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TOPIC: A CRITICAL ANALYSIS OF SOUTH AFRICA'S APPROACH TO THE COMPLEMENTARITY PRINCIPLE UNDER THE ROME STATUTE OF THE ICC

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DECLARATION

I, James Dumisani Lekhuleni hereby declare that this work is original and the result of my own effort. It has never on any previous occasion been presented in part or whole to any Institution or Board for the award of any Degree.

I further declare that all secondary information used has been duly acknowledged in the work. I am responsible for any error whatever the nature, in this work.

Student

Signed…….. Date……...

Supervisor

Signed…….. Date……...

DEDICATION

To the memory of my late mother Dinah Lefetsamang Lekhuleni and my late two sisters, Andronica and Rebecca Lekhuleni.

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My sincere appreciation goes to all who contributed in one way or another in my quest for academic excellence. In particular, my gratitude goes to my wife Lerato and my two sons, Sebusang and Tshegofatso who supported me throughout my studies and in this programme.

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LIST OF ACRONYMS

AZAPO	Azanian Peoples Organisation
AU	African Union
CC	Constitutional Court
CAT	Convention Against Torture
CICC	Coalition for the International Criminal Court
DIPA	Diplomatic Immunities and Privileges Act 37 of 2001
DPCI	Directorate for Priority Crime Investigation
DRC	Democratic Republic of Congo
DSO	Directorate of Special Operations
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILJ	Industrial Law Journal
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
SALC	South African Human Rights Litigation Centre
SAPS	South African Police Services
SCA	Supreme Court of Appeal
SCSL	Special Court of Sierra Leone
TRC	Truth and Reconciliation Commission
UK	United Kingdom
UN	United Nations
USA	United States of America
UNSC	United Nations Security Council

ABSTRACT

The Rome Statute established the International Criminal Court (the ICC) in July 2002 and South Africa was one of the first signatories. South Africa incorporated this statute into its domestic law by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act). The preamble and article 1 of the Rome Statute, provides that the jurisdiction of the ICC is 'complementary' to national courts and that, therefore, States Parties retain the primary responsibility for the repression of international crimes.

This mini thesis is undertaken to critically examine South Africa's approach to the principle of complementarity in the Rome Statute of the ICC. After providing a brief overview of the complementarity principle, the focus of this thesis will shift to the approach of South Africa to this principle. While it is accepted that to date, no case involving international crime has been prosecuted in South Africa, however, a critical assessment will be made of the implementation of the complementarity principle envisaged in the Rome Statute in South Africa in line with the South African Constitution and the Implementation Act. A critical analysis of South African courts' decisions will be employed to determine how the courts, in particular the High Courts, Supreme Court of Appeal and the Constitutional Court dealt with the principle of complementarity especially on how the Rome Statute and the Implementation Act complements each other in relation to the prosecution of international crimes. The thesis will also examine corresponding provisions of the Implementation Act and the Rome Statute more in particular, the relationship between Article 27(2) of the Rome Statute and section 4(2) of the Implementation Act and on how the South African courts, acting under the complementarity principle, are accorded the same power as the ICC to supersede the immunities which usually attach to officials of government.

KEY WORDS: International Criminal Court, Amnesty; Immunity, Complementarity, Implementation Act, International Crimes, Universal Jurisdiction, Extradition

CHAPTER 1

INTRODUCTION AND PROBLEM STATEMENT

1.1 INTRODUCTION

The establishment of the ICC in terms of the Rome Statute of the International Criminal Court (the Rome Statute) was one of the fundamental decisions that was taken by the community of nations in order to punish international crimes and maintain international peace and security in the world. The ICC was established by the Rome Statute to exercise jurisdiction over the most serious crimes of concern to the international community. The Rome Statute sets out the structure and powers of the ICC whose purpose is to put an end to impunity for the perpetrators of gross violations of human rights and thereby contribute to the prevention of such horrible crimes.[1] The focus of the Rome statute is twofold. First, in terms of Article 5, the Rome Statute delineates and proscribes crimes falling within the jurisdiction of this court.[2] Secondly, the Rome Statute sets up a co-operation system for member states to assist the Court in carrying out its mandate. The Rome Statute not only creates a court, it also establishes a system of justice.[3] This is reflected in the preamble in which member States express their resolve to 'guarantee lasting respect for and the enforcement of international justice'.[4]

The jurisdiction of the ICC is treaty-based.[5] It is in principle limited to crimes committed in States parties or by their nationals.[6] However, there are two exceptions to this principle. The first exception is that the Security Council can refer a situation relating

[1] The Preamble to the Rome Statute in particular para 5 states that: 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.'
[2] Article 5 provides as follows: 'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.'
[3] See Carsten Stahn *A Critical Introduction to International Criminal Law* (2019) at 195.
[4] See the last paragraph of the Preamble.
[5] See Carsten Stahn *A Critical Introduction to International Criminal Law* (2019) at 195.
[6] See Article 12 of the Rome Statute.

to a non-member State to the ICC, by virtue of its powers under Chapter VII of the UN Charter.[7] In this case, Stahn notes that the ICC becomes a 'quasi' ad hoc tribunal which does not require consent by the State concerned to exercise jurisdiction.[8] The second exception is that a non-member State may voluntarily accept the exercise of jurisdiction by declaration, without becoming a party to the ICC Statute.[9]

One of the most innovative feature of the Rome Statute is its more systemic turn to the interaction between international and domestic legal systems.[10] Due to its limited resources in terms of human and financial means, the ICC is not in a position to deal with all perpetrators who committed international crimes that fall within its jurisdiction wherever such crimes are committed throughout the world. As a result, at the heart of the Rome Statute is the principle of complementarity, in terms of which the Court will only be able to admit a case before it if the state party concerned is unwilling or unable to prosecute the offender at the national level. This principle has been entrenched in the preamble and in article 1 of the Statute which states that the jurisdiction of the ICC is complementary to national courts and that States Parties retain the primary responsibility for the repression of international crimes.[11] Bassiouni[12] argues that the ICC was 'never intended to be a supra-national legal institution' and that its purpose was to act as some form of juridical 'safety net' which, under the terms of the Rome Statute, would complement national and regional jurisdictions.

[7] Article 13(b) of the Rome Statute provides that 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

[8] See Carsten Stahn *A Critical Introduction to International Criminal Law* (2019) at 195.

[9] See Article 12(3) of the Rome Statute which provides that 'if the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.' See also Carsten Stahn *A Critical Introduction to International Criminal Law* (2019) at 195.

[10] See Carsten Stahn *A Critical Introduction to International Criminal Law* (2019) at 195.

[11] Article 1 of the Rome Statute states that 'An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions'. The paragraph 6 of the Preamble states that 'It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.' Paragraph 10 of the Preamble states that the 'International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.'

[12] See Bassiouni C The ICC - Quo Vadis? *Journal of International Criminal Justice* (2006) 421.

In terms of the Rome Statute, the ICC has been given three powers that have a significant impact in the fight against the culture of impunity that has bedevilled the world in the past. First, the Rome Statute provides that the ICC has the power to disregard immunities of any State officials, including heads of State and heads of governments.[13] It was pursuant to this provision that a warrant of arrest was issued against President Omar Al Bashir of Sudan.[14] It was also pursuant to this provision that a warrant of arrest was issued against the President of Kenya Uhuru Kenyatta.[15] Secondly, in order to fight and uproot the culture of impunity for the violations of human rights, the ICC can prosecute persons despite a domestic law granting them amnesty for the crimes over which it has jurisdiction.[16] Thirdly, the ICC has the power to retry a case which has already been tried in a domestic court of a State, if it is established that the proceedings at the national level were undertaken for the purpose of shielding the person concerned from criminal responsibility or were otherwise conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[17] However, the national courts retain the primary responsibility to prosecute perpetrators of international crimes. The ICC act alongside the national courts.

As will be discussed in detail in chapter two of this work, South Africa is a member state of the Rome Statute. In *Minister of Justice and Constitutional Development and Others v The Southern African Litigation Centre and Others*,[18] the Constitutional Court observed that it is a matter of pride to citizens of this country that South Africa was the first African State to sign the Rome Statute. It did this on 17 July 1998 and ratified it on 27 November 2000. The court also noted that South Africa incorporated this statute

[13] See Article 27 of the Rome Statute.
[14] *The Prosecutor v Omar Hassan Ahmad Al Bashir* Second Decision on the Prosecution's Application for a Warrant of Arrest ICC-02/05-01/09-94 (12 July 2010).
[15] *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11.
[16] Manisuli Ssenyonjo 'Accountability of Non-state Actors in Uganda for war crimes and Human rights violations: Between Amnesty and the International Criminal Court' *Journal of Conflict & Security Law* (2005), Vol. 10 No. 3, 405 at 433 notes that domestic amnesties are strictly a matter for national authorities and do not act as a bar to an investigation by the ICC. Cryer *et al* 'Introduction to International Criminal Law and Procedure' 2 ed (2010) at 566, also argue that domestic amnesty does not bind the ICC or its prosecutor.
[17] See Article 20(3) Rome Statute.
[18] [2016] 2 AII SA 365 (SCA) at para 1.

into the domestic law of South Africa in terms of section 231(4)[19] of the Constitution by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act). The Rome Statute is annexed to the Implementation Act as a matter of information.

1.2 PROBLEM STATEMENT

The Preamble to the Rome Statute affirms the fact that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. The Preamble also acknowledges that the ICC established under this Statute shall be complementary to national criminal jurisdictions. However, in addition to the jurisdiction of national courts to prosecute these crimes, the Rome Statute confers jurisdiction on the ICC to try such crimes and convict and sentence those who commit such crimes.[20] The Statute operates in terms of the principle of complementarity under which international crimes should in the first instance be prosecuted in national courts. The ICC will admit a case if national courts are unable or unwilling to do so. The ICC exercises complementary jurisdiction over the most serious crimes of international concern.[21]

South Africa ratified and incorporated the Rome statute into its domestic laws in terms of section 231(4)[22] of the Constitution by enacting the Implementation Act. Section 3 of the Implementation Act sets out the objectives of the Act. Section 3(d) of the Act endorses the complementarity principle and defines one of its objectives as being 'to enable as far as possible and in accordance with the principle of complementarity as referred to in article 1 of the Statute, the National Prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond

[19] S 231(4) provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
[20] See Articles 5 and 76 of the Statute.
[21] *National Commissioner of Police v South African Human Rights Litigation Centre & another* 2015 (1) SA 315 (CC) para 30.
[22] S 231(4) provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament.

the borders of the Republic in certain circumstance'. By granting South African court's jurisdiction over a person who commits a crime outside the Republic and that person is later found on South African territory without regard to that person's nationality or the nationality of the victims, the Implementation Act empowers South African courts with universal jurisdiction over international crime. As it will be seen in chapters three and four of this work, this study will examine the extent to which the international law principle of State sovereignty may or may not limit the ability of South African courts to exercise universal jurisdiction over international crimes committed in foreign States. Put differently, this study will investigate the extent to which the South African Court's jurisdiction may be limited notwithstanding the complementarity principle envisaged in the Preamble and in Article 17 of the Rome Statute.

1.3 SIGNIFICANCE OF STUDY

The author herein intends to make a contribution on the debate on this subject. In turn, this will enable readers in particular South Africans to have a conceptual and theoretical understanding of the principle of complementarity as envisaged in the Rome Statute, the Implementation Act and to appreciate the practical problems around the subject. The author will also contribute to the enhancement and enrichment of academic knowledge on this subject. This study is thus significant as a contribution to the body of knowledge and will contribute in assisting the courts in dealing with the complementarity principle when dealing with international crimes.

1.4 AIMS AND OBJECTIVES

The provision of section 4(3)[23] of the Implementation Act discussed in chapter two of this work empowers the South African courts to exercise jurisdiction over international crimes defined in the Implementation Act if they are committed within the South African

[23] Section 4(3) of the Implementation Act provides: 'In order *to* secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (I) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-
(a) that person is a South African citizen; or
(b) that person is not a South African citizen but is ordinarily resident in the Republic;
(c) that person, after the commission of the crime, is present in the territory of Republic; or
(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.'

territory and also in instances where they are committed outside the boarders of the Republic. In other words, when South Africa acts in terms of the complementarity principle envisaged in the Rome Statute and in the Implementation Act, it can exercise universal jurisdiction over international crimes committed in foreign States. The purpose of this study is therefore to determine the extent to which South African courts are, in the light of the international law principle of State sovereignty, empowered to exercise universal jurisdiction over persons accused of international crimes committed in foreign States. To this end, the study will investigate whether South African courts are empowered to disregard immunities which international law ordinarily grants to officials of foreign States. The thesis will also examine whether South African courts exercising their universal jurisdiction are empowered to prosecute a person who is in the Republic who has committed international crimes outside the republic and has been amnestied in his home country. In such a case, this study will examine whether a South African court can use its universal jurisdiction to try such a person if his territorial State is unwilling to do so.

1.5 RESEARCH QUESTION

The research question in this study will be what does complementarity principle envisaged in the Rome Statute viewed from the South African perspective, practically and theoretically entails? To this end, two questions arise for consideration, namely:

1. Whether South African courts exercising their universal jurisdiction are empowered to disregard immunities which international law ordinarily grants to officials of foreign States, and;
2. Whether South African courts, acting under the complementarity principle of the Rome Statute, are allowed to exercise universal jurisdiction over international crimes which were committed and have been the subject of amnesty in a foreign State.[24]

[24] This question is very much relevant especially when one considers paragraph 8 of the Preamble of the Rome Statute which states that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.

1.6 RESEARCH METHODOLOGY

The research methodology followed in this work will mainly be qualitative and theoretical in nature. This thesis explores views of various commentators, text books, legal journals, a survey of international and domestic case law, international conventions, resolution, treaties, domestic legislations, internet sources and other electronic resources.

1.7 THEORETICAL FRAMEWORK

This thesis will explore the extent to which South African courts in particular the High Court, the Supreme Court of Appeal and the Constitutional Court acting under the complementarity principle envisioned by the Rome Statute as well as the Implementation Act, can exercise universal jurisdiction over international crimes committed in foreign States. In particular, this study involves the relationship between the international law doctrine of State sovereignty, the principle of complementarity and the right to universal jurisdiction contained in the Implementation Act. This thesis will address issues concerning the immunities of foreign officials. More importantly, is the relationship between Article 27(2) of the Rome Statute and section 4(2)[25] of the Implementation Act. Article 27(2) provides that 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'. The four concepts namely, complementarity principle, universal jurisdiction, Amnesty and the doctrine of State sovereignty will be the basis of discussion in this study.

[25] Section 4(2) of the Implementation Act provides: 'Despite any other law to the contrary, including customary and conventional international law, the fact that a person-
(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official or
(b) being a member of a security service or armed forces, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither-
(i) a defence to a crime; nor
(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.'

1.8 LITERATURE REVIEW

The complementarity provisions of the Rome Statute foster not only the responsibility but also the priority of States in initially prosecuting crimes under the jurisdiction of ICC.[26] In terms of the complementarity regime of the Rome Statute, the primary responsibility for enforcing international criminal law rests with States parties, not the ICC.[27] By granting primacy to national courts, the principle of complementarity protects States parties' jurisdictional sovereignty.[28] This entails that when States avail themselves genuinely of their sovereign right to investigate and prosecute, international judicial intervention is both unnecessary and unjustified.[29] The establishment of the ICC does not relieve member States of their responsibility and obligation to try and punish those responsible for serious crimes. This principle is premised on the fact that domestic tribunals constitute forum convenience where ordinarily both the evidence and suspect will be located. The primary responsibility to investigate and prosecute international crimes remains with State parties.[30]

Cryer *et al* notes that as a court of last resort the ICC is meant to supplement, not to replace, national jurisdictions.[31] The ICC is different from the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY) in that these tribunals were established by the United Nations Security Council (UNSC) in terms of resolutions and they enjoyed primary jurisdiction. The ICC relies on national authorities or States, and their national institutions and procedures, for the arrest of suspects, their surrender for trial and, if convicted, their detention. Thus, the ICC's jurisdiction is complementary to national criminal courts. The jurisdiction of the ICC is subsidiary to that of national courts because in terms of Article 17 of the Rome

[26] L Carter 'The Principle of complementarity and the international Criminal Court: The role of the Ne Bis in Idem' *Santa Clara Journal of International Law (*2010) 168.
[27] Farbstein S 'The effectiveness of the exercise of jurisdiction by the international Criminal Court: The Issue of Complementarity' (2001) *European Center for Minority issues* at 52.
[28] Yang L 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' 2005 *Chinese Journal of International Law* 121 ta 122. Benzing 2003 *Max Planck Yearbook of United Nations Law* 595; Stigen *The relationship between the International Court and the National Jurisdictions: Principle of Complementarity* (2008) 16 and Newton 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' 2001 *Military Law Review* 2001 at 32.
[29] Stigen *The relationship between the International Court and the National Jurisdictions: Principle of Complementarity* (2008) at 18.
[30] El Zeidy *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff, London 2008) at 157.
[31] See Cryer et al *An Introduction to International Criminal Law and Procedure* (2010) 2 ed at 153.

Statute, its jurisdiction is only triggered if there is inaction, unwillingness or inability genuinely to investigate or prosecute by the national authorities. Lee[32] notes that 'this principle means that the Court will complement, but not supersede, national jurisdiction. The reason behind this is that of practicality. The ICC may have a very limited capacity to deal with mass violations of human rights throughout the world, national courts must be the primary method of enforcing the provisions of the Rome Statute.[33] The ICC does not have at its disposal all the tools necessary to achieve its objectives without State cooperation.[34] If all member States were to abdicate their responsibility to prosecute international crimes, the ICC with its scarce resources would be overwhelmed and would be flooded with cases and would become ineffective as a result of an excessive and disproportionate workload.[35] Furthermore, it is easy and practicable for national States to trace witnesses in their own States and to subpoena them to attend court and to give evidence at the national level.[36] States will generally have the best access to evidence and witnesses and the resources to carry out proceedings as opposed to the ICC which is situated miles away from national States. Tladi notes that it is a truism that cooperation is central to the success of the ICC.[37] Meanwhile Cryer *et al* argues that the principle of complementarity is based not only on respect for the primary jurisdiction of States but also on practical considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings.[38]

As will be discussed in chapter three of this work, in South Africa, the Implementation Act incorporating the Rome statute into national law has two main purposes. First, the Act establishes a comprehensive collaboration system for South Africa in relation to

[32] Roy Lee, The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 2nd edition (2002) 27.
[33] Cassese 'The Statute of the International Criminal Court: Some Preliminary Reflections' 1999 *European Journal of International Criminal Law* 158;
[34] See B Swart General Problems 'in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002) at 1589.
[35] Zeidy 2002 *Michigan Journal of International Law* 905.
[36] See D Tladi 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: Attempting to Make a Collage from an Incoherent Framework' available at: http://ssrn.com/abstract=2626490
[37] See D. Tladi, 'When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' (2014) 7 *African Journal of Legal Studies* 381 at 386.
[38] '*An Introduction to International Criminal Procedure Law and Procedure*' 2 ed (2010) at 153.

the ICC in line with article 88 of the Rome Statute.[39] Secondly, the aim of the Implementation Act is to provide a statutory basis for national prosecution of crimes against humanity, genocide, and war crimes before a South African court in line with the principle of complementarity.[40] Section 3 of the Implementation Act sets out the objectives of the Act. Section 3(d) of the Act endorses the complementarity principle and defines one of its objectives as being 'to enable as far as possible and in accordance with the principle of complementarity as referred to in article 1 of the Statute, the National Prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstance.' To this end, South Africa has elected to create a very strong system to bring persons who commit such atrocities to justice. The international crimes referred to in the Implementation Act are genocide, crimes against humanity and war crimes.[41] The Rome Statute's definitions of these crimes are incorporated directly into South African law through a schedule appended to the Implementation Act.[42]

1.9 SCOPE OF RESEARCH

This thesis will revolve around the ICC, the South African Courts, the Implementation Act and the member's States of the ICC. To this end, such States will be mentioned as and when a need has arisen in the course of the study. Reference will also be made to the UN Charter and other relevant work in this area of study.

1.10 OUTLINE OF CHAPTERS

This thesis will be divided into five chapters. Chapter one will briefly outline the subject and scope of the thesis. This chapter will indicate the research problem and the methodology that will be used in this thesis and will give a brief summary of the structure of the thesis.

[39] See chapter 4 of the Implementation Act. Article 88 of the Rome Statute provides that State Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.
[40] See preamble of the Implementation Act.
[41] See article 6, 7 and 8 of the Rome Statute.
[42] See Schedule 1 Part 1 for the definition of Genocide. See Schedule 1 Part 2 for the definition of the crime against humanity and see Schedule 1 Part 3 for the definition of war crimes.

Chapter two will examine the constitutional framework of South Africa vis-à-vis international law in particular the constitutional process in terms of which obligations assumed under international agreements become a part of South Africa law.

Chapter three will examine the Incorporation of the Rome Statute in terms of the Implementation Act into the national laws of the Republic. The focus of this chapter will be on the salient sections of the Implementation Act more in particular, section 3(d) of the Act which endorses the complementarity principle and sections 4(2) and 4(3) of the Implementation Act. This chapter will critically examine how our courts in particular the High Court, the Supreme Court of Appeal and the Constitutional Court dealt with the principle of complementarity especially on how the Rome statute and the Implementation Act complement each other in relation to the prosecution of international crimes. This chapter will also investigate the relationship between Article 27(2) of the ICC and section 4(2) of the Implementation Act and how the South African courts, acting under the complementarity principle, are accorded the same power as the ICC to supersede the immunities which usually attach to officials of government.

Chapter four of this thesis will seek to examine the question whether South African courts acting under the complementarity principle of the Rome Statute, are allowed to exercise universal jurisdiction over international crimes which were committed and have been the subject of amnesty in a foreign State. This question is relevant especially when paragraph 8 of the Preamble of the Rome Statute is considered which states that nothing in this Statute shall be taken as authorising any State party to intervene in an armed conflict or in the internal affairs of any State.

Chapter five will be the conclusion of this thesis and the relevant recommendations.

CHAPTER TWO

THE DOMESTICATION OF TREATIES INTO SOUTH AFRICAN MUNICIPAL LAW FROM A CONSTITUTIONAL PERSPECTIVE

2.1 Constitutional Framework

Ever since the advent of constitutional democracy in South Africa, its Constitution has guaranteed the protection of the fundamental rights of all people. The adoption of the Interim Constitution[43] with a Bill of Rights marked the beginning of a new era founded on the supremacy of a Constitution to which all laws were made subordinate.[44] With the endorsement of the Interim Constitution, black and white leaders renounced the racist past and embraced a Bill of Rights promising all South Africans freedom of speech, movement, political activity and other liberties that in the past were reserved only for whites.[45] Wing noted that the purpose of the South African Constitution was the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights.[46]

The Interim Constitution had a revolutionary effect on the South African legal system.[47] The atrocities of the past regime were remedied by the supremacy of the Constitution and the protection of human rights.[48] South Africa entered a new chapter of

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[43] Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution). The Interim Constitution was approved by South Africa's last racially defined Parliament on 22 December 1993. The Interim Constitution came into effect on 27 April 1994. It set out the procedures for the negotiation of the Final Constitution. The Final Constitution 108 of 1996 was signed into law by former President Nelson Mandela on 10 December 1996 and came into effect on 4 February 1997.

