

Transnational Criminal Justice and Crime Prevention - International and African
Perspective

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Sitting Head of State Immunity for Crimes under International Law: Conflicting
Obligations of ICC Member States?



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WESTERN CAPE.

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DECLARATION

I, Wintana Kidane Gebremeskel hereby declare 'Sitting Head of State Immunity for Crimes under International Law: Conflicting Obligations of ICC Member States?' is my work and has not been submitted to degree or any other examination in other universities. All sources used have been properly acknowledged.

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ABSTRACT

Sitting head of state immunity for crimes under international law has been a very controversial issue in recent times. On the one hand, the debate bears that personal immunity has been renounced for crimes under international law. On the other hand, the advocates of personal immunity claim that the principle of immunity is still persisting under customary International law. Although the International Criminal Court (ICC) is a treaty based court, it is able to extend its jurisdiction to non-state parties to the Rome Statute through a referral by the United Nations Security Council. Lacking its own enforcement body the ICC relies on the cooperation of other states for arrest and surrender of those it indicts. The extension of the court's jurisdiction to non-state parties, such as the case of Sudanese President Omar Al Bashir, has led to the reluctance of state parties to the Rome Statute to effect arrest and surrender citing a 'dilemma between two conflicting obligations'.

This paper analyses the legal status of personal immunity before different fora such as International tribunals, foreign domestic courts and under customary international law. It also critically examines the legal basis for the alleged conflicting obligations of state parties. The paper at the end concludes that there is no conflicting obligation for states parties to fully cooperate with the ICC and the lack of co-operation in the arrest and surrender of a sitting head of state is inconsistent with international law particularly with United Nation Charter and the Rome Statute.

KEY WORDS

International Criminal Court

Customary International Law

Personal Immunity

Rome Statute

Sitting/Incumbent Head of State

United Nation Security Council Referral



Conflicting Obligations

Al-Bashir

LIST OF ABBREVIATIONS

AU	African Union
DIPA	Diplomatic Immunities and Privilege Act
DRC	Democratic Republic of Congo
EAC	Extraordinary African Chamber
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ILC	International Law Commission
IMTFE	The International Military Tribunal for Far East
ICTR	The International Criminal Tribunal for Rwanda
ICTY	The International Criminal Tribunal for the Former Yugoslavia
PTC	Pre-trial Chamber
SALC	South African Litigation Centre
SCSL	The Special Court for Sierra Leone
SC	Security Council
UN	United Nation
UNSC	United Nation Security Council

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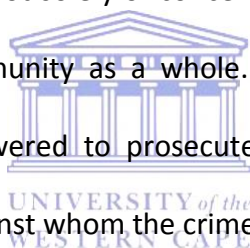
CHAPTER ONE

INTRODUCTION

1.1 Background of the Problem

Under international law, for a state to apply its criminal jurisdiction the alleged crime should be committed in the state's territory (territoriality principle) or the perpetrator's or victim's nationality should belong to the state in question (active and passive personality principles).¹

However, international crimes are not solely of concern to one state rather it is against the interest of the international community as a whole. Thus, it should be fitting that the international community is empowered to prosecute international crimes regardless of where the crimes occurred and against whom the crimes are committed.



According to the development of the principle of universal jurisdiction, states have an authority to prosecute even in the absence of a special link to the crime. Consequently for crimes of genocide, war crimes and crimes against humanity, the principle of universal jurisdiction has been recognized under customary international law.² The case of Pinochet³ and Eichmann⁴ are both cases where domestic courts have exercised their jurisdiction in prosecuting international crimes.

¹ Bassiouni MC (ed) *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* 3ed (2008) 157.

² Orentlicher DF 'Setting Accounts: the Duty to Prosecute Human Rights Violations of Prior Regime' (1991) *Yale Law Journal* 2582-94. See also Scharf M 'The Letter of the Law: the Scope of International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *The Law of Contemporary Problem* 59.

³ Pinochet was a Chile former president, when he travelled to UK for medical checks ups The Spanish government issued an arrest warrant for human rights violation he committed while he was in office. The case was brought before House of Lords and Court of Appeal in Britain. See *Regina v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte*, House of Lords (2000) No.3 AC 147.

⁴ Adolf Eichmann was a Nazi official, who was involved in the slaughtering of the Jews. He was seized in Argentina by Israeli security agents and brought before the District court of Jerusalem and Supreme Court

However, tension between state sovereignty and the protection of human rights has sparked a long standing debate on whether state officials should be held responsible for crimes under international law.⁵ However, one of the major possible hindrances of the prosecution of international crimes is the protection the person is granted as a result of immunity.⁶ Immunity is enjoyed by state officials from any judicial proceeding in foreign courts.⁷ However, the idea of individuals being held criminally responsible for crimes under international law regardless of their criminality under domestic law has been recognized.⁸ This crucial turn in international law is echoed in the eminent Nuremberg judgment.⁹



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Within the past decades, several former leaders have been prosecuted and convicted by international courts/hybrid courts for crimes under international law. The Rome Statute has clearly provided under Article 27 that immunity cannot be a bar to prosecution and contracting parties to the statute accept the provision which limits immunity while signing and ratifying it. Nonetheless, the United Nation Security Council (hereinafter UNSC) referral can subject a non-state party to the jurisdiction of the International Criminal Court. This

of Appeal. See *Attorney General of Israel v Eichmann*, District court of Jerusalem (1961). See also, *Attorney General of Israel v Adolf Eichmann* (1962) Supreme Court of Israel International Law Report Vol 36 (1968).

⁵ Akande D 'International Law Immunities and the International Criminal Court' 98 *The American Journal of International Law* (2004) 1.

⁶ Cassese A *et al Cassese's International Criminal Law* (2013) 318. See also Zappalà S 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi case before French cour de cassation' (2001) 12 *European Journal of International Law* 598.

⁷ *Democratic Republic of Congo (DRC) v. Belgium* (Arrest Warrant case) International Court of Justice (2002) Para 51. See also Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 276, Cassese A *et al* (2013) 318.

⁸ Foakes J 'Immunity for International Crimes: Development in the Law on Prosecuting Heads of State in Foreign Courts' (2011) available at <https://www.chathamhouse.org/publications/papers/view/17986> (accessed on April 09, 2016).

⁹ '[C]rimes against international law are committed by men, not by the abstract entities, and only by punishing individuals who commit such crimes can the provisions of international be enforced.' See International Military Tribunal, judgment, in the Trial of German Major war Criminals, proceeding at Nuremberg, Germany, Pt 22 (1950) Para 447.

happened in the cases of Libya's former leader Muammar Gaddafi¹⁰ and Sudan's president Omar Al-Bashir¹¹ when the ICC issued arrest warrants following the UNSC's referrals. While Gaddafi was overthrown from power by the Western backed revolution and later killed,¹² Al-Bashir is still a sitting president of Sudan and the country is not a state party to the Rome Statute.

However, before a foreign domestic court, according to customary international law, a sitting president has absolute immunity from criminal jurisdiction.¹³ In addition, in June 2014 the African Union adopted an Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights (hereafter Malabo Protocol) to expand the jurisdiction of the African Court by adding criminal jurisdiction for crimes under international law,¹⁴ which has faced a lot of criticism for being a buffer for African leaders and for deflating the ICC jurisdiction as result of the inclusion of the Article 46*bis* immunity provision.

The ICC does not have its own police force and only with state co-operation can individuals like Al-Bashir fall under the jurisdiction of the ICC. Article 89 of Rome Statute has laid down an obligation on states parties to cooperate with the Court in terms of surrendering suspects to the Court. At the same time, the exception to this obligation is provided that the Court may

¹⁰ Pre-Trial Chamber I Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, the Situation in Libya No. ICC-01/11-13 2/7(2011).

¹¹ Pre-Trial Chamber I Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir the Situation in Darfur, Sudan ICC-02/05-01/09 1/146 (2009) Para 36.

¹² Daqum L 'Has Non-Immunity for Head of State Become a Rule of Customary International Law?' in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (2012) 65.

¹³ *Arrest Warrant Case* (2002).

¹⁴ Tidai D 'The Immunity Provision in the AU Amendment Protocol Separating the (Doctrinal) Wheat from the (Normative) Chaff' (2015) 13 *Journal of International Criminal Justice* 3-4.

not proceed with the request when the request is inconsistent with a state's diplomatic immunity obligations.¹⁵

States claim a competing obligation occurs between the serving head of state's immunity under customary international law and the obligation to cooperate with ICC under the Rome Statute. Consequently, states have been unable to execute the arrest warrant for Bashir, the current head of state of Sudan and cooperate with the ICC. Even states like South Africa had warned Bashir not to attend national events like President Jacob Zuma's inauguration and the 2010 World Cup in order to avoid the so called 'dilemma of the two obligations'.¹⁶ Furthermore, South Africa as a state party to the Rome Statute, had failed to arrest Al-Bashir while he was in South Africa for the African Union Summit.¹⁷ Nevertheless, the failure to cooperate with the ICC is not only attributed to South Africa, but also to other fellow ICC Statute members Kenya¹⁸, Malawi,¹⁹ Djibouti²⁰ and Chad,²¹ who failed to arrest Bashir when he visited their countries.²²



¹⁵ Article 98 of the Rome Statute.

¹⁶ Al-Bashir Watch available at <http://bashirwatch.org/> (accessed on April 15, 2016).

¹⁷ *South African Litigation Centre (SALC) v Government of South Africa*, South African High Court Gauteng Division Pretoria (2015) judgment Para 34 seq.

¹⁸ Al- Bashir visited Kenya on 27 August 2010 for the adoption of the new constitution however on November 20, 2011 Kenya court has ordered the government to arrest Al-Bashir if he travelled again: available at <http://bashirwatch.org/> (accessed on April 15, 2016).

¹⁹ Al Bashir had also visited Malawi on 14 October 2011 for the Regional trade Summit available at <http://bashirwatch.org/> (accessed on April 15, 2016).

²⁰ Al- Bashir travelled to Djibouti on 9 May 2011 to attend the inauguration of President Ismael Omar Guelleh available at <http://bashirwatch.org/> (accessed on April 15, 2016).

²¹ Al-Bashir has visited Chad multiple times for regional conference, Green African summit, swearing ceremony available at <http://bashirwatch.org/> (accessed on April 15, 2016).

²² Dougall C *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 305.

1.2 Objective of the Study

The objective of the study is to clarify the current status of immunities of sitting heads of states for crimes under international law. On one hand, the immunity before International Courts for international crimes has been precluded by the different international tribunals, on the other hand domestic courts of foreign states and the International Court of Justice have ascertained the absolute immunity of sitting of the head of state under customary international law. The Rome Statute, only applies to a state party before proceeding before the ICC and does not dictate the obligation of states under customary international law which likely governs the relationship between state parties to the ICC and non-member states. At the same time, the Malabo Protocol which intends to extend the jurisdiction of the African Court of Justice and Human Right has clearly protected the sitting head of state with utter immunity before the criminal chambers to be established within the court.



Therefore, this research paper examines whether the Rome Statute's exclusion of immunity for serving head of state and the principles of customary international law to accord immunity for sitting head of states invite 'contradictory obligations' to the state. Should the duty of states under the ICC be allowed to trump the obligation of a state party to respect immunity of a serving head of state under customary international law? Whether this obligation, obliges the state to comply with their treaty obligation and cooperate with ICC, will be further analyzed. Furthermore, if there are recent customary international law exception developed for immunity of head of state will also be examined.

In addition, it also explore whether Article 98 of the Rome Statute, which provides exceptions to the state duty to cooperate with the ICC, be revoked by a state for lack of co-operation

with the ICC in arresting and surrendering individuals. Furthermore, the inconsistency of Article 46bis of the Malabo Protocol is also discussed. .

1.3 Significance of the Study

The issue of serving head of state immunity is still controversial even if the Rome Statute clearly avoided immunity for crimes under international law. Nevertheless, the right to immunity enjoyed by a sitting head of state accused of international crimes under customary international is not cut and dry. The status of this immunity before international tribunals and before domestic court is still confused. The Malabo Protocol's inclusion of the Article 46bis immunity provision and Al-Bashir's case before a South African court has brought the issue to the table again. Thus, the study sheds light on this matter by going through the recent developments regarding the status of the sitting head of state immunity for crimes under international law which will be used as *opinio juris* and to give direction and clarity on this divisive issue of serving head of state immunity.

1.4 Research Methodology

The research methodology employed are a qualitative desktop review of primary and secondary sources. The primary sources include, but are not limited, to laws, international treaties, case laws, and reports. The secondary sources such as books, journal articles, and internet sources are also reviewed.

CHAPTER TWO

UNDERSTANDING STATE IMMUNITY AND IMMUNITY FOR THEIR OFFICIALS

2.1 Historical Background of State Immunity

The origin of the rule on state immunity from foreign jurisdiction can be traced back to the early nineteenth century.²³ The first case was *France v US in The Schooner Exchange V.M Faddon* before a US District Court. When a ship belonging to the US was taken by orders of Napoleon, Emperor of France on 30 December 1810.²⁴ The ship under a different name, made a stop in port of Philadelphia a year after the seizure, the original owners brought a claim against France before US court, nevertheless the claim was dismissed on the ground of state immunity.²⁵



State immunity is a creation of customary international law and emanates from the notion of independence and equality of states. It denotes the notion that states are free from administrative, legislative and judicial jurisdiction of other states.²⁶ Certainly, many states have acknowledged the notion of absolute immunity at one point or another, for instance the French Cour de Cassation has rejected France's claim against a Spanish Company concerning the purchase of boots on the ground of absolute immunity of Spain.²⁷ The notion of absolute immunity made no distinction between state officials'; civil, commercial and criminal actions; all official deeds enjoyed immunity. Nevertheless, the increasing involvement of states in commercial activities, officials taking advantage of their status and the fact that individuals

²³ Alebeek RV *The Immunity of States and Their Official in International Criminal Law and International Human Rights Law* (2008) 12.

²⁴ *The Schooner Exchange v M.Faddon* US Supreme Court (1812) 116.

²⁵ *The Schooner Exchange v M.Faddon* (1812) 116.

²⁶ Zhou L 'Brief Analysis of Few Controversial Issues in Contemporary International Criminal Law in Bergsmo M and Yan L *State Sovereignty and International criminal Law* (2012) 46.

