion is not regulated by ICC statute nor does rule of the court, but precedent finding in *Ruto Sang*. The chamber set out motion where,³¹⁵

“Whether the Prosecution has lead sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts before commencing that stage of the trial.”

Trial chamber seems to be passive in responding such issue, but in the end, trial chamber in a way confirmed that prosecutor has failed to complete their burden of proof in proving Gbagbo’s guilt beyond reasonable doubt.³¹⁶ The term of “reasonable doubt” also unsettled, while it is specifically regulated under article 66 of ICC statute. One of the topic is

³¹³ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Order scheduling a hearing before the Appeals Chamber and setting a time limit for any request for leave to reply* ICC-02/11-01/15 A, 3, (2020), https://www.icc-cpi.int/CourtRecords/CR2020_01177.PDF

³¹⁴ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Public Redacted Version of “Corrected Version of ‘Defence’s written observations on the continuation of the trial proceedings pursuant to Chamber’s Order on the further conduct of the proceedings, ICC-02/11-01/15-1124)”, 24 April 2018, ICC-02/11-01/15-1158-Conf (‘Blé Goudé Defence observations’), ICC-02/11-01/15, (2018), https://www.icc-cpi.int/CourtRecords/CR2018_02371.PDF*

³¹⁵ *The Prosecutor v Ruto (William Samoei) and Sang (Joshua Arap), Decision No 5 on the conduct of trial proceedings (principles and procedure on ‘No case to answer’ motions, Case No ICC-01/09-01/11, 11-12 (2014), https://www.icc-cpi.int/CourtRecords/CR2014_04595.PDF*

³¹⁶ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Urgent Prosecution’s motion seeking clarification on the standard of a “no case to answer” motion, Case ICC-02/11-01/15, 4-5, (2018) https://www.icc-cpi.int/CourtRecords/CR2018_03038.PDF; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion, Case ICC-02/11-01/15, 4-5, (2019), https://www.icc-cpi.int/CourtRecords/CR2019_03853.PDF.**

that the existence of common plan between Laurent Gbagbo and his inner circle, which is questionable. Other than that, establishing direct connection between those perpetrators in the ground with Laurent Gbagbo is the main duty of prosecutor in the next trial.

6. Non-legal issues

When chaotic clash between candidates began, this situation attracted international community interest. Needless to say, UNSC adopted resolution 1975 which authorize use of force leading to Gbagbo's arrest. It explicitly use expression "To use all necessary means"³¹⁷ for UNOCI and added point to prevent heavy weapon against civilian.

Another captivating issue is that the presence of French troops which actually was requested to assist UNOCI since 2003.³¹⁸ UNOCI acting on peacekeeping mission was questioned before the adoption of resolution 1975,³¹⁹ as this conflict essentially part of political independence to hold a presidential election then there will be possible lack of neutrality. One might argue, in the context of political interest, France can be the most sensitive party to this conflict. Since, it is commonly known that Gbagbo continuously used to present political disagreement to the influence from

³¹⁷ UN Security Council, "UN Security Council Resolution 1975" UN Doc. S/RES/1975, 30 March 2011, <http://unscr.com/files/2011/01975.pdf>

³¹⁸ UN Security Council Resolution 1528, *Op.cit*, 16: UN Security Council Resolution 1765, *Op.cit*, 1.

³¹⁹ UN Security Council, "UNSC Verbatim Records" UN Doc S/PV.6508, 30 March 2011, 7. <https://undocs.org/S/PV.6508>.

France or the ruler who trusted African not the western outsider.³²⁰ So then France have to clarify this mission was initiated out of its political interest and tried to eliminate its contribution while in an occasion representative of UN reaffirmed full cooperation of France in arresting Laurent Gbagbo.³²¹

By illustration of Gbagbo case, superior responsibility tends to be neglected as the fact only provides ground for direct engagement to the crimes. Not to mention failure to prevent, direct engagement in Laurent Gbagbo has put heavy burden to the prosecutor both in providing evidence and establish required standard of proof. This case, is less problematic example of accountability for head state where the admissibility and jurisdiction of ICC is settled also to the enforcement in respect to the arrest warrant.

