

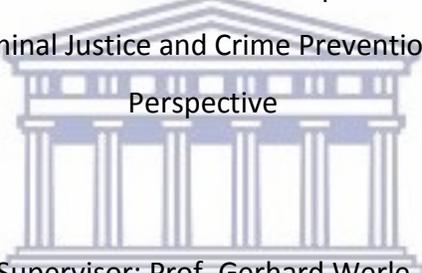
UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

Master of Laws (LL.M) in Transnational Criminal Justice: An International and African
Perspective

Title: The Immunity Clause in the Statute of the 'African Criminal Court' and Its Impact in the
Exercise of the Courts' Jurisdiction over the Crimes

Research Paper submitted in partial fulfilment of the requirement for the degree of Master of
Laws (LLM) in Transnational Criminal Justice and Crime Prevention: An International and African
Perspective



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2017

DECLARATION

I, Nicksoni Filbert, hereby declare that **The Immunity Clause in the Statute of the African Criminal Court and Its Impact in the Exercise of the Court’s Jurisdiction over the *Crimes***’ is my own original work and has not been submitted for a degree or any other examination in other universities or similar institutions. All used sources have been properly acknowledged.

Nicksoni Filbert

Student

.....

Signature

Prof. Gerhard Werle

Supervisor

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Signature



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Date

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Date

ACKNOWLEDGEMENT

I would like to thank the Almighty God, the Creator of the Heavens the Earth, for His protection and enduring mercies in my life.

Sincerely, I would like to thank the DAAD Programme funded by Germany tax payers' money to help us in Africa acquire knowledge from one of the South Africa's best universities, University of the Western Cape. As an appreciation for a selfless spirit of the German government and its people, I would like to say *Danke schön*.

I would like to thank Prof. Gerhard Werle, my supervisor, for accepting me not only to be his supervisee, but also for allowing me to undertake a study on the immunity provision of the Malabo Protocol (Annex) that has enriched my understanding of the contemporary trends in the jurisprudence of international criminal law.

My heartfelt gratitude goes to Dr. Marshet Tadesse. He has been always ready and willing to help me at every stage of my Thesis writing to its completion. The corrections and references he requested me to consider and consult have added in me an invaluable treasure of knowledge in the field of international criminal law. Dr. Marshet has been selfless and always available to help whenever I needed his support and advice.

I would like also to thank Professors Lovell Fernandez and RA Koen for improving my English writing skills. They have sharpened my reading and writing skills that have helped me to succeed not only in this LLM Programme, but also in laying a great foundation for my future career as an academician and researcher.

DEDICATION

I dedicate this work to my loving parents. Their love and nurturing has made it possible for me to successfully complete my LLM studies at the University of the Western Cape.



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ABBREVIATIONS AND ACRONYMS

ACC	African Criminal Court or the International Criminal Law Section of the ACJHPR
ACJHPR	African Court of Justice and Human and Peoples' Rights or the Court
AU	Africa Union
Dec.	Decision
ECOWAS	Economic Community of West African States
HL	House of Lords
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda, 1994
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993
ILC	International Law Commission
IMT Charter	Charter of the International Military Tribunal, 1945

IMTFE Charter	Charter of the International Military Tribunal for the Far East, 1946
Malabo Protocol	Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights, 2014
NGOs	Non-Governmental Organisations
OAU	Organisation of the Africa Unity
Para(s)	Paragraph or Paragraphs
PSCAU	Peace and Security Council of the African Union
RECs	Regional Economic Communities
RES	Resolution
Rome Statute	the Rome Statute of the International Criminal Court, 1998
SCSL	Special Court for Sierra Leone
Statute	Statute of the African Court of Justice and Human and Peoples' Rights
UCG	crime of the Unconstitutional Changes of Government
UN Charter	Charter of the United Nations

UN Doc.	United Nations Documents
UN	United Nations
UNTS	United Nations Treaty Series
WLR	Weekly Law Report



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KEYWORDS

Malabo Protocol

African Criminal Court

Crime of Unconstitutional Change of Government

Immunity

Statute

International Crimes

Transnational Crimes

African Union

Individual Criminal Responsibility

Impunity



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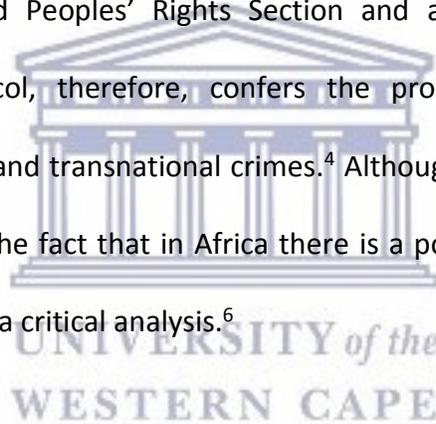
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CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1. Background to the Study

In June 2014, the AU adopted a Protocol which included in its annexe a Statute of the African Court of Justice and Human and Peoples' Rights.¹ The Protocol proposes to expand the jurisdiction of the African Court of Justice and Human and Peoples' Rights (ACJHPR) by vesting it with criminal jurisdiction.² The ACJHPR will comprise of three sections, namely, a General Affairs Section, a Human and Peoples' Rights Section and an International Criminal Law Section.³ The Malabo Protocol, therefore, confers the proposed ACJHPR with criminal jurisdiction over international and transnational crimes.⁴ Although the Malabo Protocol and its Statute are not yet in force,⁵ the fact that in Africa there is a possibility of having the 'African Criminal Court (ACC)' deserves a critical analysis.⁶



¹ The official nomenclature of the Protocol adopted in Malabo is: The Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014 (Hereinafter 'The Malabo Protocol'). The moniker of the Statute annexed to it is: The Statute of the African Court of Justice and Human and Peoples' Rights (Hereinafter 'The Statute').

² Article 3, Malabo Protocol.

³ Article 16, the Statute.

⁴ Article 28A, the Statute.

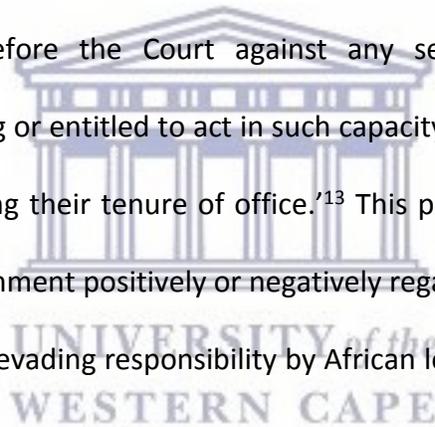
⁵ Article 11 of the Malabo Protocol states that the Protocol and its Annexe will enter into force when 15 member states deposit their instruments of ratification. Currently, there are nine signatures and no ratification, available at <https://www.au.int/en/treaties> (Accessed 27 March 2017).

⁶ Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 3.

The ACC determines all situations and cases of international and transnational crimes in Africa.⁷ It has three chambers, namely, a Pre-Trial, a Trial and an Appellate Chamber.⁸ It exercises jurisdiction over the 14 crimes under the Statute.⁹

The ACC incorporates the internationally accepted principles of international criminal law.¹⁰ These principles include individual criminal responsibility, irrelevance of official position, superior responsibility and irrelevance of superior orders.¹¹ The Statute goes further to hold legal persons criminally liable.¹²

Article 46A *bis* grants immunity to certain state officials. It states ‘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.’¹³ This provision has prompted various scholars and institutions to comment positively or negatively regarding the entire project. Some view the provision as a way of evading responsibility by African leaders by shielding themselves



⁷ Article 17, the Statute. See also Mninde-Silungwe F ‘Trafficking in Persons (Article 28J) and Trafficking in Drugs (Article 28K)’ in Werle G & Vormbaum M (eds) (2017) 111-112.

⁸ Article 16(2), the Statute.

⁹ Article 19 *Bis* and 28A, the Statute.

¹⁰ Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, United Nations General Assembly Resolution 95(1) (1946). See also *Almonacid-Arellano et al v Chile, Preliminary Objections, merits, reparations and costs*, (2006) IACHR Series C No. 154, IHRL 1538 para 98.

¹¹ Articles 46B and 46C, the Statute; Ratner SR, Abrams JS & Bischoff JL *Accountability for Human Rights Atrocities in International Law: Beyond Nuremberg Legacy* 3 ed (2010) 6-26; Schabas WA *An Introduction to the International Criminal Court* 3 ed (2008) 211-218 and Bassiouni MC *Introduction to International Criminal Law* (2013) 59-61.

¹² Article 46C.

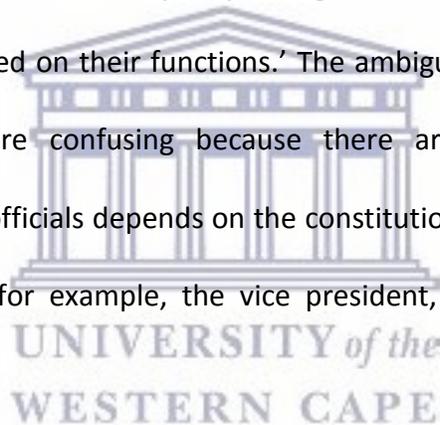
¹³ Article 46A *bis*.

against the ACC.¹⁴ They view Article 46A *bis* as an infringement on the principles of the Constitutive Act of the AU and a justification for prevalence of impunity in Africa.¹⁵ Others view the provision as legally justified under international law.¹⁶

1.2. Statement of the Problem

Pursuant to Article 46A *bis*, immunity is given to the serving heads of state and government of the AU, anybody acting or entitled to act in such a capacity and senior state officials based on their functions.

The provision is not clear as to who is 'anybody acting or entitled to act in such capacity, or other senior state officials based on their functions.' The ambiguity surrounding the immunity provision becomes even more confusing because there are no *travaux preparatoires*. Therefore, ascertaining these officials depends on the constitutional legal framework of the AU member states. In Tanzania, for example, the vice president, the Speaker of the National



¹⁴ KPTJ *Seeking Justice or Shielding Suspects?: An Analysis of the Malabo Protocol on the African Court* (2016) 15 and Naidoo P & Murithi T *The African Court of Justice and Human Rights and the International Criminal Court: Unpacking the political dimensions of concurrent jurisdiction* (2016) 5.

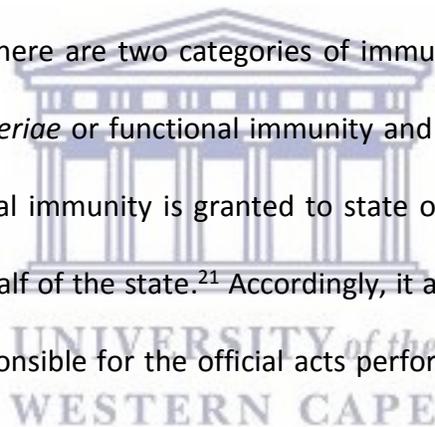
¹⁵ Human Rights Watch 'Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights' (2014) available at <https://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and> (Accessed 19 March 2017); the Report of the Conference on 'Understanding the Malabo Protocol: The Potential, The Pitfalls, and way Forward for International Justice in Africa' (2016) available at <http://www.hrforumzim.org/wp-content/uploads/2016/11/Malabo-Protocol-Communique.pdf> (Accessed 19 March 2017) and Amnesty International, *Malabo Protocol: Legal and Institutional Implication of the Merged and Expanded African Court* (2016) 6 and 11.

¹⁶ Tladi D 'Immunities (Article 46A *bis*)' in Werle G & Vormbaum M (eds) (2017) 204-213.

Assembly or the Chief Justice of the Court of Appeal are entitled to act as heads of State when the office of the president is vacant.¹⁷ It is not clear whether the ACC will follow this approach.

Likewise, the term 'senior state officials' and the persons it includes is not clear. In many legal systems in Africa, a number of state leaders are in fact senior state officials.¹⁸ Therefore, the work of determining state officials is left for the ACC. The ACC will be required to determine who is a senior state official on a *case-by-case* basis, considering their functions in accordance with international and domestic laws.¹⁹

Since Article 46A *bis* deals with immunity, it is necessary to have a critical study on the nature of the immunity it provides. There are two categories of immunities under international law, namely, immunity *ratione materiae* or functional immunity and immunity *ratione personae* or personal immunity.²⁰ Functional immunity is granted to state officials by virtue of the official functions they perform on behalf of the state.²¹ Accordingly, it affects the substantive law as it presumes the state to be responsible for the official acts performed by its officials.²² Personal



¹⁷ Article 37, Constitution of Tanzania, 1977. For related framework, section 90(1) and (2), Constitution of South Africa, 1996; and Article 107, Constitution of Rwanda, 2003.

¹⁸ The Constitution of Tanzania provides immunity to a number of state officials under Part II.

¹⁹ Executive Council Report on the Draft Legal Instruments and Recommendations of the Specialised Technical Committee on Justice and Legal Affairs of the African Union (2014) 6.

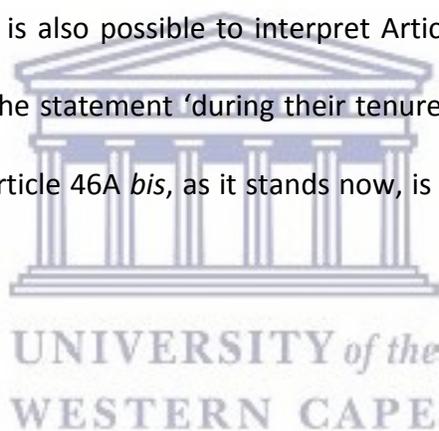
²⁰ Gugard J 'Immunity Human, Rights and International Crimes' (2005) 2005 *JSAL* 484-485; Cassese A *et al International Criminal Law: Cases & Commentary* (2012) 76; Cryer R *et al An Introduction to International Criminal Law and Procedure* 2 ed (2010) 531; Pedretti R *Immunity of Heads of State State Officials for International Crimes* (2015) 13-56 and Luban D 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11 *JICJ* 512-514.

²¹ Cassese A, Gaeta P & Baig L *et al Cassese's International Criminal Law* 3ed (2013) 240-241; Cassese A *et al* (2012) 76-88 and Akande D 'International Law Immunities and the International Criminal Court' (2004) 98 *The American Journal of International Law* 412-415.

²² Werle G & Jessberger F (2014) marg. No. 724 and Prouveze R 'Immunities' in Schabas WA & Bernaz N (eds) *Routledge Handbook of International Criminal Law* (2011) 355-356.

immunity is granted to a limited number of state officials such as heads of state and government, diplomats and foreign affairs ministers as their freedom of action in international interaction is especially important for the proper functioning of their states.²³ This immunity is a procedural bar to prosecution and not a prevention of criminal liability.²⁴ It ends with the expiration of the office tenure.²⁵

Article 46A *bis* is ambiguous as it seems to provide both categories of immunities. It presents a possibility of applying personal immunities to heads of states and government and those entitled to act in their capacity and for functional immunity to other senior state officials based on their functions. Likewise, it is also possible to interpret Article 46A *bis* as applying only to personal immunities because the statement 'during their tenure of office' refers, generally, to personal immunities.²⁶ Thus, Article 46A *bis*, as it stands now, is not clear as to which category of immunities it provides.



²³ Labuschagne JMT 'Immunity of the Head of State for Human Rights Violations in International Criminal Law' (2006) 26 *SAYIL* 188; Warbrick C 'Immunity and International Crimes in English Law' (2004) 53 *International & Comparatively Law Quarterly* 770; Bassiouni MC (2013) 73; *Certain questions of Mutual Assistance in Criminal Matter (Djibout v France)* [2008] ICJ General List 136 at 10; Akande D 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunity' (200) 7 *JICJ* 334; Tladi D 'The Duty of South Africa to Arrest and Surrender Al Bashir under South African and International Law: A Perspective from International Law' (2015) 13 *OJICJ* 1034-1035; Tladi D 'ICC Decisions on Chad and Malawi on Cooperation, Immunities, and Article 98' (2013) 11 *JICJ* 203 and Murungu CB 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *JICJ* 1070. See for example, Article 31 of the Vienna Convention on Diplomatic Relations, 1961. 500 UNTS 95 and concerning the Arrest Warrant (*Democratic Republic of the Congo v Belgium*) [2002] ICJ Reports 3 at para 54.

²⁴ Akande D (2004) 98 *AJIL* 409-412.

²⁵ Werle G & Jessberger F (2014) marg. No. 725; Jia BB 'The Immunity of State Officials for International Crimes Revisited' (2012) 10 *JICJ* 1311-1312 and Cassese A *et al* (2012) 88-96.

²⁶ Tladi D in Werle G & Vormbaum M (eds) (2017) 206-207.

Furthermore, Article 46A *bis* has a direct relation to the criminal jurisdiction of the ACC in relation to the crimes. It has a direct impact on the exercise of criminal jurisdiction of the ACC in relation to the crimes under Article 28A. Based on the nature of these crimes and the official capacity of those who commit such crimes, the ACC will be impeded from exercising its jurisdiction against such officials over the crimes. As it will be shown below, certain crimes have the highest likelihood to be committed by officials who enjoy immunity under Article 46A *bis*. Thus, the ACC will be hindered to prosecute the officials for the crimes. Consequently, it is pertinent to analyse these crimes, their nature, those who are prone to commit such crimes and how that affects the ACC's jurisdiction as based on the immunity clause. To explain this problem further, the study considers the crime of corruption and the crime of aggression.