[44] Section 4 of the Interim Constitution reads as follows: 'this Constitution shall be the supreme law of the Republic and any law or Act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of its inconsistency.'

[45] See Steenkamp A 'The South African Constitution of 1993 and the Bill of Rights: An evaluation in light of international human rights norms' (Feb 1995) Vol. 1.17 *Human Rights Quarterly* 101-126; also available at (www.Jstor.org/pss/762349). For the first time in the history of South Africa fundamental rights were enshrined in the Constitution and enforced by the Constitutional Court.

[46] Wing AK 'The South African Constitution as a role model for the United States' *Harvard BlackLetter Law Journal* (2008) vol. 24 at 73.

[47] Currie I and De Waal J, *The Bill of Rights Handbook* 5 ed (2005) at 1.

[48] In *Brink v Kitshoff* 1996 (4) SA 197 (CC) at para 40, the Constitutional Court highlighted the fact that the previous government systematically discriminated against black people in all aspects of social life. The court further noted amongst others, that the policy of apartheid, in law and in fact, deprived the historically disadvantaged from senior jobs, from becoming owners of property or even residing in areas classified as 'white' and access to schools and universities.

constitutionalism.[49] For the first time, equal political and civil rights were afforded to all South Africans, regardless of their race or origin. In *S v Makwanyane & Another,*[50] Mahomed J, as he then was, in his concurring judgment highlighted the importance of the Constitution and stated as follows:

> 'In some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commit to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimised racism. The Constitution expresses in its preamble the need for a 'new order…in which there is equality between…people of all races.'[51]

The Bill of Rights in the Interim Constitution was superseded by Chapter 2 of the Final Constitution (hereinafter the Constitution).[52] The Constitution defines the Bill of Rights as a cornerstone of our democracy in that it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[53] The rights in the Bill of Rights are intrinsically interdependent, indivisible and inseparable.[54] The rights to human dignity, equality, as well as freedom and security, in particular, are influenced by our historical and political background.[55] The Preamble

[49] Langa J, as he then was, in *S v Makwanyane* 1995 (3) SA 391 (CC) at para 20 of his concurring judgment noted that when the Constitution was enacted, it signaled a dramatic change in the system of governance from one based on rule by Parliament to a constitutional state in which the rights of individuals are guaranteed by the Constitution. It also signaled a new dispensation where, as it were, rule by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom.

[50] 1995 (3) SA 391 (CC).

[51] At para 262H-J.

[52] The Constitution of the Republic of South Africa, 1996.

[53] Section 7 (1). Section 7(2) reads as follows: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

[54] *Gcaba v Minister for Safety and Security & Others* [2009] 12 BLLR 1145 (CC) at para 54. See also the judgment of Sachs J in *Sidumo v Rustenburg Platinum Mine Ltd & Others* (2007) 28 *ILJ* 2405 (CC) at para 148 where the learned judge stated: 'Acceptance of hybridity is based on the fact that protected rights in a constitutional democracy overlap, intersect and mutually reinforce each other.'

[55] In *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) at paras 24 to 26 the Constitutional Court, per Moseneke DJP, expressed the need for a credible and abiding process of reparation for past exclusion, dispossession and indignity within the discipline of our constitutional framework.

to the Constitution acknowledges the injustices of the past and confirms the intention of establishing a society based on democratic values, social justice and fundamental human rights, as can be seen from the following extract from the judgment of Ngcobo J (as he then was) in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others,*[56]:

> 'South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed "to create a new order… [based on equality] in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedom."[57] This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution "recognises the injustices of our past" and makes a commitment to establishing "a society based on democratic values, social justice and the fundamental human rights". This society is to be built on the foundation of values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedom.'[58]

In the broader scheme of things, the Bill of Rights aims to achieve social, political and economic equality. It applies to all laws, and binds the legislature, the executive, the judiciary and all the organs of state.[59] The rights it protects are subject to the limitations permitted in terms of section 36 of the Bill of Rights.[60] The Constitution also recognises the supremacy of the Constitution and the protection of human rights.[61] The courts have been given the power to declare invalid any law or conduct that is inconsistent

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[56] 2004 (4) SA 490 (CC).
[57] Preamble to the Interim Constitution.
[58] At para 73. Quoting section 1(*a*) of the Constitution.
[59] Section 8 (2).
[60] Section 36 of the Bill of Rights provides as follows: '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bills of Rights.'
[61] Section 2 of the Constitution.

with the Bill of Rights.[62] Apart from the more commonly accepted fundamental rights contained in the Bill of Rights, the Constitution acknowledges South Africa's obligations towards the international community. The Preamble to the Constitution also provides that the nation adopts the Constitution as the supreme law of the Republic so as to build a united and democratic South Africa that is able to take its rightful place as a sovereign state in the family of nations.

2.2 International law during the pre-constitutional dispensation

A distinctive feature of the Constitution was its treatment of international law. Under apartheid, international law was reviled as a source of alien and hostile doctrines.[63] For instance, on 30 November 1973, the United Nations General Assembly opened for signature and ratification the International Convention on the Suppression and Punishment of the Crime of Apartheid, which 76 countries ratified.[64] During the dark days of apartheid, the State and its institutions denied the application of international law.[65] However, authoritative organs of the United Nations repeatedly condemned the actions of the racist regime of South Africa, such as racial discrimination, segregation and repression in the country, continued occupation of Namibia and acts of aggression and terrorism against neighbouring States as violations of the Charter of the United Nations and of international law.[66] Notwithstanding, international law became an important instrument in the struggle for the elimination of apartheid. International law also played a powerful role in undermining the South African government's unjust policies.[67] International law became the touchstone by which South Africans challenged the validity and legitimacy of apartheid laws. For instance, Dugard notes that international law on the right to movement was used by anti-apartheid activists,

[62] See section 172(1)(a) of the Constitution which provides that 'when deciding a constitutional matter within its powers, a court *(a)* must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.
[63] See E Cameron 'Constitutionalism, Rights, and International Law: The *Glenister* Decision' (2013) 23 *Duke Journal of Comparative and International Law* 389-409 at 390.
[64] See E Cameron Constitutionalism, Rights, and International Law: The *Glenister* Decision' (2013) 23 *Duke Journal of Comparative and International Law* 389-409 at 390.
[65] See J Dugard 'The Conflict between International Law and South African Law: Another Divisive Factor in South African Society' (1986) 2 *South African Journal on Human Rights* 1.
[66] See Reddy (eds) 'Apartheid, South Africa and International law: Selected documents and Papers published by the United Nations Centre Against Apartheid in its *Notes and Documents Series'* No13/85; December 1985.
[67] See J Dugard *International Law: A South African Perspective* 3 ed (2010) at 23–24.

Desmond Tutu and Robert Sobukwe, in challenging restrictions placed on their right to travel.[68] The human rights provisions of the Charter of the United Nations were used to challenge the segregation of South African cities along racial lines.[69] However, the passion and ideology that inspired the democratic transition in the early 1990s, embraced almost all principles of international human rights law and integrated them in the Constitution. International law, therefore, has been both the mirror to reflect the disgrace of apartheid and a source of law that has guided the construction of the current South Africa.[70]

2.3 International law in the constitutional dispensation

The Constitution recognises the importance of international law. Instead of treating international law as an enemy, the Constitution embraced it. It provides that international agreements that were approved by resolution of both houses of the parliament became binding on the Republic.[71] Section 2 of the Bill of rights provides that the Constitution is the supreme law of the Republic and that all law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. The Constitution declared and proclaimed customary international law in the Republic, unless inconsistent with a statute or the Constitution. It required courts, when interpreting legislation, to prefer any reasonable interpretation that conforms with international law, over any alternative inconsistent interpretation.[72] Section 39(1)(b) of the Constitution provides that a court must consider international law when interpreting the Bill of Rights. In *S v Makwanyane,*[73] the Constitutional Court confirmed that the context of this provision includes public international law that is both binding and not binding on South Africa. The Court nevertheless emphasized that there is in terms of this provision no duty on South Africa to give effect to public international law, it merely

[68] See *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T); *Sobukwe v Minister of Justice* 1972 (1) SA 693 (A).
[69] See *S v Adams*; *S v Werner* 1981 (1) SA 187 (A).
[70] B Meyersfeld 'Domesticating International Standards: The Direction of International Human Rights Law in South Africa *Constitutional Court Review* at 411 available at http://www.saflii.org CCR (Accessed 30 April 2021).
[71] Section 231(5) provides that The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.
[72] Section 233 provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.
[73] *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

requires a court to consider it in view of the peculiarities of the South African Bill of Rights. What has to be enforced is the Bill of Rights and not so much the relevant norms of public international law.[74]

More importantly, the Constitution made provision for International law in the Bill of Rights itself. It expressly cast an obligation on courts, when interpreting the Bill of Rights, to consider international law.[75] In *Government of the Republic of South Africa and Others v Grootboom,*[76] the Constitutional Court per Yacoob J, as he then was, stated that the relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. The learned Justice noted however that, where the relevant principle of international law binds South Africa, it may be directly applicable.[77]

The Constitution provides a specific process in terms of which obligations assumed under international agreements become a part of the law of South Africa.[78] In *Glenister v President of the Republic of South Africa & others,*[79] the Constitutional Court explained the constitutional obligation of South Africa towards international law and stated as follows:

> 'Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. Firstly, s 233 requires legislation to be interpreted in compliance with international law; secondly, section 39(1)*(b)* requires courts, when interpreting the Bill of Rights, to consider international law; finally, s 37(4)*(b)*(i) requires legislation that derogates from the Bill of Rights to be 'consistent with the Republic's obligations under international law applicable to states of emergency'. These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.'[80]

[74] At paras 36 and 37.
[75] Section 39(1) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.
[76] 2001 (1) SA 46 (CC).
[77] At para 26.
[78] See section 231(4) of the Constitution.
[79] 2011 (3) SA 347.
[80] At para 97.

As it will appear fully hereunder and in the discussion in chapter three on the domestication of the Rome Statute into South African municipal law, it is a constitutional requirement in terms of our law that for an international agreement to be incorporated into our national law under section 231(4) of the Constitution, there must be a resolution of Parliament approving the agreement, as well as a national legislation passed incorporating that instrument into domestic law.[81] Chapter 14 of the Constitution consists of important provisions of international law relating to the entry into international agreements and the status of international law in South Africa. Section 231 of the Constitution governs the manner in which international agreements are concluded, made binding on South Africa, and domesticated into our national law. For the sake of brevity, section 231 provides as follows:

> '(1): The negotiating and signing of all international agreements is the responsibility of the national executive.
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection *(3)*.
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

Section 231 of the Constitution reflects the pre-1994 common law position, which required that international agreements be incorporated into municipal law by legislative enactment.[82] This is in line with the *dictum* of Steyn CJ, as he then was, long before

[81] See section 231(2) of the Constitution.
[82] See *Harksen v President of the Republic of South Africa and Others* 2000 1 SA 1185 (CPD) at para 30.

the dawn of our democracy in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd,*[83] where he stated as follows:

> 'It is common cause, and trite law I think, that in this country conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process.'[84]

In *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others,*[85] Mahomed DP, as he then was, confirmed this principle in the following words:

> 'International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.'[86]

From the provisions of section 231 it is evident that the section regulates the implementation of treaty law in South Africa. As discussed in chapter one of this work, South Africa is a member State of the Rome Statute. South Africa was the first African State to sign the Rome Statute. It did this on 17 July 1998 and ratified it on 27 November 2000. South Africa incorporated the Rome Statute into the domestic law of South Africa in terms of section 231(4)[87] of the Constitution by enacting the Implementation Act. The complementarity principle envisaged in article 17 of the Rome Statute as well as the objectives of the Implementation Act are discussed in chapter three of this work. However, it must be stressed here that section 231 of the Constitution sets out the steps the executive and the legislature must take in order for a treaty to be part of South African law: First, the executive signs the treaty;[88] second, Parliament approves the treaty in order for the treaty to bind the Republic[89] and thirdly,

[83] 1965 (3) SA 150 (A).
[84] At 161B – C.
[85] 1996 (4) SA 671 (CC) para 26.
[86] At para 26.
[87] S 231(4) provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
[88] Section 231(1).
[89] Section 231(2).

Parliament must then enact legislation to make the treaty part of domestic or municipal South African law.[90]

Oliver,[91] notes that South African courts first entered the debate on clarifying the meaning of the term 'international agreement' and the classification of different kinds of agreements for purposes of section 231 in the *Harksen v President of the Republic of South Africa and Others.*[92] In this case, the facts were briefly as follows: Harksen, a German citizen present in South Africa, was sought by the Federal Republic of Germany to face charges of fraud. The South African government received a request for Harksen's extradition from Germany in March 1994. Both the South African and German governments denied the existence of an extradition treaty between them. Section 3(2) of the South African Extradition Act[93] provides for extradition between South Africa and foreign countries where there is no extradition agreement. This section provided as follows:

> 'Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being surrendered'

After a series of several exchanges of diplomatic correspondences, the president subsequently granted his consent to extradite Harksen on the basis of section 3(2) of the Extradition Act. The President's consent had been preceded by an exchange of diplomatic notes between the South African Department of Foreign Affairs and the German Embassy. After the President granted consent for his extradition, Harksen brought an application before the Cape High Court consisting of a constitutional application and a review application. The gist of Harksen's argument was that section 3(2) of the Extradition Act was unconstitutional in that an international agreement relating to his extradition had been concluded between South Africa and Germany, which agreement is in conflict with the provisions of section 231 of the Constitution.[94]

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[90] Section 231(4).
[91] Oliver M 'Interpretation of the Constitutional provisions relating to international law' 2003(6)2 *PER/PELJ* at 32/173.
[92] 2000 (1) SA 1185 (CPD).
[93] Extradition Act 67 of 1962.
[94] At para 23 of the judgment.

Harksen describes the gravamen of his case as the deprivation of his freedom and liberty arbitrarily and without just cause, by means of the President's consent to his extradition in terms of section 3(2) of the Extradition Act.[95] This, he averred, was in conflict with section 12(1)*(c)* of the Constitution.[96] It was further contended on behalf of Harkesn that every extradition is regarded *per se* as an international agreement between the State requesting extradition and the State acceding to that request.[97] This was so even if no general extradition agreement existed between such countries and recourse had to be taken to section 3(2) of the Act. It was contended on behalf of Harksen that the President's consent in terms of section 3(2) of the Extradition Act to the German request for extradition, constituted an international agreement. Such bilateral agreement contravened the provisions of section 231 of the Constitution which requires some form of parliamentary involvement and was therefore invalid.[98] It was also contended on behalf of the applicant that the Vienna Convention, specifically the definition of a treaty, forms part of South African law through section 232 of the Constitution.[99] It was, however, submitted that the term 'international agreement' is wider than the term 'treaty' and would include *ad hoc* agreements of an informal nature.[100]

The court per Van Zyl J, found that section 3(2) of the Extradition Act provides expressly for the case where there is no extradition agreement between the countries in question and in such a case, any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State shall be liable to be surrendered to such State if the President has in writing consented to his or her being so surrendered. The court concluded that the necessary inference to be drawn from this wording is that the Legislature deliberately provided for the case where there would be a request for extradition without the benefit of an extradition agreement and quite clearly, it was not envisaged that such deliberate provision, namely the consent of the President, could nevertheless be regarded as constituting an agreement, albeit

[95] At para 24 of the judgment.
[96] Section 12(1)(c) provides that 'Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources'.
[97] At para 29 of judgment.
[98] At paras 23 to 34 of the judgment.
[99] At para 31 of the judgment.
[100] At para 31 of the judgment.

of an informal or *ad hoc* nature.[101] The court eventually found that the President's consent in terms of section 3(2) of the Act, cannot be held to constitute an international agreement and as a result section 231 of the Constitution did not come into play.

Meanwhile in *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*,[102] the court had to consider whether the power of the national executive to negotiate and sign an international treaty includes the power to withdraw from such treaty without prior parliamentary approval.[103] The court had also to consider whether parliamentary approval may be sought after notice of withdrawal had been delivered to the United Nations.[104] The court held that from the exposition of section 231 of the Constitution, there is no question that the power to conduct international relations and to conclude treaties has been constitutionally conferred upon the national executive in terms of section 231(1).[105] But that power is fettered by s 231(2) and (4), which enjoins the national executive to engage parliament.[106] The court found that section 231 clearly delineates the powers between the national executive and parliament.[107] The only power the national executive has to bind the country to international agreements without parliamentary involvement is in section 231(3).[108] Any other international agreement must be approved by parliament in terms of section 231(2) to be binding on the country.[109] Thus, once parliament approves the agreement, internationally the country becomes bound by that agreement.[110]

On the central question whether the power of the national executive to negotiate and sign an international treaty includes the power to withdraw from such treaty without prior parliamentary approval, the court found that a notice of withdrawal, on a proper construction of section 231, is the equivalent of ratification, which requires prior

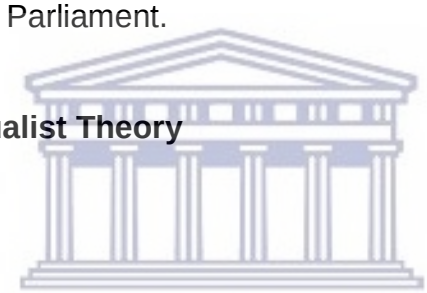
[101] At para 45 of the judgment.
[102] 2017 (1) SACR 623 (GP) at para 35.
[103] At para 32.
[104] At para 32.
[105] At para 36.
[106] At para 35.
[107] At para 35.
[108] At para 35.
[109] At para 35
[110] At para 35.

parliamentary approval in terms of section 231(2).[111] The court noted that the act of signing a treaty and the act of delivering a notice of withdrawal are different in their effect. The former has no direct legal consequences, while by contrast, the delivery of a notice of withdrawal has concrete legal effects in international law, as it terminates treaty obligations. The court opined that since on the structure of section 231, the national executive requires prior parliamentary approval to bind South Africa to an international agreement, there is no cogent reason why the withdrawal from such agreement should be different.[112] The court observed further that the national executive did not have the power to deliver the notice of withdrawal without obtaining prior parliamentary approval. As a result, the inescapable conclusion must therefore be that the notice of withdrawal requires the imprimatur of parliament before it is delivered to the United Nations.[113] The court concluded that the national executive's decision to deliver the notice of withdrawal without obtaining prior parliamentary approval violated section 231(2) of the Constitution, and breached the separation of powers doctrine enshrined in that section.[114]

Form the above discussion, it is clear that an international agreement binds South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. Inevitably, by ratifying the Rome Statute and incorporating it into our municipal law in terms of section 231 of the Constitution, South Africa acknowledged that crimes within the jurisdiction of the ICC shall, in principle, either be investigated or prosecuted by its domestic courts or by the ICC. More importantly, the Implementation Act incorporating the Rome Statute creates a structure for the national prosecution of crimes in the Rome Statute. In other words, the Act allows for the prosecution of crimes against humanity, genocide and war crimes before a South African court. The Act gives effect to the complementarity scheme envisaged in the Rome Statute by creating the structure necessary for national prosecutions in terms of the Act.

[111] At para 47.
[112] At para 57.
[113] At para 57.
[114] At para 57.

It is also abundantly clear that South Africa requires the approval of parliament to withdraw from an international agreement in terms of section 231. Some international agreements, such as those of a technical, administrative or executive nature, or those which do not require either ratification or accession, bind South Africa without approval by the National Assembly and the National Council of Provinces.[115] In other words, these conventions in terms of section 231(3) need not be approved by parliament. There is no need for an Act of Parliament to be passed to enable those conventions to form part of domestic law. Meanwhile in terms of section 231(4) any international agreement becomes law in South Africa when it is enacted into law by national legislation, excluding a so-called self-executing provision of an agreement, unless it is inconsistent with the Constitution or an Act of Parliament. Section 232 determines that customary international law is law in South Africa unless it is inconsistent with the Constitution or an act of Parliament.



2.4 The Monist and the Dualist Theory

2.4.1 Monist approach

In a monist legal system, international law is considered joined with and part of the internal legal order of state. The monist theory prioritise the desirability of a formal international legal order to establish the rule of law among nations.[116] Under the monist model, international law serves not merely as a legal framework to guide states' relations in international sphere, but as a source of law integrated into and superior to domestic law.[117] As a consequence, a properly ratified or accepted treaty forms part of the national legal regime.[118] An important consequence is that international law may be applied and enforced directly in domestic courts without the necessity of domestic implementation.

[115] In terms of section 231(3).
[116]See Dubay C 'General Principles of International law: Monism and Dualism' available at http://www.judicialmonitor.org/archive_winter2014/general principles.html (Accessed on 03 May 2021).
[117] See Dubay C 'General Principles of International law: Monism and Dualism' available at http://www.judicialmonitor.org/archive_winter2014/general principles.html (Accessed on 03 May 2021).
[118] See Dubay C 'General Principles of International law: Monism and Dualism' available at http://www.judicialmonitor.org/archive_winter2014/general principles.html (Accessed on 03 May 2021)

In summary, according to the monist theory, public international law is directly enforceable before municipal courts without any need for incorporation into municipal law. In terms of this school of thought, the international and national legal rules form one unified system hence, there is no need for a State to incorporate its international treaty obligations into its national law as these obligations automatically become domestically enforceable when the state ratifies the agreement.[119]

2.4.2 The Dualist approach

International law dualists, on the other hand, view international law, which regulates the behaviour of States, and domestic law, which regulates the behaviour of individuals within States, as two separate yet coexisting spheres of law that operate on separate planes.[120] This framework create a single and unitary legal system, with international law at the top of the legal order and local, municipal law subordinate.[121] The dualist theory prioritises the notions of individual self-determinations and sovereignty at the State level.[122] The common understanding of dualism is that international law is not supreme to national law, and the relevance of international law in the domestic legal regime is a question left to the local political processes.[123] For instance, under this framework, a treaty takes effect and is binding in international relations once it is executed by the heads of state.[124] In a dualist legal system, international law stands apart from national law, and to have any effect on rights and obligations at the national level, international law must be domesticated through legislative process. In particular, dualists insist that domestic law must specifically translate international law into its sphere before it can have domestic effect. In other words, public international law has to be formally incorporated into municipal law before it would be enforceable before a municipal court.

[119] See E Cameron 'Constitutionalism, Rights, and International Law: The *Glenister* Decision' (2013) 23 *Duke Journal of Comparative and International Law* 389-409 at 391.
[120] See E 'Cameron Constitutionalism, Rights, and International Law: The *Glenister* Decision' (2013) 23 *Duke Journal of Comparative and International Law* 389-409 at 391.
[121]See Dubay C 'General Principles of International law: Monism and Dualism' available at http://www.judicialmonitor.org/archive_winter2014/general principles.html (Accessed on 03 May 2021).
[122]See Dubay 'C General Principles of International law: Monism and Dualism' available at http://www.judicialmonitor.org/archive_winter2014/general principles.html (Accessed on 03 May 2021).
[123]See Dubay 'C General Principles of International law: Monism and Dualism' available at http://www.judicialmonitor.org/archive_winter2014/general principles.html (Accessed on 03 May 2021).
[124] See E Cameron 'Constitutionalism, Rights, and International Law: The *Glenister* Decision' (2013)23 *Duke Journal of Comparative and International Law* at 391.