³²⁰ Paul Melly, “Why France must tread carefully in Ivory Coast”, *BBC*, 12 April 2011. and Accessed 7 March 2020 <https://www.bbc.com/news/world-africa-13047838>

³²¹ UNSC Verbatim Record, *Loc.cit.*

CHAPTER IV

CLOSING

According to the analysis of problem formulation related to Accountability of head of state in superior liability article 28(b) ICC statute and in the case of Laurent Gbagbo, Uhuru Kenyatta and Omar Al-Bashir, then researcher takes conclusion and suggestion, as follows:

A. CONCLUSION

1. The concept of accountability in ICC attaches someone committed international crimes with legal procedure starting with issuance of arrest warrant until sentencing. Since it specifically manages the commission of international crimes, ICC, as the element of accountability process, examines someone legal responsibility with international criminal law. On the topic of heads of state and superior responsibility, ICC statute rules some essential provisions in determining offender responsibility those are principle of culpability, fair labelling, burden of proof and Rights of defendant especially non-absentia procedure. Besides, criminal responsibility also needs the assessment on offence (commission or omission), knowledge and most importantly the jurisdiction of ICC as the authorized forum to proceed. In indicting someone, the prosecutor must evaluate the circumstance of whether the person is individually responsible or as the leader being ignorant to the likelihood commission of the crime by subordinate while he/she has duty to prevent it. Specific article in ICC statute connects criminal responsibility of the offender as the civilian leader including head of state, regulated under article 28 (b). Let alone Head of state, the practice of ICTY and ICTR showing that even for ordinary

civilian leader both *de facto* and *de jure* authority are hard to assess. That being said, this type of liability render individual's guilt much more advance than the general concept of criminal liability in criminal law. In the other side, Status of Head has been framed as personification of a state in the highest level consistently likewise the general competence in representing state in international relations also attributability attached to it. Then, it is not impossible to hold them accountable for atrocities or international crimes occurring in their state while they possessed such position and power. Nevertheless, ICC also considers procedural aspect i.e. admissibility and concurrent conviction with its judicial system so that without reliable stance and reasonable grounds, the right of the accused must be respected. Islam in the similar manner also dictates obligation of superior to be responsible and accountable during his leadership and his follower has the right to contest his power and overthrow the government;

2. ICC has illustrated exhausting and never-ending endeavor in exercising authority over head of state especially when they remains in office. Omar Al-Bashir as the first individual of non-state party who tasted the continuous allegation and attempts of ICC to even surrender him before the court. First and foremost, Immunity still present as a bar before ICC, even it is undeniably non-state party of ICC statute. In reaching support from its state party to arrest Al-bashir, at the same time, the court received critics in its finding regarding status of non-state party is not relevant when UNSC resolution existed to bind Sudan. Uhuru Kenyatta shows even more intervention from international community particularly AU in standing before ICC on behalf of incumbent head of state accountability. Other than issue of immunity,

in the middle of between prosecutor and defence team of Kenyatta, admissibility and complementary rule came into discussion. The court then clarified the application of unwillingness and inability of domestic court must be convincing in procedure e.g the progressive investigation. Lastly, case of Laurent Gbagbo as the only real example of indictment against civilian leader and at the same time head of state, also highlights the challenge in ascertaining indirect engagement of head of state in every situation or crimes happened. This case proved that the court is unlikely convinced by the same presented facts for different liability that The court considered Article 28(b) as complementary liability and it can be overshadowed by direct perpetration or physically ordering under article 25.

B. SUGGESTION

1. It is advisable for ICC establish a collaboration of international law expert in making commentary to analyze specific indication both for elements of crime and criminal responsibility. Regardless the difficulty, adding type of liability for non-military leader is necessary and proportional to the phenomenon of indirect engagement by most senior leader. At last, prosecutor of ICC must not cease to explore this article in their indictment for the future;

2. State party of ICC must be the front line in the practice of legal enforcement by ICC and its system. Equivalently, ICC must also invite state party in essential contribution to the criminal justice so that linking the discrepancy among parties in economic, political or even legal system. Cooperation and self-reminder for the state party to evaluate and commit to their obligation under Rome statute. Notwithstanding as this court preserve mandate to fight against the threat of

international interest and value, non-state party and international community as a whole must also take contributive part in upholding international criminal justice by ICC. Thus, circumventing the challenges and steps backward, these are remarkable development of International Criminal Law in upholding international justice and fight against impunity of high rank official.



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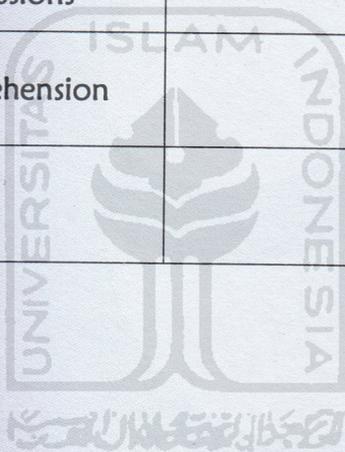
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TRANSCRIPT

No.	MODULE	GRADE
1.	Listening Comprehension	283
2.	Error Recognition & Written Expressions	70
3.	Reading Comprehension	412
Total Score		765



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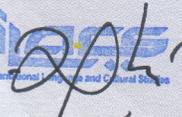
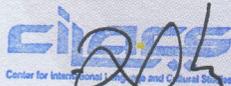
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