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IMMUNITY BEFORE FOREIGN AND DOMESTIC TRIBUNALS

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DECLARATION

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ABSTRACT

Under customary international law, many high-ranking state officials enjoyed exemption from prosecution by foreign criminal or civil jurisdictions for crimes committed. However, with the advent of the International Criminal Court, whether personal immunity as a valid defence exists before international and domestic tribunals remains questionable. This research interrogates the extent to which a sitting head of state charged with an international crime can rely on personal immunity. The study analyses the leading case of the former Sudanese head of state; Al-Bashir from 2009, by the Pre-trial Chamber of the ICC and the involvement of other independent states in this process and the developments made answering the question of whether immunity remains.

This study addresses the conflicting tensions that states have faced, not only in terms of articles 27 and 98 of the Rome Statute of the International Criminal Court (hereafter Rome Statute), but also other conflicting obligations which have made successful execution of arrest and prosecution difficult. These include membership of the African Union as well as the lack of capacity and structure of member states to execute such requests. In addition, the fact that heads of state may no longer enjoy immunity, whether personal or otherwise, threatens the very sovereignty of states.

Based on the findings of this study, it can be stated that personal immunity accorded to a head of state can no longer be raised as a valid defence before an international tribunal. However, the same cannot be said of foreign domestic tribunals. This study concludes that a sitting head of state charged for breaking the rules of international law can be subjected to the jurisdiction of the any tribunal, more so if the official is said to have vacated the office.

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Writing on international law and especially on a current and developing issue such as immunity, with a focus on the Al-Bashir case, was a very challenging process. One had to keep abreast with the developments of the unfolding decisions in various jurisdictions and this influenced my outlines and led to several changes and corrections.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

AU African Union

DIPA Diplomatic Immunities and Privileges Act

ICC International Criminal Court

ICJ International Court of Justice

ICTY International Criminal Tribunal of Yugoslavia

ICTR International Criminal Tribunal of Rwanda

SCA Supreme Court of Appeal

UNSC United Nation Security Council

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CHAPTER ONE
Introduction

1.1 Introduction and Background to the Study

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

Therefore, the international criminal law is defined as the law that deals with different categories of human conduct and when such human conduct is considered a violation of international humanitarian law and human rights.[1]

Further, international criminal law covers norms/rules that regulate criminal responsibility under international law. The following categories of crime are considered international crimes: crimes such as war crimes, crimes against humanity, genocide and the crime of aggression.[2]

In terms of international criminal law, heads of state can be liable under international law for international crimes (*jus cogens*) regardless of what state law dictates. It is based on this principle that a state's obligation to prosecute or extradite violators arises. *Jus cogens* over the years has become a subject of debate both at the international and domestic spheres.[3]

The reason why such a principle is important is because "criminal accountability for serious crimes is of fundamental importance with regards to the respect for the rule of law, deterrence of future violations, and the provision of redress and justice for victims". Further, this principle touches the core of what humanity considers to be repugnant such as threatening world peace etc.[4]

In light of the universal nature of such international crimes, the ability to prosecute these crimes derives from the fact that these crimes are of such a serious nature that they pose a threat to the international legal order as a whole. Further, Protocol II of the Geneva Convention therefore creates an obligation on states that have ratified the convention for prosecuting serious crimes

[1] LC Green 'Is there an international criminal law' (1983) 21 *Alberta LR* 251-261.
[2] Ibid.
[3] AJ Colangelo 'Jurisdiction, immunity, legality, and jus cogens' (2013) 14 *Chicago J Int'l L* 53 at 73.
[4] Diakonia International Humanitarian Law Centre 'International Criminal Law' (2010), available at https://www.diakonia.se/en/IHL/The-Law/International-Criminal-Law1/

and breaches of treaty, whenever the offenders are found in the ratified states territory. Whether or not the offence took place in the specific territory, the convention requires states to pass national legislation that criminalises war crimes at a domestic level. This enables states to prosecute offenders while entering those territories.[5]

Universal jurisdiction transcends that of national sovereignty since:

"The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail".[6]

However, the problem with this area of law is that it has been slow in its development of legal principles/ principles into a viable legal system. This is due to several factors for example, state sovereignty that acts as a shield to prosecution of heads of state.