The crime of corruption is criminalised under Article 28I. Corruption is criminalised only when acts of corruption 'are of a serious nature affecting the stability of a state, region or the Union.' Fernandez opines that this type of corruption is the grand corruption.²⁷ Such corruption is committed by high level officials such as presidents, prime ministers, ministers, governors and high level politicians or in the case of the private sector by the executives. However, these people who are prone to commit grand corruption are entitled to immunity under Article 46A *bis*. Although they may be prosecuted later when out of office, it is not clear whether indeed there will be evidence in place to hold them responsible, considering the means they have to

²⁷ Fernandez LD 'Corruption (Article 28I) and Money Laundering (Article 28I bis)' in Werle G & Vormbaum M (eds) (2017) 92.

thwart prosecution.²⁸ Thus, the nature of the crime and the people susceptible of its commission make it difficult for the ACC to hold them responsible because of their immunity.

The crime of aggression is criminalised under Article 28M. It is a crime committed when a person in a position to effectively exercise control over or to direct the political or military action of a state or organisation, plans, prepares, initiates or executes an act of aggression in violation of the Charter of the United Nations or the Constitutive Act of the AU. By its nature, this crime is restricted to people in leadership with ability to control or direct the political and military action of the state, including organisations.²⁹ For example, if today Tanzania carries out a series of acts of aggression against Uganda, it commits the crime of aggression. Its top leaders will be responsible. However, because of their immunity, they will only be punished once they are out of office, where that is at all possible.

Therefore, the immunity clause, which by its nature is ambiguous, is directly linked to the criminal jurisdiction of the ACC over the crimes. This relationship is such that the nature of the crimes and the people who are prone to commit them might be the very people who enjoy immunity. In such a situation, the ACC is hindered from exercising its jurisdiction over such persons for the crimes committed, only until they are out of power and where they are indeed arraigned to the Court for prosecution.

²⁸ Fernandez LD in Werle G & Vormbaum M (eds) (2017) 93-95.

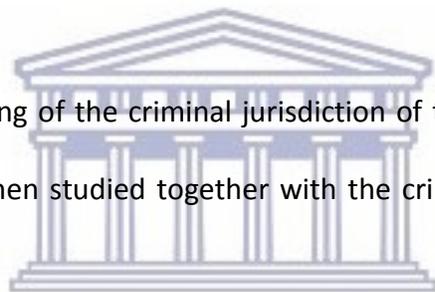
²⁹ Werle G & Jessberger F (2014) marg. No. 1476.

1.3. Objectives of the Study

The general objective of this study is to critically analyse the immunity clause under Article 46A *bis* in terms of its nature, content and how the same relates and therefore, affects the jurisdiction of the proposed Court in relation to the crimes.

More concretely, the study aims to:

- a. Analyse the nature and content of Article 46A *bis*.
- b. Study the nature of the crimes under the statute in relation to the persons who commit such crimes.
- c. Provide an understanding of the criminal jurisdiction of the African Criminal Court and how Article 46A *bis*, when studied together with the crimes under Article 28A, affects the Court's jurisdiction.



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1.4. Research Questions

This research seeks to answer the following three questions:

- a. What is the nature and content of Article 46A *bis*?
- b. What is the nature of the crimes under Article 28A and who are the persons prone to commit them?
- c. How does the immunity provision affect the jurisdiction of the African Criminal Court in relation to the crimes?

1.5. Research Hypothesis

This study is guided by the hypothesis that the immunity provision under Article 46A *bis* is not only ambiguous as regards the nature and content of the immunity it provides but also has a direct relationship that affects the jurisdiction of the Court over the crimes.

1.6. Literature Review

Tladi states that Article 46A *bis* is ambiguous and poorly drafted as it does not indicate what is meant by 'or anybody entitled to act in such capacity.' Furthermore, it is not clear whether it is restricted to immunity *ratione personae* or *materiae* or both.³⁰ He notes that the provision has a direct impact on the exercise of jurisdiction by the ACC over the crimes. He cites, for example, the crime of unconstitutional change of government. He questions whether in essence the ACC will have the power to exercise jurisdiction where the attempt to remove the government is successful. This is because other than unsuccessful attempts at unconstitutional change of government, the perpetrators of the crime would enjoy immunity under Article 46A *bis*.³¹ He opines that the proper interpretation of this provision will depend on the jurisprudence of the ACC.³² This article is a contribution to this study as it shows, among others, the direct effect of the immunity provision over the ACC's exercise of jurisdiction over the crimes.

Kemp and Kinyunyu state that the crime of unconstitutional change of government is a scourge that has plagued Africa and its people for decades.³³ They opine that the crime as provided

³⁰ Tladi D in Werle G & Vormbaum M (eds) (2017) 205-206.

³¹ Tladi D in Werle G & Vormbaum M (eds) (2017) 208.

³² Tladi D in Werle G & Vormbaum M (eds) (2017) 205-208.

³³ Kemp G & Kinyunyu S in Werle G & Vormbaum M (eds) (2017)59.

under Article 28E contains a number of acts with varying degrees of specificity. They find some of the paragraphs under Article 28E to be ambiguous and even going against the legality principle. Even more challenging, they note, is the relationship that exists between the crime of unconstitutional change of government and the immunity clause.³⁴ According to them, unless a clear interpretation is assumed, the probability is high that the immunity provision might render the jurisdiction of the court over this crime meaningless.³⁵ The authors, however, do not go further to provide concrete examples of how this relationship exists.

Fernandez states that Article 28I by its wording, deals with grand corruption which is essentially committed by senior state officials such as presidents, prime ministers, governors and high level politicians.³⁶ Fernandez notes with concern, among others, that the immunity clause is problematic as it confers immunity from prosecution to the very persons susceptible of committing grand corruption. Although these leaders can be prosecuted once out of power, he cautions that this is not easy. This is because these leaders might stay in power for a long time and may destroy evidence or thwart investigations against them.³⁷

Jessberger states that the mandate of the ACC is uniquely broad as it includes jurisdiction over both international and transnational crimes.³⁸ Jessberger notes the inclusion of these crimes as a positive step that complements and strengthens the existing treaty-based system of enforcement. He points that the inclusion of these crimes takes into account the principles

³⁴ Kemp G & Kinyunyu S in Werle G & Vormbaum M (eds) (2017) 69.

³⁵ Kemp G & Kinyunyu S in Werle G & Vormbaum M (eds) (2017) 57-70.

³⁶ Fernandez LD in Werle G & Vormbaum M (eds) (2017) 92.

³⁷ Fernandez LD in Werle G & Vormbaum M (eds) (2017) 93 and 95.

³⁸ Jessberger F 'Piracy (Article 28F), Terrorism (Article 28G) and Mercenarism (Article 28H)' in Werle G & Vormbaum M (eds) (2017) 74.

enshrined in Article 4(o) of the Constitutive Act of the AU.³⁹ However, he finds Article 46A *bis* to be problematic as it broadens immunity for senior state officials for core crimes under international law, whereas in customary international law they do not possess such immunity.⁴⁰ Although this article does not deal with the problem stated in this research, it points out that immunity clause has an impact on the ability of the Court to prosecute state officials in Africa.

1.7. Research Methodology

The study employed library research in order to gather both primary and secondary data. Secondary sources such as books, chapters in books and articles have been used. The study has made use of online journal articles, books, reports and findings by reputable regional and international institutions and NGOs. Primary sources such as legislation of several countries, international treaties and conventions, including case law, have been consulted.

1.8. Significance of the Study

This study was undertaken with the expectation of adding knowledge to the already existing gap on the immunity clause and its relation to the criminal jurisdiction of the proposed Court. There is scanty information on the African Criminal Court. This study, through analysis and research, fills the knowledge gap and motivates scholars and researchers to have an interest in the study of the African Criminal Court. Thus, the study is a contribution to the development of the international criminal law in Africa and the world at large.

³⁹ Jessberger F in Wele G & Vormbaum M (eds) (2017) 76.

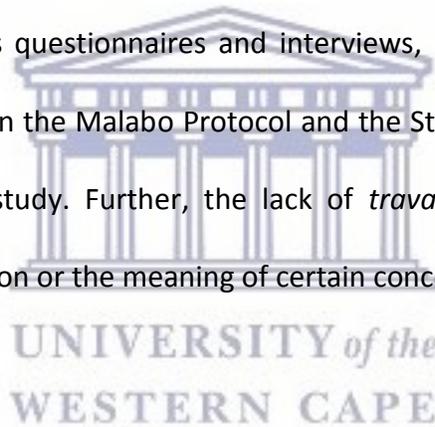
⁴⁰ Jessberger F in Werle G & Vormbaum M (eds) (2017) 74-76 and Abass A 'Historical and Political Background to the Malabo Protocol' in Werle G & Vormbaum M (eds) (2017) 26.

1.9. Delimitation of the Study

The study provides a critical study on the immunity provision and how it impacts the jurisdiction of the African Criminal Court. Therefore, it purposely avoids a critical and detailed study of the crimes. Further, the study is not concerned with, among others, legal and political debates on the establishment of the African Criminal Court and whether or not it was a proper time to establish such a Court in Africa.

1.10. Challenges to the Study

Several factors have limited the study. The study was unable to employ primary tools of research methodology such as questionnaires and interviews, due to limited time. Also, the absence of enough literature on the Malabo Protocol and the Statute has limited the extent of the literature review in this study. Further, the lack of *travaux préparatoires* has made it difficult to ascertain the intention or the meaning of certain concepts such as those surrounding the immunity provision.⁴¹



1.11. Chapters Outline

This study is divided into five chapters. Chapter one gives an introduction and the general background to the study. Chapter two provides the historical background to the adoption of the Malabo Protocol and the Statute. It proceeds to analyse the legal and institutional framework of the African Criminal Court, including its operational principles. Chapter three explores the concept of immunities under treaty and customary international law. This is followed by a

⁴¹ Ambos K in Werle G & Vormbaum M (eds) (2017) 54.

considered and critical discussion of the immunities under Article 46A *bis* of the Statute. Chapter four analyses briefly and concisely the 14 crimes under the Statute while pointing out their striking features. It establishes that while core crimes entail the involvement of the state officials in their commission, the transnational crimes entail the involvement of the state officials either directly or indirectly. The chapter concludes that the immunity provision affects the Court's exercise of jurisdiction over the crimes. Chapter five provides the findings of the study, points out the challenges, makes several recommendations and finally, states the general conclusion of the study.



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CHAPTER TWO

THE AFRICAN CRIMINAL COURT

2.1. Malabo Protocol and the Statute

On 1 July 2008, the Assembly of the AU adopted a Protocol¹ with its annexed Statute² to replace the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights of 10 June 1998 and the Protocol of the Court of Justice of the African Union of 11 July 2003.³ The 2008 Protocol proposes to establish the African Court of Justice and Human and Peoples' Rights (ACJHPR) as the principal judicial organ of the Union.⁴ The ACJHPR is the merger court of the African Court on Human and Peoples' Rights and the Court of Justice of the AU. The 2008 Protocol and its Statute shall enter into force 30 days from the date the instruments of ratification are deposited by 15 member states of the AU.⁵ Although the Protocol is not yet in force, the ACJHPR has jurisdiction over all legal matters of the AU and its member states, including human rights adjudication.⁶ However, the ACJHPR lacks criminal jurisdiction over international and transnational crimes. It was felt that there is a need to equip the ACJHPR with criminal jurisdiction.⁷ Various initiatives were

¹ The Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008. (Hereinafter 'the 2008 Protocol').

² The Statute of the African Court of Justice and Human Rights, 1 July 2008. (Hereinafter 'the 2008 Statute').

³ Assembly/AU/Dec.196 (XI) (2008).

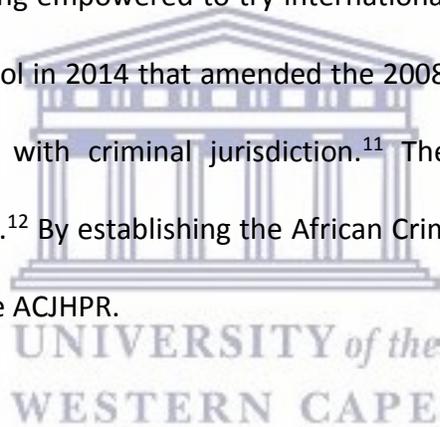
⁴ Article 2 of 2008 Protocol and Article 2 of the 2008 Statute.

⁵ Article 9 of the 2008 Protocol. Currently, there are 30 signatures, five ratifications and five depositions of the instruments of ratification. Information available at <https://www.au.int/en/treaties> (accessed 14 April 2017).

⁶ Article 28 of the 2008 Statute.

⁷ Assembly/AU/Dec.213 (XII) (2012).

taken to achieve this end since 1970s.⁸ For example, during the discussion that led to the adoption of the African Charter on Human Rights in the 1970s, the idea of having a regional criminal court was considered. However, the idea was thought to be premature. In 2006, the AU Committee of Jurists formed to advise the AU on the modalities to deal with Hissene Habre, the former President of Chad, recommended for the establishment of the regional criminal court in Africa to prosecute crimes under international law.⁹ These efforts gained momentum in 2009 when the AU Assembly requested the AU in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the ACJHR being empowered to try international crimes.¹⁰ This resulted in the adoption of the Malabo Protocol in 2014 that amended the 2008 Protocol and its 2008 Statute and empowered the ACJHR with criminal jurisdiction.¹¹ The Malabo Protocol needs 15 ratifications to enter into force.¹² By establishing the African Criminal Court (ACC), the Protocol vests criminal jurisdiction in the ACJHR.



⁸ Abass A in Werle G & Vormbaum M (eds) (2017) 15-16.

⁹ Transparency International (2016) 7-8.

¹⁰ Abass A in Werle G & Vormbaum M (eds) (2017) 12.

¹¹ Min/Legal/ACJHR-PAP/3(II) Rev. 1.5. See Abass A 'Prosecuting International Crimes in Africa: Rationales, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933-946.

¹² Article 11 of the Malabo Protocol. Currently, there are only 9 signatures. Information available at <https://www.au.int/en/treaties> (accessed 14 April 2017). See also Abaya M 'No Place for Impunity: The Arguments against The African Criminal Court's Article 46bis' (2016) 30 *Temple International and Comparative Law Journal* 192.

2.2. Legal and Institutional Framework of the ACC

2.2.1. Structure and Jurisdiction

The African Criminal Court (ACC) has three Chambers, namely, a Pre-Trial, Trial and Appellate Chambers.¹³ The ACC tries all cases under Article 28A.¹⁴ The Pre-Trial Chamber has powers to issue orders and warrants for the investigation and prosecution of cases, including protection of privacy of witnesses and victims, presentation of evidence and protection of arrested persons.¹⁵ The Trial Chamber has the mandates to, *inter alias*, conduct trials of accused persons and receive appeals from the Pre-Trial Chamber.¹⁶ The Appeals Chamber receives and conducts appeals from the Trial Chamber and its decision is final and binding.¹⁷

The ACC has personal jurisdiction over natural and legal persons.¹⁸ In establishing the criminal liability of natural persons, the ACC takes into account various modes of participation, such as commission, ordering, instigation, conspiracy and attempt.¹⁹

In terms of appeal mechanism, an aggrieved part (the accused or the Prosecutor) may appeal from the decision of the Pre-Trial Chamber to the Trial Chamber and to the Appeals Chamber.²⁰

¹³ Article 16(2).

¹⁴ Article 17(3).

¹⁵ Article 19 Bis (2) and (3).

¹⁶ Article 19 Bis (4) and (5).

¹⁷ Article 19 Bis (6).

¹⁸ Articles 46B and 46C.

¹⁹ Article 28N.

²⁰ Article 18 (2) and (4).

The grounds of appeal include a procedural error, an error of law, an error of fact or against a decision on jurisdiction or admissibility of a case and an acquittal or a conviction.²¹

2.2.2. The Office of the Prosecutor

The Office of the Prosecutor is one of the Organs of the ACC.²² It comprises of the Prosecutor and two deputies. The Office investigates and prosecutes the crimes under Article 28A.²³ The Prosecutor has power to institute investigations *proprio motu*, including receiving referrals from the states parties, the AU Security Council or Assembly.²⁴ The Prosecutor opens a preliminary investigation to ascertain whether a substantial basis exists to start an actual investigation. In case there is no basis, he notifies the parties concerned, and this does not prevent the parties from presenting new evidence and facts over the same situation.²⁵ In case he decides to open an actual investigation, the Prosecutor applies for an authorisation from the Pre-Trial Chamber.²⁶ In allowing or rejecting the application of the Prosecutor, the Pre-Trial Chamber considers grounds such as whether a reasonable basis to proceed with an investigation is present and the case falls within the jurisdiction of the ACC.²⁷ In case of refusal, the Prosecutor is not barred from making another application by presenting new facts and evidence on the

²¹ Article 18(2) and (3).

²² Article 22A.

²³ Article 22A (6).

²⁴ Article 64F and 47G (1).

²⁵ Article 6G (5) and (6).

²⁶ Article 46G (3).