²⁷ Alebbek RV (2008) 13.

affected by the misdeeds of states were being left without remedy, led to the distinction between sovereign acts and non-sovereign acts.²⁸

Subsequently, the need to limit the absolute immunity of states and adopt a more restrictive approach was gaining ground and being observed by states, such as Italy and Belgium.²⁹ The approach to shield states with absolute immunity from judicial proceedings was felt to entail a denial of justice.³⁰ Thus, courts and critics accentuated that individuals dealing with states should be allowed to bring their claims before the courts in the interest of justice.³¹ In addition, the restrictive approach also plays in favor of the states. In the case of *Guttieres v Elimlik*, the Cassation Court of Florence stipulates that sticking to the absolute immunity approach will lead to individuals not feeling secure to get in business with states as a result of fear that their claim may not be entertained by the courts of other states, however the restrictive approach facilitates economic transactions for states as trading partners.³²

The 1972 European Convention on State Immunity was the first convention which reflects the broad principle of customary international law. The Convention has illustrated areas in which states may not claim immunity pertaining to civil cases such as employment contracts, commercial transactions, property rights, such as use, ownership and possession, and torts arising in the forum state while criminal matters were left untouched.³³ The issue of immunity is not only about limitations on the jurisdiction of foreign courts over a state, but it also includes immunity from executing judgments with enforcement measures, which were

²⁸ Zhou L (2012) 47.

²⁹ Alebbek RV (2008) 13.

³⁰ Feldman CF 'The United States Foreign Sovereign Immunities Act In Perspectives A Founders View'(1986) 35 *International and Comparative Law Quarterly* 302.

³¹ Alebbek RV (2008) 47.

³² *Guttieres v Elmilik* 11F It.1886-I-913 (Italy Corte di Cassazione di Firenze 1886) 921.

³³ Voetelink J *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (2015) 129.

undertaken by foreign states. Nevertheless, a state is also entitled to waive the immunity and subject itself to the jurisdiction of a foreign court. In principle, the waiver of the immunity needs to be express, but implied waiver is also acceptable if supported by circumstances.³⁴

2.2 Rational Behind the Notion of Immunity

States and their officials are granted immunity from criminal and civil jurisdiction in the foreign states. This is justified from the fact that a state is sovereign, accordingly, one state cannot be expected to submit to the judgment of another court.³⁵ The rationale behind the rule of state immunity is explained below.



2.2.1 States are Equal “Par in Parem Non Habet Imperium”

Immunity is an old international principle and is rooted in the monarchies of pre-French Revolution.³⁶ Sovereign was the epitome of the state, which is perceived as one and same.³⁷ Modern international law is founded upon the principle of state equality.³⁸

According to Article 2 of the UN Charter, the organisation of the UN is based on the principle of sovereignty equality of all its member states.³⁹ In addition, the UN General Assembly Resolution on Principle of International Law Concerning Friendly Relation and Co-operation among States further asserts that all states enjoy sovereign equality.⁴⁰ Thus, the concept of

³⁴ Shaw NM International Law (2014) 7ed 540.

³⁵ Douglas Z 'State Immunity for the Acts of State Officials' (2012) 82 *The British Yearbook International Law* 301.

³⁶ Lauterpach H International Law: Volume 1 The General Works: Being Collected papers (1970) 26.

³⁷ Lauterpach H (1970) 26.

³⁸ Franey HE Immunity, Individuals and International Law, PhD Thesis (2009) 55.

³⁹ Article 2 of UN charter Para 2.

⁴⁰ General Assembly Resoultion 2625(XXV) 1970.

sovereign equality provides that one state shall not interfere in the internal matters of another state.

2.2.2 The Proficient Performance of State Officials Functions

Senior state officials be it diplomats, foreign affairs, heads of state or heads of government, represent their state interest in another state, and if they are arrested, detained and brought before a court of law of another state, it clearly embarrasses the represented state and compromises state dignity. Furthermore, the friendly relations between the states will be jeopardized and international peace and security will also be menaced.⁴¹ Over and above that, it opens room for states to (arbitrarily) interfere in the affairs of another state and prevent officials from carrying out their official functions freely.



Accordingly, immunity is crucial for state officials to undertake their functions in a foreign state with a different legal framework.⁴² The Vienna Convention on Consular Relations asserts that the purpose of privilege and immunities is not to the advantage of the officials, but rather to ensure efficient performance of the tasks of the diplomats in the respective state.⁴³

The Convention on Special Missions provides that the members of a special mission shall be inviolable to any form of arrest or detention.⁴⁴ Article 31(1) enumerates members of special missions who enjoy immunity from criminal jurisdiction of the hosting state.⁴⁵

⁴¹ Fox H and Webb P *The Law State Immunity* (2013) 31.

⁴² Pedretti R *Immunity of Head of State and State Official for International Crimes* (2012) 107.

⁴³ Vienna Convention Consular Relation (1963) preamble.

⁴⁴ Article 29 of Special Mission Convention (1969).

Since the purpose of the immunity is to ensure efficient function of state officials, a state can waive the immunity if the state wishes to do so.⁴⁶

2.2.3 Promotion of International Relations

Immunity is a tool used by states to facilitate smooth relations and preclude disputes between states. State officials represent their respective states, and said representation will be placed in jeopardy if these officials feel unsafe in a foreign state while traveling and/or carrying out their functions.⁴⁷ Accordingly, their domestic matters should not be securitized by another state, and their policy and public administration should not be subjected to interference from a foreign court.



2.3 Who is entitled to immunity?

A) Consular Immunity

Consular officers represent their nation in a foreign state; they involve in administrative functions and assist nationals living in that state.⁴⁸ The Vienna Convention on Consular Relations states that consuls are immune from arrest, detention, criminal and civil proceedings with regard to acts they performed in the exercise of their official functions.⁴⁹ In other words, consular officers could be tried for the private acts that s/he has undertaken, however, the proceedings should not affect the official function of the consular.⁵⁰ As

⁴⁶ Article 32 of Vienna Convention Diplomatic Relation (1961), Article 45 of Vienna Convention on Consular Relations (1963), Article 41 New York Special Mission Convention (1969). See also, Podgor ES and Clark RS *Understanding International Criminal Law* (2008) 2ed 125.

⁴⁷ Douglas Z (2012) 282.

⁴⁸ Article 5 of Vienna convention on consular relation (1961). See also Podgor ES and Clark RS (2008) 107.

⁴⁹ Article 41 of The Vienna Convention on consular Relation (1961).

⁵⁰ Shaw NM *International Law* 6 ed (2008) 774.

mentioned above, immunity enjoyed by consular officers can be waived by a sending state or by the individual, provided that the waiver of the immunity is express.

B) Diplomatic Immunity

Diplomatic immunity is the most conventional and uncontended principle of international law.⁵¹ A diplomatic agent is entitled to inviolable immunity from criminal jurisdiction of the receiving state as well as civil and administrative jurisdiction except claims pertaining to property rights situated in a receiving state, succession matters where one is involved as a private person and unofficial or commercial acts.⁵² The Vienna Convention emphasized the necessity of diplomatic relations in the proficient conduct of international relations, and consequently, it has codified existing law and established others.⁵³



States are not obliged to engage in diplomatic relations without mutual consent,⁵⁴ however, once the state gives its consent on the proposed mission, it has an obligation to respect immunity and the privilege of the diplomatic agents. Thus, the immunity is there to benefit the state; however, it may also be waived by the state.⁵⁵

C) Persons Associated with International organisations

Diplomatic immunity is also extended to representatives of international organisations located in the state territory.⁵⁶ Thus, officials employed by international organisations are entitled to immunity; however, the immunity they enjoy may differ. While permanent members and senior officials like United Nation Secretary Generals have absolute immunity;

⁵¹ Shaw NM (2008) 751.

⁵² Article 32 of Vienna Convention (1961).

⁵³ Shaw NM (2008) 752.

⁵⁴ Article 2 of Vienna Convention (1961).

⁵⁵ Article 32(1) of Vienna Convention of Diplomatic Relation (1961)

⁵⁶ Article 4 (11), of Convention on the Privileges and Immunities of the United Nations (1946).

others only enjoy protection related to their official duty.⁵⁷ This protection is embedded in the 1947 Convention on the Privileges and Immunities of Specialized Agencies and also in the General Convention on the Privileges and Immunities of the United Nations.

D) Senior Officials Immunity

Customary international law recognizes immunity for high-ranking state officials which include heads of state, heads of government and foreign affairs ministers.⁵⁸ This immunity protects officials from proceedings before foreign domestic courts. The immunity is granted to ensure the effective performance of state acts by the official in the interest of one's own state without the fear of any judicial action from justice machinery of the receiving state. The types of senior state official's immunity will be discussed below.



2.4 Types of Immunity of State Officials

International law allows certain individuals to enjoy immunity.

Two kinds of immunities are recognised for senior state officials under international law, namely, functional immunity (*ratione materiae*) and personal immunity (*ratione personae*).

2.4.1 Functional Immunity

Functional immunity (*ratione materiae*) accords protection from any judicial proceedings for the sovereign (official) acts that the state officials have undertaken.⁵⁹ It affords protection to public officials from liability for acts performed while executing their official responsibility.

⁵⁷ Podgor ES and Clark RS (2008) 110.

⁵⁸ Akande D and Shah S 'Immunities of State Official, International Crimes and Foreign Domestic Courts' (2011) 21 *European Journal of international Law* 821.

⁵⁹ Cassese A *et al* (2013) 318.

The immunity exists because of the assumption that officials perform their tasks on behalf of the respective state that they represent. Moreover, since states are equal and no state can interfere in the internal matters of other state, public officials enjoy immunity for official acts carried out as an agent of the state.⁶⁰ The allegiance of state officials is clearly with their own state and the act performed is considered an 'act of state', which is imputable to the state and not to the official who has undertaken them.⁶¹ According to act of the state doctrine, it prevents foreign domestic courts from looking into acts of another state and passing judgment as regards to its adherence to international law.⁶² Functional immunity is an apparatus for passing responsibility for the acts of the state official to the state. This has been asserted by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić*, stating that officials are agents of the state and thus cannot be sanctioned or penalised for the act that is not private.⁶³ As the official in question does not commit the acts for his own benefit, foreign courts have an obligation to grant immunity for such acts.⁶⁴ Otherwise, holding a state official responsible for the acts they carried out on behalf of the state would negate the principle of state immunity.⁶⁵ Accordingly, Article 2 paragraph 1(b) of the Convention on Jurisdictional Immunities of State and Their Property assured functional immunity to state officials.⁶⁶ Functional immunity is enjoyed by officials even after lapse of their term.



⁶⁰ Cassesse A et al International Criminal Law Cases and Commentary (2011) 77.

⁶¹ Cassesse A et al (2011) 77.

⁶² *Buttes Gas and Oil Co. v Hammer* House of Lords (No.3) 888(1982).

⁶³ *Prosecutor v. Blaškić* Judgement On The Request Of The Republic Of Croatia for Review Of The Decision Of Trial Chamber IT-95-14- (1997) Para. 38

⁶⁴ Simbeye Y *Immunity and International Criminal Law* (2004) 109.

⁶⁵ Advisory Committee Report on Immunity of Foreign State official, Advisory Report No.20 (2011) 11.

⁶⁶ Article 2(1) of the Convention 'for the purpose of the present conventionstate means... representative of state acting that capacity'.

Only state organs competent to denote the state with another state can undertake acts of state.⁶⁷ Clearly, head of state is considered to be competent to engage with other states. At the same time as representative of the state all acts committed by the head of state could be attributed to the state represented. However, this may not always be the case, when state officials, especially heads of state, commit crimes, it cannot be considered as acting on behalf of the state.⁶⁸ Individuals committing crimes under international law irrespective of the status in the organ of the government is going to be held liable for the acts, since the undertaking illegal conducts.⁶⁹ Functional immunity is conferred to official acts thus state officials cannot be immune from responsibility since international crimes are a violation of the *jus cogens* norm which cannot be imputable to a state act. In the case of *Prefecture of Voiatia v Federal Republic of Germany*, a Greek Court granted a \$30 million reparation claim for the death of 2,000 civilians as a result of a German attack, and conquered the argument that an act in violation of *jus cogens* is not entitled to immunity.⁷⁰ Consequently, where a state official commits a crime under international law, such an official cannot claim immunity *ratione matariae*. Lord Bingham reasoned in the *Pinochet* case before the Divisional Court that a former head of state was clearly entitled to immunity under international law but if such officials are immune from being liable for criminal acts, where can one draw the line? It was addressed that pertaining to international crimes that act cannot be attributed to the state but only to individual and the notion that international crimes could be raised as a defense to be an act of state was rejected during the Nuremberg Tribunal.⁷¹

⁶⁷ Simbeye Y (2004) 126.

⁶⁸ Simbeye Y (2004) 127.

⁶⁹ Simbeye Y (2004) 127.

⁷⁰ *Pretcture Volotia v Germany* Supreme Court of Greece Case no.11 (2000). See also, Akande D and Shah S (2011) 829.

⁷¹ *Pinochet Ugarte Case* (NO.3) (2000) 205.

2.4.2 Personal Immunity

Personal immunities, unlike functional immunities, are granted only to few senior state officials, such as head of state, head of government and minister of foreign affairs, as result of the relevance of the official position.⁷² However, the argument that other officials could be entitled has been raised; due to the judgment of the ICJ in the *Arrest Warrant Case* which provided list of officials in illustrative way rather than exhausting the list officials entitled to personal immunity.⁷³ According to the Vienna Convention on Diplomatic Relations, the same applies for diplomats and member special missions pertaining only to criminal jurisdiction in the states where they are accredited to. Personal immunity is enjoyed by the senior officials abroad either in official capacity or for private visits.⁷⁴ In other words, as a matter of rule this immunity applies to all forms of senior officials' conduct. Besides, the immunity applies both to the acts that was done before senior officials accredited to office and during their terms of office. This establishes full immunity from any judicial process in a foreign state. The crucial point is not the nature of the act or when it was undertaken, instead, the senior position hold by state officials could be affected by the legal process of a foreign state invoked to subject the senior official to judicial process.⁷⁵ This would arbitrarily interfere in the discharging of official functions unless protected by personal immunity.⁷⁶

Heads of state are entitled to this immunity as they are considered as an embodiment of a state and for sake of smooth international relations they must be capable to act abroad

⁷² Cassese A *et al* (2011) 88.

⁷³ *Arrest Warrant Case*, ICJ report (2002) Para 51 '...certain holders of high ranking officials such as head of state, head of government and minister of foreign affairs...'

⁷⁴ Zappala S (2001) 557.

⁷⁵ Akande D and Shah S (2011) 819.

⁷⁶ Akande D and Shah S (2011) 819.

without any interference.⁷⁷ The immunity is applicable *erga omnes*, as an obligation which is claimed upon every state.⁷⁸ Personal immunities encompass every act performed by the officials during their term but cease to exist once the person is no longer holding the office.⁷⁹ Head of state immunity *rationae personae* has been a controversial issue in relation to international crimes before international tribunals and before foreign courts which will be embarked upon in the subsequent chapters of this paper.