In addition, state sovereignty that had in the past allowed states to exercise exclusive power over their citizens has been eroded by the international protection of individuals as well as the movement of international criminal responsibility of individuals. Essentially this means that exceptions have been created to this exclusivity over state power by recognising certain rights and privileges that attach to individuals which the state cannot infringe.

For example, although customary international law rules provide for both personal and functional immunity there appears to be a trend towards moving away from granting immunity. In the case of *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (no 3)*,[7] which was a domestic court decision, the House of Lords, after analysing the principle of immunity, removed the immunity of the former head of state of Chile in terms of customary international law.[8] Furthermore, the Court held that such immunity would have remained in force had he been a sitting head of state."[9] This creates the impression that the Court's view such conduct in a serious light and worthy of prosecution.

[5] S Black 'Universal jurisdiction and Syria: A treaty based expansion of universal jurisdiction as a solution to impunity', (2018) 21 *Int'l Trade & Bus LR* 177 at 188.
[6] S Knuchel 'State immunity and the promise of jus cogens' (2011) 9 *NW U J Int'l Hum Rts* 149 at 150.
[7] [2000] 1 AC 147 at 190 (HL).
[8] *R (Pinochet Ugarte) v Bow Street Metropolitan Stipendiary Magistrate* [2000] 1 AC 61; see also J Needham 'Protection or prosecution for Omar Al-Bashir? The changing state of immunity in international criminal law' (2011) 17 *Auckland U L R* 219 at 227.
[9] *Bow Street* supra paras 63-5; see also Needham op cit n8 at 227.

So while removing immunity, the case still seemed to suggest that immunity was guaranteed under customary international law. The case of *Arrest Warrant*[10] against the Democratic Republic of the Congo (DRC) was the first decision to examine the principle of immunity accorded to a high-ranking state official. The case confirmed that immunity in terms of customary international law can be extended to foreign ministers prosecuted in foreign courts for actions undertaken while in office.[11]Although *jus cogens* was not expressly mentioned in the case, the prohibition against committing such offences did not override rules of international law.

However, with the establishment of the Rome Statute of the International Criminal Court (hereafter the Rome Statute), which is a court that aims to end to impunity for serious international crimes; in terms of Article 5 of the Rome Statute,[12] the court will only be able to exercise jurisdiction on the basis of the principle of territoriality and that of active personality. Active personality is a principle in terms of international law that grants a state the right to exercise jurisdiction when a crime is committed outside its territory.[13] This essentially means that all other cases will have to be dealt with by means of the principle of universal jurisdiction of domestic courts. All states can exercise universal jurisdiction concerning serious offences such as genocide regardless of the nationality of the offender or where the crime was committed. This has developed as a matter of state practice. Universal jurisdiction is therefore not contrary to the principle of complementarity in the Rome Statute since states will always have a role to play in investigating and prosecuting core crimes. The problem lies with the interpretation of some articles set out in the Rome Statute which create confusion as to whether perpetrators can be prosecuted before the Court. On the one hand, the International Criminal Court (ICC) is established by means of treaty and therefore is in the same position to exercise universal jurisdiction regarding core crimes as contracting parties to the ICC themselves.

Article 27 of the Rome Statute clearly bars the application of head of state immunity. It provides that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

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[10] 'Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium)* International Court of Justice (ICJ),' (14 February 2002), available at: https://www refworld.org/ cases,ICJ,3c6cd39b4 html [Accessed on 10 February 2020].

[11] Ibid para 55.

[12] Rome Statute of the International Criminal Court 27 of 2002.

[13] C Ryngaert *Jurisdiction in international law* 2nd ed (2008) 104.