2.4.3 Is South Africa a Monist State or a Dualist State?

Pursuant to the above provisions, the result in South Africa is that customary international law is directly enforceable before a South African court, while treaty law like the Rome Statute must first be incorporated into South African legislation before it becomes enforceable in municipal law in terms of section 231 of the Constitution. Ferreira and Ferreira-Snyman[125] argue that in view of the provisions discussed above, one can therefore say that South Africa follows a monist approach with regard to customary international law, but a dualist one as far as treaties are concerned. Dugard[126] notes that the nature of South Africa's approach can be described as one of harmonisation, because it is primarily aimed at harmonising public international law and South African domestic law. The provisions of national legislation incorporating an international agreement into South African law would normally be applied by the courts even if they are contradictory to the provisions of the incorporated international agreement because it is left to Parliament to decide if and to what extent an agreement should be incorporated.[127] Ginsberg, Chernykh and Elkins[128] argues that the functions of public international law should not be considered only from an interstate but also from an intrastate perspective. The learned authors believes that the interaction between domestic law and international law as reflected in the dichotomy between monism and dualism varies considerably between states. They stated:

> 'Notwithstanding these differences, the authors eventually conclude that internationalization, broadly speaking, has increased over time, with more constitutions incorporating specific treaties, providing for treaty superiority over domestic legislation, and making customary law directly applicable, even as the scope of customary law has expanded dramatically.'[129]

[125] Ferreira and Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' 2014(17)4 *PELJ* 1473.
[126] Dugard *International Law: A South African Perspective* 3 ed (2005) at 42-43.
[127] Ferreira and Ferreira-Snyman ''The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' 2014(17)4 *PELJ* 1481.
[128] Ginsberg, Chernykh and Elkins 'Commitment and Diffusion: How and why National Constitutional incorporate International Law' (2008)1 *University of Illinois Law Review* at 237.
[129] Ginsberg, Chernykh and Elkins 'Commitment and Diffusion: How and why National Constitutional incorporate International Law' (2008) 1 *University of Illinois Law Review* at 210.

As explained above, an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection 231(2). As it will be seen in chapter three of this work, the Rome Statute was domesticated in South Africa in terms of an Act of Parliament being the Implementation Act. The question whether South Africa should adopt a monist or a dualist approach in dealing with International Convention has not been easy for the courts. In *Glenister v The President of the Republic of South Africa and Others,*[130] the Constitutional Court was divided on the correct interpretation of a number of constitutional provisions dealing with the binding nature of international treaties in South African law. This case involved the legislative framework that created the Directorate for Priority Crime Investigation (DPCI) commonly referred to as the Hawks and the disbandment of its predecessor body, the Directorate of Special Operations (DSO) commonly referred to as the Scorpions. One of the key questions was whether this new legislative framework was consistent with South Africa's constitutional and international obligations to combat corruption. The complaint of the applicant in this matter related to the disbanding of the DSO, a specialised crime-fighting unit that was located within the National Prosecuting Authority (NPA), and its replacement with the DPCI, which is located within the South African Police Service (SAPS). The DSO was established in 2001 under section 7(1) of the National Prosecuting Authority Act.[131] Its purpose was to supplement the efforts of existing law-enforcement agencies in addressing organised crime. The DSO was vested with powers to investigate and institute criminal proceedings relating to organised crimes or other specified offences.

The facts of this case were briefly as follows: On 27 January 2009 the President signed into law the National Prosecuting Authority Amendment Act[132] as well as the South African Police Service Amendment Act.[133] The combined effect of these impugned laws was to disband the DSO and establish the DPCI.[134] It was these impugned legislations that were at the centre of the case before the Constitutional Court. The mandate of the new unit, the DPCI (the Hawks), remained the same as that of the

[130] 2011 (3) SA 347 (CC).
[131] Act 32 of 1998.
[132] Act 56 of 2008.
[133] Act 57 of 2008.
[134] At para 2 of the judgment.

DSO (the Scorpions). It retained the same powers. The key difference, however, was its placement in the governance of South Africa, moving from the NPA to the police service. Hugh Glenister (the applicant), a South African citizen, challenged these new legislative framework. He argued that South Africa was bound by international law and, specifically, by the international law standards of independence for a State's anticorruption body. Among others, the applicant contended that the scheme of the impugned laws which brought about these changes was unconstitutional. He submitted that it is irrational, unreasonable, unfair and undermines the structural independence of the NPA. He argued that, in enacting the impugned laws, the legislature violated a number of its constitutional obligations. The obligations contended for were to act reasonably and accountably; to cultivate good human-resource management; to respect international-treaty obligations; to maintain an independent anti-corruption unit; to allow public participation in the legislative process; to allow the NPA properly to exercise its functions; and to respect values enshrined in the Bill of Rights.[135]

The core issue facing the court was whether this new investigative unit was sufficiently independent to fulfil South Africa's obligation to prevent and combat corruption. This inquiry raised several questions. The case distilled two main issues.[136] The first was the nature of government's obligations in dealing with corruption. The question was does the international law obligations resting on the State oblige it to create an independent anticorruption unit? If so, did these obligations find direct intra-country constitutional force? Or are they obligations under international law alone? In the main the Constitutional Court had to deal with the question of whether the Constitution requires Parliament to establish an independent anti-corruption unit, and if so, whether Parliament complied. In addition, the Court was asked to establish if any rights in the Bill of Rights were infringed by the Acts of Parliament which gave practical effect to the situation before the Court.[137]

[135] At para 17 of the Judgment. See *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) at 376 to 377 on the independence of the National Prosecution Authority. See also section 179 of the Constitution.
[136] See E Cameron 'Constitutionalism, Rights, and International Law: The *Glenister* Decision' (2013) 23 *Duke Journal of Comparative and International Law* 389-409 at 397.
[137] See para 54 of the Judgment.

In considering the matter, the court was divided in its approach. However, both the majority and the minority recognized that under international law the State is obliged to establish and maintain an independent body to combat corruption and organized crime.[138] But the court split five to four on two crucial questions regarding this obligation. The first was its source; the second was its intra-country impact.[139] Ngcobo CJ, as he then was, supported by three other Constitutional Court judges, delivered a minority judgment in which he argued that section 231(2) of the Constitution does not imply that an international agreement approved by Parliament becomes law in the Republic upon such approval. It becomes law in the Republic only once it has been incorporated in terms of section 231(4) into domestic law by an Act of Parliament. The learned justice stated as follows:

> 'The constitutional scheme of s 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements.[140] But an international agreement signed by the executive does not automatically bind the Republic, unless it is an agreement of a technical, administrative or executive nature.[141] To produce that result, it requires, second, the approval by resolution of Parliament.[142]
>
> The approval of an agreement by Parliament does not, however, make it law in the Republic, unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval, unless it is inconsistent with the Constitution or an Act of Parliament. Otherwise, and third, an 'international agreement becomes law in the Republic when it is enacted into law by national legislation'.[143]

[138] See para 115 for the minority judgment and paras 183 to 189 of the majority judgment.
[139] See E 'Cameron Constitutionalism, Rights, and International Law: The *Glenister* Decision' (2013) 23 *Duke Journal of Comparative and International Law* at 397.
[140] Section 231 of the Constitution.
[141] Section 231(3) of the Constitution.
[142] Para 89 of the judgment. Section 231(2) of the Constitution.
[143] Para 90 of the judgment. Section 231(4) of the Constitution.

The minority judgment emphasised that ratification is not without consequences. It is an indication of South Africa's intention to be bound on the international level by the provisions of the particular agreement and a failure on South Africa's part to honour its provisions may therefore result in responsibility towards the other state parties to the agreement.[144] In the view of the learned justice, neither the approval of the Convention under section 231(2) nor its incorporation under section 231(4) would have the effect of transforming the rights and obligations embodied in the Convention into constitutional rights and obligations.[145] Domestic enforcement is dependent on incorporation. He observed that the legislative act which incorporates the international agreement into domestic law has the effect of transforming an international obligation that binds the sovereign at the international level into domestic legislation that binds the State and citizens as a matter of domestic law.[146]

Moseneke DCJ, as he then was, and Cameron J gave a majority judgment and deferred completely with the approach adopted by the minority. They lucidly explained the structure and effect of section 231 as follows:

> In our view the main force of s 231(2) is directed at the Republic's legal obligations under international law, rather than transforming the rights and obligations contained in international agreements into home-grown constitutional rights and obligations. Even though the section provides that the agreement 'binds the Republic', and Parliament exercises the Republic's legislative power, which it must do in accordance with and within the limits of the Constitution, the provision must be read in conjunction with the other provisions within s 231. Here, s 231(4) is of particular significance. It provides that an international agreement 'becomes law in the Republic when it is enacted into law by national legislation'. The fact that s 231(4) expressly creates a path for the domestication of international agreements may be an indication that s 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them. It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations.'

[144] See paras 91 to 92.
[145] At para 103.
[146] At para 94.

They argued that section 231(2) of the Constitution is primarily directed at the Republic's legal obligations under international law,[147] rather than aimed at transforming the rights and obligations contained in international agreements into constitutional rights and obligations. The majority argued that although the section provides that the agreement binds the Republic it must be read in conjunction with section 231(4). The latter provides that an international agreement becomes law in the Republic only when it is enacted into law by national legislation. In view of the fact that section 231(4) expressly provides for the domestication of international agreements, the court argued that section 231(2) does not have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them.[148] The court noted that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations contained in such an instrument into constitutional rights and obligations.[149]

The reasoning of the majority judgment suggest that an international agreement approved by Parliament becomes binding on the Republic. However, that does not mean that it has no domestic constitutional effect. This suggest that an international agreement approved by Parliament becomes binding between the Republic and other States parties to the agreement at the international level. The fact that section 231(2) itself provides that an agreement so approved binds the Republic has a significant impact on the state's domestic obligations in protecting and fulfilling the Rights in the Bill of Rights binds the Republic.[150]

The main difference between the reasoning of the minority and the majority is the interpretation of section 231(2) of the Constitution. As discussed above, the minority judgment's interpretation seems to confirm the traditional dualist position in terms of which an international agreement ratified but not incorporated is binding to the

[147] See Dugard *International Law: A South African Perspective* (2005) 3 ed at 59 – 62.
[148] For an academic discussion on the legal positions under the interim Constitution and the final Constitution see Dugard 'Kaleidoscope: International Law and the South African Constitution' (1997) 8 *European Journal of International Law* 77 at 81 – 3; Keightley 'Public International Law and the Final Constitution' (1996)12 *South African Journal on Human Rights* 405 at 408 – 414; and Devine 'The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1993' (1995) 44 *International and Comparative Law Quarterly* 1 at 6 – 11.
[149] At para 281 of the judgment.
[150] Ferreira and Ferreira-Snyman ‘‘The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism’ 2014(17) 4 *PELJ* 1481.

Republic on the international level only. In order for it to have any domestic effect, it has to be incorporated into domestic law in terms of section 231(4).[151] It is submitted that this monist approach adopted by the minority judgment is preferable and certain in approach. International agreement should only be enforced once they are incorporated in the municipal laws.

While on the other hand, the majority judgment suggests that this section has implications for both international law and domestic law. The majority is of the view that the effect of this section on domestic law is that the Constitution appropriates the obligation for itself, by requiring the State to fulfil it in the domestic sphere. This is so when sections 7(2) and 39(1) of the Constitution are considered. Section 7(2) of the Constitution requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 39(1) in turn, obliges a court to take international law into account when interpreting the Bill of Rights, and this includes any international human rights duties the State has accepted by ratification of the particular agreement. The majority judgment opines that if section 231(2) is read in conjunction with section 7(2), the former might also bring about a domestic law duty for South Africa in the field of human rights. From the reasoning of the majority judgment, Ferreira and Ferreira-Snyman[152] argue that one could therefore probably say that the Constitution elects to extend the implications of section 231(2) also to domestic law in those instances where a duty in an international human rights agreement has been accepted by ratification of the said agreement. Section 7(2) forces the state to take reasonable steps to give effect to that particular duty in domestic law and in that way respect, protect, promote and fulfil the rights in the Bill of Rights.

2.5 Conclusion

In conclusion, the discussion above has revealed that it is a constitutional requirement in terms of our law that for an international agreement to be incorporated into our

[151] Ferreira and Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' 2014(17) 4 *PELJ* at 1481.
[152] Ferreira and Ferreira-Snyman ''The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' 2014(17) 4 *PELJ* at 1482.

national law under section 231(4) of the Constitution, there must be a resolution of Parliament approving the agreement, as well as a national legislation passed incorporating that instrument into domestic law.[153] South Africa has incorporated the Rome Statute into the domestic law of South Africa in terms of section 231(4) of the Constitution by enacting the Implementation Act. As it will be seen in the following chapter, the Implementation Act is giving effect to the Rome Statute. The Act incorporates the definition of the Rome Statute of the crimes against humanity, war crimes, and genocide and excluded any type of immunity.[154] In terms of section 4(2)(a)(i) of the Implementation Act, South African courts are accorded the same powers as the ICC to trump any immunities which usually attach to officials of government.[155]

This chapter has also revealed that in terms of section 231(3) of the Constitution some international agreements such as those of a technical, administrative or executive nature, or those which do not require either ratification or accession, bind South Africa without approval by the National Assembly and the National Council of Provinces. It has been established in this chapter that customary international law in South Africa is directly enforceable before a South African court, while treaty law must first be incorporated into South African legislation before it becomes enforceable in municipal law. From the provisions of sections 231 and 232 of the Constitution, it is clear that the South African approach is a combination of both the monist and dualist schools. South Africa follows a monist approach with regard to customary international law, but a dualist one as far as treaties are concerned.

[153] See section 231(2) of the Constitution.
[154] Section 4(2) of the Implementation Act provides that despite any other law to the contrary, including customary and conventional international law, the fact that a person – (a) is or was a head of state or government or parliament, an elected representative or a government official; or (b) being a member of security service or armed force, was under a legal obligation to obey a manifestly unlawful order of government or superior, is neither – (i) a defence to a crime; or (ii) a ground for any reduction of sentence once a person has been convicted of crime.
[155] Du Plessis 'International Criminal Courts and South Africa's Implementation of the Rome Statute' in Dugard J *International Law: A South African Perspective* (2011) 4th ed.

CHAPTER THREE

THE INCORPORATION OF THE ROME STATUTE INTO SOUTH AFRICAN MUNICIPAL LAW AND THE IMPLICATIONS OF THE IMPLEMENTATION ACT

3.1 Introduction

As discussed in chapter one of this thesis, the establishment of the ICC in terms of the Rome Statute was one of the fundamental decisions that was taken by the community of nations in order to maintain international peace and security in the world. The ICC was established by the Rome Statute to exercise jurisdiction over the most serious crimes of concern to the international community. The Rome Statute recognises in its preamble that peace and security in the world is the paramount collective value that the ICC is to protect.[156] The preamble of the Rome Statute also recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. Creb notes that this formulation is clearly couched in prescriptive terms and corresponds to the practice of the UN not to accept amnesties in cases of crimes under international law.[157] Creb also believes that the Rome Statute therefore lends support to the emergence of a customary duty of the territorial State to investigate or prosecute the crimes in question.[158]

The focus of the Rome statute is twofold. First, in terms of Article 5, the Rome Statute delineates and circumscribe crimes falling within the jurisdiction of the court.[159] Secondly, the Rome Statute sets up co-operation system for member states to assist the court in carrying out its mandate. At the heart of the Rome Statute is the principle

[156] See C Kreb 'International Criminal Law' *Max Planck Encyclopedia of Public International Law* at para 36, www.mpepil.com (accessed 30 July 2021).
[157] 'International Criminal Law' *Max Planck Encyclopedia of Public International Law* at para 18, www.mpepil.com (accessed 30 July 2021).
[158] 'International Criminal Law' *Max Planck Encyclopedia of Public International Law* at para 18, www.mpepil.com (accessed 30 July 2021).
[159] Article 5 provides as follows: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

of complementarity, in terms of which the court will only be able to admit a case before it if the State party concerned is unwilling or unable to prosecute the offender at the national level.

South Africa is a member State of the Rome Statute. In the *Minister of Justice and Constitutional Development v The Southern African Litigation Centre*,[160] the Constitutional Court observed that it is a matter of pride to citizens of this country that South Africa was the first African State to sign the Rome Statute. It did this on 17 July 1998 and ratified it on 27 November 2000. The Constitutional Court also noted that South Africa incorporated this statute into the domestic law of South Africa in terms of section 231(4)[161] of the Constitution by enacting the Implementation Act. The Implementation Act was adopted in 2002 and provides for the comprehensive implementation of the Rome Statute.[162] Katz notes that until an Act was passed incorporating the Rome Statute in our municipal law, courts in South Africa could have no regard to the provisions of the Rome Statute and the South African authorities would not have been entitled to act in terms of its provisions.[163]

3.2 The Framework of the Implementation Act

The Implementation Act created a legislative framework for the domestic prosecution of core international crimes. Du Plessis notes that prior to the Implementation Act, South Africa had no domestic legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa.[164] The Implementation Act therefore, is the means by which to remedy that failure, and is in any event the domestic legislation that South Africa as a State party to the Rome Statute was legally obliged to pass in order to comply with its duties under the Statute's complementarity scheme.

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[160] (867/15) [2016] ZASCA 17 (15 March 2016) at para 1.
[161] S 231(4) provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
[162] See Du Plessis Bringing the International Criminal Court Home: 2002 (2003) 16 The *South African Journal of Criminal Justice* 1 at 14.
[163] A Katz 'An Act of transformation: The incorporation of the Rome Statute of the ICC into national law in South Africa' (2003) 12 *African Security Review* 25.
[164] South Africa's International Criminal Court Act: Countering genocide, war crimes and crimes against humanity' *Institute for security Studies paper* 172 (November 2008).

The preamble of the Implementation Act provides the context to the enactment of the Act and it reads:

MINDFUL that –

- throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law;

- the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations;

- the Republic of South Africa is committed to –

- bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute; and
- carrying out its other obligations in terms of the said Statute.'

The Implementation Act has two main purposes.[165] First, the Act establishes a comprehensive cooperation system for South Africa in relation to the ICC in line with article 88 of the Rome Statute.[166] Secondly, the aim of the Implementation Act is to provide a statutory basis for national prosecution of crimes against humanity, genocide, and war crimes before a South African court in line with the principle of complementarity.[167] Simply put, the Implementation Act creates a structure for the national prosecution of crimes in the Rome Statute. The Act gives effect to the

[165] See Strydom *et al International* Law (2016) at 401.
[166] See chapter 4 of the Implementation Act.
[167] See section 3(d) as well as the Preamble of the Implementation Act.

complementarity scheme envisaged in the Rome Statute by creating the structure necessary for national prosecutions in terms of the Act. Chapter four of the Implementation Act provides for cooperation, arrest of persons and their surrender to the ICC. The Act follows closely the provisions of the Rome Statute.[168] To this end, section 14 of the Act, provides for arrest of persons, cooperation and judicial assistance and includes the same types of cooperation as identified in Article 93 of the Rome Statute.[169] The Implementation Act also proceeds to provide details of the modalities for providing assistance. The most form of cooperation is the duty to arrest and surrender.[170] Section 8 of the Implementation Act provides that an arrest warrant issued by the ICC must be endorsed by magistrate for execution in any part of the Republic.[171] Tladi argues that it is noteworthy that the Implementation Act does not provide discretion for the magistrates in whether to endorse the arrest warrant.[172] Rather it provides that on receipt of the request to arrest and surrender a magistrate 'must endorse the warrant of arrest'.

The procedure for the institution of prosecutions in South African courts is set out in section 5 of the Act. This procedure involves different governmental departments and officials. First, section 5(1) of the Implementation Act stipulates that no prosecution may be instituted against a person accused of having committed an ICC crime without the consent of the National Director of Public Prosecution (NDPP). In other words, a Prosecutor or State Advocate cannot institute proceedings without the consent of the NDPP. In terms of section 5(3) of the Implementation Act, the NDPP must, when reaching a decision about a prosecution, recognise South Africa's obligation in the first instance, under the principle of complementarity in the Rome Statute, to exercise jurisdiction over and to prosecute persons accused of having committed an

[168] See Tladi 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: A Perspective from International Law' Repository.up.ac.za (Accessed on 29 July 2021)
[169] See Tladi 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: A Perspective from International Law' Repository.up.ac.za (Accessed on 29 July 2021)
[170] See Tladi 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: A Perspective from International Law' Repository.up.ac.za (Accessed on 29 July 2021)
[171] See section 8(2) of the Implementation Act.
[172] See Tladi 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: A Perspective from International Law' Repository.up.ac.za (Accessed on 29 July 2021)

international crime. However, there is no requirement for such consent in terms of the Act for the arrest of a person accused of committing the international crimes or for investigation of such cases. It is submitted that the police as law enforcement officials, may investigate and even arrest a person who has committed an International crime however, for that person to be brought before court and be criminally charged and prosecuted, the permission of the NDPP must be obtained in terms of section 5(1) of the Implementation Act. In deciding whether to charge the suspect or to issue a certificate of nolle prosequi, the NDPP must bear in mind the requirements specified in section 5(1) of the Implementation Act mentioned above.

The Implementation Act also requires that an appropriate High Court must be designated to hear cases brought under the Act. Section 5(4) obliges the Minister of Justice in consultation with the Chief Justice and the NDPP in writing to designate an appropriate High Court in which to conduct a prosecution against any person accused of having committed a crime in terms of the Act. It is doubtful whether non-compliance with this requirement would vitiate proceedings. For instance, where a prosecution of an International crime was instituted in a High Court which was not designated by the Minister. It is submitted that where there was substantial with the Act and the accused enjoyed a fair trial in terms of section 35 of the Constitution and conventional international law, the non-compliance with this requirement cannot render those proceedings irregular or a nullity.[173] In terms of section 5(5) of the Implementation Act, if the NDPP declines to prosecute a person under the Act, she must provide the Director-General for Justice and Constitutional Development with the full reasons for that decision, because the Director General is obliged to forward the decision, together with reasons, to the Registrar of the ICC.[174] Strydom *et al* notes that the

[173] In *JOF Supermarket (Pty) t/a Spar Mahikeng v Primeco Meat Wholesailers (Pty) Ltd and Another* Case Number UM47/2019 at para 49, the court stated that in establishing whether or not statutory requirements have been complied with emphasis has in the past been placed on the manner in which the statutory requirement has been cast. Statutory requirements were classified as either peremptory or directory. Substantial compliance instead of exact compliance with peremptory statutory requirement is required. In *JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 N at 327 G – H, the court stated as follows: 'I venture, with respect, to suggest that to say that substantial compliance with procedural provisions will only suffice when they are directory…That provisions which are merely directory can be ignored altogether without fatal results appears from the cases of *Scutter v Scheepers* 1932 AS 165 at 174 itself. It is clear from the cases… that what must first be ascertained are the objects of the relative provisions. Imperative provisions, merely because they are imperative will not, by implication, be held to require exact compliance with them where a substantial compliance with them will achieve all the objects aimed at.'