⁷⁷ Akande D and Shah S (2011) 815,821.

⁷⁸ Simbeye Y (2004) 115.

⁷⁹ Cassese A *et al* (2011) 88.

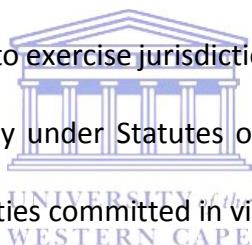
CHAPTER THREE

THE LEGAL STATUS OF PERSONAL IMMUNITY OF SITTING HEAD OF STATES

3.1 Personal Immunity of Sitting Head of States before International Criminal Courts

International law grants personal immunity to limited groups of state officials whose freedom is crucial for the proper functioning of the represented state.⁸⁰ Personal immunity does not relinquish criminal liability; rather it curtains prosecution until the official tenure lapses.⁸¹

States are entitled to consent to avoid or limit personal immunity of their officials by allowing an International Court or a Tribunal to exercise jurisdiction over their officials.⁸² The following section discusses personal immunity under Statutes of International Tribunals and Hybrid Courts established to address atrocities committed in violation of international law.



3.1.1 Nuremberg Tribunal

The Nuremberg Tribunal was established by the 1945 London Agreement for the prosecution and punishment of major war crimes of the European axis.⁸³ The Tribunal had jurisdiction to try high ranked officials accused of committing crimes against peace, war crimes, and crimes against humanity.⁸⁴ It was the first tribunal to hold individuals responsible for crimes against humanity after the failed attempt to prosecute German Emperor William II for the atrocities committed during the First World War. Although there was no judicial action taken after the First World War, the limestone for individual criminal responsibility for head of states and

⁸⁰ Werle G and Jessberger F (2014) 272

⁸¹ Werle G and Jessberger F (2014) 272.

⁸² Advisory Report (2011) 21.

⁸³ Schabas W *International Criminal Court: A Commentary on the Rome Statute* (2010) 5.

⁸⁴ Article 6 of the Charter of the International Military Tribunal. See also, Beigbeder Y *International Justice against Impunity: Progress and Challenges* (2005) 22.

other high ranking state officials were laid down by Article 277 of the Versailles Treaty.⁸⁵ A paradigm shift happened in that individuals could now also be held responsible for committing crimes under international law, and not just states as was the norm at that time.⁸⁶ Article 7 of the Nuremberg Charter established the basis for prosecuting state officials by disregarding their official position which entitled them to immunity. The provision reads:

'Official position of the defendants head of states or responsible official in government departments shall not be considered as freeing them from responsibility or mitigating punishment'.

Although high ranking Nazi officials such as Goebbels, Himmler, and Hitler were not prosecuted since they committed suicide before the trial, the provision had set a precedent for individual criminal responsibility. As a result, the General Assembly Resolution 95(1) reaffirmed the principle of the Nuremberg Tribunal.⁸⁷ The above provision is more related to functional immunity than personal immunity. Personal immunity of a head of state was never an issue before Nuremberg, since indicted Nazi officials were no longer representing Germany at the time of trial.⁸⁸ The issue of personal immunity was debatable; even after, the First World War, as one of the reasons why the US delegates did not agree with the report of the Versailles Peace Conference was the fact that jurisdiction could be established over sitting heads of state.⁸⁹

⁸⁵ Bassiouni MC 'International Criminal Justice in Historical Perspective: The Tension Between states Interest and Pursuit of International Justice' in Cassese A *The Oxford Companion to International Criminal Justice* (2009) 132.

⁸⁶ Werle G and Jessberger F (2014) 50-1.

⁸⁷ UN General Assembly Resolution 95(1) (1946).

⁸⁸ Van Alebeek R *The Immunity of States and Their Official in International Criminal Law and International Human Rights Law* (2008) 226.

⁸⁹ Van Alebeek R (2008) 226.

3.1.2 International Military Tribunal for Far East (IMTFE)

The International Military Tribunal for Far East (hereinafter: IMTFE) was established by the proclamation from the commander-in-chief of Allied Forces, Douglas Mac Arthur.⁹⁰ The Tribunal had power to try individuals charged with crimes against peace, war crimes, and crimes against humanity.⁹¹

With regards to immunity, Article 6 of the IMTFE Charter has abolished immunity for state officials and the defence of superior orders. However, contrary to Article 7 of the Nuremberg Charter, it has allowed immunity to be used for mitigating sentences of the state officials.⁹²

Notwithstanding the fact that the Tribunal was empowered to try high ranking officials, the Japanese emperor was not tried in return for agreeing to end the war in the Far East.⁹³



However, both Tribunals focused only on the criminal conducts of the defeated states. Consequently, Tribunals faced a lot criticism; one of them being victors justice.⁹⁴

3.1.3 Security Council Ad hoc Tribunals

Following the grave violations of human rights and international humanitarian law in the former Yugoslavia and Rwanda, International Tribunals were established to try the responsible individuals. The mandate of the Tribunals was to prosecute crimes against humanity, genocide and war crimes.⁹⁵ The International Criminal Tribunal for Rwanda

⁹⁰ Article 1 of Proclamation by Supreme Commander for the Allied Powers, Tokyo (1946).

⁹¹ Article 5 of IMTFE Statute.

⁹² Article 6 of IMTFE Statute provides that ...'[s]uch circumstance may be considered to mitigate punishment if tribunal determines justice so requires'.

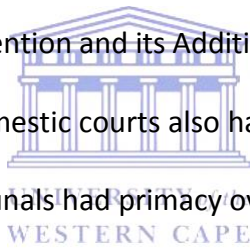
⁹³ Cryer R and Boister N (eds) *Document on the Tokyo War Crimes Tribunal: Charter, Indictment and Judgment* (2008) 1.

⁹⁴ Cassese A *et al* (2013) 226.

⁹⁵ Beigbeder Y (2005) 45.

(hereinafter: ICTR)⁹⁶ and The International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY)⁹⁷ were the result of the UN Security Council acting under Chapter VII of the UN Charter. Chapter VII of the UN Charter mandates the Security Council to take military and non-military actions under Article 41 and Article 42. Consequently, UN member states are bound by the decisions of the Council.⁹⁸ Following this, the obligation under the Charter prevails over any other international obligations.⁹⁹ As a result, the ICTY and the ICTR were established in 1993 and 1994, respectively.

The ICTY Statute was in effect to prosecute and punish individuals responsible for committing grave breaches of the Geneva Convention and its Additional Protocols, beside, genocide, and crimes against humanity.¹⁰⁰ The domestic courts also had jurisdiction over those responsible for these crimes; however, the Tribunals had primacy over national courts.¹⁰¹



Concerning the immunity enjoyed by state officials under customary international law, it was trumped by the obligation of states towards the UN Charter. In the same vein as the other Tribunals discussed above, the Statute clearly deals with functional immunity and provides that an official position cannot relieve any of the officials from responsibility as well as mitigate punishment.¹⁰² Although there is no specific provision that deals with personal immunity, Slobodan Milosevic was indicted while he was still sitting head of state of the

⁹⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) (as amended on 17 May 2002).

⁹⁷ Statute of the International Criminal Tribunal for Rwanda (1994) (as last amended on 13 October 2006).

⁹⁸ Article 27 of UN Charter.

⁹⁹ Article 103 of UN Charter.

¹⁰⁰ Article 1-5 of the ICTY Statute.

¹⁰¹ Article 9 of ICTY Statute.

¹⁰² Article 7(2) of ICTY Statute.

Federal Republic of Yugoslavia (hereinafter: FRY)¹⁰³ thus, applying the principle that personal immunity had no standing before the court. Nevertheless, Milosevic had appealed to the Court alleging immunity for his status as the president of FRY and he also contested the power of the Council to establish the Tribunal.¹⁰⁴ The Tribunal addressed the objection in light of the *Tadic Case* before the Appeal Chamber. Pursuant to Article 41 of the UN Charter, the Appeal Chamber argued that the SC is empowered to adopt measures in order to discharge its obligation to maintain peace and order under Article 39. The Tribunal also established that the list of measures provided under Article 41 was not exhaustive, and that the SC may avail other measures to maintain peace and order.¹⁰⁵ While addressing Milosevic's objection on the ground of immunity, the Tribunal stated Article 7(2) of the ICTY Statute as a reflection of customary international law and the Tribunal also mentioned the development of individual responsibility since Nuremberg has set the trend for the removal of immunity before International Tribunals.¹⁰⁶ As a result, the Tribunal dismissed the objection of the accused.¹⁰⁷ The Tribunal has also prosecuted other high ranking officials like, Karadzic¹⁰⁸ and Kunara.¹⁰⁹ The genocide against the Tutsi in Rwanda in 1994 led to the establishment of ICTR.¹¹⁰ The Court had jurisdiction over crimes of genocide, crimes against humanity, and war crimes



¹⁰³ *Prosecutor v Milosevic et al* Case no. IT-99-37 indictment, See also, *Prosecutor v Milosevic* ICTY ,Case no.IT-02-54T, Decision on Preliminary motion, ICTY trial Chamber Decision (2001) Para 26-34.

¹⁰⁴ *Prosecutor V Dragoljub Kunarac Radomir Kovac and Zoran Vukovic* Case No.: IT-96-23 & IT-96-23/1-A ICTY Appeals Chamber (2002).

¹⁰⁵ *Prosecutor v. Milosevic* (2001) Para 5-7.

¹⁰⁶ *Prosecutor v. Milosevic*(2001) Para 28-33.

¹⁰⁷ *Prosecutor v. Milosevic*(2001) Para 34.

¹⁰⁸ *Prosecutor v Karadzic* Decision on the Accused Holbrook agreement motion, ICTY Trial chamber case no. IT-95-5/18-PT (2009) Para 5. See also, *Prosecutor v Karadzic*, Appeal of Decision Concerning Holbrook Agreement Disclosure ICTY Appeal Chamber Case no. IT-95 5/18-PT,(2009) Para 8-12.

¹⁰⁹ *Prosecutor V Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* Case No.: IT-96-23& IT-96-23/1-T ICTY (2001) Para 4-11.

¹¹⁰ UN General Assembly Resolution 955(1994).

committed in Rwanda and similar crimes committed in neighbouring states by Rwandan citizens between January and December 1994.¹¹¹ Similar to the ICTY, the national courts also had jurisdiction, but the ICTR had primacy over domestic courts.¹¹²

Concerning immunity, the ICTR has also removed the immunity of higher state officials.¹¹³ Consequently, the former prime minister of Rwanda Jean Kambanda was prosecuted before the tribunal.¹¹⁴ Unlike Milosevic, Kambanda did not raise the issue of immunity, but pleaded guilty and was sentenced to life imprisonment.¹¹⁵

3.2 The International Criminal Court

International Tribunals discussed in the preceding section have clearly paved the way for the establishment of the first ever permanent international criminal court. Prior tribunals have established a rich body of procedural and substantive law that has helped the International Criminal Court with its jurisprudence.¹¹⁶ The Rome Statute of ICC was adopted in Rome in July 1998 after acquiring 60 ratifications.¹¹⁷ It is a multilateral international treaty that has become the main document for international criminal law today.¹¹⁸ The Statute provides an independent and permanent jurisdiction with power to adjudicate the most serious

¹¹¹ Article 1-4 of ICTR Statute.

¹¹² Article 8(2) of ICTR Statute.

¹¹³ Article 6(2) of ICTR Statute.

¹¹⁴ *Prosecutor v Kambanda* Case no. ICTR-97-23-S ICTR Trial Chamber I, Judgment (1998).

¹¹⁵ *Prosecutor v Kambanda* (1998).

¹¹⁶ David S 'The international Criminal Law' in Schabas W and Bernaz W *Routledge Handbook of International Criminal Law* (2010) 67.

¹¹⁷ Beigbeder Y (2005) 185.

¹¹⁸ Werle G and Jessberger F (2014) 24.

international crimes. The ICC has jurisdiction over crimes of genocide¹¹⁹, crimes against humanity¹²⁰, war crimes,¹²¹ and the crime of aggression.¹²²

According to Article 11 of the Statute, the Court has jurisdiction only over crimes committed after 1 July 2002. The jurisdiction of the Court is pursuant to the principle of complementarity.¹²³ This principle stipulates that domestic courts of states parties shall have primacy. It is only when the state is unable or unwilling to genuinely carry out an investigation and prosecution that the ICC acquires jurisdiction with regards to the matter.¹²⁴ This can only be determined by the ICC, not by the state party.¹²⁵ In other words, the ICC is a court of last resort, which is envisioned to complement domestic jurisdiction.¹²⁶ Furthermore, the principle of complementarity is an important component of the ICC in light of the efficiency and effectiveness to adjudicate cases, since states have upfront access to evidence and witnesses.¹²⁷ The Court's jurisdiction is triggered by three different mechanisms: firstly, by state referral, which is a state referring its own situation to the court.¹²⁸ The Statute creates a treaty obligation that is only applicable to a state party since the treaty creates neither obligation nor rights for third party states without their consent.¹²⁹ Secondly, *proprio motu* where the ICC prosecutor pursuant to Article 15 of the Rome Statute conducts preliminary examination and then request the Pre-Trial Chamber to launch an investigation. Finally, the



¹¹⁹ Article 5 of Rome Statute.

¹²⁰ Article 6 of Rome Statute.

¹²¹ Article 7 of Rome Statute.

¹²² Article 8 of Rome Statute.

¹²³ Article 1 of Rome Statute.

¹²⁴ Article 17 of the Rome Statute.

¹²⁵ Cryer R *et al* *An Introduction to International criminal Law Procedure* (2010) 154.

¹²⁶ Preamble of Rome Statute Para 6. See also, Cryer R *et al* (2010) (3ed) 153.

¹²⁷ Cryer R *et al* (2010) 153.

¹²⁸ Article 14 of Rome Statute.

¹²⁹ Article 34 of Vienna Convention.

UNSC referral, under Chapter VII, is the third triggering mechanism for the ICC jurisdiction.¹³⁰

The UNSC is able to refer a situation to the Prosecutor and this avoids setting up Ad-hoc Tribunals for every conflict.

With regard to immunity, the Rome Statute has followed the trends of previous International Tribunals. To that end, the Statute in the quest to end impunity for perpetrators and prevent international crimes¹³¹ has taken firm measures in disregarding immunity. Article 27 (1) of the Statute reads:

This Statute shall apply equally to all persons without any distinction based on official capacity as head of state or government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute nor shall it, in and of itself, constitute a ground for reduction of sentence.