It should be noted that cooperation is central to the success of the International Criminal Court. The drafters of the statute emphasised the importance of the obligations which member states have with regard to cooperation.[14] This is because the Court does not have all the tools necessary to achieve its objectives which include ensuring the worst perpetrators are held accountable for their crimes, to serve as a court of last resort that can investigate, prosecute and punish the perpetrators of genocide, crimes against humanity and war crimes.[15] Therefore the Court is entirely reliant on the cooperation of member states, and this is set out in detail in part 9 of the Rome Statute. This part deals with the arrest and surrender of a suspect sought by the Court.[16]

While Article 27 of the Rome Statute bars the application of immunity in proceedings before the Court, Article 98 provides for immunity as an exception to cooperation with the ICC.[17] In addition, Article 27(2) states that any immunity or special procedural rule which attaches to the official capacity of head of state under national or international law, shall not bar the court from exercising jurisdiction over such an individual. This now creates a deviation from the traditional general rule that sitting heads of states enjoy personal and functional immunity.

This seems to create a conflict between the two articles, which will be elaborated on in Chapter 3 and critiqued in Chapter 4.

In addition, it has also raised questions as to whether state parties to the Rome Statute are required to meet such obligations as set out in Article 27 and 98, in light of other conflicting obligations they may face. For example, where state parties are also members of the African Union, this may place a heavy reliance on Article 98 of the Rome Statute as a reason to refuse compliance with the requests of the ICC. Further, as a member state to the African Union, non-compliances or non-implementation of regulations and directives from the assembly shall attract appropriate sanctions from the organisation. The commitment to the AU as a regional

[14] D Nsereko 'Triggering the jurisdiction of the International Criminal Court*'* (2004) 2 *AHRLJ* 265.

[15] I Eberechi 'Armed conflicts in Africa and western complicity: A disincentive for African Union's cooperation with the ICC*'* (2009) *Afr J Legal Stud* 54.

[16] Part 9 provides that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

[17] Art. 98 of the Rome statute provides that.

> "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

organisation was prioritised because of regional political reputation.[18] Further, a non-compliance policy which was issued in 2009 by the AU remains the primary reason behind the strained relationship between the AU and the ICC.[19] In addition, it is questionable whether non-state parties can be subject to the jurisdiction of this Court in terms of Article 13 of the Rome Statute.[20]

1.2 Rationale and Assumptions and Research Questions

This research rests on the following assumptions. The United Nations General Assembly recognised the need for a permanent international court to deal with the kinds of atrocities which had been perpetrated, this was in 1948. The international community created and ratified the Rome Statute to end impunity[21] for those perpetrators charged with the most serious offences as set out in Article 5 of the Rome Statute. One of the reasons for its establishment, was because most of the offensive conduct carried out during the world wars violated international law and remained unpunished. Thus, where countries have ratified such a statute, this raises the assumption that there is an obligation on them to prosecute such perpetrators. One of the most notorious cases in modern times which is the focus of this dissertation, is the alleged atrocities committed by the former President of Sudan Al-Bashir.[22]

On 14 July 2008, the prosecution filed an application and the Pre-trial Chamber and issued a warrant of arrest for Al-Bashir.[23] The prosecutor filed a second application requesting a second warrant of arrest for Al-Bashir and in this warrant, genocide was included alongside the previous crimes mentioned namely war crimes and crimes against humanity.[24] There is a duty on the international community to hold him responsible for such atrocities. The problem is that African state parties to the ICC also have a duty in terms of the AU not to cooperate with such

[18] D Tladi 'Cooperation, immunities, and article 98 of the Rome Statute: The ICC, interpretation, and conflicting norms' (2012) 106 *Amer Soc Int'l L* 307-308.

[19] F Boehme We chose Africa': South Africa and the regional politics of cooperation with the International Criminal Court (2017) 11 *Int'l J Transit Jus* 50–70, https://doi-org.ukzn.idm.oclc.org/10.1093/ijtj/ijw024.

[20] Art. 13(b)8 provides that the ICC may exercise jurisdiction where "[a] situation in which one or more of such crimes [crimes referred to in Article 5] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations".