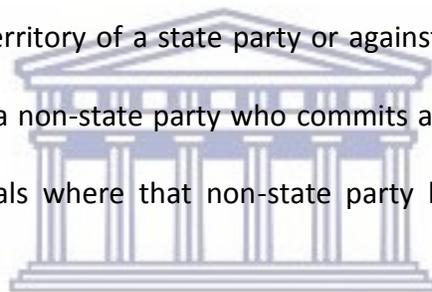
²⁷ Article 46G (4).

same situation.²⁸ Office of the Prosecutor is the means through which the criminal jurisdiction of the ACC is triggered.

2.2.3. Accessibility, Trigger Mechanism and the Exercise of Jurisdiction

The ACC exercises jurisdiction in the following four situations: (a) when a crime is either committed in the territory of the state party, including its registered vessel; (b) by the national of the state party; (c) against the victim who is a national of a state party and (d) by non-states parties that commit extra-territorial acts that threaten the vital interests of a state party.²⁹

Therefore, the ACC, like the ICC, can exercise jurisdiction over a national of a non-state party who commits a crime in the territory of a state party or against its nationals. It also exercises jurisdiction over a national of a non-state party who commits a crime in the non-state party's territory or against its nationals where that non-state party has declared to recognise the jurisdiction of the ACC.³⁰



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The ACC exercises jurisdiction over the crimes committed after the entry into force of the Malabo Protocol and the Statute.³¹ When a State becomes a Party to the Malabo Protocol and the Statute, it automatically accepts the jurisdiction of the Court.³² Like, the ICC, the ACC does

²⁸ Article 46G (5).

²⁹ Article 46E *bis*.

³⁰ Article 46E bis (3). Akande D 'The Jurisdiction of the International Criminal Court over Nationals of Non-State Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618-619.

³¹ Article 46E.

³² Article 46E bis (1).

not exercise its jurisdiction *proprio motu*. Thus, its jurisdiction must be triggered by a referral of a situation to the ACC.³³

In a criminal referral, the situation is referred to the Court by the Prosecutor, a state party and the Assembly or Security Council of the AU.³⁴ In non-criminal referrals, individuals and African NGOs with Observer Status with the AU or its Organs or Institutions have a direct access to the ACC.³⁵ However, for such NGOs to access the ACC, a state in which an NGO has been incorporated, must, as a rule, make a Declaration to accept the competence of the ACC to receive cases or applications submitted to it directly.³⁶ It is not clear whether such NGOs and individuals' accessibility extends to criminal referrals.³⁷

2.2.4. Complementarity Principle

The ACC does not work on the basis of primacy jurisdiction, instead on the complementarity jurisdiction.³⁸ The ACC exercises jurisdiction to complement National Courts of the states parties and the Courts of the Regional Economic Communities (RECs).³⁹ However, with regard to RECs, the instruments establishing them shall state expressly to that effect.⁴⁰ Under complementarity jurisdiction, the ACC does not investigate or prosecute a case where: (a) the

³³ Article 46F.

³⁴ Articles 46G and 46F.

³⁵ Article 30(f).

³⁶ Articles 30(f) and Article 9(3) of the Malabo Protocol.

³⁷ Nerlich V in Werle G & Vormbaum M (eds) (2017) 179-180.

³⁸ Article 9(2) of the ICTY Statute and Article 8(2) of the ICTR Statute. The ICC works on complementarity jurisdiction under Article 17 ICC Statute. See also Philippe X 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?' (2006) 8 *International Review of the Red Cross* 380-38.

³⁹ Article 46H (1).

⁴⁰ Article 46H (1). See also Abass A in Werle G & Vormbaum M (eds) (2017) 24-25.

state party has jurisdiction over the case; (b) the state party investigates such a case and decides not to prosecute; (c) where the state party has prosecuted the accused person who is the subject of the Court's charge and (d) where the Court finds the situation is not of a satisfactory weight to warrant further action.⁴¹ Therefore, in complementarity jurisdiction, the duty to investigate and prosecute is primarily left to the states parties, and not the Court.⁴²

The ACC exercises jurisdiction only when there is unwillingness or inability on the part of the state party to investigate or prosecute.⁴³ To determine unwillingness, based on the recognised principles of due process under international law, the ACC considers whether: (a) a state concerned conducts proceedings to shield its nationals from the Court's jurisdiction; (b) proceedings have been delayed unjustifiably where such a delay is inconsistent with intent to bring such a person to justice and (c) proceedings are carried on without impartiality or independence and thus inconsistent with intent to bring a person to justice.⁴⁴ Regarding inability of the state concerned, the Court takes into consideration factors such as substantial or total failure or inaccessibility of the state's national judicial system. The ACC will also consider the state's inability where such a state fails to obtain the accused or necessary evidence to conduct its proceedings.⁴⁵ The ICC's threshold of 'genuinely' unwilling or unable to

⁴¹ Articles 46H. See Trendefilova E in Werle G, Fernandez L & Vormbaum M (eds) (2014) 22-23.

⁴² Van Der Wilt H 'Universal Jurisdiction Under Attack: An Assessment of African Misgivings Towards International Criminal Justice as Administered by Western States' (2011) 9 *JICJ* 1047-1048.

⁴³ Article 46H(3) and (4); *National Commissioner of South African Policy Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30 paras 29, 31 and 34 and *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) paras 1, 35, 54, 91 and 199.

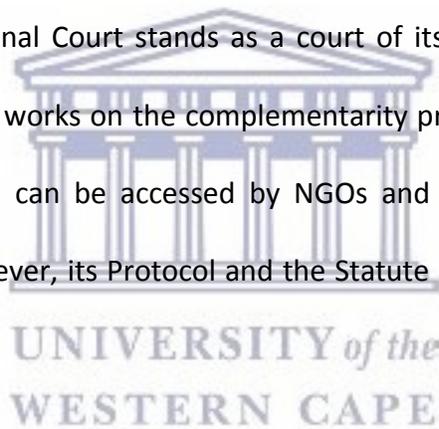
⁴⁴ Article 46H (3) (a), (b) and (c).

⁴⁵ Article 46H (4).

carry out the investigation or prosecution does not form part of Article 46H.⁴⁶ The omission implies that the evidentiary standard of the inability to prosecute has been lowered. Consequently, African states parties may avoid prosecuting even the trivial cases within their jurisdictions and refer them to the ACC.⁴⁷

2.3. Chapter Summary

Therefore, the African Criminal Court represents the only court with jurisdiction over international and transnational crimes. Its creation was not an afterthought. It was a result of thoughtful consideration and deliberations. With its various chambers and operational mechanisms, the African Criminal Court stands as a court of its own. It exercises jurisdiction through referrals of situations, works on the complementarity principle, has competence upon natural and legal persons and can be accessed by NGOs and natural persons upon certain conditions being fulfilled. However, its Protocol and the Statute are not yet in force, rendering the Court non-operational.



⁴⁶ Abass A in Werle G & Vormbaum M (eds) (2017) 26; Trendafilova E in Werle G, Fernandez L & Vormbaum M (eds) (2014) 22-26; Jessberger F & Geneuss J 'The Many Faces of the International Criminal Court' (2012) 10 *JICJ* 1087-1088 and Van Der Wilt H in Werle G & Vormbaum M (eds) (2017)193-194. Pertaining to the ICC rulings on admissibility criteria see *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muiga Kenyatta and Mohammed Hussein Ali*; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*; *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*; *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* and *The Prosecutor v Saif Al-Islam Gaddafi and Abudllah Al-Senussi*.

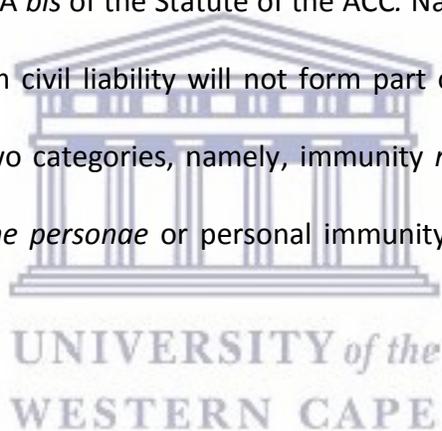
⁴⁷ Abass A in Werle G & Vormbaum M (eds) (2017) 26.

CHAPTER THREE

IMMUNITIES UNDER THE STATUTE OF THE AFRICAN CRIMINAL COURT

3.1. The General Overview of Immunities

Generally, immunity refers to the principle upon which certain state officials are protected from civil and criminal prosecution by either the domestic courts or foreign domestic courts and international tribunals.¹ The purpose of this section of the study is to consider and therefore, discuss immunity from criminal prosecution of state officials under customary international law, treaty law and under Article 46A *bis* of the Statute of the ACC. National or domestic immunities as well as the immunities from civil liability will not form part of the discussion.² Essentially, immunities are divided into two categories, namely, immunity *ratione materiae* or functional immunity and immunity *ratione personae* or personal immunity.³ Each category of immunity will be discussed in this study.



¹ Werle G & Jessberger F 3 ed (2014) Marg. No. 722; Akande D & Shah S 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *The European Journal of International Law* 815-852; Shaw MN *International Law* 6 ed (2008) 697-777; Cassese A (2012) 76; Cryer R (2010) 513; Pedretti R (2015) 13-56; Cassese A, Gaeta P & Baig L *et al* (2013) 240-241 and Bassiouni MC (2013) 73.

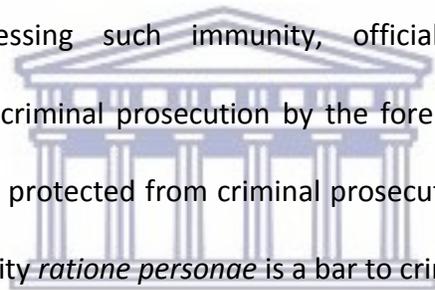
² Akande D (2004) 408.

³ Luban D (2013) 512-514; Pedretti R (2015) 13-56; Cryer R *et al* (2010) 531; Cassese A *et al* (2012) 76; Gugard J (2005) 484-485 and Steinerte E & Wallace RMM (2006) 907.

3.2. Immunities

3.2.1. Personal Immunities

Personal immunities adheres or attaches to the status or office of an official.⁴ This immunity subsists as long as a person holds office and covers both private and official acts committed prior and during the tenure of office.⁵ Thus, when one is out of power, he ceases to possess personal immunity.⁶ It is given to a limited number of people such as heads of state,⁷ heads of government,⁸ ministers of foreign affairs,⁹ diplomats¹⁰ and other state officials with particular mission in other countries.¹¹ It is given to facilitate and maintain relations and interactions between states.¹² By possessing such immunity, officials become completely and unconditionally immune from criminal prosecution by the foreign courts. Those who benefit from this type of immunity are protected from criminal prosecution even for the crimes under international law. Thus, immunity *ratione personae* is a bar to criminal prosecution, not criminal



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⁴ Van Alebeek R (2008) 159-199.

⁵ Articles 3 and 6 of Chapter V of the Report of the International Law Commission (ILC) on the Work of its Sixty-Fifth Session (6 May-& June and 8 July-9 August 2013) 2013.

⁶ Werle G & Jessberger F 3 ed (2014) marg. No. 725; Cassese A *et al* (2012) 88-96; Jia BB (2012) 1311-1312 and Cassese A 'Is the Bell Tolling for Universality? A Plea for Sensible Notion of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 59.

⁷ Murungu CB (2011) 9 *JICJ* 1070; Tladi D (2013) 11 *JICJ* 203; Tladi D (2015) 13 *OJICJ* 1034-1035; Akande D 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunity' (2009) 7 *JICJ* 334 and *Certain questions of Mutual Assistance in Criminal Matter (Djibout v France)* [2008] ICJ General List 136 at 10.

⁸ Article 6 of Chapter V of the ILC Report, 2013.

⁹ Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), Judgment of 14 February [2000] ICJ Reports 3 at para 54.

¹⁰ Article 31 of the Vienna Convention on Diplomatic Relations, 1961. 500 UNTS 95.

¹¹ Werle G & Jessberger F 3 ed (2014), marg. No. 725.

¹² Akande D (2004) 409; Labuschagne JMT (2001) 188; Warbrick C (ed) (2004) 770 and Bassiouni MC (2013) 73-95.

liability.¹³ This means it is possible to prosecute the holders of immunity *ratione personae* once out of office for crimes they committed while in office or prior to the coming into office.¹⁴

3.2.2. Functional Immunities

Functional immunity is bestowed upon state officials¹⁵ for performing acts of or on behalf of the state. As its name suggests, this immunity attaches to the official act,¹⁶ not the official.¹⁷ Thus, functional immunity provides a substantive defence to a state official against criminal prosecution for an act which has been performed on behalf of the state.¹⁸ It can be relied on as a defence not only by serving state officials but also former officials as well in relation to the acts they performed for the state while in office.¹⁹ Unlike personal immunities, functional immunities is given to a wider number of state officials who carry out official functions, thereby personifying the states they represent. Foreign courts are prohibited from prosecuting individuals who perform acts of the state on the ground that by purporting to punish these officials, such courts or states will be punishing other states—a practice not permissible under international law. There is, however, an exception with regard to functional immunity. It has been held and now it is settled position that an official cannot plead functional immunity for

¹³ Akande D (2004) 409-412.

¹⁴ Paragraph 8 of the commentary to draft Article 1 under Chapter V of the ILC Report 2013.

¹⁵ A state official can be any individual who either exercises the functions of the state or represents the state. See draft Article 2(e) under Chapter IX of the Report of the International Law Commission on the Work of its Sixty-Sixth Session (5 May- 6 June and 7 July-8 August 2014) 2014.

¹⁶ An official act or state function means a function or an act carried by the state through its officials in terms of its executive, legislative or judicial nature. See para 11 on the commentary to draft Article 2(e) under Chapter IX of the ILC Report, 2014.

¹⁷ Werle G & Jessberger F 3 ed (2014) marg. No. 724 and Cassese A, Gaeta P & Baig L *et al* 3 ed (2013) 240-241.

¹⁸ Prouveze R in Schabas WA & Bernaz N (eds) *Routledge* (2011) 55-356 and Van Alebeek R (2008)103-158.

¹⁹ Akande D (2004) 412-413.

commission of a crime against international law.²⁰ This is because the commission of international crimes is not an official act or state function.²¹

3.3 Immunities under Treaty and Customary International Law

3.3.1. Treaty Law

International law, as expressed in the declarations, multilateral agreements and treaties, recognises immunities for certain state officials from criminal prosecution in foreign jurisdictions. The immunities provided in these conventions, mostly, is with respect to personal immunities of the heads of state or government, ministers of foreign affairs and diplomats. Convention on Special Missions states that the head of state or government and minister of foreign affairs, when on official visit, shall be granted immunities.²² The immunity these officials are granted with includes both immunity under the Convention and those accorded under international law. The Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character not only grants immunities to heads of state, government, ministers of foreign affairs and high ranking officials of states but also recognizes such immunities and privileges accorded to these leaders under international law.²³

²⁰ *Regina v Bartle and Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet*, UK [1999] HL 2 W. L. R. 827, 38 ILM. 581 (1999) 594-595; Article 7 of the IMT Charter 82 UNTS 279; Article 6 of the IMTFE Charter 1946 TIAS no. 1589; Article II(4)(a) of the Control Council Law No. 10, Official Gazette of the Control Council for Germany No. 3, 1945; Article 27 of the Rome Statute 1998, 37 ILM (1998), 999; Article 7(2) of the ICTY Statute, UN Doc. S/25704; Article 6(2) of the ICTR Statute, UN Doc. S/RES/955 (1994). The Constitutive Act of the African Union is silent on immunities save it provides for intervention in a state party to the African Union in case of grave circumstances under Article 4(h).

²¹ Akande D (2004:413).

²² Article 21 of the Convention on Special Missions 1969, 1400 UNTS 231.

²³ Article 50, Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Charter, 1975. UN Doc. A/CONF.67/16.

Likewise, the United Nations Convention on Jurisdictional Immunities of States and their Properties recognises the immunities of states under international law, including personal immunity of heads of state and those officials connected with the functions of the state.²⁴ The Vienna Convention on Diplomatic Relations provides that diplomats representing their states enjoy immunities from criminal jurisdiction of the receiving states.²⁵ The same can be mentioned regarding consular officers. The Vienna Convention on Consular Relations stipulates that consular officers have immunity against criminal jurisdiction of the states they are accredited to.²⁶ The OAU General Convention on the Privileges and Immunities of the Organisation of African Unity provides immunities to its staff members in the course of discharging their duties.²⁷

Much as treaty law recognises immunities, it also waives the immunities of state officials with respect to crimes under International law before certain international tribunals. For example, Article 7 of the IMT Charter removed the immunities of state officials for international crimes. Also, Article 6 of the IMTFE Charter denied immunities of state officials for international crimes. Similar position has been recognised in Article II (4)(a) of the Control Council Law No. 10, Article 27 of the ICC Statute, Article 7(2) of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda.

²⁴ Article 3, United Nations Convention on Jurisdictional Immunities of States and their Properties, 2004. UN Doc. A/RES/59/38 (Dec 2, 2004).

²⁵ Articles 41 and 42, Vienna Convention on Diplomatic Relations, 1961. 500 UNTS 95.

²⁶ Article 43, Vienna Convention on Consular Relations, 1963. 596 UNTS 261.

²⁷ Article V, OAU General Convention on the Privileges and Immunities of the Organisation of the African Unity, 1965.

Therefore, it is submitted that under international treaty law, immunity of state officials is not only recognised and enforced, but also can be waived depending on what the provisions of the respective instruments or treaties provide.