The above provision is fundamentally similar to all the international tribunals that came into existence since Nuremberg as it avoids substantive immunity of state officials before international courts. However, unlike the previous International Tribunals' Statutes, the Rome Statute has also dealt with personal immunity of state officials under Article 27(2):

Immunities or special procedural rules which may attach to the official capacity of a person whether under national or international law shall not be bar the court from exercising its jurisdiction over such person.

¹³⁰ Article 16 of Rome Statute.

¹³¹ Preamble of Rome Statute Para 5.

Thus, upon ratification, states parties renounce the personal immunity that their officials would have otherwise enjoyed under customary international law.¹³² The provision renounces immunity in national and international law since the jurisdiction of the court is reliant on the co-operation of state parties in arrest and surrender of indicted individuals.¹³³ Accordingly, states parties cannot hide their officials behind national immunity provided under the domestic law.

3.3 Hybrid Courts

3.3.1 The Extraordinary Chamber of Cambodia

The Chamber was established to try individuals responsible for genocide and crimes against humanity committed during the Khmer Rouge regime between 1975-1979.¹³⁴ It is a hybrid court established by agreement with the UN and later approved by the Cambodian Parliament.¹³⁵ The Chamber also had a jurisdiction over crimes of homicide, torture and religious persecution according to the Cambodian Penal Code.¹³⁶ It had jurisdiction over crimes of genocide, crime against humanity, and destruction of cultural property of international protected persons.¹³⁷ The law of the Chamber had stipulated under Article 9 that the position or rank of the suspects will not relieve or mitigate punishment. The Chamber prosecuted its own nationals. Hence it is clear that the issue of international immunity did not arise in the Extraordinary Chamber of Cambodia.

¹³² Schabas W (2010) 448.

¹³³ Akande D (2004) 420.

¹³⁴ UN General Assembly Resolution 52/135, Letter from the Secretary General to the President of General Assembly, UN/Doc/52/1007 (1998) .

¹³⁵ Law on the Establishment of Extraordinary Chambers with Inclusion Amendments (2004).

¹³⁶ Donlon F (2010) Hybrid Courts' in Schabas W and Bernaz N (eds) (2010) 150.

¹³⁷ Donlon F (2010) 151.

3.3.2 Special Tribunal for Lebanon

Following the terrorist attack in Beirut that killed Prime Minister Ratik and 22 others, the government requested the SC to establish a tribunal on December 13, 2005.¹³⁸ The establishment of the Tribunal is a result of an agreement concluded with the UN. Unfortunately, the political crisis in the government, could not bring the ratification of the agreement by the parliament.¹³⁹ As a result, the UNSC acting under Chapter VII brought the agreement into force.¹⁴⁰ The Statute of the Tribunal under Article 3 provides for individual criminal responsibility. However, immunities of heads of state of third states were not affected as it did not contain any provision that removes immunities.



3.3.3 Special Court for Sierra Leone

The Special Court for Sierra Leone (hereinafter: SCSL) was established as the result of the request of the Sierra Leone government to the international community to establish the 'Special Court for Sierra Leone' to prosecute the atrocities committed by leaders of the rebel Revolutionary United Front.¹⁴¹ Thus, UNSC Resolution 1315 provided the foundation for the Court and upheld the need to hold individuals responsible for the violation of international crimes.¹⁴² Subsequently, the legal framework of the court was set out in the agreement signed between the UN and the government of Sierra Leone on 16 January 2002.¹⁴³

¹³⁸ Letter dated 13 December 2005, from the Prime Minister of the Republic of Lebanon to Secretary General UN/Doc S/2005/783 (2005). See also, Beigbeder Y (2005) 170.

¹³⁹ Wireda *et al* 'Early reflection on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon' (2007) 5 *Journal of International Criminal Justice* 1065.

¹⁴⁰ UN Security Council resolution 1757, on the establishment of a Special Tribunal for Lebanon, S/RES/1757 (2007).

¹⁴¹ Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council (2000) 2.

¹⁴² Security Council Resolution 135 (2000) Para 6.

¹⁴³ The Agreement On Establishing Special Court For Sierra Leone, 2178 U.N.T.S. 137 (2002).

The Court issued an indictment for the then incumbent head of state of Liberia, Charles Taylor, for crimes against humanity and grave breaches of the Geneva Conventions.¹⁴⁴ Before he stepped down, he filed an application claiming that he was protected by personal immunity since the SCSL was not a product of Chapter VII of the UNSC Resolution, hence, not an International Tribunal as it was referred in the *Arrest Warrant Case*.¹⁴⁵

The Court rejected the application asserting that immunity does not apply before the jurisdiction of an international court and explained that the SCSL is outside the national legal system of Sierra Leone, established because of the situation in Sierra Leone posed a threat to international peace.¹⁴⁶ Thus, engendering its competence and jurisdiction in the similar manner to that of ICTY, ITCR and ICC.¹⁴⁷ The Court held that the immunity Taylor enjoyed as an incumbent head of state is not a bar for prosecution by the court. Similarly, the SCSL Statute has also renounced immunity under Article 6(2) and the Court asserted that it cannot ignore what is laid down in the Statute unless there exists a provision that goes against the peremptory norm of international law.¹⁴⁸

3.3.4 The Extraordinary African Chamber

It was the first universal jurisdiction case where a former head of state was convicted by an African Court. Under the regime of Hissene Habre, from 1982 to 1990, Chad experienced

¹⁴⁴ *Prosecutor v Charles Ghankay Taylor* Case no.2004/01-I, SCSL (2003) Para 5.

¹⁴⁵ *Prosecutor v Charles Ghankay Taylor* (2004) Para 14.

¹⁴⁶ *Prosecutor v Charles Ghankay Taylor* (2004) Para 41.

¹⁴⁷ *Prosecutor v Charles Ghankay Taylor* (2004) Para 41.

¹⁴⁸ *Prosecutor v Charles Ghankay Taylor* (2004) Para 53.

serious human rights violations.¹⁴⁹ However, attempts to prosecute him before national courts of Chad and Senegal failed short.¹⁵⁰ Victims approached the Brussel District Court in Belgium, which led to an international arrest warrant against Habre, however the Senegalese Government refused the extradition request.¹⁵¹ The Appeal Court refused to extradite relying on the immunity of Habre, which had actually been waived by the Chad government.¹⁵² Thus, no issue of immunity was raised before the Chamber since immunity was waived by the state. In the end, the AU got involved and allowed Senegal to establish the Extraordinary African Chamber (hereinafter EAC).¹⁵³ The Chamber found the former Chadian leader guilty of crimes against humanity, war crimes, and torture for which he was sentenced to life imprisonment.¹⁵⁴



3.4 The African Court of Justice and Human Rights

African states were huge supporters of the idea of establishing the ICC when it was conceived.¹⁵⁵ The participation of African states ranged from hosting conferences to adapting declarations that attested their full commitment to the process. In the Rome Conference, 8 out of the 31 delegates were from African countries, namely: Algeria, Kenya, Malawi, Nigeria,

¹⁴⁹ Human Rights Watch Chad: The Victims of Hussen Habre Still Awaiting Justice (2005) available at <https://www.hrw.org/reports/2005/chad0705/4.htm> (accessed at October 17 2016).

¹⁵⁰ William S 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem' (2013) 11 *Journal of International Criminal Justice* 1141.

¹⁵¹ *Case Concerning Questions Relating to the Obligation to prosecute or Extradite (Belgium v Senegal)* (2009) I.C.J Para 6.

¹⁵² *Belgium v Senegal* (2009) I.C.J Para 6. See also William S (2013) 1142.

¹⁵³ William S (2014) 1144.

¹⁵⁴ Pablo J 'The conviction of Hissène Habré by the Extraordinary African Chambers in the Senegalese Courts: Bringing justice in cases of serious human rights violations in Africa' available at <https://africlaw.com/2016/06/30/the-conviction-of-hissene-habre-by-the-extraordinary-chambers-in-the-senegalese-courts-bringing-justice-in-cases-of-serious-human-rights-violations-in-africa/> (accessed on October 5 2016).

¹⁵⁵ Monageng MS 'African and the International Criminal Court: Then and Now' in Werle G, Fernandez L and Vormbaum M (eds) *African and the International Court* (2014) 14.

Burkina Faso, Egypt, Gabon, while Egypt was even assigned to chair the drafting committee.¹⁵⁶ African states took an active part and they were the primal states to sign and ratify the treaty allowing the continent to have the largest number of representatives in the Assembly.¹⁵⁷ However, in the past decade, the ICC has been criticised by African states for its focus on the continent. The recurring conflicts in African states and the three situations which resulted in the jurisdiction of the Court were self-referral of African states,¹⁵⁸ nevertheless, the Court's lack of jurisdiction to undertake investigation and prosecution in areas deserving its attention such as Palestine, Syria and the fact that half UNSC states are not a party to the Statute has led to the persisted criticism.¹⁵⁹



The arrest warrant issued against Al-Bashir intensified the situation between Africa and the ICC.¹⁶⁰ The AU made the decision that African states will not co-operate with the ICC in the arrest and surrender of the incumbent head of state of Sudan. Following the arrest warrant of the ICC, the AU requested the deferral by UNSC pursuant to Article 16 of the Rome Statute.¹⁶¹ Nevertheless, the request was denied resulting in the AU's decision not to co-operate with the ICC pertaining to the arrest and surrender of the Sudanese president Al-

¹⁵⁶ Monageng MS (2014) 14.

¹⁵⁷ Monageng MS (2014) 15. Number of states in the different continent, African States 34 states parties, Asian states 19, Eastern Europe 18, Latin America 27 and Western Europe 25.

¹⁵⁸ Uganda and Central African Republic Africa were both self-referrals while Cote d'Ivoire made declaration accepting the jurisdiction of the court, Kenya's situation was triggered *Proprio motu*.

¹⁵⁹ Monageng MS (2014) 15.

¹⁶⁰ Du Plessis M and Gevers C' Balancing Complete Obligation: The Rome Statute and AU Decision ISS paper 225 (2011) 1 available at <https://www.scribd.com/document/165053642/AU-VS-ICC> (accessed on October 2 2016).

¹⁶¹ AU Decision on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Decision 334 (XVI) (2011) Para 3-6.

Bashir.¹⁶² Consequently, the tension between the AU and the ICC had brought about the idea for establishing a Regional Criminal Court to address African problems by an African Court.¹⁶³

In 2014, the AU adopted a protocol that extends the jurisdiction of the African Court of Justice and Human Rights to address serious crimes under international law in Malabo, Equatorial Guinea.¹⁶⁴

Although the efforts to establish a Regional Court were admired by commentators because the latter fills the jurisdictional gap of the ICC, there were serious questions raised concerning the motive of the AU.¹⁶⁵ The criticism ranged from the closed policy followed to the decision of non-involvement of the civil society and non-governmental organisations from the drafting stage to the feasibility of three Chambers staffed with the same judges to address 14 international crimes.¹⁶⁶ Furthermore, the apprehension on the Protocol is fuelled as result of Article 46*abis* which reads:

No charges shall be commenced or continued before the court against any serving AU head of state, Government or anybody acting or entitled to act in such capacity or other senior state officials based on their functions, during their tenure of office.

¹⁶² Decision on the Meeting of African States Parties to Rome Statute of the International Criminal Court, AU Assembly /13(XIII) (2009) Para 5.

¹⁶³ Vanlin SL 'Non-Compliance and the Law and Politics of State Co-operation Lessons from the Al-Bashir and Kenyatta Cases' in Bekou O and Brikeet B *Co-operation and International Criminal Court: Perspectives from Theory* (2016) 138.

¹⁶⁴ AU Draft Protocol on Amendments to the Protocol on the Statute of African Court of Justice and Human Rights STC/Legal/Min7(1) Rev 1, EX.CL/846 (XVV) (2014).

¹⁶⁵ Udamabana NJ 'Can These Dry Bones Live? In Search of Lasting Theory for AU and ICC Toxic Relation' (2014) *African Journal of International Criminal Justice* 69.

¹⁶⁶ Abraham G 'African Evolving Continental Court Structures: At the Cross Road' South African Institute of International Affairs available at <http://www.saiia.org.za/occasional-papers/669-africa-s-evolving-continental-court-structures-at-the-crossroads/file> (accessed on April 18, 2016).

Accordingly, the Protocol has chosen to grant personal immunity to sitting heads of states. This clearly shows the different approach taken from the preceding treaties establishing International Tribunals. The Court's relation to the ICC and its impact on the international law will be further analysed in the next chapter of the thesis.

3.5 Sitting Head of States Immunity under Customary International law

Customary international law is one of the most prominent forms of international law following treaties. It is a 'general and consistent practice of states followed by a sense of legal obligation'.¹⁶⁷ Precedent and scholarly writings are also a supplementary means of determining rules of international law.¹⁶⁸ Nonetheless, it should not be conceived that scholarly writings could solely be the source of customary international law in the absence of the state practice. Thus, states conform to customary international law and incorporate the norms into their domestic law. For customary international law to exist, there must be a prevalent and constant practice of states and *opinio juris* that explains why states act in accordance with the regulatory framework.¹⁶⁹ Scholars and courts affirm that an established state practice among states 'ripens' or 'hardens' into customary international law that becomes recognised by states as legal binding laws.

As discussed in the first chapter, state immunity is rooted in the principles of international law by virtue of treaties or conventions that give rise to fundamental state rights. Moreover, this practice has given rise to customary international law.¹⁷⁰ Accordingly, judicial decisions

¹⁶⁷ 102(2) of Restatement Third of the Foreign Relation law of the United States (1987).

¹⁶⁸ Thompson B *Universal Jurisdiction: The Sierra Leone Profile* (2015) 10.

¹⁶⁹ Goldsmith JL and Posner EA 'Theory of Customary International Law' 66 *The University of Chicago Law Review* (1999) 1117. See also Brownlie I *Principle of Public International Law* (1990) 7-9.

¹⁷⁰ Caplen LM 'State immunity, Human Rights and *Jus cogens* a critique of Normative Hierarchy Theory' (2003) 97 *The American Journal of International Law* 744, See also Chapter of 2 of the thesis.

of courts are a clear example of state practices and can be raised to be evidence of *opinio juris* with regard to state immunity.¹⁷¹ Akande asserts that both state practice and judicial decisions are unanimous with regard to personal immunity.¹⁷² However, as discussed in the previous section, the issue of immunity under customary law has encountered development through the emergence and development of international criminal law. As a result, the status of immunity under customary international has to be viewed from two different angles, when it raised before international criminal courts and when it is before foreign domestic courts.

As it was addressed in the previous section, the concept of immunity before International Tribunals has been eroded and this argument has also been substantiated by precedents of the International Tribunals. However, the personal immunity of a sitting head of state before a domestic court is still a matter that is hotly contested.