[21] S Anoushirvani 'The future of the International Criminal Court: The long road to legitimacy begins with the trial of Thomas Lubanga Dyilo' (2010) 22 *Int'l L Rev* 213 at 214.

[22] 'In the Case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* "Warrant of Arrest for Omar Hassan Ahmad Al-Bashir' (4 March 2009), (ICC-02/05-01/09-1).

[23] 'In the Case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*'Warrant of Arrest for Omar Hassan Ahmad Al-Bashir Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir*'* (July 12, 2010) (C-ICC-02/05-01/09-95).

[24] In the Case of the *Prosecutor v Omar Hassan Ahmad Al-Bashir* supra n23.

requests for arrest and surrender. This raises the question as to how such state parties should be dealt with for non-compliance. In addition, although Sudan is not a signatory to the Rome Statute, it appears as if this state can still be brought within the jurisdiction of the Court. This is salient in light of the fact that Sudan is a member of the UN as well as the Geneva Conventions.[25] In addition, Sudan is also a member of the Genocide Convention.[26] This also creates certain rights and obligations towards this body and Conventions and by implication towards the international community at large. In light of this, it is necessary to consider whether it is possible to hold President Al-Bashir responsible for the crimes and to determine the basis for such liability.

Therefore, the main research question this dissertation aims to answer is: "Is the immunity (personal and functional immunity) granted to a head of state justified before foreign and domestic tribunals?

In light of the fact that there are conflicting principles which will determine such liability, it is necessary to consider the following sub-questions:

1. What is the current position in customary international law on sovereign immunity in the context of international criminal law?
2. Under what circumstances can the ICC exercise jurisdiction over a non-state member?
3. Does Security Council Resolution 1593 give the ICC jurisdiction over Sudan and if so, what is the effect of this Resolution on the sovereign immunity that Al-Bashir as a former head of state enjoyed under customary international law?
4. What is the interrelationship between Articles 27(2) and 98(1) of the Rome Statute and how does Security Council Resolution 1593 resolve the apparent tension between these Articles?

1.3 Research Methodology

This study is a desk top study involving interrogation of primary and secondary sources. The data used for research purposes has been extracted through a search of the various international law journals and cases on the topic of immunity. Primary sources, such as case law, international treaties such as the Rome Statute of ICC, as well as domestic legislation such as the Diplomatic Immunities and Privileges Act 37 of 2001 have been consulted. Secondary

[25] The Geneva Conventions of 1949.
[26] UN General Assembly 'Convention on the Prevention and Punishment of the Crime of Genocide' 1948.

sources included books, journal articles, and internet sources. Both international and domestic instruments on personal immunity and its application before tribunals were analysed.

1.4 Structure of the Dissertation

This dissertation consists of five chapters. The following chapter outline presents the structure and flow of the study:

Chapter one is a general introductory chapter. The chapter outlines background of the study, the critical questions and the objectives of the study, the research methodology applied and the structure of the study.

Chapter two provides a discussion of the customary law position of immunity. It commences with a historical overview of the development of the principle of immunity as well as an explanation of the rationale of immunity. The different types of immunity will be canvassed. In addition, before the establishment of the International Criminal Court, different types of tribunals that dealt and addressed issues concerning immunity will be examined.

Chapter three will set out the position of the ICC. It will include a discussion of the development of the Court. It will also set out the relevant articles that require state cooperation, that of Articles 27 and 98. It will also consider the application of the Rome Statute before foreign and domestic courts. Last, the effect of the UNSC Resolution 1593 on non-member states will be considered as will the obligation that African states have towards the AU.

Chapter four will critically analyse the link between Articles 27(2) and 98(1) of the Rome Statue. It will also examine Security Council Resolution 1593 pertaining to the Al-Bashir case and how these provisions can be reconciled with the provisions in the ICC statute.

Chapter five provides concluding remarks and possible recommendations.