3.3.2 Customary International Law

As a rule, both functional and personal immunities originate from customary international law which forbids other states from exercising authority over other states' public acts as well as protecting from criminal prosecutions state officials accredited to other states for particular functions.²⁸ In like manner, decisions of various national and international courts, expressing *opinio juris* and state practice, have recognised the presence of personal and functional immunities for certain officials of a state under customary international law.

In the *Arrest Warrant*, a case concerning the arrest warrant issued by Belgium against a Minister of Foreign Affairs of the Congo, the International Court of Justice (ICJ) made a pronouncement regarding the question of immunities under customary international law.²⁹ According to ICJ, personal immunity from criminal prosecution by foreign courts is granted to the heads of state and government, ministers of foreign affairs, diplomatic and consular agents as well as high ranking state officials.³⁰ This position applies regardless of whether the act complained against is an official or private act of the official.³¹ This position is not affected by whether the official concerned has committed international crimes. In fact, no exception exists

²⁸ Akande D (2004:409) and Abaya M (2016) 199.

²⁹ (*Democratic Republic of the Congo v Belgium*) Judgment of 14 February 2002 [2002] ICJ Reports 3.

³⁰ Paragraph 51 [2002] ICJ Reports 3.

³¹ Paragraph 55 [2002] ICJ Reports 3.

under customary international law in that respect.³² However, such immunity is only a bar to criminal prosecution, not its liability. Thus, officials who enjoy personal immunity under customary international law can be prosecuted once out of office.³³ Similarly, in the case of *Djibouti v France*, the ICJ held that by issuing a witness summons to the Head of State of Djibouti, France has violated, pursuant to the principles of customary international law, an obligation to respect the immunity of the head of a state of Djibouti who enjoys personal immunity.³⁴

In *Tachlona v Mugabe*, Tachlona made an application for the arrest warrant against President Mugabe in respect of the alleged crimes of torture in Zimbabwe. Tim Workman J, stated that such an order cannot be issued because, Mugabe as a sitting head of state, enjoys personal immunity under common law and customary international law.³⁵

In *Jones v Minister of Interior of Saudi Arabia*, Jones and three other UK citizens were tortured in Saudi Arabia on the allegations of their involvement in bombings in Saudi Arabia.³⁶ They decided to bring a case in the UK against the Ministry of Interior of Saudi Arabia and its officials. The House of Lords held that Saudi Arabia and its officials enjoyed functional immunity under

³² Paragraph 58[2002] ICJ Reports 3.

³³ Paragraphs 60 and 61 [2002] ICJ Reports 3. See also Wirth S 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case' (2013) 13 *European Journal of International Law* 877-893.

³⁴ *Certain questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Reports. See also [2002] ICJ Reports para 170.

³⁵ *Tachlona v Mugabe*, 169 Supp 2d (SDNY 2001) and Warbrick C (2004) 767-770.

³⁶ Case No. [2006] UKHL 26.

customary international law for such liability as the acts performed by Saudi Arabia's officials were acts of the state.³⁷

In *France v Gaddafi Case*, it was held that, in the absence of any contrary international law provision binding the concerned parties, international customary law prohibits the exercise of criminal jurisdiction over foreign Heads of State in Office.³⁸

As it is with treaty law, customary international law recognises exceptions to the immunities. In the *Arrest Warrant Case*, ICJ stated four exceptions, namely, (a) non-recognition of immunity by official's domestic court, (b) waiver of immunity by the official's state, (c) cessation of office tenure or removal from office and (d) waiver of immunity before certain international tribunals and courts.³⁹ Regarding the fourth exception, the justification is obvious. International tribunals are not national courts but rather institutions that derive their mandate from international law.⁴⁰ It is for this reason that in the *Prosecutor v Charles Tylor*,⁴¹ the Special Court for Sierra Leone held that 'the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.'⁴² Similar reasoning has been

³⁷ Steinerte E & Wallace RMM (2006) 902.

³⁸ *France v Gaddafi Case*, Cour de Cassation, Judgment of 13 March 2001 and Cassese A *et al* (2012) 91.

³⁹ Paragraph 61 [2002] ICJ Reports 3.

⁴⁰ Cassese A *et al* (2012) 96.

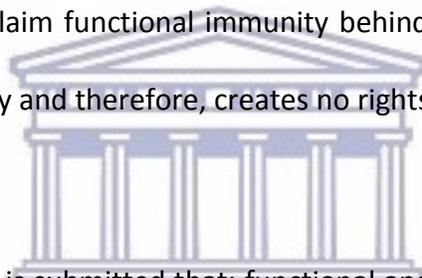
⁴¹ *Prosecutor v Charles Tylor*, Appeals Chamber, Decision on Immunity from Jurisdiction [2004] SCSL.

⁴² [2004] SCSL para 52

followed by the ICTY in the *Prosecutor v Karadzic*,⁴³ where the Court held that the accused could not claim immunity from criminal prosecution as a head of state before the tribunal.⁴⁴

Furthermore, under customary international law, incumbent state officials and those officials who normally enjoy personal immunity but are out of the office, enjoy functional immunity for acts they carried on behalf of the state. However, an exception has been recognised with respect to functional immunity. Commission or authorisation to commit crimes against international law is not a state function. In the *Pinochet 3*, it has been held that torture, perpetrated by a former head of state, is not a state function. Therefore, a torturer, even as a former head of state, cannot claim functional immunity behind the shield of state function.⁴⁵

Such an act seems to be a nullity and therefore, creates no rights or privileges for recognition of immunity.⁴⁶



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From the ongoing discussion, it is submitted that: functional and personal immunities originate from customary international and their status is recognised by the treaty law; a limited number of state officials such as heads of state and government, ministers of foreign affairs and diplomats enjoy personal immunity from prosecution before foreign courts; a wide number of state officials enjoy functional immunity which subsists even when the officials are out of office

⁴³ *Prosecutor v Karadzic*, Decision on Karadzic's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009.

⁴⁴ Paragraph 36 of the *Prosecutor v Karadzic* judgment. This judgment has been quoted by Cassese A *et al* (2012) 97-99.

⁴⁵ Paragraphs 593-595.

⁴⁶ Horowitz J 'Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex-parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations' (1999) 23 *Fordham International Law Journal* 510-511.

and lastly, with few exceptions, there is no rule under customary international law that prohibits the granting of or the removal of personal immunity of the state officials.⁴⁷

3.4 Immunities under Article 46A *Bis* of the Statute

Article 46A *bis* 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.’

It is clear that this provision provides immunity to three categories of state officials, namely, the heads of state or government, those acting or are entitled to act as heads of state or government and (other) senior state officials based on their functions.

While it is clear as regards who the heads of state are, certain aspects of this provision are not clear. For example, it is not clear:

- (a) Who is ‘anybody acting or entitled to act in such capacity’?
- (b) Who are the senior state officials?
- (c) What does it mean by the phrase ‘based on their functions’?
- (d) What category of immunity does it contemplate?

⁴⁷ Tladi D in Werle G & Vormbaum M (eds) (2017) 214 and [2002] ICJ Reports 3Para 61

Regarding question (a), literally ‘anybody acting or entitled to act in such capacity’ relates to the capacity or entitlement to act or serve as a head of state or government.⁴⁸ However, since the provision and the entire Statute are silent on the identification of these officials, it is prudent to consult states parties’ practice. Various constitutional and legal systems of AU member states recognise officials who can act or are entitled to act as heads of state and government. For example, according to Article 146(2) of the Constitution of Kenya,⁴⁹ the deputy president and the Speaker of the National Assembly can act or are entitled to act as heads of state of Kenya when the office of the President is vacant. According to Article 35(2) of the Constitution of Botswana,⁵⁰ the vice president or any minister designated by the cabinet can act or is entitled to act as a head of state when the office of the President is vacant. In Article 100 of the Constitution of the Republic of Zimbabwe,⁵¹ the vice president, second vice president or a minister appointed by the president or the cabinet, are entitled to act as heads of state or government in the absence of the President.⁵²

Therefore, regarding ‘anybody acting or entitled to act’ it is submitted that the Court will consider various constitutional regimes of states parties.⁵³ Since these leaders have the same

⁴⁸ Article 31 of the Vienna Convention on the Law of Treaties, 1969. 1155 UNTS 331. The rule of interpretation requires the application of literal meaning in the first place when interpreting a treaty provision.

⁴⁹ The Constitution of the Republic of Kenya, 2010.

⁵⁰ The Constitution of the Republic of Botswana, 2010.

⁵¹ The Constitution of the Republic of Zimbabwe, 2013.

⁵² Similar provisions can be cited from Article 37 of the Constitution of the United Republic of Tanzania, 1977 and Section 90 of the Constitution of the Republic of South Africa, 1996.

⁵³ Babington-Ashaye A ‘International Crimes, Immunities and the Protocol on Amendments to the Protocol on the Merged African Court: Some Observations’ in Jalloh CC & Elias O (eds) *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (2015) 416.

capacity to act as heads of state or government, they enjoy the same immunity as that of the head of state or government.

Concerning (b), the phrase 'senior state officials', just as it is with 'anybody acting or entitled to act', applies the same rule. That is to say, their identification is subject to the constitutional and legal regimes of the states parties. Therefore, while it cannot be pointed out clearly who these might be, it includes ministers, deputy ministers and other officials of a state party.

About (c), the words 'based on their functions' represent an adjective that qualifies senior state officials. In other words, the phrase puts a threshold upon which senior state officials are to be identified. However, the Statute is silent on this threshold. It is contended that the work of determining who really qualifies to be a senior state official in the context of the phrase 'based on their functions,' will depend on *a case by case analysis* as the ACC will interpret Article 46A *bis* based on international law.⁵⁴

Regarding (d), the words 'during their tenure' identify personal immunity. This is because only personal immunity can be granted to the state officials while in office or during their tenure. This immunity ceases with the expiration of the office of the immunity holder. Literally, therefore, the provision grants personal immunities to the three categories of state officials identified above.

⁵⁴ The Report, *the Draft Legal Instruments and Recommendations of the Specialised Technical Committee on Justice and Legal Affairs of the African Union* (2014) 6. See also Tladi D in Werle G & Vormbaum M (eds) (2017) 207.

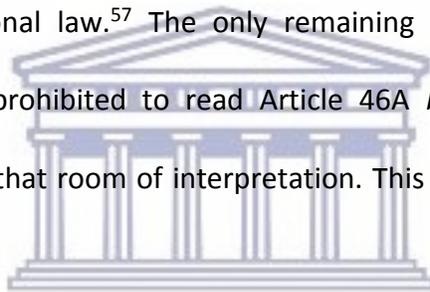
However, as discussed above, customary international law and treaty law recognise personal immunity to a limited number of state officials whereas functional immunity extends to a wide number of state officials who discharge state functions. It is argued that when this position is incorporated under Article 46A *bis*, it makes it possible that personal immunity will be accorded to the heads of state or government and those entitled to act in that capacity while functional immunity will be enjoyed by other senior state officials based on their functions. In other words, it is possible to interpret Article 46A *bis* as providing two categories of immunities. However, in the absence of *travaux préparatoires*, it is difficult to discern the intention behind the formulation of Article 46A *bis* and its exact meaning.

Notwithstanding this possibility, there is a problem with this position. Article 46A *bis* seems to include, for example, ministers of foreign affairs within other senior state officials, who, in the first place, enjoy personal immunity as opposed to functional immunity while in office.⁵⁵ The author of this study contends that this position might make the clause unclear and ambiguous as it will require senior state officials to be split into two groups, namely, the group of ministers of foreign affairs and other senior state officials. This categorisation is such that the foreign affairs ministers will enjoy the same personal immunity as that of the heads of state or government and those entitled to act in their positions while the rest of the senior state officials will enjoy functional immunity alone. Equally, it will be confusing to accept the proposition that ministers of foreign affairs should be included in the general phrase 'other

⁵⁵ [2002] ICJ reports 3 Para. 54

senior state officials based on their functions’ as such leaders naturally enjoy functional immunity.

To solve this dilemma, it appears that Article 46A *bis* applies only personal immunity.⁵⁶ This might resolve the ambiguity only in so far as the words ‘during their tenure of office’ are interpreted as applying to all the three categories of state officials. This meaning might be reinforced by the idea that naturally, it is personal immunity that is associated with the words ‘based on their tenure.’ The only challenge connected with this view also is that, the Statute will be the first international instrument to confer personal immunity to the largest number of state officials ever under international law.⁵⁷ The only remaining issue regarding the immunity provision is that one is not prohibited to read Article 46A *bis* as applying both types of immunities because it creates that room of interpretation. This is reinforced by the discussion below.



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The question as to the nature, content and extent of the immunities under Article 46A *bis* becomes more reinforced when one considers the AU decisions, the deliberations of the Executive Council of the AU and the Specialised Technical Committee on Justice and Legal Affairs of the AU.

In October 2013, the AU Assembly held an extraordinary meeting in Addis Ababa, Ethiopia and thereby adopted a decision on the AU relationship with the ICC. Among other things, it decided that ‘no charges shall be commenced or continued before any international Court or Tribunal

⁵⁶ Tladi D in Werle G & Vormbaum M (eds) (2017) 206-208.

⁵⁷ Abaya M (2016) 198.

against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.’⁵⁸ While this decision conflicts fundamentally with the obligation of the AU member states to the Rome Statute,⁵⁹ it contains a phrase similar to that of Article 46A *bis* with a slight modification. The decision declares that African heads of state or government and those entitled to act as such enjoy personal immunity even before the ICC. The words, other senior state officials based on their functions’ were not part of this provision.

In addition, the word, ‘serving’ seems to be consistently used in that decision and under Article 46A *bis*. This word relates to personal immunities. Essentially, the AU is decided that its heads of states or those entitled to act in their positions should be prosecuted only when out of power. When this interpretation is considered in relation to the immunity provision, it appears that Article 46A *bis* only contemplates personal immunity.

Furthermore, according to the report of the Executive Council of the AU, the phrase ‘senior state officials based on their functions’ was inserted in Article 46A *bis* in order to grant certain African leaders personal immunity as opposed to functional immunity.⁶⁰ This seems to be motivated by the understanding that personal immunity is given to a limited number of state officials. In that case, to include and give personal immunity to more officials who naturally are

⁵⁸ Ext/Assembly/AU/Dec. 1 (Oct. 2013) para 10(1).

⁵⁹ Article 27 of the Statute of the ICC takes away immunity of state officials. African states, by submitting to the jurisdiction of the ICC, accepted that African leaders shall not enjoy any kind of immunity whatsoever under national, customary or international law. As to the contention between African Union and ICC on this question see for example, the decisions of the ICC in *the Prosecutor v Omar Hassan Ahmad Al Bashir*, *the Prosecutor v Omar Hassan Ahmad Al Bashir*, *the Prosecutor v Omar Hassan Ahmad Al Bashir*, and *the Prosecutor v Omar Hassan Ahmad Al Bashir*. See also Ventura MJ ‘Symposium on President Al-Bashir’s Presence at the African Union Summit in South Africa and the Non-execution of the ICC Arrest Warrant: Escape from Johannesburg?’ (2015) 13 *Journal of International Criminal Justice* 995-2025.

⁶⁰ EX.CL/846(XXV).

accorded with functional immunity, a qualifying and different phrase in the provision of Article 46A *bis* was added. That phrase is ‘or other senior state officials based on their functions.’⁶¹ The only determinant factor that establishes a threshold of senior state officials who deserve personal immunity will be ‘based on their functions.’⁶² This seems to be the intention of the drafters of Article 46A *bis*. However, there is no *travaux preparatoires* or any decision to substantiate this position. Only the jurisprudence of the ACC will be able to determine that.⁶³ When Article 46A *bis* is considered from the history preceding its enactment, it makes the provision ambiguous and exceptional. It is ambiguous because its plain reading indicates that it provides only personal immunities while at the same time it allows one to read it as envisioning functional immunities as well. Due to its ambiguity, the provision becomes exceptional as it appears to provide two separate categories of immunities on three separate categories of state officials at the same time. Secondly, but based on the first exception, Article 46A *bis* seems to accord ministers of foreign affairs with functional immunity, whereas under international law, they enjoy personal immunity. This appears to be the result of poor drafting.⁶⁴

Lastly, it is about non-senior state officials. As pointed out above in the discussion, few state officials enjoy personal immunity while the majority of state officials enjoy functional immunity. However, Article 46B(2) takes away functional immunity of non-senior state officials who generally under international law enjoy functional immunity as they are also state officials

⁶¹ EX.CL/846(XXV).

⁶² According to the Executive Council, ‘based on their functions’ was not in the original draft. It was included later on to qualify the senior state officials who enjoy functional immunity. See EX.CL/846(XXV).

⁶³ EX.CL/846(XXV). There are no *travaux preparatoires*.

⁶⁴ Tladi D in Werle G & Vormbaum M (eds) (2017) 205.

discharging state functions. The applicability of this ambiguous exception is yet to be determined.⁶⁵ Although this does not relate to immunities under Article 46A *bis*, it helps to point out the weakness of the immunity regime under the Malabo Protocol.

Pertinent to this research, Article 46A *bis* sustains a direct relationship to the exercise of jurisdiction by the ACC. As it will be established in the next chapter, Article 46 A *bis* affects the jurisdiction of the ACC in relation to the crimes. This emanates from the fact that, Article 46A *bis* provides immunity to the largest number of state officials who, as it will be established, are susceptible of committing the very crimes for which the ACC is given jurisdiction to try and prosecute.