[174] See Section 5(5) of the Implementation Act.

Implementation Act, does not provide any specific trial procedure or punishment regime for domestic courts, so it can be assumed that the usual trial procedure for a criminal trial will be followed and that the court will be empowered to pass any of the sentences usually imposed.[175] It is submitted that the provisions of section 51 of the Criminal Law Amendment Act,[176] which provides for minimum sentences in certain offences will be applicable during the trials and subsequent convictions of International crimes.

Section 4(1) of the Implementation Act, provides that despite anything to the contrary in any other law in the Republic, any person who commits a crime (international crime), is guilty of an offence. Schedule 1 of the Implementation Act creates a structure for the national prosecution of the international crimes of genocide, war crimes, and crimes against humanity.[177] The Act incorporates the definition of the Rome Statute of the crimes against humanity, war crimes, and genocide and excluded any type of immunity.[178] In this regard, Du Plessis argues that under section 4(2)(a)(i) of the Implementation Act, South African courts are accorded the same powers as the ICC to trump any immunities which usually attach to officials of government.[179] As stated above, the Act incorporates the core crime of the Rome Statute. To this end:

- Part 1 of Schedule 1 to the Implementation Act follows the wording of article 6 of the ICC Statute in relation to genocide;
- Part 2 of the said Schedule mirrors article 7 of the ICC Statute in respect of crimes against humanity.
- Part 3 does the same for war crimes as set out in article 8 of the ICC Statute.

[175] Strydom *et al* International law (2016) at 403.
[176] Act 105 of 1997.
[177] See Part one to Part three of Schedule 1 of the Act.
[178] Section 4(2) of the Implementation Act provides that despite any other law to the contrary, including customary and conventional international law, the fact that a person – (a) is or was a head of state or government or parliament, an elected representative or a government official; or (b) being a member of security service or armed force, was under a legal obligation to obey a manifestly unlawful order of government or superior, is neither – (i) a defence to a crime; or (ii) a ground for any reduction of sentence once a person has been convicted of crime.
[179] Du Plessis 'International Criminal Courts' the International Criminal Court, and South Africa's Implementation of the Rome Statute" in Dugard J *International Law: A South African Perspective* (2011) 4th edition.

From the above, it is abundantly clear that the international core crimes in terms of the Rome Statute of the ICC forms part of South African law in terms of this Act.[180] Du Plessis notes that a South African court, charged with the prosecution of a person allegedly responsible for a core crime, shall apply the Constitution and the law as required by section 2 of the Implementation Act.[181] The right to a fair trial set out in section 35 of the Bill of Rights for arrested, detained and accused persons must be afforded to any person who is being tried under the Implementation Act.

The Act also allow for the amendment of domestic laws, such as the Criminal Procedure Act,[182] and the Military Discipline Supplementary Measures Act,[183] in order to have these Acts conform to the definitions of crimes in the Rome Statute.[184] In *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*,[185] the court noted that the overall purpose of the Implementation Act is to bring the perpetrators of serious international crimes to justice, in domestic courts or in the ICC.[186]

3.3 The objectives of the Implementation Act

Section 3 of the Implementation Act sets out the objectives of the Act. The first objective of the Act recorded in section 3(a) is to create a framework to ensure that

[180] Du Plessis South Africa's International Criminal Court Act: Countering genocide, war crimes and crimes against humanity' *Institute for security Studies paper* 172 (November 2008).
[181] Du Plessis South Africa's International Criminal Court Act: Countering genocide, war crimes and crimes against humanity' *Institute for security Studies paper* 172 (November 2008). Section 2 of the Implementation act provides that in addition to the Constitution and the law, any competent court in the Republic hearing any matter arising from the application of this matter must also consider, and, where appropriate, may apply – (a) conventional international law, and in particular the Statute; (b) customary international law and; (c) comparable law.
[182] 51 of 1977.
[183] 16 of 1999.
[184] See Section 39 of the Implementation Act read with Schedule 2. In terms of this section, section 18 of the Criminal Procedure Act was amended with the addition of paragraph (g) to include the crime of the crime of genocide, crime against humanity, and war crime as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002. The Military Discipline Supplementary Measures Act was amended by the addition of subsection 3(4) to the Act to the effect that, when a person who is subject to the Code is suspected of having committed a crime contemplated in section 37 of the Implementation Statute for the International Criminal Court Act, 2002 the matter must be dealt with in terms of that Act.
[185] 2017 (1) SACR 623 (GP) (22 February 2017) at para 35.
[186] At para 10.

the Rome Statute is effectively implemented in South Africa. The second object of the Act recorded in section 3(b) is to ensure that anything done in terms of the Implementation Act conforms with South Africa's obligations under the Rome Statute, including its obligation to prosecute the perpetrators of crimes against humanity referred to in the Act. Section 3(d) of the Implementation Act also defines one of its objectives as being 'to enable as far as possible and in accordance with the principle of complementarity as referred to in article 1 of the Statute, the National Prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstance'. In terms of section 3(e)(ii) and (iv) of the Act, in the event of the NPA declining or being unable to prosecute a crime contemplated in section 3(d) the republic will cooperate with the ICC in the investigation and prosecution persons accused of having committed crimes or offences referred to in the Statute and in particular to provide mechanisms for the surrender to the court of persons accused of having committed a crime referred to in the Statute and to enforce any sentence imposed or order made by the court.

Section 3(d) endorses the complementarity principle contained in the Preamble of the Rome Statute. The principle of complementarity ensures that the ICC operates as a buttress in support of the criminal justice systems of States Parties at a national level, and as part of a broader system of international criminal justice.[187] The principle proceeds from the belief that national courts should be the first to act. It is only if a State party is 'unwilling or unable' to investigate and prosecute international crimes committed by its nationals or on its territory, that the ICC is then seized with jurisdiction.[188] The Act underscores the complementarity obligation on South African courts to domestically investigate and prosecute ICC offences. The preamble, for instance, speaks of South Africa's commitment to bring persons who commit such atrocities to justice in a court of law of the Republic in terms of its domestic law where possible.

[187] Du Plessis South Africa's International Criminal Court Act: Countering genocide, war crimes and crimes against humanity' *Institute for security Studies paper* 172 (November 2008).
[188] Du Plessis South Africa's International Criminal Court Act: Countering genocide, war crimes and crimes against humanity' *Institute for security Studies paper* 172 (November 2008).

Like the Rome Statute, the Implementation Act does not apply retrospectively. Section 5(2) of the Implementation Act provides that no prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the statute.[189] To this end, South Africa has elected to create a very strong system to bring persons who commit such atrocities to justice. To date, we have not had a case prosecuted in South Africa for the crimes in terms of the ICC statute. However, in the case of *S v Basson*,[190] the accused was alleged to have participated in a number of acts that may amount to international crimes, including the mass murder of South West African Peoples Organization detainees in Namibia, and the assassination of members of ANC in Namibia, Swaziland, Mozambique and London.[191] The accused was charged on 67 counts, including 229 murders, conspiracy to murder, fraud totalling R36 million, and manufacturing, possessing and dealing in drugs. These offences were committed during the apartheid era. Due to the non-retroactivity of the Implementation Act and the Rome Statute, the accused was not charged in terms of these statutes for the International crimes that he committed. However, the serious nature of his alleged conduct, and the possibility that his acts amounted to international crimes, became relevant to the proceedings before the Constitutional Court. Following his acquittal in April 2002 on all counts, the State appealed to the Supreme Court of Appeal the High Court decision on a number of grounds.

The Supreme Court of Appeal rejected the appeal outright on procedural grounds and the prosecution approached the Constitutional Court on the basis that the matter raised constitutional issues. The State succeeded partly in the Constitutional Court in that the court dismissed the appeals relating to bias on the part of the trial Judge and the refusal to accept the bail record, but overturned the quashing of certain charges by the High Court. The State declined to pursue these charges against Basson. The Constitutional Court raised the international criminal character of the allegations in support of its finding that quashing of the charges gave rise to a constitutional matter.[192] In doing so, it found that 'international law obliges the state to punish crimes

[189] Article 24(1) of the Rome Statute provides that 'no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
[190] 2005 (1) SA 171 (CC).
[191] See the headnotes of the case.
[192] At para 37 of the judgment.

against humanity and war crimes'. Furthermore, it found that it is clear that the practice of apartheid constituted crimes against humanity and that some of the practices of the apartheid government constituted war crimes. Broadly speaking, the court found that, in so far as the enforcement of International Criminal law is concerned, the establishment of the ICC in no way deprives national courts of responsibility for trying cases involving breaches of such law which are properly brought before them in terms of national law.[193]

3.4 The Jurisdiction of South African courts in respect of International crimes in terms of the Implementation Act

The Implementation Act establishes a variety of jurisdictional grounds in terms of which a South African court might be seized with the prosecution of a person alleged to be guilty of genocide, crimes against humanity and war crimes. Section 4(1) of the ICC Act creates jurisdiction for a South African court over International crimes by providing that 'despite anything to the contrary in any other law of the Republic, any person who commits a crime, in terms of the Act is guilty of an offence and liable on conviction to a fine or imprisonment or both such fine and imprisonment. Strydom *at al* note that there are four grounds upon which jurisdiction may be exercised over international crimes by South African courts under the implementation Act namely, territoriality, nationality, passive personality and the universality principle.[194] The provision of section 4(3) of the Implementation Act discussed hereunder which deals with the jurisdiction of the South African Courts in relation to crimes listed in the Act has been the basis for the development of the complementarity jurisprudence in South Africa. Section 4(3) of the Act provides as follows:

> "In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (I) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-
> (a) that person is a South African citizen; or
> (b) that person is not a South African citizen but is ordinarily resident in the Republic;

[193] See *State v Basson* 2007 (3) SA 582 (CC) at para 171 (*State v Basson II*).
[194] Strydom *et al* International law (2016) at 402.

(c) that person, after the commission of the crime, is present in the territory of the Republic; or

(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic."

When a person commits an International crime outside the territory of the Republic in one of these four circumstances, then section 4(3) deems that crime to have been committed in the territory of the Republic.[195] In other words, this section empowers the South African courts to exercise jurisdiction over international crimes defined in the Implementation Act if they are committed within the South African territory and also in instances where they are committed outside the borders' of the Republic. This kind of jurisdiction is referred to as universal jurisdiction.[196] This therefore entails that when South Africa acts in terms of the complementarity principle envisaged in the Rome Statute and in the Implementation Act it can exercise universal jurisdiction over international crimes committed in foreign States.[197] Simply put, the Implementation Act gives the South African courts the power to exercise universal jurisdiction in respect of international crimes, namely, crimes against humanity, genocide and war crimes as defined in the Rome Statute and in the Implementation Act. Du Plessis notes that this form of jurisdiction is to be welcomed because genocide, crimes against humanity, and war crimes are among the most serious crimes of concern to the international community as a whole, and as such, are often regarded as giving rise to 'universal jurisdiction.[198] The exercise of universal jurisdiction over a foreign state may be prevented by the principle of immunity. This principle is part of Customary International law and was confirmed by the International Court of Justice in *Arrest Warrant (Congo v Belgium)* decision, where the Congolese Minister of Foreign affairs, Yaradia was granted immunity by the International Court of Justice pursuant to his official position. This principle is briefly discussed hereunder.

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[195] *National Commissioner of Police v South African Human Rights Litigation Centre & Another* 2015 (1) SA 315 (CC) paras 51 to 55.

[196] *National Commissioner of Police v South African Human Rights Litigation Centre & Another* 2015 (1) SA 315 (CC) paras 51 to 55.

[197] Strydom *et al 'International Law*' (2016) notes that according to the Princeton Principles on Universal Jurisdiction (2001), 'universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction' (The Princeton Principles on Universal Jurisdiction (2001), Principle 1(1)).

[198] Du Plessis M 'Bringing the International Criminal Court Home – The Implementation of the Rome Statute of the International Criminal Court Act 2002' (2003) 16 *SACJ* 1 at 6.

3.5 The Principle of Immunity

Traditionally, international law granted absolute immunity to heads of State in respect of all commercial and criminal acts.[199] Heads of states were not subject to criminal responsibility for their actions, because of the merger of the sovereign and the sovereignty of the state.[200] Strydom *et al* notes that International law may, in certain instances, prevent a court from exercising criminal or civil jurisdiction over foreign States and their representatives through the principle of immunity.[201] Under this principle, International law will prohibit a State from exercising jurisdiction over a matter that would ordinarily fall within its jurisdiction, either based on the identity of the person or entity involved for example, a Head of State or the nature of the conduct in question.[202] The ICJ noted in the *Arrest Warrant* case that immunity is not designed to provide impunity, but to balance competing rationales.[203] Stahn notes that the main purpose of immunities is to protect certain official acts carried out by individuals on behalf of the state, or to facilitate the role of certain office holders in international affairs e.g. heads of states, ministers, diplomats during their term of office.[204]

Over time, international law has carved out a number of exceptions to the absolutist position.[205] One such exception, which now forms part of customary international law, is that immunities (including immunities of heads of State) are unavailable as a defence or jurisdictional bar to charges involving allegations of international crimes.[206] The lifting of immunity of heads of states has been incorporated in a number of international instruments dealing with the prosecution of war crimes, genocide or crimes against humanity.[207] Moreover, International Conventions and custom prescribe a wide range of human obligations with which states must comply. For

[199] H. Fox, *The Law of State Immunity* (2008) at 686.
[200] Bassiouni B *Crimes Against Humanity in International Criminal Law* (1999) at 505.
[201] Strydom *et al International Law* (2016) at 253.
[202] Strydom *et al International Law* (2016) at 253.
[203] At para 60.
[204] C Stahn *Introduction to international Criminal Law* (2019) at 250.
[205] See J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (2014) 83 at 89–96. See also R. Van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (2008).
[206] See G Mettraux, J Dugard and Max Du Plessis " Heads of State Immunities, International Crimes and President Bashir's visit to South Africa' *International Criminal Law review*' (2018) 18 577– 622 at 577.
[207] For instance see Article 6 of the Convention on the Prevention and Punishment of Genocide of 1948; See also Article 7 of the ICTY Statute of 1993 and Article 6 of the ICTR of 1994.

instance, Article 2(2) of the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 1984 (CAT) ratified by 136 countries including South Africa provides that:

> 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or other public emergency, may be invoked as a justification for torture."

Article 4 of this Convention requires States parties to criminalize the offence of torture in their domestic law, including attempts and complicity as well as participation. In addition, some human rights norms enjoy such a high status that their violation, even by state officials, constitutes an international crime.[208]

Immunities spring from two distinct, yet related, concerns of international law. The first is the need to ensure the smooth conduct of international relations which requires that States are able to negotiate with each other freely and that those State agents charged with the conduct of such activities should be able to perform their functions without harassment by other states.[209] This is said to be the predominant justification for personal or diplomatic immunity, which provides 'inviolability for the person and premises of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.[210] The second source of immunities is the principle of State sovereignty, in terms of which all states are equals and no State may exercise jurisdiction over another State's conduct.[211]

3.6 Different types of Immunities

3.6.1 Ratione materiae

There are two types of immunity that may apply to States' individual officials. First, there is immunity ratione materiae which applies to acts performed in an official

[208] Dugard, J *International Law: A South African Perspective*, (2000) 2nd ed at 202.
[209] See Cryer *et al* '*An Introduction to International Criminal Law and Procedure'* (2010) 2 ed at 538.
[210] See Cryer *et al* '*An Introduction to International Criminal Law and Procedure'* (2010) 2 ed at 538.
[211] Strydom *et al International Law* (2016) at 253.

capacity.[212] This form of immunity is said to 'attach' to the official acts of the individual and not to his or her status.[213]

This immunity is often referred to as subject-matter immunity or functional immunity and continues to apply even once the official has left office.[214] Functional immunity is conduct-based.[215] It relates to acts carried out in an official function, and excludes acts in a private capacity.[216] Douglas notes that where foreign state officials are named defendants, they can only benefit from their state's jurisdictional immunity if the foreign state itself is, by operation of the rule of law, the proper defendant in the action.[217] He also notes that the usage of the term immunity ratione materiae in this situation may give the impression that the foreign state's officials have the right to invoke immunity in their own right in respect of their impugned acts. But that is not the case: the immunity vest in the foreign state alone as corporate entity.

One of the rationales of functional immunity is to ensure that wrongful acts are not attributed to agents personally, but rather to the state on whose behalf they act. Functional immunity continues to apply after the individual has ceased to hold public office, since the protection is tied to state conduct.[218] In *Zoernsch v Waldock*[219] the British Court stated as follows:

> 'A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'en poste' at the date of his suit.'

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[212] Dugard *International Law: A South African Perspective* (2011) 4 ed at 253.
[213] See A Sanger 'Immunity of state officials from the criminal jurisdiction of a foreign state' 2013(62)1 *International and Comparative Law Quarterly* 193 at 200. See also *Church of Scientology* (1978) 65 *ILR* 193 at 198; See also M Tomonori, 'The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct' (2001) 29(4) *Denver Journal of International Law & Policy* 101.
[214] Akande and Shah 'Immunities of State Officials, International Crimes and Foreign Domestic Courts' *European Journal of International Law (*2011) 827;
[215] D. Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21*EJIL* 815 at 825.
[216] C Stahn *Introduction to international Criminal Law* (2019) at 250.
[217] See Z Douglas 'State Immunity for the Acts of State Officials' 2012(82) *British Year Book of International Law*
[218] C Stahn *Introduction to international Criminal Law* (2019) at 250.
[219] [1964] 1 WLR 675 692.

As stated above, functional immunity protects conduct carried out on behalf of a State. Cryer *et al*, note that this immunity is linked to the maxim that a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal. If a State could bring criminal proceedings against the individual officials who carried out official functions of another State, the State would be doing indirectly what it cannot do directly, namely, acting as the arbiter of the conduct of another State.[220] This immunity attaches to a comparatively large class of officials who carry out State functions.

In the American civil case of *Herbage v Meese,*[221] Mr Herbage, a British citizen, had been extradited from the UK to the USA where he was indicted in the United States District Court of Florida on twenty three counts of mail fraud and two counts of interstate or foreign transportation of fraudulently obtained money or property.[222] Herbage, however, proceeded to sue a number of UK officials who had taken part in the extradition process alleging a number of irregularities in the process that led to his arrest and extradition. Among other things, Mr Herbage alleged that the defendants conspired to violate his due process rights by falsely and knowingly stating that the United States had made a valid provisional request for his extradition, a necessary prerequisite to such extradition. It was on the basis of this request that a London magistrate had issued the provisional warrant under which he was arrested in England. Because that basis was false, Herbage claimed, his constitutional rights had been violated and, for relief, Herbage sought, among other things, an order for compensatory damages in the sum of two million dollars and punitive damages in the sum of ten million dollars.

The British defendants argued that they were entitled to immunity as officials of a foreign State. Mr. Herbage asserted that he was not suing a foreign sovereign, but suing the British defendants, solely, in their individual capacity. The court found that the actions complained of were ones that the British officials could have taken only in

[220] *An Introduction to International Criminal Law and Procedure'* (2010) 2 ed at 533.
[221] *Herbage v Meese* Civ. No 89-0645 747 F. Supp.60 (D.D.C 1990). Available at http://www.leagle.com/get_cited/747%20F.Supp.%2060 (Accessed 29 July 2021).
[222] See background to the case.

their official capacities, they were acting as law enforcement officers, and that immunity under the Foreign Sovereign Immunities Act.[223] The court noted that this case invokes the venerable Act of State doctrine, which precludes American courts from inquiring into the validity of the public acts of a recognised foreign sovereign power committed within its own territory. The court eventually dismissed the plaintiff's case.

Meanwhile in *Khurts Bat v Investigating Judge of the German Federal Court,*[224] the English High Court considered whether Mr Bat, a Mongolian State official who was accused of kidnapping and abduction and for causing serious bodily injuries could plead immunity and prevent his extradition to Germany for the prosecution of municipal crimes. Mr Bat advanced three alternative defences of immunity.[225] First, was that he was on special mission to the UK. Secondly, he was a high ranking official and thirdly that he benefited from the sovereign immunity of Mongolia. The English Court found that Mr Bat as head of the office of National Security of Mongolia was not entitled to a person immunity afforded to high ranking foreign state officials.[226] The High Court rejected all three grounds for immunity and found that Mr Bat who committed municipal crimes on German territory was not immune from the jurisdiction of German Courts and could therefore be extradited to Germany.[227]

3.6.2 Ratione personae

On the other hand, immunity *ratione personae*, or personal immunity, attaches to a limited category of officials by virtue of their particular role in representing the State abroad, for example heads of State or heads of government, ministers of foreign affairs and diplomats.[228] Personal immunity is not limited to any particular conduct; it provides complete immunity of the person of certain office-holders while they carry out important representative functions.[229] Cryer *et al* notes that personal immunity is absolute, but it attaches to a limited set of official roles and it endures only while the

[223] 28 U.S.C, 1330 (b), 1602-1611.
[224] [2012] 3 WLR 180.
[225] See para 1 of the judgment.
[226] At paras 55 – 56 of the judgment.
[227] At para 101 of the judgment.
[228] See Cryer *et al An Introduction to International Criminal Law and Procedure'* (2010) 2 ed at 533.
[229] *An Introduction to International Criminal Law and Procedure'* (2010) 2 ed at 533.

person enjoys the official position which attracts the immunity. Conversely, functional immunity protects only conduct carried out in the course of the individual's duties, but does not drop away when a person's role comes to an end, since it protects the conduct, not the person.[230]

In the In *Arrest Warrant Case (DRC v Belgium)* (14 February 2002),[231] the ICJ found that diplomatic and consular agents, and certain holders of high ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae*.[232] The court found that the issue and circulation of the arrest warrant by Belgium against a Congolese Minister of Foreign affairs in terms of its universal jurisdiction violated Belgium's international obligations towards Congo.[233] The Court accordingly found that the issuing of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.[234] Meanwhile in *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte,*[235] the question was whether immunity could be raised in a British court in proceedings against a former head of state (General Pinochet of Chile) for acts of torture committed while he was in office. In this case, Pinochet assumed power in Chile as a result of military coup that overthrew the government of President Allende. Pinochet was the Commander in Chief of the Chilean Army until 1974 when he assumed the position for presidency which lasted until 1990. His regime was known for its systematic and widespread violations of human rights, with allegations of murder, torture and hostage taking of political opponents. In 1998 during a visit to the United Kingdom for medical treatment he was arrested by the English authorities with a view to extradite him to Spain where a Spanish Judge had issued an International arrest warrant against him. Pinochet applied to have the warrant quashed on the ground that as a former Head of State, he enjoyed immunity from criminal prosecution.