CHAPTER TWO

Customary International Law and Immunity

2.1 *Introduction*

The aim of this chapter is to discuss the customary international law position pertaining to personal and functional immunity by addressing the foundational concepts that underlie the principle of immunity. The chapter will commence by defining the concept of immunity as a legal provision available to high-ranking state officials, in pursuance of carrying out their official duties. This chapter will also consider the different forms of immunity available, and the rationale underlying the concept of state sovereignty. In addition, this chapter will also examine the current customary international law status of immunity through proceeding to examine the differences of such immunity before domestic and international tribunals. This discussion will demonstrate that courts are taking the stance that immunity for international crimes while no longer appearing to be applicable, has not as yet developed into a rule of customary international law. This in part could be attributed to the manner of the establishment of the tribunal concerned whether through UNSC Resolution or whether through treaty-based decision.

2.2 *Definition of Immunity*

Immunity is a principle that protects a state's high ranking officials from being subjected to civil or criminal prosecution before a court and is encompassed in the principle "*par in parem non habet imperium,"* which means "an equal has no power over an equal."[27] Therefore, in terms of this principle, a state is vested with the authority to govern its territory, manage its people, its affairs, and make important decisions without the interference of another state.[28] Since immunity originates from this principle, the jurisdiction which a state has over its citizens is restricted and therefore one state cannot claim jurisdiction over another.[29]

Although this principle is based upon the act of the state doctrine of sovereignty, immunity is further guaranteed by several other instruments, treaties, or statutes. The Vienna Convention

[27] S Wirth *Immunities, related problems, and Article 98 of the Rome Statute Criminal Law Forum* (2002) 429 at 430.
[28] Charter of the United Nations, Article 2(1) General Assembly Res 2625 (xxv) (1970).
[29] EH Franey *Immunity, individuals and international law: Which individuals are immune from the jurisdiction of national courts under international law?* LLD (London School of Economics) (2009) 16.

on Diplomatic Relations (1961), for example, recognises immunity as an important factor that contributes to the relationship that exists between countries and adds value to the growth of such interactions. What is clear is that immunity is a principle developed not for the benefit of the individual; rather, it is for ensuring the efficiency of diplomatic functions.[30] Immunity is not only observed by domestic courts, but by international tribunals as well. Thus, it becomes topical when customary international law clearly recognises immunity, but international tribunals such as the ICC do not.[31] The principle of "*par in parem non habet imperium"* is arguably the core reason for the controversy surrounding the Al-Bashir case. This is because if states are expected to govern their own internal affairs without any external interference, it would explain why Sudan's former president was not arrested, when the warrant of arrest was issued against him by the ICC, when he visited various African countries such as Malawi, Chad and South Africa. It can be argued that member states to the Rome Statute saw the arrest of Al-Bashir for the crimes committed in Sudan-Darfur as an obligation of the Sudanese government in light of the Security Council Resolution 1593. This will be addressed in more detail in Chapter 4.

Therefore, what then is the rationale for according heads of state immunity, if the principle of *par in parem non habet imperium* is arguably one of the reasons for the controversy*?* Before this question can be answered, it should be noted that the immunity accorded to a head of state derives from customary international law, which is because of a broader concept, state immunity. These include sovereignty and equality. The sovereign was traditionally viewed as the embodiment of the state. As a personnification of the state, his dignity was regarded as the dignity of the state, and as such, any action which offended the sovereign would be an offence against the state.[32]

[30] Preamble: The Vienna Convention on Diplomatic Relations 1961.

[31] *The Prosecutor v Omar Hassan Ahmad Al-Bashir* 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court ICC'-(ICC-02/05-01/09-195) (April 2014); "*The Prosecutor v. Omar Hassan Ahmad Al-Bashir* 'Decision Pursuant to Article 87(7) on the Failure of the Republic of Chad to comply with the cooperation Request issued by the Court with respect and Surrender of Omar Hassan Ahmed Al-Bashir' (December 2011) (ICC-02/05-01/09); and *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* 'Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to comply with the cooperation request issued by the Court with respect and Surrender of Omar Hassan Ahmed Al-Bashir'(ICC-02/05-01/09-139-Corr).