Due to its ambiguous nature, the author of this study argues that it will be reasonable where Article 46A *bis* is either re-drafted or removed. Where it is re-drafted, the ambiguities that surround the provision will be cleared. Where it is removed, it will give more weight and credibility to the AU efforts to not only develop criminal jurisprudence in Africa, but also its determination to prosecute top leaders who are naturally powerful in their domestic states, but powerless before international courts such as the ACC.

3.5. Chapter Summary

Therefore, it is submitted that Article 46A *bis*: provides immunities to the three categories of state officials; literally, it provides personal immunity with a room to interpret it as envisaging functional immunity as well; it lacks *travaux preparatoires* to determine who are 'anybody

⁶⁵ Jessberger F in Werle & Vormbaum M (eds) (2017) 76-77.

acting or entitled to act' and 'other senior state officials based on their functions' and finally, the provision suffers from poor drafting.



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CHAPTER FOUR

THE EFFECT OF THE IMMUNITY CLAUSE ON THE COURT'S EXERCISE OF JURISDICTION

4.1 The Nature and the Structure of the Crimes

The Statute criminalises 14 crimes.¹ It contains the four core crimes under International law, namely, genocide, crimes against humanity, war crimes and the crime of aggression.² The remaining ten crimes are characterised as transnational and treaty based crimes as they do not entail direct responsibility under international law.³

The structure of the crimes is such that some of the crimes contain chapeau with contextual element followed by the individual acts whereas other crimes contain individual acts only.⁴ The Statute does not contain a general provision on the mental element of the crimes under Article 28A. Therefore, ascertaining mental element of a particular crime depends either on the wording of the crime itself or by incorporating the general requirement for the mental element from other instruments into the Statute.⁵ Furthermore, the Statute does not contain a provision of the applicable law of the Court. Such a provision would have made it easier to locate the

¹ Article 28A.

² Ambos K 'Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)' in Werle G & Vormbaum M (eds) (2017) 31.

³ Article 3(2) of the United Nations Convention against Transitional Organised Crimes (2000) 2225 UNTS 209. See also Mnde-Silungwe F in Werle & Vormbaum M (eds) (2017) 111-113; Jessberger F in Werle G & Vormbaum M (eds) (2017) 74-76; Werle G and Jessberger F (2014) Marg No 125-133 and Boister N 'Transitional Criminal Law?' (2003) 14 *European Journal of International Law* 955.

⁴ Articles 28B, 28F and 28G.

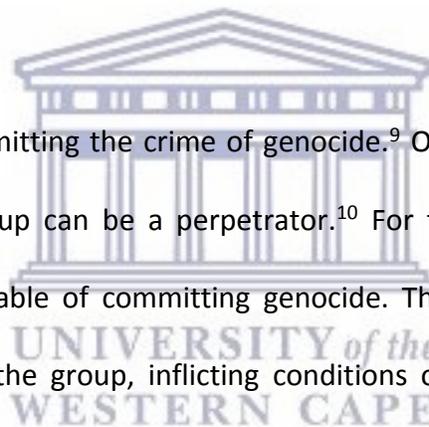
⁵ Article 30 of the Rome Statute provides for a general mental element for the four core crimes.

sources of law for interpretation purposes and the removing of ambiguity.⁶ By discussing the crimes, the chapter intends to show that the immunity clause affects the ACC' jurisdiction where persons susceptible of committing the crimes are accorded immunity from prosecution.

4.2. Core Crimes under the ACC Statute

Genocide is one of the crimes criminalised under the ACC Statute. Its definition and individual acts of the crime of genocide under the Statute are similar to the elements recognised under international law.⁷ However, the Statute provides an extension to the definition by adding 'acts of rape or any other forms of sexual violence' as forming part of the individual acts of the crime of genocide.⁸

Any person is capable of committing the crime of genocide.⁹ Other Scholars note that even a member of the protected group can be a perpetrator.¹⁰ For that reason, the state officials under Article 46A *bis* are capable of committing genocide. This is particularly so when one considers killing members of the group, inflicting conditions of life to destroy the group in whole or in part and the imposing of measures to prevent births within the group. The state



⁶ Article 21 of the ICC Statute for the hierarchy of laws the ICC applies for interpretation purposes. See also Article 31 of the Vienna Convention on the Law of Treaties, 1969.

⁷ Article 6 of the Rome Statute.

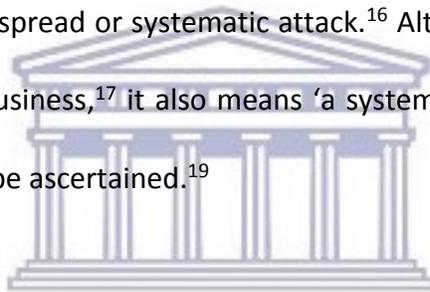
⁸ Article 28B. See Akhavan P 'The Crime of Genocide in the ICTR Jurisprudence' (2005) 3 *JICJ* 991-992; Stern B & Fouchard I 'Sexual Violence as Genocide: The Important Role Played by the Bassiouni Commission in the Recent Development of International Criminal Law' in Sadat LN & Scharf MP (eds) *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (2008) 285-307 and Ambos K in Werle G & Vormbaum M (eds) (2017) 39-40.

⁹ Birzu B 'The Subjects of the Crime of Genocide' (2015) 1 *Law Annals Titu Maiorescu University* 52.

¹⁰ Kreß C 'The Crime of Genocide under International Law' (2006) 6 *International Criminal Law Review* 473.

and its officials have the means to effectively carry out these acts of genocide.¹¹ This fact is reinforced by Article IV of the Convention on the Prevention and Punishment of the Crime of genocide.¹² Under the Convention, the crime of genocide is punishable irrespective of whether it has been committed by 'constitutionally responsible rulers, public officials or private individuals.'¹³ Furthermore, several criminal tribunals have convicted state officials for genocide.¹⁴

Crimes against humanity are recognised under the Statute. The Statute defines crimes against humanity in similar terms as recognised under international law.¹⁵ However, it adds the word 'enterprise' in addition to widespread or systematic attack.¹⁶ Although the term enterprise has several meanings relating to business,¹⁷ it also means 'a systematic and purposeful activity.'¹⁸ Its actual applicability is yet to be ascertained.¹⁹



¹¹ Schaba WA *Genocide in International Law: The Crimes of Crimes* (2003) 207.

¹² 9 December 1948, 78 UNTS (1949) 287.

¹³ Paragraph 10 of the Commentary on Article 17 of the Draft Code of Crimes Against Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eight session (6 May-26 July 1996), UN Doc.A/49/10.

¹⁴ Conviction of the Nazi state officials for genocide against the European Jews in the form of crimes against humanity-IMT judgment of 1 October 1946 in the Trial of the Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (22 August 1946-1 October 1946). See also the conviction of the former Prime Minister of Rwanda by the ICTR in *The Prosecutor v Jean Kambanda* (2000) (AC) ICTR 97-23-A.

¹⁵ Article 7 of the Rome Statute.

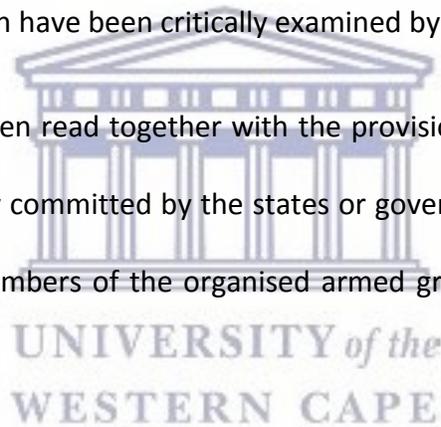
¹⁶ Article 28C and Article 7 of the ICC Statute. See also Sadat LN 'Crimes Against Humanity in the Modern Age' (2013) 107 *American Journal of International Criminal Law* 352; Roberts C 'On the Definition of Crimes against Humanity and other Widespread of Systematic Human Rights Violations' (2017) 20 *University of Pennsylvania Journal of Law and Social Change* 18-24; Ambos K & Wirth S 'The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000' (2002) 13 *Criminal Law Forum* 2-34 and Fenrick W 'Should Crimes Against Humanity Replace War Crimes' (1998-1999) 37 *Colombian Journal of Transnational Law* 778.

¹⁷ Deuter M et al (eds) *Oxford Advanced Learner's Dictionary of Current English* 9 ed (2015) 498.

Based on the nature of its definition, it is the state machinery, its officials or a group of persons with a certain level of organisation that perpetrate the crimes against humanity.²⁰ Persons under Article 46A *bis* are susceptible of committing crimes against humanity because they form part of state machinery.²¹ The ICC has established that crimes against humanity can be committed by state officials or its machinery as well as by persons with certain level or organisation who, necessarily, are non-state actors.²²

War crimes are also criminalised under the Statute. The provision on war crimes under the Statute follows the definition under international law.²³ However, the Statute adds an additional number of acts which have been critically examined by some commentators.²⁴

The wording of Article 28D when read together with the provisions of other treaties, suggests that these crimes are generally committed by the states or governments through their officials or armed forces as well as members of the organised armed groups within a state.²⁵ Various



¹⁸ <https://www.merriam-webster.com/dictionary/enterprise> (accessed 1 May 2017).

¹⁹ Ambos K in Werle G & Vormbaum M (eds) (2017) 41.

²⁰ Werle G & Jessberger F 3 ed (2014) Marg Nos 909 and 912.

²¹ Schwelb E 'Crimes Against Humanity' (1946) 23 *British Yearbook of International Law* 203-204

²² Werle G & Jessberger F 3 edn (2014) Marg Nos 906-909. See also Werle G & Burghardt B 'Do Crimes Against Humanity Require the Participation of a State or a 'State-Like' Organisation?' (2012) 10 *Journal of International Criminal Justice* 1154-1166; *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of Investigation into the Situation in the Republic of Kenya*; Knoop GJ *An Introduction to the Law of the International Criminal Tribunals: A Comparative Study* 2 ed (2014) 49-50.

²³ Article 28D. See also Werle G & Jessberger F 3 ed (2014) Marg No. 1029 and Cryer R 'Individual Liability in International Law' in Liivoja R & McCormack T (eds) *Routledge Handbook of the Law of Armed Conflict* (2016) 450-541.

²⁴ Ambos K in Werle G and Vormbaum M (eds) (2017) 42-49.

²⁵ Henckaerts JA & Beck LD *Customary International Humanitarian Law Volume I: Rules* (2005) 574.

criminal tribunals have convicted state officials as well as military leaders of various armed groups for war crimes.²⁶

The crime of aggression is provided under Article 28M. Under the Statute, certain phrases and elements have been added to the crime compared to the ICC Statute.²⁷ It adds a military or political action of an organisation in addition to the military or political action of the state.²⁸

The crime of aggression is committed by a person who being in a position of exercising effective control over or to direct the political and military action of a state or organisation,²⁹ plans, prepares, initiates or executes an act of aggression. The crime can only be committed by persons capable of exercising effective control or direction over the political and military action of a state or an organisation.³⁰ The chapeaus to Article 28M(A) and (B) indicate that even persons forming part of the state or non-state actors such as armed groups or legal entities can commit the crime of aggression through the exercise of control and effective leadership.³¹ This obligates one to conclude that the state officials accorded immunity under Article 46A *bis* are included.

Therefore, it is submitted that regarding the core crimes under international law, the jurisdiction of the ACC will be affected as most state officials who enjoy immunity are susceptible of committing the prohibited acts.

²⁶ Werle G and Jessberger F 3 ed (2014) Marg No. 26 and the ICC (TC) decision in *The Prosecutor v Thomas Lubanga Dyilo* 14 March 2012 para 1358.

²⁷ Article 8 *bis*.

²⁸ Article 28M (A).

²⁹ Whether the organisation is 'connected to the state or not.'

³⁰ Werle G & Jessberger F 3 ed (2014) Marg Nos. 1459-1460.

³¹ Ambos K in Werle G & Vormbaum M (eds) (2017) 50.

4.3. Transnational and Treaty Based Crimes

4.3.1. The Crime of Unconstitutional Change of Government

The crime of the unconstitutional change of government is committed when a person with intent of illegally obtaining or keeping power: conducts a coup d'état or intervenes by mercenaries or uses armed dissidents, rebels or political assassination, to replace a democratically elected government.³² It is also committed when a person who has lost a free, fair, and regular election refuses to relinquish power or when the constitution or legal instruments of a country are amended or revised unconstitutionally or contrary to democratic principles of changing a government, and lastly, when electoral laws are modified without the consent of the majority political actors in the last six months towards elections.³³

Unconstitutional change of government is for the first time criminalised as a crime in the Statute. This reflects the seriousness of the problem in Africa.³⁴ For that reason, steps to fight such acts have been pursued by the African Union.³⁵

³² Article 28E(1)(a)-(c).

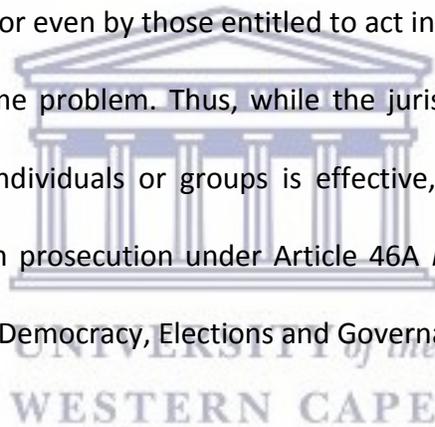
³³ Article 28E(1)(d)-(f) and Article 23(1)-(5) of the African Charter on Democracy, Elections and Governance January 2007 and Article 2(1) of the Protocol on Democracy and Good Governance of the ECOWAS A/SP/1/12/01, 2001.

³⁴ Werle G & Vormbaum M (eds) (2017) 4.

³⁵ AHG/Dec.150 (XXXVI)2000 (Decision on Unconstitutional Changes of Government in Africa). Because of its seriousness, it is the Peace and Security Council of African Union that determines the existence of acts amounting to unconstitutional changes of government. See Article 4(p) of the Constitutive Act of the African Union; Articles 24 and 25(1) of the African Charter on Democracy, Elections and Governance; Articles 5(2)(g) and 7(1)(g) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union of 9 July 2002 and The Lome Declaration AHG/Decl.5 (XXXVI) 2000 (Declaration of the Framework for an OAU Response to Unconstitutional Changes of Government).

The crime is committed by private and state officials. For example, a coup against a government can be staged by state officials in co-operation with the military force. The same applies to the refusal by the incumbent government to relinquish power, amendment or revision of the constitution or legal instruments or modification of electoral laws.³⁶ These are acts that can easily be carried out by the government through its officials. Rebel groups, dissidents and mercenaries on the other hand, can also replace a democratically elected government.

The ACC will be unable to exercise jurisdiction over this crime when leaders responsible for its commission enjoy immunity. For example, the crime under Article 28E(1)(d) is committed by heads of state or governments or even by those entitled to act in such a capacity. Article 28E (1) (a), (e) and (f) depicts the same problem. Thus, while the jurisdiction of the Court over the crime committed by private individuals or groups is effective, it is not the case with state officials who are immune from prosecution under Article 46A *bis*. This situation is not cured even by the African Charter on Democracy, Elections and Governance.³⁷



4.3.2. Piracy

According to the Statute, the crime of piracy is committed by the crew or passengers of a private marine or air vessel, who while acting for private ends, detain or depredate any marine or air vessels, property or persons either on the high seas or any other place outside any state's

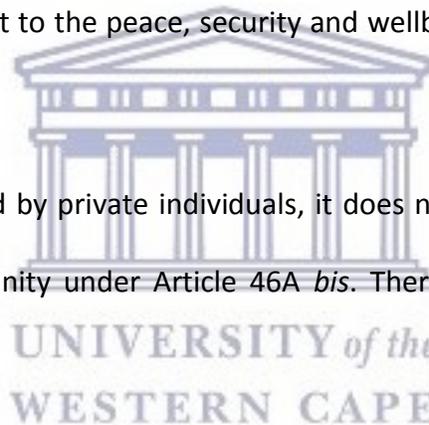
³⁶ Elvy SA 'Towards and New Democratic Africa: The African Charter on Democracy, Elections and Democracy' (2013) 27 *Emory International Law Review* 44.

³⁷ Article 25(5) provides that perpetrators of the crime are to be prosecuted before the Union's competent Court. Obvious the African Criminal Court is the competent forum. However, such leaders as are protected by Article 46A *bis* are beyond its reach.

jurisdiction.³⁸ Voluntary participation in the operation of such marine or air vessel with knowledge that such a vessel is a pirate vessel is also a crime.³⁹ Even intentional incitement or facilitation to commit piracy is also criminalised.⁴⁰

From this definition, the crime of piracy is committed for private or personal gains.⁴¹ Therefore, it is non-state actors or private individuals who are the perpetrators of the crime.⁴² Historically, the behind the curtain involvement of some state officials has been recognised and this is impliedly recognised under under Article 28F.⁴³ The ACC will be the first regional court to have jurisdiction over piracy.⁴⁴ This is justified because piracy is prevalent in Africa to such an alarming gravity posing a threat to the peace, security and wellbeing of its people, including its economy.⁴⁵

While this crime is perpetrated by private individuals, it does not rule out the involvement of state officials who have immunity under Article 46A *bis*. Therefore, it is submitted that the



³⁸ Article 28F (a).