[230] *An Introduction to International Criminal Law and Procedure'* (2010) 2 ed at 534.
[231] See discussion by Gunaratne R 'Belgian Arrest Warrant cases (Summary)' available at https://ruwanthikagunaratne.wordpress.com (Accessed 27 April 2021). This case is discussed in depth in the following chapter.
[232] At para 51 of the judgment.
[233] At para 70
[234] At para 70.
[235] (No. 3) [1999] 2 All ER 97, HL.

The Law Lords, relying on domestic law, held that the UK courts were entitled to exercise universal jurisdiction over the *jus cogens* prohibition against torture regardless of where the crime of torture was committed. The court stated as follows:

> 'International law has made plain that certain types of conduct…are not acceptable conduct on the part of anyone. That applies as much to heads of State, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law'.[236]

Pinochet was not extradited due to medical reasons. Although the Pinochet case failed to lead to an extradition owing to the UK Home Secretary's determination that Pinochet's ill-health prevented it, Spain had used universal jurisdiction successfully in other cases.[237] From the above discussion, it is submitted that regardless of rank or position, individuals could be held criminally responsible for acts committed in violation of international law.

3.7 The relationship between Article 27(2) of the Rome Statute and Section 4(2) of the Implementation Act

3.7.1 The Irrelevance of Immunity in terms of the Rome Statute

In terms of the Rome Statute, the head of State or government does not enjoy immunity from prosecution for the most serious International crimes before the ICC. Article 27 of the Rome Statute specifically excludes official capacity with regard to criminal responsibility within the court's jurisdiction. By joining the ICC, State parties have renounced the possibility of raising immunities as a ground for non-cooperation with the Court in relation to their own nationals.[238]

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[236] *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* 1998 4 All ER 897 939-940.
[237] See Christian Tomuschat, 'Issues of Universal Jurisdiction in the Scilingo Case' (2005) 3 *JICJ* 1074; Alicia Gil Gil, 'The Flaws of the Scilingo Judgment' (2005) 3 JICJ 1082; Guilia Pinzanuti, 'An Instance of Reasonable Universality' (2005) 3 *JICJ* 1092.
[238] See G Mettraux, J Dugard and Max Du Plessis " Heads of State Immunities, International Crimes and President Bashir's visit to South Africa' *International Criminal Law review*' (2018) 18 577– 622 at 602.

For the sake of completeness, Article 27 of the Rome Statue of the ICC provides as follows:

> **'Irrelevance of official capacity**
>
> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a 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.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

The effect of this provision is that in terms of the Rome Statute, a person cannot raise his position as a Head of State as a defence if he has committed international crime. Akande notes that the question of head-of-state immunity in relation to ICC proceedings arises at two different levels.[239] First, there is the question of whether a serving head of state is immune from proceedings before the Court itself. Second, there is the question of whether a head of state is immune from arrest by another state which is acting to execute an arrest warrant issued by the Court. The first question relates to the 'vertical' legal relationship between the Court and the state of the accused. The second relates to the 'horizontal' relationship between states and to whether the Court should require ICC parties to risk violating obligations they would ordinarily owe to the state of the accused. Meanwhile Kayitana believes that Article 27(1) of the Rome Statute clearly envisages the official status of the accused being invoked as a 'substantive defence' rather than a 'procedural defence,' which is dealt with in 27(2).[240] Kayitana further believes that the Rome Statute clearly distinguishes between the defence of official capacity on the one hand and the defence of immunity (both ratione materiae and immunity ratione personae) on the other. [241] According to

[239] D Akande Symposium on the Rome statute at Twenty: The immunity of Heads of States of non-parties in the early years of the ICC *AJIL Unbound* (2018) 112 at 173.
[240]See Kayitana 'The Universal Jurisdiction of South African Courts and immunities of Foreign State officials' *PER / PELJ* 2015(18)7 at 2581. Article 27(2) of the Rome Statute provides: "[I]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.
[241] See Kayitana 'The Universal Jurisdiction of South African Courts and immunities of Foreign State officials' *PER / PELJ* 2015(18)7 at 2581.

him, immunity and official capacity are dealt with separately in different articles of the Rome Statute. To this end, he believes that the wording of section 4(2)(a)(i) of the Implementation Act is modelled on article 27(1) of the Rome Statute, which refers to the defence of official capacity, not immunity, ratione materiae and ratione personae, which is dealt with in a separate provision, i.e. Article 27(2) of the Rome Statute. In his view, section 4(2)(a)(i) of the Implementation Act, is silent on the question of the immunities of foreign State officials accused of international crimes before South African courts.[242]

Tladi seems to share the view of Kayitana and argues that Article 27 of the Rome Statute contains a second paragraph, not included in the Implementation Act, which states that immunity which may attach to the official capacity of a person shall not bar the Court from exercising jurisdiction.[243] In Tladi's view, this suggests that section 4(2) of the Implementation Act does not remove immunities at all, but applies only to the availability of defences to the commission of crime.

It is submitted that Kayitana and Tladi are mistaken in that they seem to give section 4(2)(a)(i) of the Implementation Act a restrictive interpretation. Our Constitution requires a purposive approach to statutory interpretation. It is further submitted that the starting point for statutory interpretation should be section 39(2) of the Constitution which provides that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

It is submitted that section 39(2) introduced a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights.[244] The objectives of the Implementation Act in particular section 3(a), makes it clear that the objects of the Act among others, is to create a framework in

[242] See Kayitana 'The Universal Jurisdiction of South African Courts and immunities of Foreign State officials' *PER / PELJ* 2015(18)7 at 2584.
[243] The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: A Perspective from International Law' repository.up.ac.za (Accessed 28 July 2021).
[244] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) at para 91.

order to ensure that the Rome Statute is effectively implemented in the Republic. The Rome Statute annexed to the Implementation Act clearly denounce official capacity and immunity as a defence for international crimes in terms of Article 27. It is submitted that the Implementation Act in particular section 4(2) must not be read in isolation. It must be read together with the Rome Statute. Furthermore, section 233 of the Constitution enjoins courts when interpreting a legislation to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. It is further submitted that in a broader context, the argument that section 4(2)(a)(i) does not deal with immunity is incorrect and off-target.

The Rome Statute was modelled around the charters of the specialist tribunals in particular the ICTY[245] and ICTR[246] which excluded immunities for Heads of State and responsible Government officials. For instance, in *Prosecutor v Jean Kampanda,*[247] Mr Kampanda was a prime Minister of the Rwanda Interim government in April 1994. After the Genocide in 1994 the UN Security Council investigated the Genocide through a commission and found that there was a widespread systematic and widespread violation of humanitarian law resulting in genocide and a warrant of arrest was issued against him (Mr Kampanda). He was arrested and in 1997 he was indicted despite the fact that he was a Prime Minister. In terms of Article 6(2) of the ICTR he did not enjoy immunity. He had control and authority over his government and the military. He was held to be responsible for crimes committed by his subordinates under his watch. He also had knowledge of the events. He was prosecuted for genocide, crimes against humanity (murder and extermination) punishable under article 3(a) and 3(b) of the ICTR. He accepted responsibility on all the counts and pleaded guilty to the charges. The ICTR sentenced him to life imprisonment for acts of genocide and crime against humanity under the ICTR Statute. His subsequent appeal[248] on the grounds of the

[245] Article 7(2) of the ICTY provides that 'the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment'.
[246] Article 6(2) of the ICTR provides 'that the official position of any accused persons, whether Head of State or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'
[247] Case Number, ICTR 97-23-S. Judgment and Sentence 4 September 1998.
[248] See *Jean Kampanda v The Prosecutor,* The Appeal Judgment, Case Number ICTR No. 97-23-A (19 October 2000).

invalidity of the plea and that there were errors in the sentence was rejected by the appeal chamber.

Meanwhile in *Prosecutor v Charles Ghankay Taylor,*[249] the accused had applied to the Special Court of Sierra Leone (SCSL) to quash his indictment and set aside the warrant for his arrest on the grounds that he was immune from any exercise of the jurisdiction of the Court by virtue of the fact that at the time the indictment and the warrant of arrest were issued, he was a sitting Head of State. The Appeals Chamber rejected Mr Taylor's application on the ground that the sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal.

In the same way, the Rome Statute provides that the position of a person accused of international crimes before the ICC shall not bar the Court from exercising its jurisdiction over such a person. However, whether that provision applies to the most senior officials of States that are not a party to the Statute, or to their lower level officials, is a different question, one that has proven controversial and has important implications for a potential ICC investigation of war crimes committed for instance in Sudan,[250] and in Afghanistan by American soldiers.

For instance, in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre (SALC) (Helen Suzman Foundation and Others (as Amici Curiae),*[251] the Supreme Court of Appeal dismissed an appeal in respect of a decision from the High Court in which the Court ruled that the government's failure to arrest Sudanese President, Omar Al-Bashir was inconsistent with the Constitution. The facts of this case were briefly to the effect that the ICC had issued two warrants of arrest against Al-Bashir in 2009 and 2010 and the court wanted him to appear for trial in respect of cases involving crimes against humanity, genocide committed in Dafur, Sudan. In issuing its decision, the ICC Pre-Trial Chamber was of the position that President Bashir's immunities as a sitting head of State had effectively been set

[249] SCSL-2003-01-AR72 (E) (31 May 2004) para 52.
[250] See D Steward 'Official Immunity under the Rome Statute: The Path from Principle to Practice Is Seldom Straight' www.justsecurity.org. (Accessed on 25 July 2021).
[251] [2016] 2 AII SA 365 (SCA).

aside by UNSC Resolution 1593 (2005), which referred the situation in Darfur to the Prosecutor of the ICC.[252] The two warrants had been forwarded to all member states of the Rome Statute, including South Africa, with a request that they co-operate under the Rome Statute and cause President Al-Bashir to be arrested and surrendered to the ICC should he set foot in their territories. On 13 June 2015, South Africa was reminded by the International Criminal Court of its 'obligation under the Rome Statute' to immediately arrest and surrender the sitting President of Sudan, Omar Al-Bashir, during his visit to South Africa for an African Union (AU) Summit. The South African government took no steps to arrest him. The failure of the South African government to execute the warrant against Al-Bashir resulted in the SALC bringing an urgent application on Sunday 14 June 2015, in the Gauteng Division of the High Court, Pretoria[253] seeking orders declaring the failure to take steps to arrest President Al-Bashir to be in breach of the Constitution and to compel the Government to cause President Al-Bashir to be arrested and surrendered to the ICC to stand trial pursuant to the two warrants.[254] The High court directed the South African Government to take all necessary steps to prepare for the arrest and detention of Bashir pending a formal request for his surrender from the ICC. While the matter was argued before the court, the court was informed by the government's legal representative that President Al-Bashir was still in the Republic. The High Court further ordered the Government to take all required steps to prevent Bashir's departure and, to that end, directed the Government to effect service of the order on the officials in charge of every point of entry into and exit from the Republic

Immediately after the court order was granted and that arrangements were made for the arrest of President Al-Bashir, the court was informed that President Al-Bashir had left the country earlier that day around 11h30. The government appealed against the order of the court and the High Court refused to grant the government leave to appeal on the grounds that the matter was moot. On petition to the SCA, the Court granted leave to appeal and found that the South African Government was under an obligation

[252] See Guénaël Mettraux, John Dugard and Max du Plessis 'Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa' Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa' *International Criminal Law Review* (2018)18 577 – 622 at 577.
[253] *Southern Africa Litigation Centre* v. *Minister of Justice and Constitutional Development and Others*, (Case No. 27740/2015), 24 June 2015.
[254] See para 2 of the judgment.

to execute the warrant of arrest against Al- Bashir. The court rejected the argument of government that President Al-Bashir as the head of state enjoyed immunity in terms of section 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA). The court also rejected the argument of the South African government that President Al Bashir was entitled to immunity under the agreement between South Africa and the AU regarding the hosting of the AU summit. The judge held that the agreement only dealt with immunity of members of staff of the AU Commission and delegates or representatives of other international organizations. That agreement and the Ministerial Order implementing it into domestic law did not, in his view, cover heads of states or representatives of states

To this end, and in line with the complementarity principle, the court found that the Implementation Act is a specific Act dealing with South Africa's implementation of the Rome Statute. In that special area, the court found that the Implementation Act must enjoy priority.[255] The court found that the DIPA continues to govern the question of head of state immunity, but the Implementation Act excludes such immunity in relation to international crimes and the obligations of South Africa to the ICC.[256] The court concluded that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act, it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation is made.[257] The court based its reliance on section 10(9) of the Implementation Act which provides that:

> 'The fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) does not constitute a ground for refusing to issue an order [for surrender to the ICC] contemplated in subsection (5)'.

The court accepted that Section 10(9) of the Implementation Act on its face removes any immunity with regard to proceedings relating to surrender to the ICC. Section 4(2)

[255] At para 102 of the judgment.
[256] At para 102 of the judgment.
[257] At para 103 of the judgment.

is relevant in defining those persons in respect of whom immunity is removed under Section 10(9) of the Implementation Act. The court also rejected an argument that this provision deals only with surrender but does not remove immunity from arrest where the person is wanted by the ICC. To this end the court said, if the argument that Section 10(9) applies only to surrender but not to arrest were accepted:

> '…s 10(9) would serve no purpose at all. It would be entirely redundant, because there would be no possible situation in which a person brought before the magistrate under s 10(1) would be a person referred to in ss 4(2)(a) or (b). Needless to say such an interpretation is to be avoided.'[258]

In a concurring judgment Ponnan JA took the view that since section 4(2) of the Implementation Act allows for domestic prosecution of heads of State in South Africa it would be anomalous if they could not be arrested and surrendered to the ICC. He stated as follows:

> 'Recognition of head of State immunity alongside the provisions of s 4(2) to preclude someone from being brought to trial in South Africa would create an intolerable anomaly. In terms of s 4(2) of the Implementation Act, a head of State may be arrested and prosecuted before South African domestic courts. The same head of State may be prosecuted before the ICC in terms of Article 27 of the Rome Statute. But when the ICC requests South Africa to arrest and surrender that head of State to the ICC for prosecution, it would be precluded from doing so by virtue of the suspect's immunity. The immunity would not protect him against arrest and prosecution in South Africa but inexplicably protects him from an arrest in South Africa for surrender to the ICC.'[259]

The court eventually found that under the Implementation Act, South Africa was entitled to arrest President Al Bashir and surrender him to the ICC.[260] Although the Government of South Africa initially sought to challenge the judgment of the Supreme Court of Appeal before the Constitutional Court, it subsequently withdrew its application for leave to appeal on 21 October 2016 without providing reasons.[261]

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[258] At para 102 of the judgment. See also paras 122 -123 of the concurring judgment.
[259] At para 122 of the judgment.
[260] At paras 96 to 101 o the judgment.
[261] *See* South African Department of Justice and Constitutional Development, 'Minister Michael Masutha: Media briefing on International Criminal Court and Sudanese President Omar Al Bashir', 21 October 2016,www.gov.za/speeches/minister-michael-masutha-media-briefing-international-criminal-court-and-sudanese-president.

From the above discussion is abundantly clear that both the High court and the Supreme Court of Appeal took the view that the Government had acted unlawfully when it failed to arrest President Bashir. The Supreme Court of Appeal even went further in finding that the failure was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation Act and unlawful. Akande[262] notes that the most remarkable aspect of the judgment is that the judges did not just confine themselves to the application of domestic law as it relates to surrender to the ICC. Both the majority and the concurring judgments go further and express the view that under the South African Implementation Act, foreign heads of State accused of international crimes committed abroad may be arrested and subject to domestic prosecution in South Africa.

It is submitted that the manner in which the ICC handled the question of immunity particularly in respect of African leaders has strained the relations between the court and African States. South Africa at some point even served a notice of withdrawal from the Rome Statute in terms of Article 127 of the Rome Statute as it felt aggrieved by the fact that it was affronted for failing to arrest Omar Al Bashir pursuant to a warrant issued by the ICC despite the fact that Al Bashir was a sitting Head of State. However, its action in this regard was found to be unconstitutional as the process was not sanctioned by Parliament in terms of section 231 of the Constitution.[263]

The African Union (AU), relying on Article 98, of the Rome Statute had consistently objected to the Pre-trial Chambers' issuance of an arrest warrant against President Al Bashir and called for its member states not to cooperate with the court in arresting Al Bashir given his head-of-state immunity.[264] In its General Assembly meeting of the 03 July 2009, the African Union declared as follows:

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[262] The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States? *EJIL* (2019) 30.

[263] See *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the advancement of the South African Constitution Intervening)* 2017 (1) SACR 623 (GP) at paras 47 and 53.

[264] Article 98 provides as follows: (1). '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 cooperation of that third State for the waiver of the immunity. (2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first

'9. DEEPLY REGRETS that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, REITERATES ITS REQUEST to the UN Security Council;

10. DECIDES that in view of the fact that the request by the African Union has never been acted upon, the AU Member *States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities,* for the arrest and surrender of President Omar El Bashir of The Sudan.' (Emphasis added)

It is submitted that the objection of the AU was not without merit especially when one considers the inherent tension between Article 27 and Article 98 of the Rome Statute. In *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others,*[265] the Supreme Court of Appeal acknowledged the fact that it is well recognised that there is a tension between Article 27 and 98 of the Rome Statute that has not as yet been authoritatively resolved. As discussed above, Article 27 provides that no person, including sitting heads of state, enjoys immunity before the International Criminal Court (ICC) while Article 98 provides an exception to the duty to co-operate in the arrest and surrender of persons possessing immunity.[266] At the time, Al Bashir was a sitting head of State and he enjoyed immunity and inviolability under customary international law.[267]

It is also interesting to note that Sudan is not a member State of the Rome Statute. Sudan has had an increasingly fraught relationship with the ICC since 2005 when the UNSC referred the situation in Darfur to the ICC in terms of Chapter VII of the UN Charter to investigate crimes against humanity, genocide against the former President Al Basheer. Despite this, and notwithstanding the provisions of Article 98, the ICC issued a warrant for the arrest of Al Bashir. The court found that the position of Omar Al Bashir as a Head of state which is not a party to the Statute, has no effect on the

obtain the cooperation of the sending State for the giving of consent for the surrender.'
[265] 2016 (3) SA 317 (SCA) at para 61.
[266] See D Tladi 'Interpretation and international law in South African courts: the Supreme Court of Appeal and the Al Bashir saga' *African Human Rights Law Journal* 2016(16) at 310, on the methodological question concerning the way in which South African courts, in particular the SCA in the *Al Bashir* case, have approached the question of interpretation of international law.
[267] See *Arrest Warrant (DRC v Belgium),* Judgment of 14 February 2000, *ICJ Reports* 2000, 3.

court's jurisdiction over the case.[268] It is submitted that the manner in which the ICC administered international justice is very much concerning. An impression is created that the court is biased and only targeting African leaders.[269] More importantly, the case of Al Bashir has been the subject of considerable debate from various commentators.[270] The debate can roughly be divided into two schools of thought. The one school believes that South Africa was correct in not arresting Al-Bashir. They criticise the ICC calling it imperialists and targeting Africa.[271] While the other school takes the view that South Africa ought to have arrested Al-Bashir, and further argue that those who disagreed with this view were protecting a murderer, Hitler of Africa.[272]

It is submitted that the selective prosecution of African leaders has caused a lot of consternation to the AU. As a result, the AU passed a resolution in 2017, calling on all African States to stop cooperating with the ICC and to even withdraw from it.[273] The AU has advocated for the domestic prosecution of international crimes without interference by the ICC.[274] Article 46A of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights provides that no charges shall be commenced or continued before the court against any serving AU Head of State or 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. Dov

[268] See Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3 (Mar. 4, 2009) at para 41. This case is discussed hereunder.
[269] See S Dov Bachmann and Eda Nwibo 'Pull and Push'- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges' *Brooklyn Journal of International Law* 2018 (43) 459 at 465.
[270] See D Tladi 'The duty on South Africa to arrest and surrender President Al Bashir under South African and international law: A perspective from international law' (2015) 13 *Journal of International Criminal Justice* 1027. M Ventura 'Escape from Johannesburg? Sudanese President Al Bashir visits South Africa, and the implicit removal of head of state immunity by the UN Security Council in light of *Al Jedda'* (2015) 13 *Journal of International Criminal Justice* 995; E de Wet 'The implications of President Al Bashir's visit to South Africa for international and domestic law' (2015) 13 *Journal of International Criminal Justice* 1049; J van der Vyver 'The Al Bashir debacle' (2015) 15 *African Human Rights Law Journal* 559;
[271] M Pheko 'The International Criminal Court is an Instrument of Imperialism!!' available athttp://mayihlomenews.co.za/the-international-criminal-court-is-an-instrument-of-imperialism/ (accessed 29 July 2021).
[272] See N Makhubu 'Hitler of Africa had 300 000 Blacks Slain' available at http://www.pressreader.com/south-africa/pretoria-news/20150626/281543699572327/TextView.
[273] However Nigeria and Senegal stated that they oppose withdrawal from the ICC. See Constance Johnson *African Union: Resolution Urges States to Leave ICC*, Library Congress (Feb. 10, 2017), http://www.loc.gov/law/foreign-news/article/africanunion-resolution-urges-states-to-leave-icc/ (Accessed 29 July 2021)
[274] See Aaron Maasho, *African Leaders Cautiously Back Strategy to Quit Global Court*, Reuters (Feb. 1, 2017, 6:55 AM), https://af.reuters.com/article/ topNews/idAFKBN15G49S (Accessed 27 July 2021)

Bachmann and Eda Nwibo note that the AU is currently taking steps to establish a regional criminal court, which could altogether keep the ICC out of Africa.[275] It is submitted that this will impact on the implementation of the complementarity principle by African countries. It is concerning though that notwithstanding all the atrocities committed by President Bush and Tony Blair in Iraq, no arrest warrants were issued against them. The objection of African leaders to the ICC is not without merits.

3.8 The Intersection between Article 27(2) of the Rome Statute and section 4(2) of the Implementation Act

The relationship between Article 27(2) of the Rome Statute and section 4(2) of the Implementation Act is very interesting. As discussed above, Article 27(2) of the Rome Statute provides that 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. Section 4(2) of the Implementation Act provides that the official position of a person shall not be a defence to a crime. Section 4(2) of the Implementation Act provides as follows:

> "Despite any other law to the contrary, including customary and conventional international law, the fact that a person-
> (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official or
> (b) being a member of a security service or armed forces, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither-
> (i) a defence to a crime; nor
> (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime."