[32] Franey op cit n29 at 55, 59.

Franey notes that one of the justifications for immunity was based on the equality of all states, thus, an equal cannot claim authority over another equal or allow the interference of a state over the jurisdiction of another.[33]

Thus, the principle of immunity is more a mechanism that protects state jurisdictions from being violated or removed by third party states. Furthermore, if immunity were removed, then such removal can only be done through a waiver by the state of that particular official.[34] The Latin maxim "*par in parem non habet imperium"* provides a rationale upon which immunity is accorded. This principle is applicable in every state and is reflected in Article 2(1) of the Charter of the United Nations. In terms of this principle, states are free to decide and determine their own internal affairs without external interference.[35]

Further, the need for diplomatic relations between states further supports functional immunity.[36] The ability of officials to execute their duties efficiently in office facilitates friendly relationships between nations and maintains international peace and security.[37] Article 29 of the Special Mission Conventions ensures that high-ranking state officials are able to carry out special duties or missions for the states and such principle is not for individual's benefit.[38] Finally, functional immunity can assist in preventing disputes between states and promote international relations.[39]

Although immunity is important in its own right, it is notable that state practice and *opinio juris* have confirmed that the provision of immunity does not stop the prosecution of crimes that violate international law and it is also not a mitigating factor for punishment.[40] Initially the notion of absolute immunity[41] meant that all official acts were covered in terms of the principle of immunity regardless of whether such conduct or act was criminal or not. However, this notion became problematic as it left states without recourse. In addition, there are differences between sovereign and non-sovereign acts and differences between the categories of persons

[33] Franey op cit n29 at 55, 59
[34] P Oguno 'The concept of state immunity under international law: An overview*'* (2016) 2(5) *Int'l J L* 18.
[35] Franey op cit n29 at 60.
[36] Franey op cit n29 at 60.
[37] Franey op cit n29 at 61.
[38] Convention on Special Missions, 1969.
[39] Franey op cit n29 at 61.
[40] *Al-Adsani v United Kingdom* (2001) 34 EHHR 273, Dissenting Opinion of Judges Rozaskis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Viji.
[41] Oguno op cit n34 at 15.

entitled to such immunity. It is now necessary to consider the historical background of the development of immunity as well as case law development.

2.3. Historical Background and Rational of Immunity in Terms of Customary International Law

There are two primary forms of international law. The first form is customary international law and the second form is that of treaty.[42] However, in this section of the chapter, the focus is on customary international law and how it relates to immunity. This form of international law is followed and observed by governments and ensures that such rules are complied with. Furthermore, customary international law is also known as the rule or principle that is included in a nation's domestic statutes and are rules of decision, or a defence, or a canon of statutory construction.[43]

Therefore, upon such basis, the violations of customary international law could become grounds for war or international claims.[44] Customary international law is known as "the collection of international behavioural regularities that nations over time come to view as binding as a matter of law." Further, in terms of this definition, there are two elements which it comprises. The first element is the objective element commonly known as the "widespread and uniform practice of nations."[45] The second element is central to the definition of customary international law and is known as *opinio juris.* This requirement is often referred to as the "psychological" or "subjective element." *Opinio Juris* is one aspects of customary international law that is used to "distinguish a national act done voluntarily or out of comity from one that a nation follows because it is required to do so by law."[46]

The International Court of Justice[47] also provides one of the most cited and authoritative definitions of customary international law. In addition, it is viewed as "international custom, and as evidence of general practice accepted as law,"[48] as provided for in terms of Article 38 of the Statute of the International Court of Justice. This explains the position of and the role

[42]JL Goldsmith and EA Posner 'A theory of customary international law' (1999) 66 *U Chicago L R* 1113.
[43] Goldsmith & Posner op cit n42 at 1114.
[44] Goldsmith & Posner op cit n42 at 1114.
[45] Goldsmith & Posner op cit n42 at 1114.
[46] Goldsmith & Posner op cit n42 at 1114.
[47] Article 38 of the International Court of Justice.
[48] AT Guzman 'Saving customary international law' (2005) 27(1) *Mich J Int'l L* 123.