³⁹ Article 28F (b). As to the definition of pirate marine or air vessel see Article 103 of the United Nations Convention on the Law of the Sea, 1982.

⁴⁰ Article 28F (c). The definition of Piracy is taken verbatim from Article 101 of the UN Convention on the Law of the Sea (UNCLOS).

⁴¹ Cassese A *International Criminal Law* 2 ed (2008) 54 and Jessberger F in Werle g & Vormbaum M (eds) (2017)78.

⁴² O'Brien M 'Where Security Meets Justice: Prosecuting Maritime Piracy in International Criminal Court' (2014) 4 *Asian Journal of International Law* 81.

⁴³ O'Brien M (2014) 84.

⁴⁴ United Nations Security Council Resolution 1918 (2010): Acts of Piracy and Armed Robbery against Vessels in the Waters off the Coast of Somalia. Paragraph 4 calls for the establishment of such regional tribunals or domestic tribunals with international components to punish piracy.

⁴⁵ O'Brien (2014) 83-84 and Scott K *Prosecuting Pirates: Lessons Learned and Continuing Challenges* 6-7 available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/ProsecutingPiratesReportDigital.pdf> (accessed 5 May 2017).

jurisdiction of the ACC will be affected by the immunity provision to the extent the state officials are involved.

4.3.3. Terrorism

The crime of terrorism is committed when a person, acting with intent, commits unlawful acts intending to intimidate, force, coerce or induce the government, public body or general public to abstain to do an act or to adopt or abandon a certain standpoint, or disrupts any public service or its delivery or creates public emergency or general insurrection in a State.⁴⁶ Such an act is unlawful because it violates either criminal laws of a State Party, the laws of the African Union and the laws of any regional economic community.⁴⁷ Such unlawful acts endanger or violate the protected individual interests and cause damage to public or private property and the environment.⁴⁸ Any motives or justification for its commission is not a defence from liability.⁴⁹ However, the struggle or armed struggle by the people for their liberation or exercise of their right to self-determination does not amount to an act of terrorism.⁵⁰ Likewise, serious violations of international humanitarian law are not acts of terrorism.⁵¹

From the wording of Article 28G, it is not the state or its officials who commit the crime of terrorism, rather private individuals or organised groups. However, those who promote,

⁴⁶ Article 28G (A), Article 1(3) (a) of the OAU Convention on the Prevention and Combating of Terrorism, 1999; and Article 2(1) and (2) of the United Nations Draft Convention against International Terrorism (A/59/894).

⁴⁷ Article 28G(A).

⁴⁸ Article 28G(A).

⁴⁹ Article 28G(E) and Article 3(2) of the OAU Terrorism Convention.

⁵⁰ Article 28G(C) and Article 3(1) of the OAU Terrorism Convention.

⁵¹ Article 28G(D). See also Jessberger F in Werle G & Vormbaum M (eds) (2017) 79.

sponsor, contribute, order, assist, induce or conspire in the commission of acts of terrorism, irrespective of their positions whether in government or not, are equally responsible.⁵² In other words, there is a possibility that a state, indirectly through its officials, may become the instigator of the terrorist acts.⁵³

Therefore, the jurisdiction of the ACC might be affected because state officials are capable of participating in the commission of the crime terrorism.

4.3.4. Mercenarism

The crime of mercenarism is committed either when a mercenary is hired to engage in an armed conflict or a concerted act of violence or when he participates directly in such hostilities or concerted act of violence by himself.⁵⁴ The mercenary is used or participates in an act of violence with an aim to overthrow a legitimate government or its constitutional order, assisting the government to maintain its power or a group of persons to obtain that power, and or undermining that state's territorial integrity.⁵⁵ The mercenary and any person who uses him, with his knowledge of being used, are guilty of the crime of mercenarism.

⁵² Article 4(b) of the OAU Terrorism Convention. See Blakesley CL 'Extraterritorial Jurisdiction' in Bassiouni MC (ed) *International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanism* (2008) 127-128 and Bassiouni MC in Bassiouni MC (ed) (2008) 697 and 701.

⁵³ Paraschiv G 'Terrorism: International Crime' (2015) 1 *Journal of Law and Public Administration* 53.

⁵⁴ Article 28H (2) and (3).

⁵⁵ Article 28H(1)(b)(i).

The crime of mercenarism can be committed by any individual, a group of persons, and or representatives of the state.⁵⁶ Therefore, the jurisdiction of the Court appears to be affected where the crime is committed through the state officials who have immunity from prosecution.

4.3.5. Corruption

The Statute criminalises active and passive bribery in the public and private sectors, including other acts of corruption such as illicit enrichment by a public official and concealment of proceeds derived from acts of corruption.⁵⁷ However, the Statute sets a high threshold for an act to amount to corruption. Such an act must be of a serious nature affecting the stability of a state, region or the Union.⁵⁸ Therefore, the ACC has jurisdiction over grand corruption in public and private sector.⁵⁹

Grand corruption refers to corruption committed mostly by the people in the highest leadership positions.⁶⁰ Therefore, with regard to the crime of corruption, the Court's exercise of jurisdiction is affected.⁶¹ The Court's jurisdiction is effective only with respect to corruption committed by the private sector officials.

⁵⁶ Article 1(2) of the OAU Convention for the Elimination of Mercenarism in Africa.

⁵⁷ Article 28I.

⁵⁸ Article 28I (1).

⁵⁹ Fernandez L in Werle G & Vormbaum M (eds) (2017) 92; Olaniyan K 'The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal (2004) 4 *African Human Rights Law Journal* 75-83; and Hindess B 'Introduction: How Should we Think About Corruption? In Barcham M, Hindess B & Larmour P *Corruption: Expanding the Focus* (2012) 2-3.

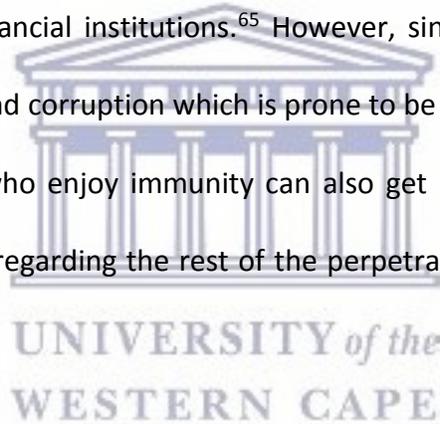
⁶⁰ Boersma M *Corruption: A Violation of Human Rights and a Crime under International Law?* (2012) 29 and Porta DD & Vannucci A *The Hidden Order of Corruption: An Institution Approach* (2012) 93-110.

⁶¹ Fernandez L in Werle G & Vormbaum M (eds) (2017) 95 and 99.

4.3.6. Money Laundering

Money laundering is committed when proceeds of a crime are converted or transferred either to conceal or disguise their illicit origin or to help a person involved in its commission to evade his criminal liability.⁶² According to the Statute, the crime is also committed when the illicit proceeds are concealed or disguised to give them the provenance of legality, and are acquired, possessed or used with the knowledge of their illicit nature, at the time of receipt.⁶³ The Statute criminalises any form of participation in money laundering.⁶⁴

The crime of money laundering is committed by organised groups or organisations, including reputable banks and other financial institutions.⁶⁵ However, since this crime involves several predicate offences such as grand corruption which is prone to be committed by state officials, it is argued that state officials who enjoy immunity can also get involved.⁶⁶ This will affect the Court's jurisdiction. However, regarding the rest of the perpetrators, the Court's jurisdiction is effective.



4.3.7. Trafficking in Persons

The crime of trafficking in persons is committed by a person who recruits, transports, harbours, or receives another person(s) by using force, coercion or any unlawful means in order to exploit

⁶² Article 28Ibis (1)(i). See also Reuter P & Truman EM *Chasing Dirty Money: The Fight Against Money Laundering* (2004) 1 and 3 and Mugarura N *The Global Anti-Money Laundering Regulator Landscape in Less Developed Countries* (2012) 3.

⁶³ Article 28Lbis.

⁶⁴ Article 28Ibis (1)(iv).

⁶⁵ Reuter P & Truman EM (2004) 25.

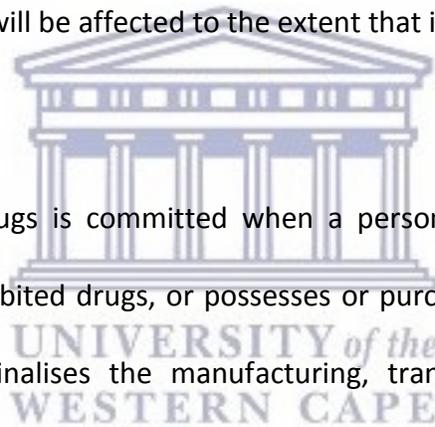
⁶⁶ Woodiwiss M 'Transnational Organised Crime: The Strange Career of an American Concept' in Beare ME (ed) *Critical Reflections on Transnational Organised Crime, Money Laundering, and Corruption* (2005) 7. See also Report of the High Level Panel on Illicit Financial Flows from Africa (2015) 20, 24 and 32-33.

them with or without their consent.⁶⁷ The intended exploitation can include prostitution, other forms of sexual exploitation, forced labour or services, slavery and practices similar to it, servitude or the removal of organs.⁶⁸ Consent of the victim is not a defence against criminal liability.⁶⁹ Furthermore, child trafficking is also prohibited as it amounts to trafficking in persons.⁷⁰

From the nature of the crime, it is the perpetrators in the informal and organised criminal networks that commit this crime.⁷¹ Trafficking in human beings also involves complicity of the state officials in its commission.⁷² Thus, it is submitted that the jurisdiction of the ACC over the crime of trafficking in persons will be affected to the extent that it involves state officials.

4.3.8. Trafficking in Drugs

The crime of trafficking in drugs is committed when a person cultivates prohibited plants, produces and distributes prohibited drugs, or possesses or purchases illicit drugs to distribute them. The Statute also criminalises the manufacturing, transportation or distribution of



⁶⁷ Article 28J (1) and Article 3 of the Protocol to Prevent, Suppress and Punishing Trafficking in Persons, Especially Women and Children, 2000. See also Paolini F 'Legal Frameworks on Trafficking in Persons' (2012) 19 *Lex ET Scientia International Journal* 8-9.

⁶⁸ Article 28J (2); Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000); Article 5 of the African Charter on Human and Peoples' Rights, 1981; and Article 4(g) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003. See also Sumanaru L 'Prevention and Combating of Trafficking in Persons' (2014) 1 *Journal of Eastern-European Criminal Law* 135-152.

⁶⁹ Article 28J (3).

⁷⁰ Article 28J (4) and Article 29 of the African Charter on the Rights and Welfare of the Child, 1990.

⁷¹ Radovic N, Boskovic A & Pavlovic Z 'Trafficking in Human Beings in Serbia' (2016) 1 *Journal of Eastern-European Criminal Law* 39.

⁷² United States Department of State *Trafficking in Persons Report* (2017) 9-10.

precursors with knowledge of their illicit use in the making of illicit drugs.⁷³ The only defence from liability is when the prohibited drugs or plants are used by the perpetrators themselves for personal consumption.⁷⁴

Organised criminal networks and individual perpetrators are involved in the commission of the crime. The experiences of Colombia and Afghanistan have indicated that government officials have been involved in the narcotic drug business.⁷⁵ Therefore, there is involvement of state officials. The involvement of such officials is through corruption of the law enforcement and judicial authorities and certain key government officials.⁷⁶ Therefore, it is submitted that the Court's exercise of jurisdiction over the perpetrators of the crime of illicit trafficking in drugs is affected where protected state officials are involved.

4.3.9. Trafficking in Hazardous Wastes

The crime is committed when prohibited hazardous wastes are imported into the territory of the state party.⁷⁷ Such hazardous wastes are banned from importation or transportation because of their adverse effect on both human health and the environment.⁷⁸

⁷³ Article 28K (1) and (3). However, this should be read together with the provisions of the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961 and Article 3 of the Vienna Convention, 1988.

⁷⁴ Article 28K (2).

⁷⁵ Maskas ML 'Trafficking Drugs: Afghanistan's Role in Russia's Current Drug Epidemic' (2005-2006) 13 *Tulsa Journal of Comparative and International Law* 145-147. See also paragraph 3 and Article 10(f) of the United Nations General Assembly Resolution A/RES/48/12 of 1993.

⁷⁶ Maskas ML (2005-2006) 13 *TJCL* 154.

⁷⁷ Article 28L (1)-(3); Article 2 of the Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 1991; and Article 9 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989.

This crime can be committed by anyone, especially those in charge of companies and industries responsible for hazardous waste production. Companies in industrialised countries have been notorious for production and the selling of hazardous wastes in collusion with state officials in Africa.⁷⁹ It is submitted, therefore, that with regard to this crime, the jurisdiction of the Court is also affected where state officials are involved.

4.3.10. Illicit Exploitation of Natural Resources

The crime of illicit exploitation of natural resources is committed when: an agreement to exploit natural resources is concluded in violation of the principle of permanent sovereignty over natural resources; in violation of the legal regime of the state concerned; and through corrupt practices or is one-sided.⁸⁰ The crime is also committed when natural resources are exploited without any formal agreement with the state exploited, or without complying with norms of environmental protection and the security of the people concerned, as well as in violation of norms or standards established by natural resources certification mechanism.⁸¹

Illegal exploitation of natural resources has been experienced in Africa in the context of armed conflicts.⁸² However, the Statute recognises that even in the absence of such conflicts, agreements can be concluded for the illegal exploitation of natural resources. As such, the

⁷⁸ Article 28L (2)(d) and the Preamble to the Bamako Convention.

⁷⁹ Eguh EC 'Regulations of Transboundary Movement of Hazardous Wastes: Lessons from Koko' (1997) 9 *African Journal of International and Comparative Law* 130-134.

⁸⁰ Article 28L bis (a)-(d).

⁸¹ Article 28L bis (e)-(g). see also Article 12 of the Protocol against the Illegal Exploitation of Natural Resources, 2006.

⁸² Heger M 'Trafficking in Hazardous Wastes (Article 28L) and Illicit Exploitation of Natural Resources (Article 28Lbis)' in Werle G & Vormbaum M (eds) (2017) 131.

crime is committed not only by the individual or an organised network of perpetrators, but also by the very people who enjoy immunity from prosecution. This is reflected by the crime's individual acts and the threshold requiring the acts to affect the stability of a state, region or the Union in terms of their gravity.⁸³ Therefore, it is contended that the jurisdiction of the Court with respect to the prosecution of persons accorded immunity is affected.

4.4. Chapter Summary

The discussion has revealed that the immunity granted to the state officials for the commission of international and transnational crimes will affect the competence and jurisdiction of the Court. The discussion has shown that these crimes involve, directly and indirectly, the state officials in their commission. However, the study has also shown that the ACC's jurisdiction will not be affected where such crimes are committed by persons who have no immunity under the Statute. This, therefore, begs the question of whether the ACC will be a competent and capable regional body to prevent and prosecute crimes in Africa if the people most susceptible of committing the crimes enjoy immunity from prosecution.

⁸³ The Chapeau to Article 28Lbis.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

The study has provided a critical analysis of the immunity provision and its impact on the court's exercise of jurisdiction over the crimes. It has noted that the adoption of the Malabo Protocol and its Statute in June 2014 marked an important era in the history of international criminal law in Africa. The study went further to provide the historical background to the adoption of the Malabo Protocol and its Statute in 2014. It has established that the proposal to establish a court to prosecute international crimes in Africa was not an afterthought. It started way back in the 1970s, when African heads of state and government negotiated the adoption of the African Charter on Human and Peoples Rights.

The Malabo Protocol amends the Statute of the African Court of Justice and Human and Peoples' Rights, thereby vesting the ACJHPR with criminal jurisdiction over the 14 crimes criminalised under Article 28A of the Statute. The Malabo Protocol establishes an International Criminal Law Section of the ACJHPR, otherwise referred to as the African Criminal Court. The African Criminal Court has three divisions, namely, the Pre-Trial Chamber, the Trial Chamber and the Appeals Chamber, with the office of the prosecutor as an independent investigative and prosecutorial organ of the Court. The African Criminal Court is vested with jurisdiction to try and prosecute any person who commits any of the 14 crimes proscribed under Article 28A of the Statute. The 14 crimes include the four core crimes under international law and the

remaining ten crimes commonly referred to as transnational or treaty-based crimes. Being the only African regional court with criminal jurisdiction, the ACC works on complementarity jurisdiction in relation to the courts of its states parties and the courts of the African Regional Economic Communities (RECs). Its jurisdiction can be triggered by either the prosecutor, the AU Assembly or the AU Security council, where it is established that a crime has been committed either in the territory of the state party, by the national of the state party, against the victim of the state party or where a non-state party commits extra-territorial acts that threaten the vital interests of the state party. Despite this new jurisprudence, the study has found that the ACC might face several challenges, such as how will the ACC be able to exercise complementarity jurisdiction with respect to the RECs and will it not be a dumping court of the states parties after lowering the 'genuinely' threshold requirement for assessing the state party's inability or unwillingness to prosecute. Further, the study has found that the court is not yet operational as it does not have the required number of 15 ratifications from its states parties in order to enter into force. Currently, there are only ten signatures without even one ratification.¹ It is not known when will the ACC be operational.