3.5.1 Immunities before Domestic Courts

The principle of immunity of a head of state under one's own domestic court could vary according to the country's national laws. Even if heads of states are granted immunity under customary international law, countries, in light of their constitution, can limit or even renounce the immunity. For Instance, Belgium¹⁷³, Botswana¹⁷⁴, and Sudan¹⁷⁵ provide full immunity to their sitting heads of states. In contrast, the UK's head of state is not entitled to

¹⁷¹ *Jones v The Ministry of Interior for the Kingdom of Saudi Arabia and others*, UK House of Lords (2006) para 10, 59-63,

¹⁷² Akande D (2004) 411.

¹⁷³ Article 88 of the Belgian Constitution (2007).

¹⁷⁴ Article 24 of Botswana Constitution (2002).

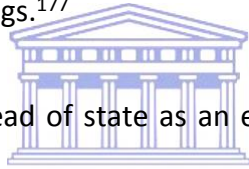
¹⁷⁵ Article 60(1) Interim Constitution of Sudan (2005).

such immunity since the prime minister is subject to questioning and investigation. The US, on the other hand, entitles its head of state a limited immunity.¹⁷⁶

However, the focus of this thesis is international immunities and not domestic immunity under national law, thus an elaborate discussion on domestic immunities under this section will not be undertaken as it is beyond the focus of the topic.

3.5.2 Sitting Head of States Personal Immunity before Foreign Domestic Courts

As a result of the development of the principle of universal jurisdiction, which rectifies the limitations or lack of international adjudicatory bodies, domestic courts have been crucial in undertaking international proceedings.¹⁷⁷



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State immunity is extended to a head of state as an embodiment of the state in order to undertake official conducts effectively and efficiently. Nevertheless, the immunity of a sitting head of state varies before the courts of the state of origin and before a foreign domestic court. While the former is dealt by the domestic law of the country, the latter is governed by principles of international law. In dealing with judicial decisions pertaining to the personal immunity of senior officials accused of crimes under international law, the House of Lords has asserted in the *Pinochet Case* that the reason provided for disregarding functional immunity did not affect personal immunity of the senior officials.¹⁷⁸ Besides, the Spanish Court, Audiencia Nacional, in the case against Fidel Castro for crimes under international law,

¹⁷⁶ Bachmann SD *Civil Responsibility for Gross Human Right Violation: The Need for a Global instrument* (2007) 21.

¹⁷⁷ Nwosu UN Head of State Immunity under International Law (unpublished PhD thesis London School of Economics and Political Science 2011) 156.

¹⁷⁸ *Pinochet Ugrate Case* No.3 (2000) 168.

asserted that criminal jurisdiction could not be exercised since an incumbent head of state enjoys immunity.¹⁷⁹

Thus, the notion that a sitting head of state is immune from the criminal jurisdiction of foreign national courts, is a widely accepted doctrine.¹⁸⁰ The assertion has also been confirmed by the decision of the ICJ in the *Arrest Warrant Case*.¹⁸¹

3.5.2.1 The Arrest Warrant Case

Belgium adopted a criminal legislation which recognises neither functional nor procedural immunity for crimes under international law. Subsequently, an international arrest warrant was issued by Belgium for the Minister of Foreign Affairs of the Democratic Republic of Congo (hereinafter: DRC) Abdulaye Yerodia Ndombas.¹⁸² He was accused of inciting hate speech against the Tutsi Population in the DRC which resulted in hundreds of deaths and summary executions.¹⁸³ In response to the arrest warrant, the DRC brought an application before the ICJ alleging Belgium has violated its right by issuing a warrant against its minister all in while protected by immunity.¹⁸⁴ Belgium argued that according to the Nuremberg Charter and the Rome Statute, incumbent ministers of foreign affairs cannot raise immunity as defence where the individual is accused of having committed war crimes and crimes against humanity.¹⁸⁵ The Court ruled that personal immunity is an absolute immunity. The court cited domestic legislation and previous judicial decisions including that from the House of Lords in Pinochet's

¹⁷⁹ Fox H and Webb P (2013) 113.

¹⁸⁰ Cassese A *et al* (2013) 271-273. See also, Fox H and Webb P (2002) 430-3.

¹⁸¹ *Arrest Warrant Case* (2002).

¹⁸² *Arrest Warrant Case* (2002) Para 8.

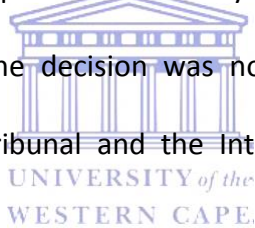
¹⁸³ Orakhelashvili A 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo V. Belgium)' (2002) 96 *African Journal of International Law* 677.

¹⁸⁴ *Arrest Warrant Case* (2002) Para 8.

¹⁸⁵ *Arrest Warrant Case* (2002) 23, 56.

case and from the French Court of Cassation, were unable to reach the conclusion that there exists an exception developed for personal immunity under customary international law.¹⁸⁶

The Court also concluded that the instruments of International Criminal Tribunals such as Article 7 of the Nuremberg Charter, could not allow it to conclude that an exception exists under customary international law.¹⁸⁷ Thus, according to the court's decision, the difference between procedural and functional immunity have been differentiated as separate concepts since jurisdictional immunity is procedural in nature while criminal responsibility is a question of substantive law.¹⁸⁸ Therefore, the irrelevance of official capacity under customary international law did not affect the personal immunity of senior officials. Subsequently, the Court emphasised the fact that the decision was not contrary to the principle of the Nuremberg Tribunal, the Tokyo Tribunal and the International Tribunal for the Former Yugoslavia.¹⁸⁹



Hence, the court submitted that Belgium, issuing an arrest warrant and circulating it, was a clear violation of the principle of the international law.¹⁹⁰ However, Judge Van den Wyngaert in her dissenting opinion argued that the principle of irrelevance of official capacity is an issue of individual versus state responsibility, and not personal and functional immunity.¹⁹¹ She insisted that official capacity is not solely for making officials accountable but it also guarantees jurisdiction to the court. Her argument is not stating that the principle affects personal immunity directly, however, she justifies for the interest of preventing impunity; the

¹⁸⁶ *Arrest Warrant Case* (2002) Para 98.

¹⁸⁷ *Van Alebeek R* (2008) 270.

¹⁸⁸ *Arrest Warrant Case* (2002) 25, 60.

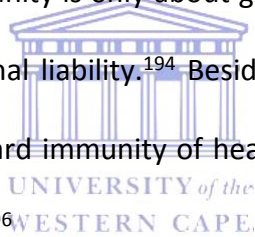
¹⁸⁹ *Arrest Warrant Case* (2002) 24, 58.

¹⁹⁰ *Arrest Warrant Case* (2002) 29-30.

¹⁹¹ *Arrest Warrant Case* (2002), Dissenting Opinion Judge Van den Wyngaert 158-159.

latter should outweigh the interest of protected personal immunity.¹⁹² Van Alebeek responds to this argument that judges can establish changing circumstances through judicial decisions, however, this does not mean that the judge can go against state practice to balance the interest protected by personal immunity and with the interest of fighting impunity, the decision can only reflect what the law states not what law should be.¹⁹³

On the basis of state practice, it is only the United States that does not recognise personal immunity limitations to prosecution. Pertaining to the rule of immunity, the United States proclaims that a head of state immunity is only about grace and comity not a right provided to a head of state to escape criminal liability.¹⁹⁴ Besides, the 'Flatow Amendment'¹⁹⁵ also asserts that US courts could disregard immunity of heads of states who are believed to be labelled as a sponsor of terrorism.¹⁹⁶



To sum up, before a foreign domestic court, personal immunity is an obstacle for the prosecution of state officials. Thus, without existing state practices, no exception has been developed for the prosecution of an incumbent state official for crimes under international law.¹⁹⁷ In the *Arrest Warrant Case*, the Court provided the only circumstance in which state officials enjoy procedural immunity and are able to be brought before the jurisdiction of a

¹⁹² *Arrest Warrant Case* (2002) joint Separate opinion of judges Higgins, Kooijmans and Buergenthal Para 79-80.

¹⁹³ Van Alebeek R (2008) 272.

¹⁹⁴ *Lafontant v Ariside* (1994), (Citing *Hilton v Guyot* 159 US 113 US Supreme Court, 1895) (1994) 163-164

¹⁹⁵ Civil Liability for Acts of State Sponsored Terrorism, Sept. 30, 1996, Pub. L. No. 104-208, Div. A, Title 1, § 101(c) [Title V § 589], 110 Stat. 3009-172, An amendment to the US Foreign Sovereign Immunities Act of 1976, named after a lawyer Stephen Flatow, who initiated a series of cases against Iran for state sponsored terrorism after he lost his daughter in suicide bombing.

¹⁹⁶ Flatow Amendment (1996) 354-357 and 251-252.

¹⁹⁷ Werle G and Jessberger F (2014) 278.

foreign state: if the state in question waives its immunity; otherwise the official is protected.¹⁹⁸

3.6 Personal Immunity under International Law Commissions

The International Law Commission (ILC) is a permanent body that was established in November 1947 by the UN.¹⁹⁹ The Commission started with a limited number of members and through the years, the members have increased. It has contributed different articles pertaining to immunity with regard to clarifying and establishing uniform understanding and application of international law. The Commission contributed significantly towards the formulation of the Nuremberg Principles which was later affirmed by the resolution.²⁰⁰

The argument that international law has reached a stage where immunity should no longer be a hurdle for crimes under international law is persisting.²⁰¹ However, some argue against this assertion by mentioning the political and practical difficulties in permitting domestic courts to prosecute officials of foreign states.²⁰² The controversial issue of allowing domestic courts with jurisdiction over foreign leaders has led to the International Law Commission to include it in its work programme.²⁰³

¹⁹⁸ *Arrest Warrant Case* (2002) Para 58.

¹⁹⁹ Statute of International Law Commission, UN General Assembly Resolution 174(11) (1947) as amended by resolutions 485 (V) of 1950, 984 (X) of 1955, 985 (X) of 1955 and 36/39 of 1981.

²⁰⁰ UN General Assembly Resolution Affirmation of the Principles of International Law recognised by the Charter of the Nürnberg Tribunal, A/RES/95(1) (1946).

²⁰¹ Foakes J *The position of Head of State and Senior Officials in International Law* (2014) 3.

²⁰² Foakes J (2014) 3.

²⁰³ Report of ILC on the work of its 63rd Session, UN/ Doc A/C/6/66/L 26 (2011) Para 8.

The International Law Commission adopted three draft articles that identify the head of state, head of government and foreign minister enjoy immunity before foreign courts for both private and public acts and the immunity ceases once the officials leave office.²⁰⁴ Besides the provisionally adopted three articles, the Commission awaits subsequent reports that explore possible exceptions to immunity and procedural matters. The only recognised exception so far is the waiver of immunity by the government of the officials.²⁰⁵ Thus, whether other exceptions could emerge, according to the ILC is not yet clear. However, ILC has clarified on one hand avoiding responsibility for crimes under international law are unacceptable, on the other hand immunity is necessary since the peaceful international relations of states is crucial to avoid domestic court allegations driven not by justice, but politics.²⁰⁶



Although the Commission held in its sixty-sixth and sixty-seventh sessions in 2014 and 2015 respectively, the focus area of both sessions was, namely, what are the elements of immunity *ratione matriae* and what amounts to ‘official acts’. Therefore, the issue of personal immunity was not further addressed.

3.7 Limitation to Personal Immunity under Treaty Obligations

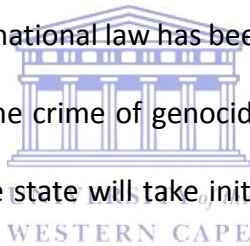
In overcoming the atrocities of the Second World War, the international community was very vigilant to protect individuals from atrocities perpetrated by the state. This resulted in the promulgation of different human rights conventions. The obligation to extradite or prosecute is laid down in different conventions.

²⁰⁴ Report of International Law Commission on the work on it’s sixth fifth session UNGAOR, 68th session Supp No.10 (2013) Para 49.

²⁰⁵ *Arrest Warrant Case* (2002) Para 61.

²⁰⁶ Murphy SD ‘The Immunity *Ratione Personae* of foreign government officials and other topics the sixty-fifth session of the international law Commission’ 108 *American Journal of International Law* (2014) 12.

The Convention on Prevention and Punishment of the Crime of Genocide²⁰⁷(hereinafter: Genocide Convention) was adopted in the wake of the Nuremberg Trial to establish individual responsibility for the crimes of genocide.²⁰⁸ It provides that persons committing genocide should be held responsible whether there are constitutionally responsible rulers, public officials or private persons.²⁰⁹ According to Article 4 of the Convention, responsible rulers and public officials cannot raise immunity as a defence to shield them from criminal responsibility. Individual criminal responsibility under the Convention has been established placing duties on the state to prosecute or extradite.²¹⁰ Customary international law recognises that the state in which the crime under international law has been committed has a duty to prosecute under treaty law.²¹¹ Nonetheless, the crime of genocide is committed with the collusion of the state itself so it is less likely the state will take initiative to try the matter in a national court. Therefore, there has been an evolution of the principle of universal jurisdiction which allows states to exercise jurisdiction over the crime.



Beside the Genocide Convention, the Convention against Torture and other Cruel Inhuman Degrading Treatment (hereinafter: Torture Convention)²¹² also imposes an obligation on states parties to undertake judicial measures to prevent torture. The Convention also clearly stipulates that superior orders or public authority cannot be invoked as a defence for the act of torture.²¹³ The Convention also provides an obligation on a state party to prosecute or

²⁰⁷ UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (1948) (hereinafter Genocide Convention).

²⁰⁸ Gaeta P 'Genocide' in Schabas W and Bernaz N (eds) *Routledge Handbook of International Criminal Law* (2013) 109

²⁰⁹ Article 4 of Genocide Convention.

²¹⁰ Bassiouni MC *International Criminal Law, Sources, Subjects and Contents Volume 1* 3ed (2008) 42.

²¹¹ Werle G and Jessenbger F (2014.) 14.