that customary international law operates in, that it is central to international law and a primary source of universal law.[49] Further, it is clear that the development of customary international law is attributed to serious and constant state practices and *opinio juris* which is crystalised to be recognised as legally binding.[50] It is upon such rules that immunity from prosecution is established for heads of state or high-ranking officials. Immunity is not only established in terms of customary international law, but it is also established in terms of statutory provisions. The following statutory provisions recognise immunity: State Immunity Act 1978, Diplomatic Immunities and Privileges Act, 2001 and the Vienna Convention on Diplomatic Relations, 1961. The latter stipulates who is entitled to immunity, as well as the functions or position that guarantees such privileges, the duration of immunity and in case of death.[51]

Furthermore, regarding state immunity, there are judicial decisions which are examples of state practise and often these are indications of *opinio juris*. In the case of *Jones v The Ministry*[52] the Court's main aim was to determine if there were any form of exception for immunity in terms of customary international law for the state or its agent. It was held that with regards to immunity, "there are evidence or enough precedence to show when a foreign state is entitled to claim immunity for its servants and such right to immunity cannot be circumvented by suing its servants or agents."[53] This is because immunity as a rule of customary international law originates from a broader concept, the principle of equality of state and independence of state.

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[49] Guzman op cit n48 115.

[50] *Al-Adsani v United Kingdom* supra 284.

[51] Article 39(1-4) *Vienna Convention* states:

> "1.Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> 2.When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.
>
> 3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.
>
> 4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission."

[52] *Jones v The Ministry of Interior for the Kingdom of Saudi Arabia* case no [2006] UKHL 26, paras 10, 59-63.

[53] *Jones v the Ministry of Interior* supra para 10.

This explains the difficulty in determining the application of immunity or its obligation in terms of the law.

In the case of *Schooner Exchange v. Mcfaddon*[54] the question was whether the court had jurisdiction over a case in terms of customary international law. On the basis of sovereignty, a state has absolute immunity over its own territory but could also waive such jurisdiction either impliedly, or expressly. However, a foreign state/agent is generally presumed to be free from jurisdiction of domestic courts in terms of customary international law.[55] The principle of "*par in parem non habet imperium"* is applicable in all states and it is reflected in Article 2(1) of the Charter of the United Nations.[56] In terms of this principle, states are free to decide and determine their own internal affairs without external interference.[57]

The above discussion demonstrates that the principle of sovereignty opposes the interference of external parties. However, since it is a principle observed as a state practice, it can also mean that its existence and observation is dependent upon states' previous practice. This emphasises the point that immunity applies because of the state's existence and function of the office of the state official and not on the individual in the office itself. Therefore, if a state ceases to observe this type of immunity, what consequences will follow such an act? It is now necessary to examine the differences in the treatment of categories of officials that are entitled to immunity.

2.4 Categories of Persons Entitled Immunity

a) Introduction to The Different Categories of Immunity

In terms of the doctrine of immunity (functional), the general rule is that every act performed by diplomats or state officials is inviolable. This also means that the officials cannot be subject to civil or criminal jurisdiction. Therefore, "immunity is well established in international law as a possible obstacle to prosecuting international crimes."[58] The benefit of this type of immunity; i.e. functional, is that it allows heads of state or senior officials to travel freely and

[54] *Schooner Exchange v Mcfaddon* 11 U.S. (7 Cranch) 116 (1812).
[55] *Schooner Exchange v Mcfaddon* supra.
[56] United Nations Charter 1945, Article 2.
[57] Franey op cit n29 at 60.
[58] *Arrest Warrant* supra para 5; see also Articles 29 and 32 of the United Nations Conventions on Special Missions 1969.