Based on its objectives, the study has given a considerable and comprehensive research on the immunities under customary and international law, before examining the immunity provision under Article 46A *bis* of the Statute. The Study has considered the two types of immunities, namely, functional immunity and personal immunity in terms of their origin, fundamental rules governing them and the established exceptions regarding the immunities. The study has

¹ <https://au.int/en/treaties> (Accessed 26 October 2017).

established that the immunity provision under Article 46A *bis* is unique and as such it has demanded a thoughtful consideration. The provision provides immunity from prosecution for crimes to three categories of states parties' officials, namely, heads of state and government, those entitled to act in the capacity of the heads of state or government and other senior state officials based on their functions. The study submits that while the provision contemplates personal immunity, poor drafting has rendered the provision as envisioning functional immunity as well.

Although the study has established that the immunity provision is not inconsistent with the international law completely, its presence argues against the determination to prosecute state officials for crimes under international law before an international court.² The study finds the immunity provision ambiguous as regards the nature of the immunity it provides and the officials it covers.³ For example, who the senior state officials are based on their functions, is not clear from the provision itself.⁴ Thus, the immunity provision acts as a Court's jurisdictional obstacle over the crimes. As established by the study, the ACC's competence is tied by the immunity provision as it is not expected that the court will be able to exercise jurisdiction over the very persons who have immunities from prosecution. Therefore, the provision suffers from poor drafting fundamentally.

Regarding the crimes, the study has established that there is no general provision on the mental element. Thus, ascertaining mental element depends on the nature of the crimes

² Tladi D in Werle G & Vormbaum M (eds) (2017) 215.

³ Tladi D in Werle G & Vormbaum M (eds) (2017) 206-207.

⁴ Tladi D in Werle G & Vormbaum M (eds) (2017) 207.

themselves or employing other rules of statutory interpretation.⁵ Because the immunity provision relates to the crimes, the ambiguities and uncertainties surrounding the crimes impact on the immunity clause as well. In dealing with the issues discussed above, the study has positively responded to the stated hypothesis, objective and the research questions.

The researcher is of the view that the adoption of the Malabo Protocol and the idea of having the African Criminal Court is an effort that needs to be congratulated and welcomed. It indicates the undeniable development of the international criminal law in the world and Africa, in particular. It manifests the faith that African leaders have in using international criminal law to address impunity and strengthen the rule of law, democracy and accountability of its public officials. It is possible to rectify the weakness this study has appointed out.

4.2. Recommendations

Based on the findings and the conclusion of the study, the study proposes several recommendations.

First, the provision is deleted to reflect the current prevailing position of other international criminal statutes that recognise no immunity to state officials. Often times, perpetrators of international and transnational crimes are the highest state and government officials, as such, it is difficult to prosecute them domestically. This is because, in addition to the power and influence they possess, they also enjoy immunity from prosecution for the crimes they committed while in power. Even when out of power, prosecuting them has proved difficult as

⁵ Kemp G & Kinyunyu S in Werle G & Vormbaum M (eds) (2017) 67-68; Jessberger F in Werle G & Vormbaum M (eds) (2017) 85-85 and Melon C in Werle G & Vormbaum M (eds) (2017) 142.

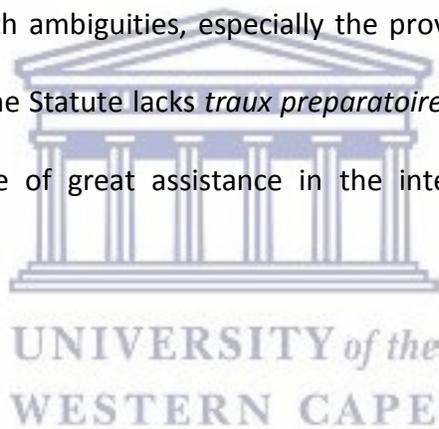
they still retain considerable power and influence to hinder investigations and prosecutions. An international court, such as the ACC, forms an ideal avenue to prosecute such leaders. Such a court, based on the jurisdiction it is vested with, is always more powerful, well resourced and staffed, is beyond and above the national criminal justice systems of the states parties and enjoys more supremacy and legitimacy. Furthermore, states parties have entrusted such a court with enough power and mandate to prosecute their state officials.

Secondly and alternatively, the provision should be amended or modified so as to clarify the nature of the immunity it provides and the persons it is accorded to. It has been established that the provision on the immunity is ambiguous regarding the nature of the immunity it provides and the state officials it is accorded to. Where states parties find it difficult to delete the provision, it is important to modify or amend it to state in clear terms the nature of the immunity it provides and the state officials it is accorded to, especially other senior state officials based on their functions. The provision should indicate when the immunity expires for the purpose of investigations and prosecutions.

Thirdly, the granting of immunity for almost all the crimes under the Statute should be re-considered. As it stands now, it defeats the intention of prosecuting crimes in the African continent if the very people capable of committing the crimes have immunity from prosecution for all the crimes. The immunity provision grants immunities for international core crimes and transnational crimes as well. In other words, it does not state nor specify the categories of crimes to which it contemplates immunities. This argues against having a court that cannot prosecute any state official who commits any crime solely because he enjoys immunity.

Fourthly, the Statute should be amended to include a general provision on the mental element to assist in the clarification of the elements of the crimes. Considering that the immunity provision relates to the crimes as well, it is pertinent to have a general mental element clause. As it stands now, the mental element of each crime is to be ascertained either from the wording of the crime itself or its individual acts. While this is not wrong, a general provision offers more clarification.

Lastly, there should be a general provision of the applicable law of the Court. This is important for the interpretation and prosecution of the crimes. The Statute to the Malabo Protocol contains several provisions with ambiguities, especially the provisions on immunities and the crimes, considering also that the Statute lacks *traux preparatoires*. Thus, a provision of the law applicable by the ACC will be of great assistance in the interpretation and resolution of ambiguities.



BIBLIOGRAPHY

A. PRIMARY SOURCES

I. Treaties, Resolutions and Agreements

1. (Decision on Unconstitutional Changes of Government in Africa 2000) AHG/Dec.150 (XXXVI)
2. 40 + 9 Recommendations of the Financial Action Task Force (FATF), 2003.
3. Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, United Nations General Assembly Resolution 95(1) (1946).
4. African Charter on Democracy, Elections and Governance 30 February 2007, Assembly/AU/Dec.147 (VIII).
5. African Charter on Human and Peoples' Rights (1981) 1520 UNTS 363.
6. African Charter on the Rights and Welfare of the Child, 1990, AHG/Res.197 (XXVI).
7. African Union Convention for Preventing and Combating Corruption, 2003, Assembly/AU/Dec.27 (II).
8. African Union *Decision on Africa's Relationship with the International Criminal Court (ICC)*. Ext/Assembly/AU/Dec. 1 (Oct. 2013).
9. African Union *Decision on the Single Legal Instrument on the Merger of the African Court of Human and Peoples' Rights and the African Court of Justice*. Doc.Assembly/AU/13(XI) (2008).
10. African Union Non-Aggression and Common Defence Pact of 31 January 2005, Assembly/AU/Dec.71 (IV).
11. Assembly Special Declaration on Illicit Financial Flows, Doc. Assembly/ AU/ 17 (XXIV).
12. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 (1989) 57.

13. Charter of the International Military Tribunal for the Far East 1946 TIAS no. 1589.
14. Charter of the International Military Tribunal, Annexe to the London Agreement on the Prosecution and Punishment of the Major War Criminals of the European Axis Powers 82 UNTS 279.
15. Charter of the United Nations of 26 June 1945.
16. Constitutive Act of the African Union 26 May 2000, AHG/Dec.143 (XXXVI).
17. Control Council Law No. 10, Official Gazette of the Control Council for Germany No. 3, 1945.
18. Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS (1949) 31.
19. Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members in Armed Forces at Sea of 12 August 1949, 75 UNTS (1949), 85.
20. Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, (1949) 96 UNTS 271.
21. Convention on Special Missions 1969, 1400 UNTS 231.
22. Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 1991.
23. Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, 78 UNTS (1949) 277.
24. Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS (1949), 277.
25. Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS (1949) 135.
26. Executive Council *Report on the Draft Legal Instruments and Recommendations of the Specialised Technical Committee on Justice and Legal Affairs of the African Union* EX.CL/846(XXV) (2014).

27. International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989) 2178 UNTS 197.
28. International Criminal Court, *Elements of Crimes* (2002) United Nations Publication, Sales No. E. 03. V. 2 and (2010) International Criminal Court Publications RC/11.
29. Lome Declaration AHG/Decl.5 (XXXVI) 2000 (Declaration of the Framework for an OAU Response to Unconstitutional Changes of Government).
30. OAU Convention on the Prevention and Combating of Terrorism, 1999 AHG/Dec.132 (XXXV).
31. OAU Convention the Elimination of Mercenarism in Africa, CM, 817 (XXXIX), Annex II Rev 1, 1490 UNTS 89.
32. OAU General Convention on the Privileges and Immunities of the Organisation of the African Unity, 1965 AHG/Res. 29 (II).
33. Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, 2001.
34. Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 UNTS (1977) 3.
35. Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS (1977) 609.
36. Protocol against the Illegal Exploitation of Natural Resources, 2006.
37. Protocol Amending the Single Convention on Narcotic Drugs of 1961 (1972) 976 UNTS 3.
38. Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, Doc. Assembly/AU/8 Doc. (XXIII).
39. Protocol Relating to the Establishment of the Peace and Security Council of the African Union of 9 July 2002, Assembly/AU/Dec.16 (II).

40. Protocol to Prevent, Suppress and Punishing Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, (2000) 2273 UNTS 319.
41. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 Assembly/AU/Dec.19 (II).
42. Rome Statute of the International Criminal Court 1998, 37 ILM (1998), 999.
43. Single Convention on Narcotic Drugs, (1961) 520 UNTS 151.
44. Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994).
45. Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704.
46. Statute of the special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138. UN Doc. S/2002/246.
47. UN General Assembly, 'Traffic in Women and Girls Report of the Secretary-General,' UN Doc. A/50/369 (1995).
48. United Nations Convention against Corruption, 2349 (2004) UNTS 41.
49. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (1988) 1582 UNTS 95.
50. United Nations Convention against Transnational Organised Crimes (2000) 2225 UNTS 209.
51. United Nations Convention on Jurisdictional Immunities of States and their Properties, 2004. UN Doc. A/RES/59/38 (Dec 2, 2004).
52. United Nations Convention on the Law of the Sea 1982. 1933 UNTS 397.
53. United Nations Draft Convention against International Terrorism (A/59/894).
54. United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974.
55. United Nations General Assembly Resolution A/RES/48/12 of 1993.

56. United Nations General Assembly, 'Traffic in Women and Girls,' UN Doc. A/RES/49/166 (1994).
57. United Nations Security Council Resolution 1918 (2010) [On Acts of Piracy and Armed Robbery against Vessels in the Waters off the Coast of Somalia].
58. Vienna Convention on Consular Relations, 1963. 596 UNTS 261.
59. Vienna Convention on Diplomatic Relations, 1961. 500 UNTS 95.
60. Vienna Convention on the Law of Treaties, 1969. 1155 UNTS 331.
61. Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Charter, 1975. UN Doc. A/CONF.67/16.

II. Regional and International Reports

1. Amnesty International *Malabo Protocol: Legal and Institutional Implication of the Merged and Expanded African Court* (2016) Amnesty International: London.
2. Commission of Inquiry *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General* (2004) United Nations: New York.
3. International Law Commission *Draft Code of Crimes Against Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eight session (6 May-26 July 1996)* (1996). UN Doc.A/49/10 International Law Commission: New York.
4. International Law Commission *The Report of the International Law Commission (ILC) on the Work of its Sixty-Fifth Session (6 May-& June and 8 July-9 August 2013)* (2013). International Law Commission: New York.
5. International Law Commission *The Report of the International Law Commission on the Work of its Sixty-Sixth Session (5 May- 6 June and 7 July-8 August 2014)* 2014. International Law Commission: New York.
6. Kenyans for Peace with Truth and Justice *Seeking Justice or Shielding Suspects?: An Analysis of the Malabo Protocol on the African Court* (2016) Kenyans for Peace with Truth and Justice: New York.

7. Specialised Technical Committee on Justice and Legal Affairs *the Draft Legal Instruments and Recommendations of the Specialised Technical Committee on Justice and Legal Affairs of the African Union* (2014) Specialised Technical Committee on Justice and Legal Affairs: Addis Ababa.
8. The Executive Council *Report on the Draft Legal Instruments and Recommendations of the Specialised Technical Committee on Justice and Legal Affairs of the African Union* (2014) The Executive Council: Addis Ababa.
9. The Institute of Justice and Reconciliation *The African Court of Justice and Human Rights and the International Criminal Court: Unpacking the political dimensions of concurrent jurisdiction* (2016) The Institute of Justice and Reconciliation: Cape Town.
10. The Report of the High Level Panel on Illicit Financial Flows (2015) United Nations Economic Commission for Africa: Addis Ababa.

III. Legislation

1. The Constitution of the Republic of Botswana, 2010 [Laws of Botswana].
2. The Constitution of the Republic of Kenya, 2010 [const2010].
3. The Constitution of the Republic of Rwanda, 2003.
4. The Constitution of the Republic of South Africa, 1996.
5. The Constitution of the Republic of Zimbabwe, 2013.
6. The Constitution of the United Republic of Tanzania, 1977 [CAP 2 RE: 2002].

IV. Cases

1. *Almonacid-Arellano v Chile, Preliminary Objections, merits, reparations and costs*, (2006) IACHR Series C No. 154, IHRL 1538.
2. Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), Judgment of 14 February 200 ICJ Reports 3.
3. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of American v Tehran)* [1980] ICJ Reports 3.

4. *Certain questions of Mutual Assistance in Criminal Matter (Djibout v France)* [2008] ICJ General List 136 at 10.
5. *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of Investigation into the Situation in the Republic of Kenya*, 13 March 2010. ICC-01/09-19.
6. *France v Gaddafi Case*, Cour de Cassation, Judgment of 13 March 2001.
7. IMT judgment of 1 October 1946 in the Trial of the Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (22 August 1946-1 October 1946).
8. *National Commissioner of South African Policy Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30.
9. *Prosecutor v Charles Tylor*, Appeals Chamber, Decision on Immunity from Jurisdiction [2004] SCSL.
10. *Prosecutor v Dusko Tadic* [1995] ICTY (AC) IT-94-1 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).
11. *Prosecutor v Karadzic*, Decision on Karadzic's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009.
12. *Regina v Bartle and Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet*, UK House of Lords 2 W. L. R. 827, 38 ILM. 581 (1999) 592-593.
13. *Tachlona v Mugabe*, 169 Supp 2d (SDNY 2001).
14. *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre (867/15)* [2016] ZASCA 17 (15 March 2016).
15. *The Prosecutor v Clement Kayishema and Obed Ruzindana* (1999) ICTR (TC) Para. 98.
16. *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on Confirmation of Charges) 30 September 2008. NO. ICC-01/04-01/07.
17. *The Prosecutor v Jean Kambanda* (2000) (AC) ICTR 97-23-A.
18. *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on non-Compliance of the Republic of Chad with cooperation requests issued by the Court regarding the arrest and surrender of Omar Hassan Ahmad Al-Bashir, 26 May 2013, ICC-02/05-01/09/151.
19. *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Al Bashir, 4 March 2009, ICC-02-/05-01/09.
20. *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation

requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, ICC-02/05-01/09-140-tENG.

21. *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision pursuant to Article 7(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, ICC-02/05-01/09.
22. *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 1 May 2012, ICC-01/11-01/11-307-Red.
23. *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, 2 April 2013, ICC-01/11-01/11-307-Red2.
24. *The Prosecutor v Saif Al-Islam Gaddafi and Abudllah Al-Senussi*, Decision on the admissibility of the case Against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-334-Red.
25. *The Prosecutor v Thomas Lubanga Dyilo (TC)* 14 March 2012 ICC-01/04-01/06 (Judgment Pursuant to Article 7 of the Statute).
26. *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to Article 19(2) (b) of the Statute, 30 May 2011, ICC-01/11-01/11-101.
27. *The Prosecutor v Willium Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang and The Prosecutor v Francis Kiriimi Muthaura, Uhuru Muiga Kenyatta and Mohammed Hussein Ali*, Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute, 31 March, ICC-01/09/01/11-19.

B. SECONDARY SOURCES

I. Books

1. Ambos K *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (2013) Oxford: Oxford University Press.
2. Arnone M & Borlini L *Corruption: Economic Analysis and International Law* (2014) UK: Edward Elgar Publishing Limited.
3. Barcham M, Hindess B & Larmour P *Corruption: Expanding the Focus* (2012) Australia: ANU E Press.