Article 27 of the Rome Statute regulates the prosecution of international crimes before the ICC while section 4(2)(a)(i) of the Implementation Act governs prosecution of international crimes in South African courts.[276] The Implementation Act ensures that

[275] See S Dov Bachmann and Eda Nwibo 'Pull and Push'- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges' *Brooklyn Journal of International Law* 2018 (43) 459 at 465. See also Firew Kebede Tiba, *Regional International Criminal Courts: An Idea Whose Time Has Come?* 2016 (17) *Cardozo Journal of conflict Resolution* 521 at 521
[276] See Kayitana 'The Universal Jurisdiction of South African Courts and immunities of Foreign State

South Africa's international obligations are met.[277] It is submitted that section 4(2) discussed below finds its force from the Rome Statute. This view is fortified by the provision of section 2(a) of the Implementation Act which provides that South African courts hearing matters arising from the application of the Implementation Act may apply conventional international law, and in particular the statute. It is submitted that the word 'statute' in section 2(a) refers to the Rome Statute and any interpretation that is to be given to the Implementation Act should be compatible with the provisions of the Rome Statute. This view is fortified by section 233 of the Constitution which states that:

> '[W]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law (emphasis added)'

Section 4(2) does not draw a distinction between functional immunity and personal immunity. In other words, it removes the defence of immunity from Heads of State and from officials of States in respect of prosecution of international crimes.[278] It is submitted that this provision is in line with the aim of ICC to end impunity for serious crimes under international law.[279] This means that foreign government officials or Head of States, suspected of having committed war crimes, crimes against humanity or genocide anywhere in the world can, upon arrival in South Africa, be arrested and tried in a South African criminal court for these crimes. [280] Du Plessis is of the view that notwithstanding the contrary position under Customary International law, immunity *ratione personae* does not apply in South African courts in case of international crimes.[281] He argues that under section 4(2)(a)(i) of the Implementation Act, South African courts are accorded the same powers as the ICC to trump any immunities which usually attach to officials of government. Meanwhile, Dugard also supports the

officials' *PER / PELJ* 2015(18)7 at 2583.

[277] See A Katz 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa' (2003) 12 *African Security Review* 25.

[278] Dugard and Abraham 'Public International Law' 2002 *Annual Survey of South African Law* 140-192 See also Du Plessis 'South Africa's Implementation of the ICC Statute: An African Example' *Journal of International Criminal Justice* (2007) 460 at 470.

[279] See Kayitana 'The Universal Jurisdiction of South African Courts and immunities of Foreign State officials' *PER / PELJ* 2015(18)7 at 2565.

[280] See Kayitana 'The Universal Jurisdiction of South African Courts and immunities of Foreign State officials' *PER / PELJ* 2015(18)7 at 2565.

[281] See Du Plessis 'South Africa's Implementation of the ICC Statute: An African Example' *Journal of International Criminal Justice* (2007) 460 at 470.

view that section 4(2)(a)(i) of the Implementation Act removes both functional and personal immunities. He stated as follows:

> 'This would seem to mean that a head of state or government will not be able to plead immunity in respect of the crimes recognised by the Rome Statute—genocide, crimes against humanity and war crimes—unless the word "defence" in s 4(a)(i) is interpreted narrowly to apply only to a substantive defence on the merits of the case and not to a plea to jurisdiction, which would be an untenable interpretation in the light of article 27 of the Rome Statute denying immunity.'[282]

It is submitted that section 4(2)(a)(i) affirms the aspirations of the Rome Statute in particular the Preamble which declares that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. It is further submitted that South Africa has taken measures at the national level by enacting the Implementation Act with a provision of universal jurisdiction to ensure that those who commit heinous international crimes do not escape punishment. I support the views expressed by Dugard and Abraham[283] who argue that section 4(2)(a)(i) of the Implementation Act represents a choice by the legislature not to follow the *Arrest Warrant (Congo v Belgium)* decision, where the Congolese Minister of Foreign affairs, Yaradia was granted immunity by the International Court of Justice (ICJ) pursuant to his official position. They are also of the view that it would be ridiculous to allow a foreign Head of State to plead immunity before a South African court when he could not do so before the ICC.[284] It is submitted that this view should hold sway because at the time the Implementation Act was enacted, the legislature in South Africa was aware of this decision of *Arrest Warrant (Congo v Belgium)* and its implications and as a result, functional and personal immunity were deliberately excluded from the Implementation Act. In *Southern African Litigation Centre v National Director of Public Prosecutions,*[285] Fabricius J observed that:

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[282] Dugard *International Law: A South African Perspective* (2011) 4 ed at 257.
[283] Dugard and Abraham 'Public International Law' 2002 *Annual Survey of South African Law* 140 at 166.
[284] See also Kayitana E 'The universal jurisdiction of South African criminal courts and immunities of foreign State officials' 2015(18) 7 *PER/PELJ* 2561.
[285] 2012 *JDR* 0822 (GNP) 129.

> "It must not be forgotten that the ICC Act itself denies explicitly diplomatic immunity to government officials accused of committing ICC Act crimes. (See s 4(2) (a)). The recent trial of Taylor, in the International Criminal Court in The Hague, is a case in point."

Du Plessis believes that section 4(2)(a)(i) implies that South African courts, acting under the complementarity principle, are accorded the same power to supersede the immunities which usually attach to officials of government.[286] Du Plessis also argues that this signals South Africa's intention of acting hand in hand with the ICC in bringing State officials, whatever their standing, to justice. It is submitted that this view is correct in that it brings the complementarity principles envisaged in Article 17 of the Rome Statue into a reality.

It is further submitted that the provision of section 4(2) and 4(3) of the Implementation Act discussed above, provides a fertile ground in South Africa for cases dealing with complementarity. As explained above, section 4(3) of the Implementation Act gives South African Courts jurisdiction over international crimes not only when they are committed on South African territory but also when they were committed outside the territory of the Republic and that person, after the commission of the crime, is present in the territory of the Republic. An interesting case that comes to mind is that of the former President of America President Obama. In 2013 former President Barack Obama paid an official visit to South Africa. Pursuant to the provisions of section 4(3) of the Implementation Act, which provides for universal jurisdiction for South Africa, two South African groups tried to obtain arrest warrants for him for war crimes and crimes against humanity allegedly committed against Pakistan and Syria. The Muslim Lawyers' Association made an urgent application to the North Gauteng High Court for Barack Obama's arrest.[287] The applicant claimed that former President Obama was directly and indirectly responsible for killing and injuring more than 3000 people including women and 176 children in countries that posed no threat to America such as Pakistan and Syria. The applicant also accused President Obama of ordering or

[286] Du Plessis M "Bringing the International Criminal Court Home – The Implementation of the Rome Statute of the International Criminal Court Act 2002" 2003 *South African Journal Criminal Justice* 6.
[287] Obama: SA groups want arrest warrants" *City Press* (2013/06/26) available at http://www.citpress.co.za/politics/obama-sa-groups-want-arrest-warrants.

sanctioning the use of unmanned aerial drones to kill people that the American government considered a threat to national safety. The applicant also claimed that the targets were mainly followers of the Islamic faith, and this amounted to genocide. There was no judicial oversight to determine if these persons were indeed guilty of any alleged crime. They argued that these victims were deprived of a hearing. They argued further that there was no accountability at all, but just simple brazen murder. The North Gauteng High Court considered the matter and found that the case was not urgent and dismissed the application. The court did not rule on the merits of the case.

The application was based on the universal jurisdiction of South Africa in terms of the Implementation Act. The application was lodged on the basis that because Obama would be present as the legitimizing link in terms of the Act in South Africa, that his arrest was sought for the alleged commission of International crimes. However, this application was dismissed on a point of law and not on the merits. It is submitted that based on the provisions of section 4(2)(a)(i) of the Implementation Act, the applicants were within their rights to bring the urgent application. Furthermore, the Implementation Act clearly removed both functional and personal immunities including for Heads of State suspected of committing International crimes. It is submitted that the High Court took an easy way out and dismissed the application on technical grounds. It is further submitted that it was simply convenient for the court to dismiss the application for lack of urgency. The matter was urgent in that President Obama was scheduled to be in South Africa for a very short time. It is contended that the court should have heard the matter on the merits.

It is worth noting that even if the court authorized the arrest warrant against President Obama it would have been difficult to execute it and this would have strained relations between South Africa and the United States of America. America is not a member state of the ICC and is in fact its fiercest opponent.[288] The implementation of the American Service Members' Protection Act of August 2002, authorizes the President of the United States of America to use all necessary and appropriate means including the military to free United States or allied personnel detained by or on behalf of the

[288] Sascha-Dominik Bachmann 'The quest for international criminal justice – the long road ahead' (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 731.

ICC. It is submitted that if President Obama was arrested, this would have had far reaching consequences for South Africa. It would appear the court feared to authorise the warrant in order to avoid straining relations and causing tension between the two States hence, it dismissed the application on technical grounds. Although it is not explicitly expressed, it is submitted that politics played a vital role in influencing the decision of the court. It is further submitted that this is a clear indication that political considerations often outweigh legal obligations.

In *National Commissioner of Police v South African Human Rights Litigation Centre & Another,*[289] (SALC matter) which involved the Zimbabwean torture of its citizens, the Constitutional Court ruled that crimes against humanity perpetrated in Zimbabwe by Zimbabweans against Zimbabweans can and should be investigated in South Africa. In this case, the facts were briefly as follows: In 2007, in Harare, the Zimbabwe police raided the headquarters of the opposition party and afterwards detained and allegedly tortured 100 Zimbabwean nationals. The Southern Africa Litigation Centre (SALC) began collecting evidence from the victims and from medical and non-governmental organisation records, and sought other corroborating information of the allegations.[290] After collecting the relevant information, SALC delivered it to the National Prosecuting Authority (NPA) in South Africa, along with the request that the NPA consider the evidence and decide whether to investigate what the SALC asserted was the crime against humanity of torture, in the Implementation Act.[291] SALC adopted this approach since these atrocious acts in the past did not lead to any prosecution or accountability in Zimbabwe and that it was deemed unlikely that the situation would change in the future. The NPA referred SALC's representations to the South African Police Service (SAPS) which ultimately declined to investigate. This led to SALC and the Zimbabwe Exiles' Forum applying successfully to a High Court[292] to review and set aside SAPS's decision. The National Commissioner of Police on behalf of SAPS appealed to the Supreme Court of Appeal (SCA).[293] The SCA dismissed the appeal and ordered

[289] 2015 (1) SA 315 (CC) para 30.
[290] See para 10 of the judgment.
[291] See para 11 of the judgment.
[292] *Southern African Litigation Centre and Another v. National Director of Public Prosecution and Others* [2012] ZAGPPHC 61, (8 May 2012).
[293] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Center* [2014] 1 AII SA 435 (SCA).

SAPS to investigate the matter.[294] The National Commissioner appealed on behalf of SAPS to the Constitutional Court.

The Constitutional Court held that there is not just a power for SAPS to investigate allegations of torture, but there was a duty to do so.[295] The court noted that while the finding that SAPS does have the power to investigate is unassailable, the point of departure is that the SAPS has a duty to investigate the alleged crimes against humanity of torture. That duty arises from the Constitution read with the Implementation Act, which must be interpreted in relation to international law.[296] The court found that the above considerations require that the South African investigating institutions may investigate alleged crimes against humanity committed in another country by and against foreign nationals only if that country is unwilling or unable to do so itself.[297] The court noted that the perpetrators involved in the matter were high ranking officials of the ruling party in Zimbabwe and that it was highly unlikely that there will be investigations conducted in the matter.[298]

The court found that if Zimbabwe were able and willing to investigate and prosecute the alleged crimes of torture, there would be no place for South Africa also to do so.[299] The court opined that SAPS has misconceived the legal position in its decision not to investigate the torture allegations.[300] The court went on to say that SAPS has misconstrued the meaning of its legal duty in terms of the SAPS Act and the Implementation Act and has failed to recognise that the crime of torture has been domesticated into our law by the Implementation Act in terms of section 231(4) of the Constitution and that it is law in the Republic in terms of s 232 of the Constitution due to its status as a peremptory norm of customary international law.[301] The court noted further that SAPS has further failed to recognise that we are required to interpret all national laws in accordance with binding international law as prescribed by section 233 of the Constitution. Ultimately, there is no distinction between national

[294] See para 70 of the SCA judgment.
[295] At paras 56 and 58 of the Constitutional Court judgment.
[296] At para 61 of the Constitutional Court judgment.
[297] At para 62 of the Constitutional Court judgment.
[298] At para 62 of the Constitutional Court judgment.
[299] At para 62 of the Constitutional Court judgment.
[300] At para 77.
[301] At para 77.

and international high priority crimes domesticated into South African law.[302] The Court ordered that investigations begin without further delay.[303]

It is submitted that the decision of the court in this regard is consistent with the constitutional imperative that enjoins South African courts to recognise and respect international law when interpreting any legislation. It is further submitted that the interpretation that the court gave to the Implementation Act and the Rome Statute in this regard was in keeping with section 233 of the Constitution which provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. This is in line with what the Constitutional Court in *Law Society of South Africa & Others v President of the Republic of South Africa & Others,*[304] said that our Constitution insists that courts should not only give a reasonable interpretation to legislation but also that the interpretation must accord with international law. In other words, it is not sufficient to interpret any domestic legislation in a manner that is reasonable and textually appropriate; courts must also interpret the legislation to accord with international law.[305]

In the *SALC* matter, the ICC could not act against Zimbabwe as Zimbabwe was not a member State of the Rome Statute. The ICC could have only acted if the matter was referred to it by the UNSC in terms of Chapter VII of the UN Charter and Article 13(b) of the Rome Statute. South Africa is a member State of the Rome Statute and the Implementation Act granted its authorities and courts with jurisdiction over such offences. This case is indicative that the national courts can act in a complementary manner with the ICC though in a horizontal fashion, that is, between States. It is also submitted that this case clearly indicates that where the ICC cannot act member states using the complementarity principle must take responsibility and act. It is further submitted that the incorporation of the Rome Statute in South Africa in terms of the

[302] At para 77.
[303] At para 82.
[304] 2019 (3) SA 30 (CC) at para 5.
[305] See A Coutsoudis and M Du Plessis 'We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law' *Constitutional Court Review* 2020 (10) 155 at 157.

Implementation Act with its element of universal jurisdiction paid off for the victims of crimes against humanity in Zimbabwe.[306]

3.9 Conclusion

In conclusion, it is submitted that the enactment of the implementation Act in South Africa actualised and made the complementarity principle a reality. In addition to providing domestic law basis for South Africa's cooperation obligations under the ICC Statute, the Implementation Act is providing a basis under which South Africa can prosecute International crimes so as to avoid ICC complementarity jurisdiction.[307] It is also submitted that the Implementation Act has given South African Courts universal jurisdiction to prosecute International crimes. The South African courts have wide discretion to deal with International crime in terms of universal jurisdiction incorporated in the Implementation Act. Pursuant to the broad principle of universal jurisdiction combined with the lack of immunity as provided in terms of section 4(2) of the Implementation Act, it remains to be seen whether South Africa in the near future will investigate and prosecute Heads of State in South Africa who are alleged to have committed International crimes.

The South African Courts have set precedent for other countries in the world on the reality of the principle of complementarity. It remains to be seen whether in the near future South Africa will prosecute perpetrators of international crime in South Africa. Another conundrum to be considered is whether in the exercise of its universal jurisdiction, South Africa can exercise universal jurisdiction against perpetrators of international crimes who have been amnestied in their home countries or in the countries where those crimes were committed. In such a case, will South Africa not be infringing on the sovereignty of another State in exercising its universal jurisdiction? In the following chapter this question will be unpacked and discussed in-depth.

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[306] For a further discussion, see Mudukuti Angela 'Active Complementarity: The South African Example' available at Africalegalaid.com

[307] Akande 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States?' *EJIL* (2019) 30.

However, South Africa can pride herself in that the legislative framework to deal with International Crime in line with the Rome Statute in terms of the principle of complementarity is beyond blemish and is indeed a template for other States.

CHAPTER FOUR

THE EXCERCISE OF UNIVERSAL JURIDICTION BY SOUTH AFRICAN COURTS OVER AMNESTIED PERPETRATORS OF INTERNATIONAL CRIMES

4.1 Introduction

In this chapter, the thesis examines the question whether South African courts acting under the complementarity principle of the Rome Statute, are allowed to exercise universal jurisdiction over international crimes which were committed and have been the subject of amnesty in a foreign states. This question is apposite and relevant especially when paragraph 8 of the Preamble to the Rome Statute is considered which states that nothing in this Statute shall be taken as authorising any State party to intervene in an armed conflict or in the internal affairs of any State. In order to give proper context to this chapter, various concepts such as the notion of state sovereignty, universal jurisdiction and amnesty will be discussed with reference to cases decided by various tribunals including the International Court of Justice (ICJ).

4.2 The notion of universal jurisdiction and state sovereignty

4.2.1 The notion of state sovereignty

At the beginning of the twenty-first century, sovereignty remained an essential foundation for peace, democracy and prosperity.[308] Sovereignty is the supreme power by which any State is governed.[309] The principle of sovereignty has been seen as total and unconditional within international law for centuries.[310] It has been a source of stability for more than two centuries.[311] Hall argues that customarily, the notion of sovereignty refers to the idea of supreme, independent authority over a territory.[312] If

[308] See R Haass 'Sovereignty: Existing Rights, Evolving responsibilities' 2003 http://2001-2009.state.gov/s/p/rem/2003/16648.htm (Accesses 10 May 2021).
[309] Wheaton Henry *Elements of International Law*. 8th ed. Boston: Little, Brown, and Company.
[310] A Hall 'The Challenges to State Sovereignty from the Promotion of Human Rights' available at https://www.e-ir.info/2010/11/17/the-challenges-to-state-sovereignty-from-the-promotion-of-human-rights/ (Accessed on 30 July 2021).
[311] Forcese C 'De-immunizing Torture: Reconciling Human Rights and State Immunity' *McGill Law Journal* (2007)130.
[312] A Hall 'The Challenges to State Sovereignty from the Promotion of Human Rights' available at https://www.e-ir.info/2010/11/17/the-challenges-to-state-sovereignty-from-the-promotion-of-human-

a state is sovereign over a territory, its leader (be it a monarch, government, president or sheikh) has the unreserved authority within that land.[313] A State is sovereign when it has a body within it which effectively commands the rest of the society and which is not effectively commanded by any outside force.[314] Lee notes that sovereignty thus has both a positive and a negative aspect: the sovereign is obeyed by others and does not obey others.[315] The sovereign commands and is uncommanded.[316] Sovereignty concerns a certain type of relation within the State, namely, supremacy, as well as a certain type of relation between the State and outside parties, namely, independence. These two aspects, supremacy and independence, are often referred to, respectively, as internal sovereignty and external sovereignty.[317] Article 1(2) of the UN Charter also acknowledges the sovereignty of States. It established as one of the purposes of the United Nations, to develop friendly relations between states, not on any terms, but based on respect for the principles of equal rights and self-determination of peoples.[318] The definition of sovereignty entitles States to non-intervention in their domestic affairs.[319]

At its core, sovereignty is typically taken to mean the possession of absolute authority within a bounded territorial space.[320] Haass notes that this doctrine has fostered world order by establishing legal protections against external intervention and by offering a diplomatic foundation for the negotiation of international treaties, the formation of International organizations, and the development of International law.[321] It has also

rights/ (Accessed on 30 July 2021).

[313] A Hall 'The Challenges to State Sovereignty from the Promotion of Human Rights' available at https://www.e-ir.info/2010/11/17/the-challenges-to-state-sovereignty-from-the-promotion-of-human-rights/ (Accessed on 30 July 2021).

[314] Lee A Puzzle of Sovereignty available at https://www.bu.edu/wcp/Papers/Poli/PoliLee.htm (Accessed on 28 April 2021).

[315] Lee A Puzzle of Sovereignty available at https://www.bu.edu/wcp/Papers/Poli/PoliLee.htm (Accessed on 28 April 2021).

[316] Lee A Puzzle of Sovereignty available at https://www.bu.edu/wcp/Papers/Poli/PoliLee.htm (Accessed on 28 April 2021).

[317] Lee A Puzzle of Sovereignty available at https://www.bu.edu/wcp/Papers/Poli/PoliLee.htm (Accessed on 28 April 2021).

[318] See M Reisman 'Sovereignty and human rights in contemporary International Law'1990 (84) *American Journal of International Law* 866 at 876.

[319] A Hall 'The Challenges to State Sovereignty from the Promotion of Human Rights' available at https://www.e-ir.info/2010/11/17/the-challenges-to-state-sovereignty-from-the-promotion-of-human-rights/ (Accessed on 30 July 2021).

[320] See Biersteker, TJ and C Weber (eds) (1996) State Sovereignty as Social Construct. New York: Cambridge University Press).

[321] See R Haass 'Sovereignty: Existing Rights, Evolving responsibilities' 2003 http://2001-2009.state.gov/s/p/rem/2003/16648.htm (Accesses 10 May 2021).

provided a stable framework within which representative government and market economies could emerge in many nations.[322] Haass also gives the following four distinct attributes to the concept of State sovereignty:

> 'First, a sovereign state is one that enjoys supreme political authority and a monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognised by other governments as an independent entity entitled to freedom from external intervention'.[323]

Kayitana points out that Haass' definition of state sovereignty accurately reflects the two features which International law scholars commonly attribute to sovereignty, namely; internal sovereignty and external sovereignty.[324] Internal sovereignty may be described as the competence by a State to exercise jurisdiction over people, events, and things found or occurring within the territory of that State.[325] In other words, internal sovereignty entails the right to exercise the functions of a State within national borders and to regulate internal matters freely and independently from other States.[326] This include the choice of political, economic, social and cultural systems and the formulation of foreign policies.[327] Leigh argues that the Rome Statute is drafted so as to fit within the classic international law jurisdictional framework that a nation has jurisdiction over criminal acts occurring within its sovereign territory regardless of the nationality of the offender; and a nation has jurisdiction over its nationals regardless of the place where they commit an offense against its law.[328]

Rubin believes that it is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another without

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[322] See R Haass 'Sovereignty: Existing Rights, Evolving responsibilities' 2003 http://2001-2009.state.gov/s/p/rem/2003/16648.htm (Accesses 10 May 2021).
[323] See R Haass 'Sovereignty: Existing Rights, Evolving responsibilities' 2003 http://2001-2009.state.gov/s/p/rem/2003/16648.htm (Accesses 10 May 2021).
[324] E Kayitana '*The Universal Jurisdiction of South African Criminal Courts and the Immunities of Foreign state officials'* LLD Thesis, North west University (2014) at 58.
[325] C Forcese 'De-immunizing Torture: Reconciling Human Rights and State Immunity' *McGill Law Journal* (2007)130.
[326] C Forcese 'De-immunizing Torture: Reconciling Human Rights and State Immunity' *McGill Law Journal* (2007)130.
[327] See The International Commission on Intervention and State Sovereignty Report issues in 2001.C.XI.
[328] See M Leigh 'The American Journal of International Law' 2001 (95) 124 at 125.

the latter's consent.[329] This means that a State may not interfere in the relations between a foreign government and its own nationals.[330] One State cannot demand or direct another State to take an action. Such demand would be barred by the other State's sovereignty.[331] For instance, South Africa cannot interfere in the affairs of neighbouring states such as Zimbabwe, Swaziland or Lesotho etc.