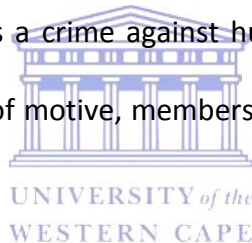
²¹² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

²¹³ Article 2(1)-3 of Torture Convention.

extradite suspected offenders, including non-nationals who are in the territory of the state party.²¹⁴

The Convention for Protection of All Forms of Enforced Disappearance also provides that deprivation of liberty of individual by a state official as enforced disappearance, at the same time, Article 9 of the Convention also provides that a state party to take measures needs to have a jurisdiction over the responsible individual. The state party must try the suspect in its territory or extradite the individual to another state for a trial.²¹⁵

In addition, the International Convention on the Suppression and Punishment of the Crime of Apartheid²¹⁶ describes apartheid as a crime against humanity.²¹⁷ It provides for individual criminal responsibility irrespective of motive, membership of the organisation and status as representative of the state.²¹⁸



As it has been noted, all the above international treaties, clearly provide individual criminal responsibility for state officials. Therefore states parties are either competent or obliged to prosecute or extradite responsible individuals regardless of them being state officials.²¹⁹ However, the ICJ in the *Arrest Warrant Case*, has clearly asserted that various conventions impose an obligation on states to either extradite or prosecute such an extension of the criminal jurisdiction of states and should not affect immunity of state officials under

²¹⁴ Article 5 of the Torture Convention.

²¹⁵ Article 9(1) of the Torture Convention.

²¹⁶ UN General Assembly Resolution 3068 (XXVIII) (1973).

²¹⁷ Article 1 of The Convention on the Suppression and Punishment of the Crime of Apartheid.

²¹⁸ Article 3 of the Apartheid Convention.

²¹⁹ Advisory Report (2011) 23.

customary international law.²²⁰ On this basis, the personal immunity of a head of state cannot be affected by foreign jurisdiction as a result of the treaty obligation to prosecute or extradite.



²²⁰ *Arrest Warrant Case* (2002) Para 59.

CHAPTER FOUR

EXPLORING THE EXISTENCE OF CONFLICTING OBLIGATIONS

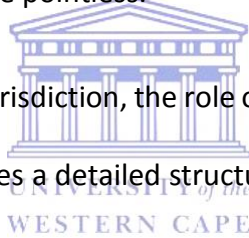
The notion of personal immunity is contained within the Rome Statute and is not to a shield for criminal responsibility. In the same token, the court has indicted sitting senior officials for prosecution; nevertheless, it was unable to bring them before the jurisdiction of the Court. The Court is established by a treaty law and immunity under customary international law is still persisting, achieving a clear understanding of the personal immunity of senior officials and acquiring co-operation of states parties still seems to be challenging.

This Chapter deals with circumstances where non-co-operation of member states is attributed to conflicting obligations of states parties to the Rome Statute and to their obligation under customary international law. The Rome Statute is a treaty law between consenting states. However it has an implication on non-member states when the jurisdiction of the Court is triggered by UNSC Council. Although Al Bashir is not the first sitting head of state to be indicted before the Court since Gadaffi's indictment has become mute as result of his death, this paper will only focus on Al Bashir indictment.



4.1 Indictment of Sitting Head of State of a State Party to the Rome Statute

The primacy of international criminal law is to hold individuals accountable under international law.²²¹ Thus, the ICC has set out the core crimes and has established responsibility for individuals who fall under the jurisdiction of the Court. It is clear that states parties to the Rome Statute have agreed that the immunity enjoyed by their heads of the states will not be a bar for prosecution before the ICC. Therefore, a state party may abolish the immunity of another state party in order to assist the Court. Article 27 abrogates not only international immunity but also national immunity of the official, which is mainly significant to the process of arrest and surrender, since if the state official's national immunity is still intact, the structure of the ICC will be pointless.²²²



In order for the ICC to establish its jurisdiction, the role of states cannot be undermined.²²³ As a result, the Rome Statute establishes a detailed structure under part 9 of the Statute which sets out procedures for the Court to request the arrest and surrender of indicted individuals. This part of the Statute sets out obligations on member states to cooperate with the ICC. Article 86 of the Rome Statute clearly identifies the obligations of member states to cooperate fully in the investigation as well as prosecution. Moreover, the obligation to cooperate fully is further clarified under Article 89 that it incorporates arrest and surrender of individuals for prosecution.

²²¹ Akande D (2012) 299.

²²² Daqum L (2012) 62.

²²³ Akande D (2012) 299.

4.2 Indictment of Sitting Head of State of a Non- State Party to the Rome Statute

In light of Article 27 of Rome Statute, official status is irrelevant before the Court. Although the Statute renounces immunity of sitting head of states of states parties, this provision does not extend to non-states parties unless the state consented to the jurisdiction of the Court.²²⁴

As already mentioned, the ICC is a treaty based court where member states have willingly accepted and ratified the principles of the Statute. Thus, non-member states have not ratified the treaty, which implies that they have not renounced their official right to immunity. This is a principle that can easily be inferred from the Vienna Convention Article 34 which provides a treaty cannot be extended to a third state.

Nevertheless, one of the triggering mechanisms for the jurisdiction of the Court is a UNSC referral under Chapter VII of the UN Charter. Thus, a sitting head of state of a non-member state can be indicted before the Court. Under customary international law, a head of state is entitled to immunity under a domestic court if not under an international court. As discussed in the second chapter, an incumbent head of state is protected from any criminal jurisdiction including arrest under a foreign domestic court.²²⁵ This right has also been confirmed as an absolute right even when the indictment is for crimes under international law in light of the *Arrest Warrant Case*.²²⁶ Thus the issue to ponder upon is whether multilateral treaties can side-step personal immunity of a non-state party established under customary International law. Different scholars forward different lines of argument. Some asserts a treaty based International Tribunal is unable to renounce immunity that customary international law

²²⁴ Rastan R 'Jurisdiction' in Stahn C *The Law and Practice of International Criminal Court* (2015) 143.

²²⁵ *Arrest Warrant Case* (2002) Para 22, 54.

²²⁶ *Arrest Warrant Case* (2002) Para 22, 54.

entitles to the state official provided that the state is not a party to the Rome Statute.²²⁷ However, customary law is the default rule, and states are entitled to contract with each other out of the customary law according to their agreement.²²⁸ Consequently, states have come together to limit immunity of their officials pursuant to the Rome Statute. The following question arises: what is the impact of the Statute on a non-state party when the UNSC is involved in the referral? In order to answer this question, first we have to undertake a discussion on the UNSC referral of the Darfur situation and its impact on head of state immunity of a non-state party to the Rome Statute.

4.2.1 UNSC Referral of the Darfur Situation

The human rights violations in Darfur by the government engendered in the UNSC determining the situation as a threat to international peace and security.²²⁹ Consequently, the UNSC laid down an obligation on the state of Sudan to cease the violations and bring the responsible individuals to justice.²³⁰ The Council noted that a failure to take measures by Sudan could result in resort to military or other measures according to Article 41 of the Charter.²³¹ Subsequently Sudan's failure to take measures to stop the atrocities led to the UNSC Resolution 1564,²³² which established an inquiry committee to investigate the human rights violations and also to determine if acts of genocide occurred in Darfur.²³³ The

²²⁷ Blommestijn M and Ryngaert C 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010) available at http://www.zis-online.com/dat/artikel/2010_6_461.pdf (accessed on October 18, 2016).

²²⁸ Lepard BD *Customary international law: a new theory with practical applications* (2010) 240.

²²⁹ Article 39 of UN Charter.

²³⁰ UNSC/RES 1556 (2004).

²³¹ UNSC/RES 1556 (2004) Para 6.

²³² UNSC/RES 1564 (2004).

²³³ UNSC/RES 1564 (2004) Para 12.

Commission's Report²³⁴ affirmed the alleged violations and provided recommendations for the case to be referred to the ICC.²³⁵ The UNSC passed a resolution triggering the jurisdiction of ICC.²³⁶ The involvement of the UNSC clearly shows that it is exercising its power under Article 41 of UN Charter to maintain peace and security by employing measures other than the use of force.²³⁷ This initiated the public prosecutor's investigation of the situation of Darfur in 2005.²³⁸ This was followed by the issuance of an arrest warrant by the Pre-trial Chamber (hereinafter PTC) of the ICC against the sitting head of state of Sudan.

4.2.1.1 PTC's Decision to Issue an Arrest Warrant

The PTC, in its decision against the sitting head of state of Sudan, Al-Bashir, clarified that the immunity enjoyed as a non-state party to the Rome Statute has no implication in the Court's Jurisdiction.²³⁹ The Chamber provided four reasons for its decision. The first, PTC affirmed that the UNSC referring the Darfur situation to the Court pursuant to Article 13(b) has also accepted that the investigation into the situation, as well as the prosecution arising from the investigation, will take place in accordance with the statutory framework of the Rome Statute.²⁴⁰ Second, the Chamber provided that the preamble of the Rome Statute as another ground for its decision which states the need to end impunity by bringing responsible individuals for crimes under international law before the jurisdiction of the Court.²⁴¹ Third,

²³⁴ The Report of International Commission of Inquiry on Darfur to the UN Secretary General Pursuant to Security Council Resolution 1564 (2004) available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (accessed 10 October 2016).

²³⁵ The Report of International Commission of Inquiry on Darfur (2004) 5, 6.

²³⁶ UNSC/RES/ 1593/2005.

²³⁷ Conforti B *The Law and Practice of United Nation* 2ed (2000) 206.

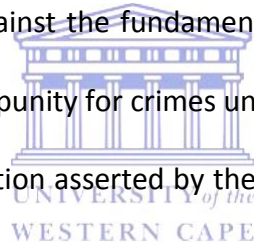
²³⁸ ICC Press Release (2005) ICC-OTP-0606-104.

²³⁹ *Prosecutor v Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-3 Pre-trial Chamber (2009).

²⁴⁰ *Pre-trial Chamber Decision* (2009) Para 41.

²⁴¹ *Pre-trial Chamber Decision* (2009) Para 42,43.

reasoning of the Chamber, provides in order to achieve the goal of the Statute, the Chamber asserts Article 27 as an essential principle that needs to be accorded.²⁴² Finally, the Chamber stressed the predominance of rules of the Statute over other sources of international law.²⁴³ However, the reasoning of the Chamber has been criticised by a number of legal scholars. The Chamber has justified the removal of sitting heads of state immunity of non-state parties by resorting to the preamble of the Statute which is not a very convincing reasoning as the preamble is not binding even to member states let alone to non-state parties.²⁴⁴ However, this reasoning of the Chamber can be viewed as indication that claiming immunity or entitling immunity for Al Bashir as going against the fundamental purpose of the Statute.²⁴⁵ As the purpose of the Statute is to fight impunity for crimes under international law as described by the Chamber. The other rationalisation asserted by the Chamber confirmed Article 27 as an essential principle for the jurisdiction of the Court, however, the Chamber fails to address how this provision applies to non-state parties to the Rome Statute.²⁴⁶ The Chamber also stated the primacy of the Statute from other sources of international law, which is confusing since the Statute itself expressly provides the applicability of other sources of international law and also makes reference to immunity under international law in Article 98.²⁴⁷ However, the explanation of the Chamber which explains for the UNSC referral of Sudan's situation to



²⁴² *Pre-trial Chamber Decision* (2009) Para 42,43

²⁴³ *Pre-trial Chamber Decision* (2009) Para 44.

²⁴⁴ William S and Sherif L 'The Arrest Warrant for President Al Bashir: Immunities of Incumbent Heads of State and International Criminal Court (2009) 14 *Journal of Conflict and Security Law* 82.

²⁴⁵ William S and Sherif L (2009) 82.

²⁴⁶ William S and Sherif L (2009) 83.

²⁴⁷ William S and Sherif L (2009) 83.

the Court, subjects a state to the provisions of the Rome Statute is more convincing compared to the other reasoning.²⁴⁸

On the basis of the above reasoning, it is clear to see that the Chamber did not lay a strong foundation to substantiate its decision and did not at the same time emphasise the effects of the UNSC referral which will be discussed below

4.2.1.2 The Effect of Security Council Resolution 1593 on Al Bashir's Immunity

The UNSC Resolution 1593 brought about the indictment of an incumbent head of state of a non-state party before the Court. Indicting a sitting head of state before an international tribunal is not unprecedented. As mentioned before, the ICTY issued an arrest warrant for Milosevic while he was an incumbent head of state of the former Yugoslavia and the SCSL also indicted Charles Taylor while he was still office.²⁴⁹ It goes without saying that the referral of the UNSC expects the Court to take up the investigation and prosecution of Al Bahir.²⁵⁰ However, due to the lack of enforcement personnel (in the form of ICC security/police), arrest and surrender can only be affected by state co-operation according to Section 9 of the Rome Statute. This raises the issue of a non-state party's immunity in which Al Bashir claims he is entitled to. Does this situation give rise to a conflicting or competing obligation? In order to address this, the effect of referral has to be addressed.

First, the power of the UNSC referral of a situation of a non-state party emanates from the UNSC's power to maintain global peace and security, as enumerated under Article 39 of UN Charter. Provided a situation arises that threaten the world peace and security, the Council

²⁴⁸ William S and Sherif L (2009) 83

²⁴⁹ Akande D ' The Legal Nature of Security Council Referral to the ICC and its Impact on Al Bashir Immunities' (2009) 7 *Journal of International Criminal Justice* 335.

²⁵⁰ Akande D (2009) 340.

has the mandate to take measures to ensure peace and security and eliminate the threat. Coming to the case at hand, the UNSC council was under the impression that the Darfur situation was a threat to peace and security of the international community. As a result, the Council, in order to maintain stability of the country and avoid further insecurity referred the situation to the ICC. According to Article 25 of UN Charter, UN member states have an obligation under the Charter to accept and carry out the decision of the Council. Thus the extension of the ICC jurisdiction to a non-member state by the UNSC referral has to be accepted by the states as they have an obligation under the UN Charter. In the same token, the jurisdiction of the ICC which encompasses the investigation and prosecution of responsible individuals is going to be undertaken according to the Rome Statute. Consequently, this subjects Sudan to the rules and principles of the Statute and this was confirmed by the UNSC's request to 'cooperate fully'.²⁵¹ The Provision of the Statute which avoids both international and national immunities of incumbent head of states will be applicable to Sudan's President. However, Sudan's obligation to act according to the Rome Statute and cooperate with the ICC is not the result of the extension of the treaty obligation to unconsented third states, rather, the obligation of Sudan ascends from the UNSC resolution and the UN Charter.²⁵²

Sudan's obligation to cooperate can be understood as waiving the immunity of the sitting head of state and surrendering him to ICC. Had Sudan granted waiver of immunity this will allow the states parties to effect the arrest and surrender Al Bashir while he is in their territory. Nonetheless, Sudan did not waive the immunity of its official, but does this then

²⁵¹ UNSC/RES 1589 (2005) Para 2.

²⁵² Akande D (2009) 342.

imply that Al Bashir's immunity is still protected? Because if he is, then it will bring conflicting obligations to states who take measures to effect his arrest and surrender.