4. Bassiouni MC (ed) *International Criminal Law, volume I: Sources, Subjects and Contents*, 3 ed (2008) The Hague: MARTINUS NIJHOFF PUBLISHERS.
5. Bassiouni MC (ed) *International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanism* 3 ed (2008) Leiden: MARTINUS NIJHOFF PUBLISHERS.
6. Bassiouni MC *Introduction to International Criminal Law: Second Revised Edition* in International Criminal Law Series (2013) AMERSFOORT: MARTINUS NIJHOFF PUBLISHERS.
7. Beare ME (ed) *Critical Reflections on Transnational Organised Crime, Money Laundering, and Corruption* (2005) Toronto: University of Toronto Press.
8. Boersma M *Corruption: A Violation of Human Rights and a Crime under International Law?* (2012) Cambridge: Intersentia Ltd.
9. Boister N & Currie R (eds) *Routledge Handbook of Transnational Criminal Law* (2015) New York. Routledge.
10. Booth R *et al Money Laundering Law and Regulation: A Practical Guide* (2011) Oxford: Oxford University Press.
11. Calvo-Goller KN *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents* (2006) Leiden: MARTINUS NIJHOFF PUBLISHERS.
12. Cassese A *et al International Criminal Law: Cases & Commentary* (2012) Oxford: Oxford University Press.
13. Cassese A *International Criminal Law* 2 ed (2008) Oxford: Oxford University Press.
14. Cassese A, Gaeta P & Baig L *et al Cassese's International Criminal Law* 3 ed (2013) Oxford: Oxford University Press.
15. Cryer R *et al An Introduction to International Criminal Law and Procedure* 2 ed (2010) New York: Cambridge University Press.
16. Deuter M *et al (eds) Oxford Advanced Learner's Dictionary of Current English* 9 ed (2015) China: Oxford University Press.
17. Gaeta P (ed) *The UN Genocide Convention—A Commentary* (2009) Oxford: Oxford University Press.

18. Glundo G *et al* *Everyday Corruption and the State: Citizens and Public Officials* (2006) South Africa: David Philip.
19. Goredema C (ed) *Money Laundering Experiences: A Survey* (2006) Pretoria: Institute for Security Studies.
20. Graycar A & Smith RG (eds) *Handbook of Global Research and Practice in Corruption* (2011) UK: Edward Elgar Publishing Limited.
21. Henckaerts JM & Doswald-Beck L *Customary International Humanitarian Law Volume I: Rules* (2005) New York: Cambridge University Press.
22. Jalloh CC & Elias O (eds) *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (2015) Leiden: BRILL
23. Knoop GJ *An Introduction to the Law of the International Criminal Tribunals: A Comparative Study* 2 ed (2014) Leiden: BRILL NIJHOFF.
24. Liivoja R & McCormack T (eds) *Routledge Handbook of the Law of Armed Conflict* (2016) New York: Routledge.
25. Mugarura N *The Global Anti-Money Laundering Regulator Landscape in Less Developed Countries* (2012) England: Ashgate Publishing Company.
26. Pedretti R *Immunity of Heads of State and State Officials for International Crimes* (2015) Leiden: BRILL NIJHOFF.
27. Porta DD & Vannucci A *The Hidden Order of Corruption: An Institution Approach* (2012) England: Ashgate Publishing Company.
28. Ratner SR, Abrams JS & Bischoff JL *Accountability for Human Rights Atrocities in International Law: Beyond Nuremberg Legacy* 3 ed (2010) New York: Oxford University Press.
29. Reuter P & Truman EM *Chasing Dirty Money: The Fight against Money Laundering* (2004) Washington: Institute for International Economics.
30. Sadat LN & Scharf MP (eds) *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (2008) Leiden: Martinus Nijhoff Publishers.
31. Schabas WA *Genocide in International Law: The Crimes of Crimes* (2003) Cambridge: Cambridge University Press.

32. Schabas WA & Bernaz N (eds) *Routledge Handbook of International Criminal Law* (2011) London: Routledge.
33. Schabas WA *An Introduction to the International Criminal Court* 3 ed (2008) Cambridge: Cambridge University Press.
34. Schabas WA *An Introduction to the International Criminal Court* 4 ed (2011) New York: Cambridge University Press.
35. Shaw MN *International Law* 6 ed (2008) New York: Cambridge University Press.
36. Van Alebeek R *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) New York: Oxford University Press.
37. Werle G & Jessberger F *Principles of International Criminal Law* 3 ed (2014) Oxford: Oxford University Press.
38. Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) The Hague: ASSER PRESS.
39. Werle G, Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) The Hague: ASSER PRESS.

II. Chapters in Books

1. Abass A 'Historical and Political Background to the Malabo Protocol' in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) The Hague: ASSER PRESS.
2. Ambos K 'Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)' in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) The Hague: ASSER PRESS.
3. Babington-Ashaye A 'International Crimes, Immunities and the Protocol on Amendments to the Protocol on the Merged African Court: Some Observations' in Jalloh CC & Elias O (eds) *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (2015) Leiden: BRILL.

4. Bassiouni MC 'Perspectives on International Terrorism' in Bassiouni MC (ed) *International Criminal Law, volume I: Sources, Subjects and Contents*, 3 ed (2008) The Hague: MARTINUS NIJHOFF PUBLISHERS.
5. Blakesley CL 'Extraterritorial Jurisdiction' in Bassiouni MC (ed) *International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanism* 3 ed (2008) Leiden: MARTINUS NIJHOFF PUBLISHERS.
6. Blundo G 'Corruption in Africa and the Social Sciences: A Review of the Literature' in Glundo G *et al Everyday Corruption and the State: Citizens and Public Officials* (2006) South Africa: David Philip.
7. Cryer R 'Individual Liability in International Law' in Liivoja R & McCormack T (eds) *Routledge Handbook of the Law of Armed Conflict* (2016) New York: Routledge.
8. Dickison LA 'Mercenarism and Private Military Contractors' in Bassiouni MC *International Criminal Law, volume I: Sources, Subjects and Contents* 3 ed (2008) The Hague: MARTINUS NIJHOFF PUBLISHERS.
9. Fernandez LD 'Corruption (Article 28I) and Money Laundering (Article 28Ibis)' in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) The Hague: ASSER PRESS.
10. Heinrich F and Hodess R 'Measuring Corruption' in Graycar A & Smith RG (eds) *Handbook of Global Research and Practice in Corruption* (2011). UK: Edward Elgar Publishing Limited.
11. Hindess B 'Introduction: How Should We Think About Corruption?' in Barcham M, Hindess B & Larmour P *Corruption: Expanding the Focus* (2012) Australia: ANUE Press.
12. Jessberger F 'Piracy (Article 28F), Terrorism (Article 28G) and Mercenarism (Article 28H)' in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) The Hague: ASSER PRESS.
13. Jessberger F 'The Definition and the Elements of the Crime of Genocide' in Gaeta P (ed) *The UN Genocide Convention—A Commentary* (2009) Oxford: Oxford University Press.

14. Kemp G & Kinyunyu S 'The Crime of Unconstitutional Change of Government (Article 28E)' in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) The Hague: ASSER PRESS.
15. Melon C 'Modes of Responsibility (Article 28N), Individual Criminal Responsibility (Article 46B) and Corporate Criminal Liability (Article 46C) in Werle G & Vormbaum M (eds) (2017) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017). The Hague: ASSER PRESS.
16. Mninde-Silungwe F 'Trafficking in Persons (Article 28J) and Trafficking in Drugs (Article 28K)' in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017). The Hague: ASSER PRESS.
17. Mthembu-Salter G 'Money Laundering in the South African Real Estate Market Today' in Goredema C (ed) *Money Laundering Experiences: A Survey* (2006) Pretoria: Institute for Security Studies.
18. Nerlich V 'Preconditions to the Exercise of Jurisdiction (Article 46E bis), Exercise of Jurisdiction (Article 46F) and the Prosecutor (Article 46G) in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) The Hague: ASSER PRESS.
19. Prouveze R 'Immunities' in Schabas WA & Bernaz N (eds) *Routledge Handbook of International Criminal Law* (2011) London: Routledge.
20. Saul B 'Terrorism as a Transnational Crime' in Boister N & Currie R (eds) *Routledge Handbook of Transnational Criminal Law* (2015) New York: Routledge.
21. Stern B & Foucard I 'Sexual Violence as Genocide: The Important Role Played by the Bassiouni Commission in the Recent Development of International Criminal Law' in Sadat LN & Scharf MP (eds) *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (2008) Leiden: Martinus Nijhoff Publishers.
22. Tladi D 'Immunities (Article 46Abis)' in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) The Hague: ASSER PRESS.

23. Trendafilova E 'Africa and the International Criminal Court: A Judge's Perspective' in Werle G, Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) The Hague: ASSER PRESS.
24. Van Der Wilt H 'Complementary Jurisdiction (Article 46H)' in Werle G & Vormbaum M *The African Criminal Court: A Commentary on the Malabo Protocol* (2017). The Hague: ASSER PRESS.
25. Woodiwiss M 'Transnational Organised Crime: The Strange Career of an American Concept' in Beare ME (ed) *Critical Reflections on Transnational Organised Crime, Money Laundering, and Corruption* (2005) Toronto: University of Toronto Press.

III. Journal Articles

1. Abass A 'Prosecuting International Crimes in Africa: Rationales, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933-946.
2. Abaya M 'No Place for Impunity: The Arguments against The African Criminal Court's Article 46bis' (2016) 30 *Temple International and Comparative Law Journal* 189-223.
3. Akande D & Shah S 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *The European Journal of International Law* 815-852.
4. Akande D 'International Law Immunities and the International Criminal Court' (2004) 98 *The American Journal of International Law* (2004) 407-433.
5. Akande D 'The Jurisdiction of the International Criminal Court over Nationals of Non-State Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618-650.
6. Akande D 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunity' (2009) 7 *Journal of International Criminal Justice* 333-352.
7. Akhavan P 'The Crime of Genocide in the ICTR Jurisprudence' (2005) 3 *Journal of International Criminal Justice* 989-1006.
8. Akopayan E 'Money Laundering' (2010) 47 *American Criminal Law Review* 821-845.
9. Ambos K & Wirth S 'The Current Law of Crimes against Humanity: An Analysis of UNTAET Regulation 15/2000' (2002) 13 *Criminal Law Forum* 1-90.

10. Ambos K 'What Does 'Intent to Destroy' in Genocide Mean?' (2009) 91 *International Review of the Red Cross* 883-858.
11. Bassiouni MC 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001-2002) 42 *Virginia Journal of International Law* 81-162.
12. Birzu B 'The Subjects of the Crime of Genocide' (2015) 1 *Law Annals Titu Maiorescu University* 51-58.
13. Blakesley CL 'United States Jurisdiction over Extraterritorial Crime' (1982) 73 *Journal of Criminal Law and Criminology* 1109-1163.
14. Boister N 'Transitional Criminal Law?' (2003) 14 *European Journal of International Law* 953-976.
15. Bothe M 'War Crimes in Non-International Armed Conflicts' (1994) 24 *Israel Yearbook of Human Rights* 241-253.
16. Canny Niall 'A Mercenary World: A Legal Analysis of the International Problem of Mercenarism' (2003) 3 *University College Dublin Law Review* 37-48.
17. Cassese A 'Is the Bell Tolling for Universality? A Plea for Sensible Notion of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 589-595.
18. Eguh EC 'Regulations of Transboundary Movement of Hazardous Wastes: Lessons from Koko' (1997) 9 *African Journal of International and Comparative Law* 130-155.
19. Elvy SA 'Towards and New Democratic Africa: The African Charter on Democracy, Elections and Democracy' (2013) 27 *Emory International Law Review* 41-116.
20. Fenrick W 'Should Crimes Against Humanity Replace War Crimes' (1998-1999) 37 *Colombian Journal of Transnational Law* 767-785.
21. Gugard J 'Immunity, Human Rights and International Crimes' (2005) *Journal of South African Law* 482-488.
22. Guilfoyle D 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' (2008) 57 *International & Comparative Law Quarterly* 690-699.
23. Guillaume G 'Terrorism and International Law' (2004) 53 *International and Comparative Law Quarterly* 537-548.

24. Hinds LS 'The Legal Status of Mercenaries: A Concept in International Humanitarian Law' (1977) 52 *Philippine Law Journal* 395-429.
25. Horowitz J 'Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex-parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations' (1999) 23 *Fordham International Law Journal* 489-527.
26. Jessberger F & Geneuss J 'The Many Faces of the International Criminal Court' (2012) 10 *Journal of International Criminal Justice* 1081-1094.
27. Jia BB 'The Immunity of State Officials for International Crimes Revisited' (2012) 10 *Journal of International Criminal Justice* 1303-1321.
28. Kreß C 'On the Outer Limits of Crimes against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflection on the Mach 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855-873.
29. Kreß C 'The Crime of Genocide under International Law' (2006) 6 *International Criminal Law Review* 461-52.
30. Kreß C 'Universal Jurisdiction over International Crimes and the Institut de Droit International' (2006) 4 *Journal of International Criminal Justice* 561-585.
31. Labuschagne JMT 'Immunity of the Head of State for Human Rights Violations' (2001) 26 *International Criminal Law in South African Yearbook of International Law* 180-191.
32. Luban D 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11 *Journal of International Criminal Justice* 505-515.
33. Maskas ML 'Trafficking Drugs: Afghanistan's Role in Russia's Current Drug Epidemic' (2005-2006) 13 *Tulsa Journal of Comparative and International Law* 141-176.
34. Murungu CB 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067-1088.
35. O'Brien M 'Where Security Meets Justice: Prosecuting Maritime Piracy in International Criminal Court' (2014) 4 *Asian Journal of International Law* 81-102.
36. Oberg MD 'The Absorption of Grave Breaches into War Crimes' (2009) 91 *International Review of the Red Cross* 163-182.
37. Olaniyan K 'The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal (2004) 4 *African Human Rights Law Journal* 74-92.

38. Paolini F 'Legal Frameworks on Trafficking in Persons' (2012) 19 *Lex ET Scientia International Journal* 7-19.
39. Paraschiv G 'Terrorism: International Crime' (2015) 1 *Journal of Law and Public Administration* 50-53.
40. Petersohn U 'Reframing the Anti-Mercenary Norm: Private Military and Security Companies and Mercenarism' (2014) 69 *International Journal* 475-493.
41. Philippe X 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?' (2006) 8 *International Review of the Red Cross* 375-398.
42. Radovic N, Boskovic A & Pavlovic Z 'Trafficking in Human Beings in Serbia' (2016) 1 *Journal of Eastern—European Criminal Law* 36-47.
43. Roberts C 'On the Definition of Crimes against Humanity and other Widespread of Systematic Human Rights Violations' (2017) 20 *University of Pennsylvania Journal of Law and Social Change* 1-27.
44. Sadat LN 'Crimes against Humanity in the Modern Age' (2013) 107 *American Journal of International Criminal Law* 334-377.
45. Schwelb E 'Crimes against Humanity' (1946) 23 *British Yearbook of International Law* 178-226.
46. Steinerte E & Wallace RMM 'Jones v the Ministry of Interior of the Kingdom of Saudi Arabia. Case No. [2006] UKHL 26' (2006) 100 *American Journal of International Law* 901-908.
47. Sumanaru L 'Prevention and Combating of Trafficking in Persons' (2014) 1 *Journal of Eastern-European Criminal Law* 135-152.
48. Tladi D 'ICC Decisions on Chad and Malawi on Cooperation, Immunities, and Article 98' (2013) 11 *Journal of International Criminal Justice* 199-221.
49. Tladi D 'The Duty of South Africa to Arrest and Surrender Al Bashir under South African and International Law: A Perspective from International Law' (2015) 13 *Oxford Journal of International Criminal Justice* 1027-1047.
50. Van Der Wilt H 'Universal Jurisdiction Under Attack: An Assessment of African Misgivings Towards International Criminal Justice as Administered by Western States' (2011) 9 *Journal of International Criminal Justice* 1043-1066.

51. Ventura MJ 'Symposium on President Al-Bashir's Presence at the African Union Summit in South Africa and the Non-execution of the ICC Arrest Warrant: Escape from Johannesburg?' (2015) 13 *Journal of International Criminal Justice* 995-2025.
52. Warbrick C (ed) 'Immunity and International Crimes in English Law' (2004) 53 *International & Comparatively Law Quarterly* 769-774.
53. Werle G & Burghardt B 'Do Crimes against Humanity Require the Participation of a State or a 'State-Like' Organisation?' (2012) 10 *Journal of International Criminal Justice* 1151-1170.
54. Wirth S 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case' (2013) 13 *European Journal of International Law* 877-893.

V. Internet Sources

1. <http://oceansbeyondpiracy.org/sites/default/files/attachments/ProsecutingPiratesReportDigital.pdf> (accessed 5 May 2017).
2. <http://www.bbc.com/news/world-africa-38672840> (accessed 27 March 2017).
3. <http://www.un.org/africarenewal/magazine/april-2016/terrorism-overshadows-internal-conflicts> (accessed 5 June 2017).
4. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 (accessed 1 May 2017).
5. <https://www.hrw.org/tag/hissene-habre> (accessed 28 August 2017).
6. <https://www.merriam-webster.com/dictionary/enterprise> (accessed 1 May 2017).
7. Statement Regarding Immunity for Sitting Officials before the Expanded African Court of Justice and Human Rights (2014) available at <https://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and> (accessed 19 March 2017).
8. The Report of the Conference on "Understanding the Malabo Protocol: The Potential, The Pitfalls, and way Forward for International Justice in Africa" held at Southern Sun Hotel in Pretoria, South Africa 7-8 November (2016) available at

<http://www.hrforumzim.org/wp-content/uploads/2016/11/Malabo-Protocol-Communique.pdf> (accessed 19 March 2017).



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