Meanwhile, external sovereignty means that States are equal and independent from each other in the conduct of their international relation.[332] This presupposes that a State is entitled to conduct its international relations freely and independently from other States. External sovereignty is a matter of independence.[333] External sovereignty is independence, or freedom from interference, in relation to other States. As independence, external sovereignty is the freedom of a country to govern itself. Lee notes that as internal sovereignty implies unlimited freedom to interfere within, external sovereignty implies unlimited freedom from interference from without.[334] External sovereignty involves a State's freedom to choose with whom it will establish diplomatic relations or with whom it enters into commercial agreements, without authorisation or approval from any other State.[335]

However, although a state is sovereign, its sovereignty is limited by the norms of international law. For instance, under customary international law, it is accepted that where a rule of international law has evolved to the status of *jus cogens,* that is, peremptory norms of international law, all states are bound to refrain from any actions prohibited by that peremptory norm.

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[329] A Rubin 'Is International Criminal Law Universal?' 2000 (2001) 351 at 365.
[330] Cassese *International Law* (2005) 2 ed at 53.
[331] The Levin Institute - The State University of New York 2014 http://www.globalization101.org/the-issue-of-sovereignty.
[332] See Kayitana E 'The Jurisdictional Problems of South African Courts in Respect of International Crimes' LLD Thesis, North West University (2014) at 58.
[333] Lee 'A Puzzle of Sovereignty' available at https://www.bu.edu/wcp/Papers/Poli/PoliLee.htm (Accessed on 28 April 2021).
[334] Lee 'A Puzzle of Sovereignty' available at https://www.bu.edu/wcp/Papers/Poli/PoliLee.htm (Accessed on 28 April 2021).
[335] See Kayitana E 'The Jurisdictional Problems of South African Courts in Respect of International Crimes' LLD Thesis, North West University (2014) at 58.

It is submitted that the sovereignty of a state is limited by customary international law and the need to protect human rights. The Appeal Chamber in the *Tadic´* case in the ICTY stated as follows:

> A State-sovereignty-oriented approach has been gradually supplanted by a human-being oriented approach . . . [I]international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings.[336]

It is further submitted that human rights promoted by the Charter of the United Nations indubitably challenges the ability of the state to act within its borders without question. For instance, the Convention on the Suppression and Punishment of the Crime of Apartheid had its roots in the opposition of the United Nations to the discriminatory racial policies of the South African government before the constitutional dispensation. Notwithstanding the sovereignty of South African at the time, the policy of racial segregation was annually condemned by the National Assembly of the UN as contrary to Articles 55[337] and 56[338] of the UN Charter.[339] Hall argues and quite correctly so in my view, that a State is deemed to be legitimately sovereign once it is supporting the rights of the individuals and granting all the basic rights and liberties of life.[340] Accordingly, once a state fails to protect its citizens, by definition it relinquishes the previously unshakable sovereignty it once possessed.

Furthermore, despite the independence of States, international law obliges States to either prosecute or extradite to another State which is willing to prosecute persons who are suspected of having committed international crimes who are present in their territories. This obligation generally referred to as *aut dedere aut judicare* (either extradite or prosecute) contradicts the notion that a sovereign State is completely free to decide whether or not to prosecute a particular person.

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[336] *Tadic´* ICTY A. Ch. 2.10.1995 para 97.
[337] This article enjoined the community of nations among others to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
[338] This article provides that 'All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.'
[339] The General Assembly of United Nations labelled apartheid as crime against humanity under resolution 2202 A (XXI) of 16 December 1966.
[340] See also D Jarczewska 'Do Human Rights Challenge State Sovereignty? https://www.e-ir.info/2013/03/15/do-human-rights-challenge-state-sovereignty/ (Accessed 30 July 2021).

It is submitted that in the Pan Am case often referred to as the Lockerbie case,[341] the doctrine of State sovereignty as discussed above and the principle of either prosecute or extradite were infringed. In this case, two members of the Libyan Intelligence Service were prosecuted for offences of terrorism, which had been committed on behalf of the State of Libya. On 21 December 1988 Pan Am Flight 103 was on route from London to New York, when it exploded in mid-air over the village of Lockerbie in Scotland. The flight was heading to Detroit via New York. 259 passengers and crew members on board were killed. 11 residents in Scotland town of Lockerbie on the ground where the crash happened were also killed. The cause of the disaster was an explosive device that was placed in the luggage hold of the aircraft. The investigation established that a bomb, contained in a radio-cassette player, had been detonated automatically and caused the explosion. After thorough investigations, Washington announced that two Libyan nationals were to be charged for the bombing. On 13 November 1991 warrants were issued for the arrest of two Libyans, Abdelbasset al-Megrahi and Ali Fhimah, on charges of conspiracy to murder, murder and breaches of the UK Aircraft Security Act 1982. The charges alleged that the conspiracy to blow up the aircraft and the actions performed in furtherance of that conspiracy, were Libyan State policy and officially sanctioned. Investigations established that the two suspects committed the crimes as members of the Libyan Intelligence Services, and that their acts were official actions performed by State officials in the execution of State policy. The issue of immunity did not arise at all. The United States of America (US) and United Kingdom (UK) whose citizens were on board the aircraft, requested Libya to extradite the two suspects and demanded that then Colonel Gadaffi accept full criminal and financial liability for the Lockerbie bombing. Libya was expected to take full responsibility of the tragedy even before the trial or before the matter could be heard by an international tribunal. The UNSC supported the request of UK and US and stated that it was:

> '[D]eeply concerned over the results of investigations, which implicate officials of the Libyan government and […] Recalling the statement made on 30 December 1988 by the President of the Council on behalf of the members of the Council strongly

[341] *Her Majesty's Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhima* The High Court of Justiciary Case No 1475/99 (30 January 2001). http://www.scotcourts.gov.uk/docs/sc---lockerbie/lockerbiejudgement.pdf?sfvrsn=2

condemning the destruction of Pan Am flight 103 and calling on all States to assist in the apprehension and prosecution of those responsible for this criminal act.'[342]

The Libyan authorities appointed a Judge to investigate the allegations of the US and UK. They arrested the two men accused by the UK and US and declared that a Libyan investigation would be done on the Lockerbie bombing. The two men suspected of the bombing denied any involvement in the bombing of the Pan Am. Colonel Gadaffi refused to hand them over to the UK and the US and contended that the two men would not get a fair trial abroad. In terms of the sovereignty principle neither the British nor the American courts had jurisdiction to try the Libyan nationals. Libya said that it would consider trying the men itself.[343] Furthermore, there was no extradition treaty between the UK, the US and Libya and therefor, Article 7 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 applied. Article 7 states:

> 'The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of ordinary offence of a serious nature under the law of that State.'

The US, the UK and Libya were all signatories to the Montreal Convention and had to comply with the principle of "either extradite or prosecute as set out by Article 7. What was interesting was that Libya acted lawfully in accordance with International law by appointing a High Court Judge in order to carry out the charges raised against the two Libyan citizens. According to the Montreal Convention, Libya had a right to refuse the extradition of the two suspects. However, after years of negotiations, a Scottish Court was convened in the Netherlands and Libya surrender its two nationals for trial. On 31 January 2001 the court convicted Mr al-Megrahi of murder and the other accused was acquitted.

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[342] Paras 5 and 6 of UNSC Resolution 731(1992) of 21 January 1992.

[343] Franey *Immunity Individuals and International law: Which Individuals are Immune from the Jurisdiction of National Courts under International Law?* Phd Thesis, University of London (2009) at 208-209

It is submitted that in this case, the State sovereignty of Libya was undermined by the UK and the US. It is further submitted that this conduct was unfortunately supported by the UNSC. It is submitted that politics trumped over International justice in this matter. Political considerations in this matter eclipsed international justice.

4.2.2 The notion of universal jurisdiction

It is now trite that an offence which is considered a crime under International law implies that such a crime is of common concern to all States, which gives them the right (universal jurisdiction) to bring perpetrators of those crimes to justice, regardless of territory and the nationality of the perpetrator or the victim.[344] The purpose of universal jurisdiction, is linked to the idea that international crimes affect the international legal order as a whole.[345] Due to the fact that the recognition that International offences affect all States and peoples, and the fact that in most cases the territorial and nationality States do not always respond fairly and effectively to allegations of international crimes, International law grants all States the right to prosecute heinous international crimes.[346] Universal jurisdiction is not based on notions of sovereignty and State consent.[347] As it will appear fully hereunder, the exercise of universal jurisdiction by States has not been easy. The fact that it is not depended on the consent of the State and it disregard the doctrine of sovereignty of State makes it so contentious and controversial.

Bassiouni argues that if used in a politically motivated manner or simply to vex and harass leaders of other States, universal jurisdiction could disrupt world order and deprive individuals of their basic rights.[348] Even with the best of intentions, universal jurisdiction could be used imprudently, creating unnecessary frictions between States and abuses of legal processes. States are entitled to assert universal jurisdiction over

[344] M Bassiouni *International Criminal Law* 50.
[345] R Higgins, Problems and Process: International Law and How We Use It (1994) at 56–63.
[346] CF Swanepoel 'Universal jurisdiction as procedural tool to institute prosecutions for international core crimes' *Journal for Juridical Science* (2007)32(1) at 119; Matthew Garrod 'The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality' (2012) *Criminal Law Review* 12(5) 763 at 764.
[347] Henry Kissinger 'The Pitfalls of Universal Jurisdiction' *Foreign Affairs* (July/August 2001) 86.
[348] M. Cherif Bassiouni '*The History of Universal Jurisdiction*' in Stephen Macedo (ed.) '*Universal Jurisdiction*' (2004) University of Pennsylvania Press, Philadelphia, at 39.

war crimes, crimes against humanity, genocide and torture.[349] Ryngaert believes that any State would have the right, or even the obligation, to prosecute core international crimes without the consent of the territorial or national State.[350] In so doing, such a 'bystander' State would not exercise its own sovereignty, but act as an agent of the international community enforcing International law in the absence of a centralized enforcer of the core values of that community. The learned author argues that this moral justification has become the 'dominating legitimizing discourse of universal jurisdiction over core crimes against international law.[351] Reydams calls this the 'unilateral limited universality principle' in terms whereof any State may unilaterally exercise its jurisdiction over certain offences with an international character, even in absentia.[352] Cryer argues that the term 'universal jurisdiction' refers to jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognised linking point between the crime and the prosecuting State.[353] It is a principle of jurisdiction limited to specific crimes. Meanwhile Lee states as follows on this principle:

> 'Unlike other bases for jurisdiction, which require some direct connection between the offense and the state exercising jurisdiction, the universality principle is predicated on the assumption that certain offenses are so egregious and universally condemned that all states have an interest in proscribing and punishing the offenses no matter where or by whom they occur.'[354]

When a State's courts exercise universal jurisdiction, the State is not acting in its own name or for its own benefits, but in the name of the international community as a whole.[355] Universal jurisdiction can be divided into two categories, namely the absolute or pure universal jurisdiction, also known as 'universal jurisdiction in absentia' and 'conditional' universal jurisdiction, sometimes known as 'universal jurisdiction with presence'.[356] Pure universal jurisdiction arises when a State seeks to assert

[349] Cedric Ryngaert '*Jurisdiction in International Law*' (2008) at 112.
[350] Cedric Ryngaert '*Jurisdiction in International Law*' (2008) at 114.
[351] Cedric Ryngaert '*Jurisdiction in International Law*' (2008) at 114.
[352] Luc Reydams *Universal Jurisdiction: International and Municipal Legal Perspectives* at (2004) at 38-42.
[353] Cryer *et al* '*An Introduction to International Criminal Law and Procedure'* (2010) 2 ed at 50.
[354] A S Lee 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations *Virginia Journal of International Law* (1999) 433-434.
[355] Abi-Saab 'Proper Role of Universal Jurisdiction' *Journal of International Criminal Justice* (2003) 600.
[356] Cryer *et al* '*An Introduction to International Criminal Law and Procedure'* (2010) 2 ed at 50.

jurisdiction over an international crime (usually by investigating it and/or requesting extradition of the suspect) even when the suspect is not present in the territory of the investigating State. In the *Arrest Warrant (DRC v Belgium)* (14 February 2002),[357] the International Court of Justice (ICJ) speaking of universal jurisdiction in absentia remarked that:

> 'It may be politically inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.'

Conditional universal jurisdiction is universal jurisdiction exercised when the suspect is already in the State asserting jurisdiction.[358] Many States tend to limit the universal jurisdiction of their courts to cases where a suspect is present on their territory. Sometimes the provisions in domestic legislation incorporating universal jurisdiction may cause problems between States and strain relations. For instance, Article 7 of the Belgium: Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law of 10 February 1999 provided as follows:

> 'The Belgian Courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed. In respect of breaches committed abroad by a Belgian national against a foreigner, no filing of complaint by the foreigner or his family or official notice by the authority of the country in which the breach was committed shall be required'.

Under this law, the presence of the suspect in Belgium was not required and immunities were declared not applicable in proceedings relating to that Act.[359] This law immediately proved to be politically controversial and problematic in that complaints were swiftly laid against ex-US President George W Bush, Vice-President Dick Cheney and General Colin Power for war crimes alleged to have been committed

[357] See discussion by Gunaratne R 'Belgian Arrest Warrant cases (Summary)' available at https://ruwanthikagunaratne.wordpress.com (accessed 27 April 2021) at 72.
[358] See Cryer *et al An Introduction to International Criminal Law and Procedure'* 2 ed (2010) at 252. See also See Kayitana E 'The Universal Jurisdiction of South African Criminal Courts and the Immunities of Foreign state officials*'* 2015(18) 7 *PER/PELJ* 2561.
[359] Article 5(3) of the same Act provided that: 'the immunity attributed to the official capacity of a person, does not prevent the application of the present Act'.

by them in the Gulf War in 1991. Belgium came under heavy pressure from the United States to alter its legislation.[360] In response, Belgium altered its legislation twice in 2003 to limit its jurisdiction and reintroduce immunities.[361] Under the 2003 revised legislation,[362] Belgian courts have universal jurisdiction over genocide, crimes against humanity and war crimes, only if the accused is Belgian or has primary residence in Belgian territory, if the victim is Belgian or had lived in Belgium for at least three years at the time the crimes were committed, or if Belgium is obliged under International convention or customary law to exercise jurisdiction over the case.[363]

In *Arrest Warrant (DRC v Belgium)* (14 February 2002),[364] the Democratic Republic of the Congo (hereinafter 'the Congo') filed in the Registry of the Court an application instituting proceedings against the Kingdom of Belgium (hereinafter 'Belgium') in respect of a dispute concerning an 'international arrest warrant issued on 11 April 2000 by a Belgian investigating judge against a Minister of Foreign affairs of Congo, Mr. Abdulaye Yerodia Ndombasi (hereinafter Yerodia).[365] The Belgian court issued the arrest warrant based on universal jurisdiction. It accused Yerodia of inciting racial hatred. His speeches, allegedly incited the population to attack Tutsi residents in Rwanda, which resulted in many deaths. The warrant alleged that Yerodia committed grave breaches of the Geneva Conventions of 1949 and its Additional Protocols and crimes against humanity. Belgium circulated the warrant of arrest to various States including Congo. The warrant asked States to arrest, detain and extradite Yerodia to Belgium. The question that the ICJ had to consider was whether Belgium violated the principle of customary international law concerning the absolute inviolability and immunity from criminal process of an incumbent foreign Minister when it issued and internationally circulated the warrant of arrest.[366] If the answer was in the affirmative, the questions were, did it violate the principle of sovereign equality among States?

[360] Cryer *et al 'An Introduction to International Criminal Law and Procedure'* 2 ed (2010) at 57.
[361] Cryer *et al 'An Introduction to International Criminal Law and Procedure'* 2 ed (2010) at 57.
[362] See *Law* of *5 August 2003* Relating to *Grave Breaches* of *International Humanitarian Law* (Belgian Official Journal of 7 August 2003).
[363] See Article 6(1*bis),* article 10(1*bis)* and article 12 *bis* introduced by the Law of 2003 (*Law* of *5 August 2003* Relating to *Grave Breaches* of *International Humanitarian Law* (Belgian Official Journal of 7 August 2003) into the Belgian *Code of Criminal Procedure.*
[364] See discussion by Gunaratne R 'Belgian Arrest Warrant cases (Summary)' available at https://ruwanthikagunaratne.wordpress.com (accessed 27 April 2021).
[365] See paras 1-12 of the judgment.
[366] See para 11 of the judgment.

Furthermore, did the alleged unlawfulness preclude States who received the warrant from exercising it and should the Belgium Court cancel the arrest warrant. Congo argued that by issuing and internationally circulating the arrest warrant of 11 April 2000 against Yerodia, Belgium committed a violation in regard to Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers.[367] In its application, Congo contended that Belgium had violated the principle that a State may not exercise its authority on the territory of another State, the principle of sovereign equality among all members of the United Nations, as laid down in Article 2(1) of the Charter of the United Nations, as well as the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognised by the jurisprudence of the court and following from Article 41(2) of the Vienna Convention of 18 April 1961 on Diplomatic Relations.[368] It contested Belgium's basis of jurisdiction (universal Jurisdiction) stating that it violated the principle of sovereign equality. Meanwhile Belgium requested the court to reject the submissions of the Congo on the merits of the case and to dismiss the application.

The ICJ found that diplomatic and consular agents, and certain holders of high ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs' enjoy immunity *ratione personae*.[369] The court found that the issue and circulation of the arrest warrant violated Belgium's international obligations towards Congo.[370] The Court accordingly found that the issuing of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.[371] The court rejected Belgium's argument that Yerodia did not enjoy immunity because he was accused of committing war crimes against humanity. The court held that there was no exception in Customary International law to the absolute immunity of an incumbent Foreign Minister. The court stated:

[367] At para 11 of the judgment.
[368] See para 17 of judgment.
[369] At para 51 of the judgment.
[370] At para 70.
[371] At para 70.

> 'It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, when they are suspected of having committed war crimes or crimes against humanity…The court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable… It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.'[372]

From this case, it can be deduced that Heads of States and Governments, Foreign Ministers and Diplomatic and Consular agents enjoys immunities from civil and criminal jurisdictions of other States. In the absence of a treaty, customary international law determines the immunities of Ministers of Foreign Affairs.[373] This immunities are not given for their personal benefits, but to ensure the effective performance of their functions on behalf of their States. The rationale of this type of immunity is that actions against States' agents in respect of their official acts are essentially proceedings against the State they represent.[374] Bianchi argues that no immunity of any kind may be raised in response to allegations of genocide, crimes against humanity or war crimes.[375] As will be discussed below, the Rome Statute and the Implementation Act do not regard immunity as a defence to these offence.

4.3 The exercise of universal jurisdiction against amnestied perpetrators of international crimes

4.3.1 The meaning and implications of Amnesty

The term Amnesty refers to an act of forgiveness that a sovereign State grants to individuals who have committed criminal acts.[376] Amnesties are conferred under law

[372] At para 58.
[373] See para 79 of the judgment.
[374] Stewart (2011) *Vanderbilt Journal of Transnational Law* 1056.
[375] For instance, see Bianchi A, 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 *EJIL* 237. See also the comprehensive study by Amnesty International, Universal Jurisdiction: The Duty of States to Enact and Implement Legislation, Sept. 2001, AI Index IOR 53/2001, ch. 14.
[376] N Jurdi *The International Criminal Court and the National Courts: A contentious Relationship* (2011) at 73.

that blocks criminal action against people in the State in which it is passed. It eliminates the criminal nature of the conduct as defined by law. The conduct is deemed not to have constituted an offence and any criminal proceeding that may have been instituted is extinguished.[377] Amnesties were not included in the Rome Statute as a bar for the admissibility of a case before the ICC. In fact, there is no explicit reference to amnesties in the Rome Statute. From an International law perspective, domestic amnesties are strictly a matter for national authorities and do not act as a bar to an investigation by the ICC in terms of the Rome Statute.[378] There is no international convention explicitly prohibiting amnesty laws. The 1948 Genocide Convention requires contracting parties to provide effective penalties for persons guilty of genocide.[379] This suggests that in terms of the Geneva Convention, the legal duty to prosecute genocide cannot be circumvented by amnesty legislation at national level. The definition of genocide is limited to actions taken with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[380]

The ICC was established as a permanent institution with 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern'.[381] As discussed above, domestic amnesties are strictly a matter for national authorities and do not act as a bar to an investigation by the ICC.[382] In other words, a domestic amnesty does not bind the ICC nor its prosecutor.[383] The Rome statute does not address the relationship between the jurisdiction of the court and non-judicial approaches to past atrocities, such as amnesties and truth and reconciliation commissions.[384] However the tenor of the Rome Statute is that international crimes are not simply the concern of one State alone but of the international community.

[377] Joyner C 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability" 1998 *Denver Journal of International Law and Policy* 591 at 612.
[378] Manisuli Ssenyonjo 'Accountability of Non-state Actors in Uganda for war crimes and Human rights violations: Between Amnesty and the International Criminal Court' *Journal of Conflict & Security Law* (2005) 10 No. 3, 405 at 427.
[379] Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 1021, art 5.
[380] Article 2 of the Genocide Convention.
[381] See Article 1 of the Rome Statute.
[382] Manisuli Ssenyonjo 'Accountability of Non-state Actors in Uganda for war crimes and Human rights violations: Between Amnesty and the International Criminal Court' *Journal of Conflict & Security Law* (2005)10 No. 3, 405 at 433.
[383] See Cryer *et al* 'An Introduction to International Criminal Law and Procedure' 2 ed (2010) at 566.
[384] See Cryer *et al* 'An Introduction to International Criminal Law and Procedure' 2ed (2010) at 158.

In terms of article 5 of the Rome Statute, the jurisdiction of the ICC extends to the 'most serious crimes of concern to the international community as a whole' being genocide, crimes against humanity, war crimes and aggression. States are under an obligation to act in conformity with the rules of international law and to comply with the statute. The preamble of the ICC Statute provides that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.' The preamble also notes that 'the most serious crimes of concern to the international community as a whole must not go unpunished and…their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'. Article 17 sets out the principle of complementarity and provides that the ICC can only investigate or prosecute cases within its jurisdiction if the relevant State is unwilling or unable genuinely to investigate or prosecute.