4.2.1.3 Does Duty to Co-operate by the States Parties invites Conflicting Obligations?

With regard to state parties to the Rome Statute, their obligation to co-operate with the Court has clearly been provided under Article 86 with an obligation to assist the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. Thus, the obligation to co-operate for the states parties is not the outcome of the resolution rather a ratified duty under the Statute.

However, the issue of the member states duty to co-operate with the arrest and surrender of a sitting head of state of a non-state party has been a very controversial issue. Gaeta argues that a member state to the Rome Statute is not under an obligation to undertake the arrest and surrender of Al Bashir since Sudan has not waived the immunity of Al Bashir, consequently bringing a conflicting obligation which entitles states not to cooperate according to Article 98 of the Rome Statute,²⁵³ which reads:

'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity.'

²⁵³ Gaeta P 'Does President Al Bashir Enjoy Immunity from Arrest? (2009) 7 *Journal of International Criminal Justice* 316.

The provision provides an obligation on the court to obtain the co-operation of the third state by getting waiver of immunity for its officials. Unless the Court acquires the states waiver of immunity of the official, it should not proceed with the request in order to avoid conflicting obligations of states under international law.

The term 'third state' has not been clarified whether it indicates the non-member states or not. In light of the interpretation of the Vienna Convention Law of Treaties, 'third state' indicates to non-member states to a treaty.²⁵⁴ Similarly, Akande also asserts 'third state' under Article 98 represents a non-state party to the Rome Statute, he also explains giving a different meaning to the 'third state' other than non-states parties, it will make Article 27 mute.²⁵⁵ With the same token, states parties to the Rome Statute had willingly renounced their immunity while ratifying the Statute, it will be inconsistent to assume Article 98 can be raised in relation to the member states. Sudan as a non-state party to the Rome Statute falls under the category of a 'third state'. As a result, enjoys immunity under customary international law if we pursue the argument that pursuant to Article 98 Sudan did not waive immunity of Al Bashir, therefore he is still protected or entitled to immunity under customary law. Then he will not be subjected to the arrest and surrender when he travels to other states parties' territory. This argument has been asserted by most African countries for the failure to arrest and surrender Al Bashir whilst in their territory.

However, the situation of Sudan has been referred by the UNSC resolution 1593 which reads;

²⁵⁴ Article 2(1)(h) of Vienna Convention on the Law of Treaties (1969).

²⁵⁵ Akande D 'International Law Immunities and the International Criminal Court' (2004) 98 *African Journal International Law* 423-24.

'The government of Sudan and all other parties to the conflict in Sudan shall co-operate fully with and provide any necessary assistance to the Court and prosecutor to this resolution...'

According to the words of the resolution 'shall co-operate fully' asserts a mandatory obligation. Thus, Sudan is under an obligation to waive the immunity of its head of state to assist the Court according to the resolution. The resolution is the result of Chapter VII of UN Charter, a measure for maintenance of international peace and security. For the purposes of maintaining peace and security, situations which are not within the reach of ICC are referred to the ICC by the UNSC. This avoids setting up Ad-hoc Tribunal under Chapter VII for every peace treating situation.²⁵⁶ Sudan's failure to co-operate according the UNSC resolution amounts as a threat to peace and security.²⁵⁷



The referral of the UNSC gives a non-state party similar status to that of a state party since the referral brings the situation within the framework and principle of the Rome Statute. Moreover, Article 27 will be applied to Sudan preventing immunity to its head of state. In other words, if Sudan's head of state is able to invoke immunity, subjecting Al Bashir to the jurisdiction of the Court will be impossible, since States parties to the Rome Statute will be forced to respect immunity of non-state party which allows them to invoke Article 98 for failure to co-operate in the arrest and surrender. Consequently, this will make the UNSC referral ineffective as a sitting head of state will never be subjected to ICC jurisdiction.

²⁵⁶ Cryer R 'Sudan Resolution 1593 and International Criminal Justice' (2006) 19 *Leiden Journal of International Law* 200-2.

²⁵⁷ Frulli M 'Piercing the Veil of Head of State Immunity: The Taylor Trial and Beyond' in Jalloh CC (ed) *The Sierra Leone Special Court and It's Legacy: The Impact for Africa and International Criminal Law* (2014) 335.

It has been noted, that through the UNSC's referral of the Darfur situation, Sudan has the status of a state party to the Rome Statute. As a result, there is no the so called 'conflicting obligation' that arises for state parties to the Rome Statute while executing the arrest and surrender of Al Bashir. Al Bashir is not entitled to personal immunity as Article 27(2) totally strips such immunity of sitting head of states before domestic courts. Moreover, Article 98 cannot be invoked by a state party for not effecting the arrest and surrender, because Al Bashir's immunity has been renounced. Hence, Sudan is considered as a state party to the Rome Statute as a result of the UNSC resolution 1593. In a similar manner, since Al Bashir is not entitled to immunity of customary international law there is no conflicting obligation for state parties rather just the obligation to cooperate and assist the arrest and surrender of Al Bashir.



Even if, there is no competing obligation which refrains states parties from effecting their obligation, Al Bashir is still at large with no African states taking the initiative to arrest. Thus, despite their obligation to arrest and surrender Al Bashir, states parties of the Rome Statute were unable to effect the international arrest warrant issued against Al Bashir. South Africa is no exception to this. The following section discusses Al Bashir's case before South African domestic courts.

4.2.1.4 The Al Bashir Case before South African Courts

The Sudanese president visited South Africa in June 2015 to attend the 25th African Union Summit in Johannesburg.²⁵⁸ After it was ascertained Al Bashir was going to visit South Africa,

²⁵⁸ Vander VJ 'The Al Bashir Debacle' (2015) 15 *African Human Rights Law Journal* 562.

the PTC of the ICC requested South Africa adhere to its obligation and arrest Al Bashir.²⁵⁹ However, the government's lack of action led the South African Litigation Centre (hereinafter SALC) suit against Minister of Justice and nine other state officials in the Gauteng High Court in Pretoria. SALC requested an interim order to prevent Al Bashir from leaving the country before a decision was given by the Court, despite the interim order Al Bashir left the country before the judgment was rendered by the court.²⁶⁰

The government argued that as a host of the AU General Assembly it was obliged to respect Al Bashir's immunity while he was in South Africa attending the meeting and also relied on the Diplomatic Immunities and Privilege Act 37 (hereinafter DIPA) of 2001 which embodies hosting argument.²⁶¹ However, the High Court rejected the above argument explaining the Articles of Hosting Agreement only apply to officials of AU delegates and representatives of international organisations and not to state representatives.²⁶² The SALC asserted that the ICC Statute has clearly renounced immunity for incumbent head of states and similarly the provisions have been domesticated in the South African Implementation Act²⁶³ which precludes anyone from raising the defence of immunity for crimes under international law.²⁶⁴

The Court also rejected the government's claim of a competing obligation in the form of the AU decision not to co-operate, and the Court provided that South Africa's obligation under

²⁵⁹ *Prosecutor v Omar Hassen Ahmed Al-Bashir* Decision Following the Prosecutor's Request for an Order Further Clarifying that The Republic of South Africa is under Obligation to Immediately Arrest and Surrender Omar Al Bashir Case ICC-02/05-01/09-242 (2015).

²⁶⁰ *The South African Litigation Centre (SALC) v The Minister of Justice and Constitutional Development and others* Case 27740 (2016) Para 97.

²⁶¹ *SALC v Minister of Justice* (2015) Para 10-13.

²⁶² *SALC v Minister of Justice* (2015) Para 41.

²⁶³ Implementation of the Rome Statute of the International Criminal Court Regulations GN R1086 in GG 23761 (2002).

²⁶⁴ *SALC v Minister of Justice* (2015) Para 51.

the Rome Statute which has been domesticated in the Implementation Act also renounces immunity. Thus, the provisions of the Implementation Act trumps the AU decision not to cooperate.²⁶⁵

Nonetheless, the government appealed to the Supreme Court relying on an entirely different argument than that was raised in the High Court. The government argued that Al Bashir as a sitting head of state of Sudan enjoyed immunity under customary international law and under DIPA section 4(1)(a)²⁶⁶. However, the SALC raised a counter argument claiming an exception exists under customary international law when crimes under international law have been committed and alleged that Al Bashir does not enjoy immunity.

In addition, the SALC also argued Implementation Act to the Rome Statute has clearly provided there would be no immunity for foreign head of state indicted before the ICC for crimes under international law.²⁶⁷ The Supreme Court, while rendering judgment, explained that customary international law recognises head of state of immunity, and that there is no exception yet developed to assert otherwise.²⁶⁸ However, the removal of head of state immunity has clearly been specified under the Implementation Act section 10(9). Accordingly, the Court confirmed the decision of the High Court and dismissed the appeal asserting that South Africa as state party to Rome Statute had an obligation to arrest Al Bashir.²⁶⁹

²⁶⁵ *SALC v Minister of Justice* (2015) Para 33.

²⁶⁶ *SALC v Minister of Justice* (2015) Para 49. Article 4(1)(a) of DIPA provides a head of state is immune from civil and criminal jurisdiction of South African Court and enjoys privilege accorded to according to customary international law.

²⁶⁷ *SALC v Minister of Justice* (2015) Para 9.

²⁶⁸ *SALC v Minister of Justice* (2015) Para 69- 84.

²⁶⁹ *SALC v Minister of Justice* (2015) Para 113.

4.2.1.5 Does Duty Co-operation by the non-States Parties Invites Conflicting Obligations?

The duty to co-operate with judicial orders of International Courts emanate from the constitutive instrument of the tribunal.²⁷⁰ When an obligation emanates from a treaty or agreement, failure to do so results in a breach of the contractual obligation. The same applies to a non-state party to the agreement; in the absence of consent no obligation to cooperate can arise.

In principle, non-state parties to the Rome Statute are not obliged to cooperate with the ICC. Though, pursuant to Article 87(5)(a) of the Rome Statute, the Court can invite non-state parties to provide assistance on the basis of ad-hoc agreements with states. Thus, if a state who has entered into an agreement, fails to cooperate according to the agreement, the ICC may inform the Assembly of the Parties or the UNSC depending on the referral.²⁷¹ Pursuant to the above provision, unless the non-state party is willing to provide assistance by entering into an ad-hoc agreement there is no mandatory obligation for non-states parties. Nevertheless, the obligation for non-state parties to co-operate with the Court where the situation has been referred by the UNSC, the co-operation should proceed under international law and not the Rome Statute. Coming to the case at hand, the Darfur situation was referred by the UNSC as a measure to restore international peace and security. Hence, non-states parties' obligation to co-operate with the request of the ICC emanates from the UN Charter and not from the Rome Statute. As a member of the of the UN, non-members states to the ICC Statute have an obligation to obey the decision of SC pursuant to Article 25



²⁷⁰ Swart B International Co-operation and Judicial Assistance: General Problems in Cassesse A *et al* (eds) *The Rome Statute of International Criminal Court: A Commentary* (2002) 1590.

²⁷¹ Article 87(5)(b) of Rome Statute.

of the UN charter.²⁷² UNSC resolution 1593 acknowledges that non-member states to the Rome Statute do not have mandatory obligation to cooperate with the ICC under the Rome Statute. Nonetheless, the UNSC 'urges all states and concerned regional and other international organisation to co-operate fully'.²⁷³

Some scholars argue that according to the use of hortatory language 'urges', the resolution does not create an obligation to co-operate as the word does not generate a mandatory obligation, but rather gives a recommendation or encouragement to take measures.²⁷⁴ That being said, the use of hortatory language by the resolution should not be construed as there is no obligation. In *South West Africa Advisory Opinion*, the ICJ contended that before conclusion is drawn on the UNSC resolution whether it is mandatory or hortatory obligation, the resolution should be analysed in light of Article 25 of UN Charter.²⁷⁵ In addition, the Court also asserted that when the UNSC adopts a decision under Article 25 of the Charter, all the UN members states must act accordingly, even those who voted against the decision.²⁷⁶ Pertaining to the above argument, all UN member states, even those who are not states parties to Rome Statute, have an obligation to deliver on the arrest and surrender of Al Bashir. However, non-states parties' relation with state in question, which is Sudan, is governed by the principle of customary international law. Under customary international law, sitting head of state enjoys immunity, a principle that states have to respect. Thus, on the one hand non-states parties to the Rome Statute have an obligation to arrest and handover Al Bashir as a result of the UNSC resolution and UN Charter and on the other hand, non-states parties also

²⁷² Zhu W 'On Co-operation by States not Party to the International Criminal Court' (2006) 88 *International Review of the Red Cross* 91.

²⁷³ UNSC/RES 1593(2003) Para 2.

²⁷⁴ Akande D (2009) 343-44.

²⁷⁵ *South West Africa Cases: Advisory Opinion Concerning The International Status* I.C.J (1940) Para 114.

²⁷⁶ *Advisory Opinion* (1940) Para 116.

have an obligation to respect the immunity of another non-state party according to the principle of customary international law. Clearly, a conflicting obligation arises for non-states parties to the Statute. Thus, as a result of the apparent conflicting obligation which obligation of non- state parties shall prevail? Consequently, Article 103 of UN Charter comes into play. Article 103 provides that:

'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

There are two sides of the argument pertaining to Article 103. Some assert there is a conflicting obligation for non-state parties and suggest the application of Article 103 of UN Charter, which gives primacy to the obligation that arises from the UNSC resolution.²⁷⁷ In contrast, others argue that Article 103 does not apply to this situation as it does not apply in the case of conflicting obligations emanating from UN resolutions and customary international law. In fact, scholars substantiate the argument by relying on the wording of Article 103 which provides it is only an obligation that arises from an international agreement conflicts with an obligation of the resolution under the UN Charter that an obligation emanating from the Charter shall prevail.²⁷⁸ In view of that, the argument asserts international agreements encompass treaties or conventional laws and not customary international law.²⁷⁹ Nonetheless, the UN Charter is a constitutional document, thus any obligation that emanates from the charter has to get precedence from any other obligation

²⁷⁷ Lijoua R 'The Scope of Supremacy Clause of UN Charter' (2008) 5 *International and Comparative Law Quarterly* 583.

²⁷⁸ Levitt J 'The Peace and Security Council of The African Union and The UNSC in Blokker N and Schrijver N *The Security Council and Use of Force: Theory and Reality: The Need to for Change* (2005) 234.

²⁷⁹ Levitt J (2005) 234.

including duties emanating from customary international law.²⁸⁰ Similarly, in the *South West African cases*, Judge Jessup asserted that Article 103 of UN Charter should not be interpreted to exclude any treaty, convention or other international engagement or undertaking.²⁸¹

Based on the above assertion, Article 103 of Charter can be applicable to non-states parties and their obligation under the resolution prevails over the obligation to respect the immunity of sitting head of state under customary international law.