4.3.2 Amnesty vis-à-vis the Rome Statute

Ordinarily, a blanket or open-ended amnesty is difficult to reconcile with the provisions of the Rome Statute and the fundamental principles underpinning the protection, promotion and enforcement of human rights. Accountability is a fundamental ingredient in the observance and the protection of human rights. However this process must be balanced against a quest for peace and reconciliation. From an International law perspective, granting full amnesty to people who committed International crime to the exclusion of the ICC will be in conflict with the provisions of the Rome statute and the Implementation Act. Every State is under a general obligation to act in conformity with the rules of international law. As such, States bears the responsibility for breaches of human rights, whether committed by the legislative, executive or judicial organs.[385] In terms of international law, States cannot invoke their domestic legal systems or internal laws and procedures such Amnesty Acts as justification for not complying with international treaty obligations such as the obligation to prosecute arising under the Rome Statute.[386] States are obliged not to condone or encourage human rights

[385] M. Shaw, *International Law* (2003) 128.
[386] Manisuli Ssenyonjo 'Accountability of Non-state Actors in Uganda for war crimes and Human rights violations: Between Amnesty and the International Criminal Court' *Journal of Conflict & Security Law* (2005)10 No. 3, 405 at 426.

violations.[387] The preamble of the Rome Statute affirms that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. This is necessary in order 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. Werle observes that 'the duty to prosecute follows from the duty of States to guarantee human rights and ensure effective legal protection'.[388] Werle also believes that to the extent that international law creates a duty to prosecute and punish the most serious crimes, general amnesties that offer exemption from criminal responsibility are impermissible.[389] Cassese argues that 'as international crimes constitute attacks on universal values, no single State should arrogate to itself the right to decide to cancel such crimes, or to set aside their legal consequences. The requirement to dispense justice should trump the need to respect State sovereignty.'[390] The Chairman of the Ugandan Amnesty considered the Amnesty Act in Uganda that was afforded to the rebels' vis-à-vis the ICC and stated as follows:

> "Since the ICC takes precedence over our national laws, even people already granted amnesty could be taken for trial before the ICC – if this happens, the amnesty process and the law will be rendered useless.'[391]

It is submitted that while the ICC takes precedent over national laws, each case has to be dealt with according to its own facts and merits. There are those cases where it will not be in the interest of peace and stability to be investigated by the ICC or for a South African Court to use its universal jurisdiction to prosecute them. For instance, in a case where amnesty was the only solution to resolve a long lasting conflict between warring factions, it will be unwise to prosecute the perpetrators of international crime

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[387] N. Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' *California Law Review* (1990) 78 449; and D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' *Yale Law Journal* (1991) 100 2537 at 2599.

[388] G. Werle, *Principles of International Criminal Law* 3 edition (2005) 63. See also Manisuli Ssenyonjo 'Accountability of Non-state Actors in Uganda for war crimes and Human rights violations: Between Amnesty and the International Criminal Court' *Journal of Conflict & Security Law* (2005), Vol. 10 No. 3, 405 at 427.

[389] G. Werle, *Principles of International Criminal Law* 3 ed (2005) 65.

[390] A. Cassese, *International Criminal Law* (2003) 315.

[391] Justice Peter Onega, Chairman of the Uganda Amnesty Commission, stated this in a paper entitled *The Amnesty Process: Opportunities and Challenges* (2005). Quoted from Manisuli Ssenyonjo 'Accountability of Non-state Actors in Uganda for war crimes and Human rights violations: Between Amnesty and the International Criminal Court' *Journal of Conflict & Security Law* (2005) 10 No. 3, 405 at 427.

as that may exacerbate the conflict instead of resolving it. As it will appear fully below, it is submitted that in exercising its universal jurisdiction for amnestied perpetrators of international crimes, the South African National Director of Public Prosecution must properly bring his mind to bear when considering whether to give permission for the prosecution of international crimes in terms of section 5 of the Implementation Act. It is further submitted that while it is accepted that accountability is a fundamental ingredient in the observance and the protection of human rights, however it has to be balanced against genuine efforts by a war torn State that endeavours to restore peace and reconciliation through amnesty processes.

As discussed earlier in this thesis, Article 17 of the Rome Statute sets the principle of complementarity and provides that the ICC can only investigate or prosecute cases within its jurisdiction if the relevant State is unwilling or unable genuinely to investigate or prosecute a matter. This provision requires the ICC to intervene if broad, unconditional amnesties were enacted for crimes falling within its jurisdiction. In terms of Article 53 of the Rome Statute, the ICC Prosecutor has a discretion in deciding whether to investigate or prosecute cases.[392] The Rome Statute also enjoins the prosecutor to consider the following factors when deciding whether to commence with investigations: 'the gravity of the crime' the interests of victims', and whether there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.[393] Mallinder, notes that Article 53 allows the prosecutor to make a decision that is 'entirely political,' in that 'he would have to weigh the requirement of peace and reconciliation on the one hand against the need for justice on the other.'[394] The prosecutor has a discretion to investigate a matter after weighing up all the information placed before him/ her. If the prosecutor decides not to initiate investigations on the grounds that it would be against the interests of justice, the Prosecutor must inform the Pre-Trial Chamber, which may decide to review the decision.[395]

[392] M.R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court' *Journal of International Criminal Justice,* (2004)2 71 at 76.
[393] See Articles 53 and 54 of the Rome Statute.
[394] Mallinder 'Can Amnesty and the International Justice be reconciled?' *The International Journal of Transitional Justice,* (2007), 208 at 219.
[395] See Article 53(1) and (3)(b) of the ICC Statute.

4.3.3 Amnesty vis-à-vis universal jurisdiction in terms of section 4(3)(c) of the Implementation Act

As discussed in chapter one of this work, at the heart of the Rome Statute is its complementarity regime. The question that has to be considered is whether South Africa exercising its universal jurisdiction can investigate and prosecute international crimes that have been amnestied in a foreign State in terms of its complementary principle of the Rome Statute. For argument sake, can South Africa exercising its universal jurisdiction prosecute the leaders of the Rwandan Patriotic Front who happen to be in the republic assuming they were granted amnesty in Rwanda for the genocide of 1994? It is submitted that this is a vexed question especially considering the fact that prosecutions on the basis of universal jurisdiction may upset the balance struck between prosecution and amnesty in an emerging democracy, where amnesties have been used to reach a lasting solution between warring factions. If a State grants amnesty to its officials notwithstanding that they committed international crimes, will South African be able to exercise its universal jurisdiction in terms of the Implementation Act read with Article 17 of the Rome Statute? The discussion hereunder considers this question in depth.

There is no explicit reference to amnesties in the ICC Statute. However Article 17 outlines the principle of complementarity and provides that the ICC can only investigate or prosecute cases within its jurisdiction if the relevant State is unwilling or unable genuinely to investigate or prosecute. It is submitted that this provision would require the ICC to intervene if broad, unconditional amnesties were granted for crimes falling within its jurisdiction. It is further submitted that this by implication also extends to the universal jurisdiction that South Africa enjoys through the complementarity principle and in terms of the Implementation Act. Robinson has used the example of the Amnesty Committee of the South African Truth and Reconciliation Commission to argue that where States undertake a diligent, methodical effort to gather the evidence and ascertain the facts relating to the conduct in question before deciding whether to grant amnesty in an individual case according to strict criteria, and where prosecutions remain possible for those who do not participate or are denied amnesty, there is space

for the ICC to recognise such amnesties.[396] The former UN Secretary-General Kofi Annan was also of the view that no one should imagine that the ICC's power to intervene under Article 17 would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power.[397] He argued that it is inconceivable that, in such a case, the ICC would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.

It is submitted that the argument raised above is correct, plausible and is supported. Quite often peace negotiators have often relied on amnesties to secure peace and reconciliation. Accountability initiatives may in certain circumstances directly target those who are mostly needed to achieve a lasting peace agreement and this may prevent agreement being reached and ultimately prolong the conflict.[398] In the same way, it is submitted that in the exercise of its universal jurisdiction, South Africa must tread carefully. It will be expected of South Africa to weigh the requirement of peace and reconciliation on the one hand against the need for justice on the other. It must only use its universal jurisdiction in instances where it is very clear that a State has failed or is shielding perpetrators of international crimes in the national State from prosecution. If it is clear that the amnesty was granted with mala fide intent, South Africa should use its universal jurisdiction to prosecute such cases in terms of section 4(3) of the Implementation Act if the amnestied perpetrator is arrested in the Republic.

However, where it is clear that there is genuine amnesty which is meant to foster lasting peace, stability and reconciliation, the decision to prosecute should be exercised sparingly. Section 5(1) of the Implementation Act provides that no prosecution may be instituted against a person accused of having committed a crime without the consent of the National Director of Public Prosecution (NDPP). As discussed in chapter two of this work, in deciding whether to prosecute or not, the NDPP must consider the obligations of the republic in line with the complementarity

[396] D. Robinson 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' *European Journal of International Law (*2003)14 481 at 500.
[397] Quoted in C. Villa-Vicencio, 'Why Perpetrators should Not always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet' *Emory Law Journal* (2000) 49 205 at 222.
[398] Johanna Herman, Olga Martin and Chandra Sriran 'Beyond justice versus peace: transitional justice and peacebuilding strategies' *ECPR General Conference Paper University of Iceland* (25 - 27 August 2011).

principle and the responsibility to prosecute persons who have committed crime. It is submitted that in addition to this, the NDPP must give serious consideration to instances where genuine amnesty was granted as the prosecution of opponents may have detrimental and counterproductive effects on the aims of justice, peace and reconciliation. Akech believes that the argument for non-prosecution of cases in favour of amnesty and reconciliation is premised on the assumptions that factors which gave rise to the conflict can be satisfactorily resolved through reconciliation, and that political stability and reconciliation are preconditions for human rights accountability.[399]

It is submitted that where it is pretty clear that amnesty is the only logical way of ending a civil war or armed conflict, that possibility must be considered serious by the NDPP and she should not grant permission or consent in terms of section 5(1) of the Implementation Act. She must however in terms of section 5(5) of the Implementation Act inform the Minister of Justice accordingly and also the reasons for declining to prosecute.[400] It must be stressed that the NDPP is independent and must use her independence in making the call whether to prosecute or not. The Minister cannot force her to prosecute cases. In *National Director of Public Prosecutions v Zuma,*[401] the court held that although the NDPP has such a duty of informing the Minister whenever he is requested to do so, the decision to initiate a prosecution or not belongs to the sole discretion of the National Director, not the Minister.[402] The National Prosecuting Act requires members of the prosecuting authority to serve 'impartially' and exercise, carry out or perform their powers, duties and functions 'in good faith and without fear, favour or prejudice' and subject only to the Constitution and the law.[403] Thus, the Minister may not instruct the NDPP to prosecute or, to decline to prosecute

[399] See Joseph Geng Akech 'Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation' *International Journal of Transitional Justice*, (2020) at 4.
[400] Section 5(5) of the Implementation Act provides that in the event that the National Director of Public Prosecutions decides not to prosecute, the National Director must inform the Central Authority (the Director-General: Justice and Constitutional Development) of that decision and provide full reasons thereof. That decision, together with the reasons, must then be forwarded to the Registrar of the ICC. It seems to me the ICC will then determine whether or not it will institute its own investigation and prosecution.
[401] (2009) 1 SACR 361 (SCA).
[402] Se para 32 of the Judgment. See also 32(1)(b) of the National Prosecuting Authority Act 32 of 1998 which provides that 'Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.'
[403] See Section 32(1)(a) of the National Prosecuting Act 32 of 1998.

or to terminate a pending prosecution. The Court stated as follows regarding the oversight responsibility of the Minister of the NDPP:

> 'Accordingly, the Constitution on the one hand vests the prosecutorial responsibility in the NPA while, on the other, it provides that the Minister must exercise final responsibility over it. These provisions may appear to conflict but, as the Namibian Supreme Court held in relation to comparable provisions in its Constitution, they are not incompatible. It held (I amusing terms that conform with our Constitution) that although the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority'.[404]

It is submitted that in the exercise of its universal jurisdiction against individuals who have committed international crimes but who have been subsequently amnestied by their national States, the South African NDPP should consider the guidelines which Stigen suggested to the ICC prosecutor to consider in deciding whether or not he / she should institute investigations or give a chance to a national amnesty process. Stigen formulated the following suggestions to the Prosecutor of the ICC:

1. Were there compelling reasons to grant amnesty?
2. Is the amnesty adopted and implemented democratically and in good faith?
3. Has the amnesty-granting body proceeded in an effective manner?
4. Does the mechanism provide some measure of accountability or compensation?
5. Is amnesty granted to the most responsible perpetrators?
6. Has the amnesty had positive effects and has it been internationally recognised?
7. Do the involved parties perceive the amnesty as fair?[405]

In the same way, it is submitted that the NDPP should consider these factors before granting consent in terms of section 5(1) of the Implementation Act for the prosecution of amnestied person. It has been suggested that it is better 'to quell the need for vengeance' among those who have been defeated by implementing policies of

[404] At para 32.
[405] Stigen J *The Relationship between the International Criminal Court and National Jurisdiction: The Principle of Complementarity* (2008) 452 at 463.

compromise and forgiveness.[406] Mallinder argues that being merciful to former enemies whilst attempting to address the root causes of the conflict could reduce the justification for further violence, promote the development of the conditions for reconciliation and strengthen the establishment of human rights institutions.[407] If for instance, South Africa were to exercise its universal jurisdiction against those genuinely amnestied, those individuals may therefore resist peace deals which do not shield them from prosecution.[408] As mentioned above, South Africa is a perfect example. After the apartheid system was dismantled, the parties at the negotiation table agreed to establish the Truth and Reconciliation Commission (TRC) in order to address the atrocities of the past and build a new future based on unity and reconciliation for all races. The TRC was set up to deal with what happened during the apartheid years. It was establish in terms of the Promotion of National Unity and Reconciliation Act, No 34 of 1995 (the TRC Act). The then Minister of Justice Mr Dullah Omar stated that 'a Commission is a necessary exercise to enable South Africans to come to terms with their past on a moral accepted basis and to advance the cause of reconciliation.'[409] In terms of section 3 of the TRC Act, the Commission was tasked with investigation human right abuses committed from 1960 to 1994 including circumstances under which those violations were committed. It was tasked to allow victims to tell their story and to facilitate the granting of amnesty to persons who made full disclosure of all the relevant facts and drafting a reparation policy. It was entrusted with the duty to establish and to make known the fate of the whereabouts of victims and of restoring the human and civil dignity of such victims by affording them an opportunity to relate their own accounts of the violations and by recommending reparation measures in respect of such violations.[410] The TRC offered amnesty to applicants who gave full disclosures of atrocities they committed. It also recommended long term reparations and short-term relief payments to victims. The Commission had to balance the scale between a painful past and a peaceful future based on human

[406] Louise Mallinder 'Can Amnesties and International Justice be Reconciled? *The International Journal of Transitional Justice* (2007) 208 at 207.
[407] Louise Mallinder 'Can Amnesties and International Justice be Reconciled? *The International Journal of Transitional Justice* (2007) 208 at 207.
[408] Sriram, C. L. and Y. Mahmoud in *International Law and International Relations* 'Bringing Security Back in: International relations theory and Moving beyond the "justice versus peace" dilemma in transitional societies (2006) at 223.
[409] See 'Truth and Reconciliation Commission' available at http://www.justice.gov.za/trc/legal/justice/htm (Accessed 30 July 2021).
[410] Section 3(1)(c) of the TRC Act.

rights and justice. The challenges of the TRC was that it did not address social and economic transformation of South Africa.[411] Furthermore, some believed that the TRC did not do enough.[412] Perpetrators of crimes were not made to physically repent for their wrongdoings, instead were forgiven and let off the hook. Ridge argues that many victims wanted the perpetrators to be punished for what they had done, so seeing them simply being let go felt extremely dissatisfying and probably denied them the catharsis they desired or needed to recover.[413] However, it is submitted that in a broader scheme of things, it was a process that bolstered the cohesion of a rainbow nation.

It is submitted that in such circumstances, it would be unwise to prosecute those who were involve in perpetrating apartheid. Robinson notes that up to the present date, States have declined to initiate prosecutions for crimes against humanity committed under apartheid regime in South Africa, which likely reflects the higher level of international regard for the reconciliation measures adopted in the unique circumstances of South Africa.[414]

4.4 Conclusion

In Conclusion, it has been established in this chapter that diplomatic and consular agents, and certain holders of high ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs' enjoy immunity *ratione personae*.[415] However the Rome Statute and the Implementation Act excluded immunity for Heads of States and government officials as a defence against perpetrators of international crimes. It was also established in this chapter that the ICC was established as a permanent institution with 'the power to exercise its jurisdiction

[411] See R Tuazon 'Identity in context: Examining South Africa's Truth and Reconciliation Commission' available at https://www.collegesoflaw.edu (Accessed on 29 July 2021)
[412] See A Ridge 'The Failure of Good Intentions: What Went Wrong with the Truth and Reconciliation Commission upon Granting Reparations' available at https://www.sahistory.org.za (Accessed on 29 July 2021).
[413] See A Ridge 'The Failure of Good Intentions: What Went Wrong with the Truth and Reconciliation Commission upon Granting Reparations' available at https://www.sahistory.org.za (Accessed on 29 July 2021).
[414] D Robinson 'Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court' 2003 *European Journal of International Law* 504.
[415] At para 51 of the judgment.

over persons for the most serious crimes of international concern.'[416] It was also demonstrated that domestic amnesties are strictly a matter for national authorities and do not act as a bar to an investigation by the ICC and by extension to South African courts in terms of the Implementation Act.[417] The discussion also revealed that the Rome Statute does not address the relationship between the jurisdiction of the court sovereignty and non-judicial approaches to past atrocities, such as amnesties and truth and reconciliation commissions.[418] However, the tenor of the Rome Statute is that international crimes are not simply the concern of one State alone but of the international community. The ICC can only investigate or prosecute cases within its jurisdiction if the relevant State is unwilling or unable genuinely to investigate or prosecute.

This chapter has further revealed that in the exercise of its universal jurisdiction in terms of section 4(3)(c) of the Implementation Act, South Africa must tread carefully. It must only exercise its universal jurisdiction in instances where it is very clear that a State has failed or is shielding perpetrators of international crimes from prosecution. Where it is evident that amnesty was granted with mala fide intent, South Africa should use its universal jurisdiction to prosecute such cases if such perpetrators are found in the Republic. The discussion also revealed that where it is clear that there is genuine amnesty which is meant to foster lasting peace and stability, South Africa should decline to prosecute and in particular adhere to the principle of respect for the sovereignty of other States.[419] It has also been established that in deciding whether to institute prosecution or not against amnestied perpetrators of international crimes the NDPP must consider the seven factors suggested by Stigen to the ICC prosecutor. These factors forms the basis of the recommendations that are suggested in the conclusion of this thesis as discussed in the following chapter.

[416] See Article 1 of the Rome Statute.
[417] Manisuli Ssenyonjo 'Accountability of Non-state Actors in Uganda for war crimes and Human rights violations: Between Amnesty and the International Criminal Court' *Journal of Conflict & Security Law* (2005)10 No. 3, 405 at 433.
[418] See Cryer *et al An Introduction to International Criminal Law and Procedure* 2ed (2010) at 158.
[419] Cassese *International Criminal Law* (2005) at 315.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study has shown that the establishment of the ICC in terms of the Rome Statute was one of the fundamental decisions that was taken by the community of nations in order to punish international crimes and maintain international peace and security in the world. From the discussion in this study it can be said that the adoption of the Rome Statute was a positive development in the quest to promote and protect human rights throughout the globe and to end impunity against the perpetrators of international crimes.

The study has also shown that the culture of impunity for international crimes is a thing of the past. The Rome Statute sets out the structure and powers of the ICC whose purpose is to put an end to impunity for the perpetrators of gross violations of human rights and thereby contribute to the prevention of such horrible crimes.[420] At the heart of the Rome Statute is the principle of complementarity, in terms of which the Court will only be able to admit a case before it if the State party concerned is unwilling or unable to prosecute the offender at the national level.

It was also established in this study that South Africa ratified and incorporated the Rome statute into its domestic laws in terms of s 231(4)[421] of the Constitution by enacting the Implementation Act. Section 3 of the Implementation Act sets out the objectives of the Act. Section 3(d) of the Act endorses the complementarity principle and defines one of its objectives as being 'to enable as far as possible and in accordance with the principle of complementarity as referred to in article 1 of the Statute, the National Prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstance'. By granting South African court jurisdiction over a person who

[420] The Preamble to the Rome Statute in particular para 5 states that: 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.'
[421] S 231(4) provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament.

commits a crime outside the Republic and that person is later found on South African territory without regard to that person's nationality or the nationality of the victims, the Implementation Act empowers South African courts with universal jurisdiction over international crime.

This study also examined the corresponding provisions of the Implementation Act and the Rome Statute more in particular, the relationship between Article 27(2) of the Rome Statute and section 4(2) of the Implementation Act on how the South African courts, acting under the complementarity principle, are accorded the same powers as the ICC to supersede the immunities which usually attaches to Heads of States and to officials of government. It was established that their official positions does not insulate them against prosecution if they have committed international crimes. It was also shown that amnesties were not included in the Rome Statute as a bar for the admissibility of a case before the ICC and that domestic amnesties are strictly a matter for national authorities and do not act as a bar to an investigation by the ICC in terms of the Rome Statute. While the ICC takes precedent over national laws, each case has to be dealt with according to its facts and merits. There are those cases where it will not be in the interest of peace and stability to be investigated by the ICC or for a South African Court to use its universal jurisdiction to prosecute them.

5.2 Recommendations

In conclusion, it is recommended that African States and other countries of the world should emulate South Africa by domesticating the Rome Statute into their municipal law in a quest to bring to justice those who commit crimes listed under the Rome Statute. It is also recommended that the ICC must put its house in order. The selective prosecution of international crimes must come to an end and the court must live up to the promises made in the preamble of the Rome Statute. All those who commit international crimes must be brought to book irrespective of their nationality, whether they are Africans, Asians, Europeans, and Americans etc. The prosecution of international crimes must be done without fear, favour or prejudice. Such an approach would bring to an end the argument that the ICC is an institution which is targeting or discriminating against Africa. In that way, the Rome Statute would have achieved one of its objectives of putting an end to impunity for perpetrators of genocide, crimes

against humanity and war crimes. It is submitted that this will indeed guarantee lasting respect for the enforcement of international peace and justice.

From the South African perspective, it is recommended that in exercising its universal jurisdiction in terms of section 4(3)(c) of the Implementation Act, South Africa must tread carefully especially because prosecution on the basis of universal jurisdiction may upset the balance struck between prosecution and amnesty in an emerging democracy, where amnesties have been used. South Africa is a classical case study in considering the prosecution of perpetrators of international crimes who have been amnestied. It is also recommended that South Africa must not flinch from exercising its universal jurisdiction in instances where it is very clear that a State has failed or is shielding perpetrators of international crime from prosecution through amnesty. Where it is evident that amnesty was granted with mala fide intent, South Africa should use its universal jurisdiction to prosecute such cases if all the jurisdictional requirements have been satisfied. However, where there is genuine amnesty which is meant to foster lasting peace and stability, South Africa should decline to prosecute and respect the sovereignty of other States.[422]

It is further recommended that where perpetrators of international crimes have been amnestied, in deciding whether or not to prosecute or grant permission for the prosecution of those perpetrators, NDPP should consider the guidelines discussed in chapter four of this thesis that were suggested by Stigen to the ICC prosecutor in deciding whether or not he / she should give a chance to a national amnesty process.

As stated by Mallinder, it is better 'to quell the need for vengeance' among those who have been defeated by implementing policies of compromise and forgiveness.[423] It is hoped that the South African authorities and those responsible for the administration of justice in particular the office of the Minister of Justice will consider and act upon these recommendations. It is also hoped that the National Prosecuting Authority in particular the NDPP will heed the suggestions made above.

[422] Cassese *International Criminal Law* (2008) 2ed 315.
[423] Mallinder Can Amnesty and the International Justice be reconciled? *The International Journal of Transitional Justice,* (2007), 208 at 219.

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