Thus, non-states parties have an obligation to live up to the request of the resolution not because of the Rome Statute, but as result of UN Charter and as being a member of UN Charter, states have to cooperate with the decision of the UNSC as it attributes to maintaining peace and security of the international community.



4.3 Emerging exception to Personal Immunity under International Law?

Under the principle of international law, states can alter their rights under customary international law by entering into agreement to the contrary. In other words, states are entitled to modify the existing custom by entering into a multilateral treaty. However is this enough to establish customary international law? Customary international law is a result of state practice and *opinio juris*.

In the PTC Decision of the Republic of Malawi's failure to comply with the co-operation request of the ICC to arrest and surrender Al Bashir, the Chamber held that customary

²⁸⁰ International Law' Report of the Study Group on the Fragmentation of International Law : Difficulties arising from the Diversification and Expansion of International Law Commission UN.Doc A/CN4/L682 (2006) 168-173.

²⁸¹ *South West Africa Preliminary Objection* ICJ Report 319, Separate Opinion of Judge Jessup (1962) 407.

international law creates an exception to the head of state immunity before international courts.²⁸² The Chamber stated immunity of head of state has been rejected since the First World War and also asserted there is an increase of international prosecutions of head of states by international courts.²⁸³ It affirms that the prosecution of a head of state by international courts is an accepted practice.²⁸⁴ The Chamber supports its argument by pointing out that the ICC Statute has been ratified by 120 states, which in effect means that these states parties accept the abolishment of immunity under international law for crimes under international law.²⁸⁵

However, the reasoning of the Chamber has been contested, since the rationale that the prosecution of sitting head of states is accepted practice is a far-fetched argument, because only Muammar Gaddafi and Al Bashir have been indicted by the ICC while in capacity of sitting head of state.²⁸⁶ However, Gaddafi died and did not appear before the Court. Al Bashir remains the sole incumbent head of state to be indicted before the Court.²⁸⁷ Although Charles Taylor and Milosevic were indicted while they were sitting heads of state before SCSL and ICTY respectively. The Chamber also points out the number of states parties who have ratified the Rome Statute and renounced the immunity of sitting heads of states for crimes under international law. However, this can only address the issue of personal immunity before International Courts and not before domestic jurisdictions. In addition, it is not enough to

²⁸² *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (2011) Para 43.

²⁸³ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (2011) Para 38.

²⁸⁴ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (2011) Para 39.

²⁸⁵ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (2011) Para 40.

²⁸⁶ Daqum L (2012) 65.

²⁸⁷ Daqum L (2012) 65.

evidence for the establishment of an exception for customary international law before foreign domestic courts.²⁸⁸

The principle that individual official capacity does not protect the individual from criminal responsibility, does not mean it removes the immunity that the official may enjoy.²⁸⁹ The violation of human rights is the reason for the shift from state responsibility to subjecting individuals to international law. However, Van Alebeek argues the development of international human rights does not affect international law immunity principles, while she also emphasises that there is no clear state of law argument in favor of the exception developed for personal immunity.²⁹⁰ Cryer *et al* also assert that functional immunity has been redefined with regard to crimes under international law; however, state practice and jurisprudence have upheld personal immunity in domestic jurisprudence despite the nature of the crime.²⁹¹ As a result, without state practice and *opinio juris* it is hard to conclude that non-immunity has emerged as an exception to the rule of immunity under customary international practice before domestic jurisdiction.²⁹² The only situation where immunity has become irrelevant is according to the ICJ *Arrest Warrant Case*, when the state official is indicted before international court such as ICC.

4.4 Malabo Protocol and ICC

The clear contradiction of Article 46*abis* compared with the provisions contained in the Rome Statute has drawn considerable criticism as immunity provided in the Protocol retrogrades

²⁸⁸ Akande D (2004) 433.

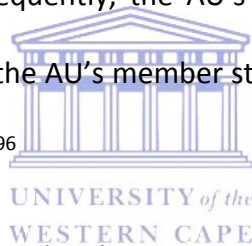
²⁸⁹ Van Alebeek (2008) 416.

²⁹⁰ Van Alebeek (2008) 416.

²⁹¹ Cryer *et al* (2010) 545.

²⁹² Daqum L (2012) 73. See also, Wuerth I 'Pinochet Legacy Reassessed' (2012) 106 *American Journal of International Law* 731-768.

the fight against immunity. The immunity provision has also received criticism for being unclear to which officials it applies. The inclusion of the number of crimes which most likely are to be committed by sitting heads of state, for instance aggression, unconstitutional change of government, which at the same time providing them a shield from prosecution seems inconsistent.²⁹³ Article 46*abis* is not only inconsistent with the Rome Statute, but it is also at odds with the AU's Constitutive Act.²⁹⁴ The AU Constitutive Act Article 4(h) provides a mandate for the AU to intervene pursuant to the decision of the Assembly for crimes against humanity and war crimes.²⁹⁵ Subsequently, the AU's report on universal jurisdiction has indicated that Article 4(h) provides the AU's member states to practice universal jurisdiction for crimes under international law.²⁹⁶



This is a recognition of the AU that certain crimes are serious to Africa and to the international community, so those responsible for the acts should not go unpunished.²⁹⁷ With regard to the Rome Statute, Article 46*abis* also creates confusion and further contradiction for the few states that domesticated the Rome Statute.²⁹⁸ Incongruously, the inclusion of immunity by the Protocol may actually assert the importance of the ICC, by making it impossible to prosecute the African leaders for serious human rights violations in the African Court, AU, strengthen the need for ICC. ²⁹⁹It is more likely the argument that accountability is not

²⁹³ Du Plessis M' Shambolic, Shameful and System Implication of the AU's Immunity for African Leaders (2014) available at <https://www.files.ethz.ch/isn/185934/Paper278.pdf> (accessed on October 15 2016).

²⁹⁴ Du Plessis M (2014).

²⁹⁵ Constitutive Act of African Union (2001).

²⁹⁶ Report of Model Law Office of the Legal Counsel of the African Union (2012) Para 40.

²⁹⁷ Preamble of African Union (draft) Model National Law on Universal Jurisdiction on International Crime (2012).

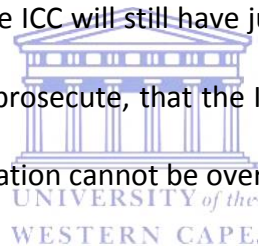
²⁹⁸ Eight states have domesticated the Rome Statute: Kenya, Mauritius, Senegal, Burkina Faso, Uganda, Comoros, South Africa and Central Africa Republic.

²⁹⁹ Tsumga A and Jordash W The day AU Leaders Justified the Existence of ICC (2014) available at <http://ilawyerblog.com/day-au-leaders-justified-existence-icc/> (accessed on October 10 2016).

removed, but rather delayed and African leaders can be brought to justice when they are no longer in office. However, it cannot be ignored when such a provision produces inducement for the official in power and subsequently avoids criminal responsibility and the victims have to wait a long time to acquire justice, as 'justice delayed is justice denied'.³⁰⁰

Unfortunately, at the time of writing, Burundi and South Africa have decided to withdraw from the Rome Statute. This decision can likely bring a chain reaction from other African states. In particular, Burundi's decision to leave seems to be a reaction to the commenced investigation by ICC prosecutors. Be that as it may, before Burundi's withdrawal is recognised, there will be a one year grace period in which the Court will still have jurisdiction over Burundi.

On this basis, one can argue that the ICC will still have jurisdiction, since it is when domestic courts are unable and unwilling to prosecute, that the ICC becomes effective. However, the Protocol's impact on states co-operation cannot be overlooked.



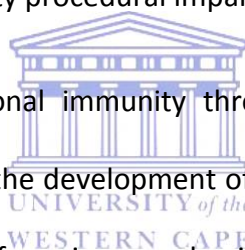
³⁰⁰ Du Plessis M (2014) 8.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Immunity is an international law principle which protects high ranking government officials from judicial action. International immunity can be categorised into functional immunity and personal immunity. Functional immunity protects all governmental officials from being held accountable for the decisions they undertake while they are state representatives. The principle of personal immunity safeguards the head of state, head of government and foreign ministers from any judicial action while still in office. Functional immunity is a substantive impediment while personal immunity procedural impairment.



Importantly, the concept of personal immunity through time has achieved customary international law status. However, the development of international criminal law which led to holding individuals responsible for crimes under international law, has brought some progress to international criminal law. The need to fight impunity for heinous atrocities of the world has initiated the irrelevance of personal immunity. Accordingly, jurisprudence of international tribunals has rejected the principle of personal immunity of incumbent head of states from being used as a safeguard from criminal prosecution. Following this precedent, the Rome Statute also provided a clear stipulation that personal immunity of state officials cannot be a bar to prosecution. States parties of the Statute have willingly accepted the removal of immunity for their officials, and as a result, have to act accordingly when the ICC indicts their officials.

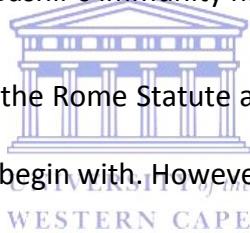
The UNSC's referral could trigger the jurisdiction of the ICC which may lead to the indictment of non-states parties head of states before the court as illustrated by the case against Al Bashir. As the ICC has no police force the Court is dependent on the co-operation of states to prosecute indicted individuals and to bring them to justice. However, securing the co-operation of member states and non-members has been difficult for ICC, if not impossible. The controversy in relation to personal immunity of head of states before international tribunals and before domestic courts is still hotly contested matter. As discussed in the third chapter, personal immunity has been abolished before international tribunals and the precedent of the international tribunals and the decision of ICJ in the *Arrest Warrant Case* has provided much needed clarity on the matter. Nonetheless, the status of personal immunity is still persisting before foreign domestic courts.



The indictment of Al Bashir has been contested as Sudan is not a member state of the Rome Statute, however, pertaining to the UNSC referral, the Darfur situation has been referred to the Court which led to the arrest warrant against Al Bashir. According to Article 39, the UNSC is mandated to take measures which encompass military or otherwise to maintain the peace and security of the world. Such measures of the UNSC bring non states parties like Sudan before the jurisdiction of the Court. The focus of the research was to explore if states parties face conflicting obligations if they decided to arrest and surrender Al Bashir. Although the concept of personal immunity is void before international tribunals, it is still confirmed to exist before foreign domestic courts. In order to bring Al Bashir before the jurisdiction of ICC, states parties have to arrest him and order him before their domestic courts.

According to the UNSC referral, the jurisdiction of ICC can be extended to non-state parties to the Rome Statute. As a result of this non-state party's immunity will also be affected.

However, some scholars raise the Vienna Convention and argue that a treaty based court cannot create an obligation on a non-state party without its consent. Sudan is not member state of the Rome Statute, nonetheless, it is a member of the UN Charter. The UNSC employing its mandate to maintain peace and security has referred the Darfur situation to the ICC. As a result, the resolution has laid an obligation on Sudan to fully cooperate and assist the jurisdiction of the court. The UNSC referral gives non-state parties a similar status to that of state party. Thus, if Sudan acquires the same status as that of a state party, Al Bashir no longer enjoys immunity and as a result Article 98 of Rome Statute cannot be claimed since personal immunity has already been renounced. Consequently, a state party to the Rome Statute cannot invoke the so called conflicting obligation for failure to co-operate with arrest and surrender of Al Bashir, since Al Bashir's immunity has already been renounced.



As a principle, non-states parties to the Rome Statute are not obliged to cooperate with the ICC as they are not states parties to begin with. However, Al Bashir's indictment is a result of a UNSC referral to restore international peace. Accordingly, the obligation to cooperate is a result of the UN Charter and not of the Rome Statute. On the one hand, pursuant to Article 25 of UN Charter, all member states have an obligation to obey the decision of the UNSC which includes non-states parties to the Rome Statute. On the other hand, a non-state party to the Rome Statute also has an obligation to respect the immunity of head of states before their domestic jurisdiction. In this case, states are in between competing obligations. In such cases Article 103 of UN Charter provides that the Charter obligations prevail over other international obligations which include customary law according to the *South West Africa Case* before the ICJ.

In Conclusion, both states parties and non-state parties to the Rome Statute have an obligation to assist the ICC in the arrest and surrender of Al Bashir. Despite this, African states have refused to co-operate with the ICC, and has alleged that they have been targeted by the ICC. In addition, if the Malabo Protocol is ratified and enforced, African leaders will be protected by personal immunity which goes against the development of international criminal law and the pursuit against impunity.

5.2 Recommendations

The absence of enforcement mechanisms in the international tribunals and the lack of co-operation of states has led to a delay in the international judicial process. Particularly, the controversy in relation to the status personal immunity before international tribunals and domestic courts has to be clarified. Besides the impact of the UNSC referral in the personal immunity of head of states of non-state parties to the Rome Statute is one of the major issues that need to be explained and asserted by the International Law Commission in order to acquire co-operation of states in the indictment of high-level government officials.

The current stand-off between a number of African states and the ICC seems to trigger a chain of action where African states are threatening and even few are in the process of the withdrawing their membership from the ICC. Thus, in order to maintain functionality of the ICC there needs to be a constructive discussion between African states and the ICC. This perhaps will contribute to tackle negative perceptions against the ICC. The ICC has to reassure African states by investigating and prosecuting atrocities beyond the African continent.

It goes without saying that the criticism of bias against the African continent is mostly raised by threatened political leaders. Therefore, African states have to stop campaigning against the ICC. After all, the ICC can only acquire jurisdiction based on the principle of

complementarity. Thus, it is only when the domestic courts are unwilling and incapable of bringing to justice those accountable for crimes that the ICC takes charge of a case. If African states are committed to respecting human rights and ending the culture of impunity, then the ICC will have a very limited significance over the continent.

Besides, if African states are serious about providing an African solution to an African problem, the undertaken efforts should be appreciated and encouraged. However, establishing a regional court particularly to try fourteen crimes is going to need huge amount of resources. If the Malabo Protocol has to be enforced the relation between ICC and the African Court has to be clearly addressed. The relation should once again be based on the principle of complementarity. In addition, the issue of finance and political independence has to be managed as well. Most importantly, the immunity provision has to be omitted from the Protocol if it is going to have any success of maintaining justice in the African continent.



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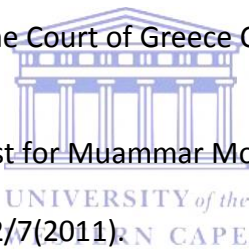
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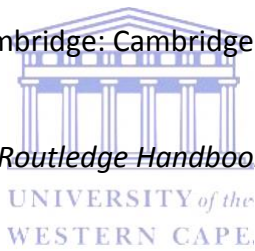
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