conduct their roles without fear of prosecution.[59] Furthermore, the *Vienna Convention* codified existing laws and established new rules of law, in order to highlight and emphasise the importance or necessity of diplomatic relations.[60] In terms of Article 31(1) of the Vienna Convention, "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction."[61] However, mutual consent is essential because states cannot engage or participate in diplomatic relations without it.[62] Furthermore, since immunity is recognised for the benefit of the state, an obligation to respect such privileges arises. Only states vested with such authority, can waive it.[63] There are theories that supports this principle and these include the "extraterritoriality" theory, the "representative character" theory and the "functional" theory.[64] The "extraterritoriality" theory regards the diplomatic premises as an extension of the territory of the sending state abroad; since it falls under the jurisdiction of the sending state, it cannot be subjected to the host country's authority.[65] In terms of the "representative character" theory, the diplomatic mission personifies the sending state. Finally, in terms of the functional theory, in order to execute and perform certain duties, it is required that the diplomat be accorded immunities and privileges.[66] The Vienna Convention emphasised the necessity of diplomatic relations in the proficient conduct of international relations, and consequently, it has codified existing law and established others.[67] Once a state consents to a proposed diplomatic mission, it has a duty or obligation to respect immunity of these agents.[68] In essence, while immunity

[59] Ibid; see also *Arrest Warrant* supra at par 55. Article 29 of the Special Mission Conventions is provided to ensure that high-ranking state officials are able to carryout special duties or missions on behalf of the states and not for the state official's individual benefit.

[60] Article 32 of the Vienna Convention supra note 28.

[61] Article 31 of the Vienna Convention Supra note 28.

[62] Article 2 of the Vienna Convention Supra note 28.

[63] ET Aniche 'A critical examination of the British municipal court rulings on cases of international immunity: Revisiting the imperatives of politics of international law' (2016) 2 *Cogent Soc Sci* 6.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Article 2 of the Vienna Convention states that "The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent."

[68] Article 31 of the Vienna Convention stipulates that:

"1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

does benefit the state, it can be waived by the state.[69] Therefore, diplomatic immunity is well-defined in terms of the Vienna Convention on Diplomatic Relations 1961, and the following types of immunity are defined in the convention.

b) Consular Immunity

These officers act as representatives of their countries in foreign states and assist nationals who live in those states. In terms of this type of immunity, the consular officer is guaranteed protection from legal proceedings or the jurisdiction of the domestic court in his or her place of work.[70] Law enforcement authorities are required in terms of the international rules of law to accord and extend privileges and immunities to members of foreign diplomatic missions.

c) Immunity of International Organizations and Their Agents

Immunity and it various privileges are also extended to the United Nations representatives and officials for official purpose and functions. These privileges are accorded in terms of Article 105(2) of the United Nations Charter, and are extended to those officials under a foreign authority or jurisdiction. Further, these principles are expounded in terms of the Privileges and Immunities of the United Nations (UN) Convention 1946.[71]

In addition, the principle only became accepted in the 1970's by most states. The headquarters agreement was entered into in 1974 by the United States of America. However, the principle was rejected by most states, including the hosts nation of its headquarters, that of the United States.[72] This agreement states that diplomats:

> "Shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State."

[69] Article 32 of the Vienna Convention states that:
"The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state; (2) waiver must always be expressed; (3) the initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim; (4) waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of execution of judgement, for which a separate waiver shall be necessary."

[70] Aniche op cit n63 at 6, see also S Goossens 2011. *Diplomatic immunity: An argument for re-evaluation*. LLM (University of KwaZulu-Natal) (2011) 32-36.

[71] Article 4 (11) Convention on the Privileges and Immunities of the United Nations (1946).

[72] Article V section 15(1-4) of the United Nations and United States of America Agreement regarding the Headquarters of the United Nations, signed at Lake Success, 26 June 1947.

> to it. In the case of Members whose governments are not recognized by the United States, such privileges and immunities need be extended to such representatives, or persons on the staffs of such representatives, only within the headquarters district, at their residences and offices outside the district, in transit between the district and such residences and offices, and in transit on official business to or from foreign countries."[73]

Therefore, it is upon the above principle and rules that officials employed by international organisations are accorded immunity. However, the immunity accorded to them differs. For instance, while high-ranking officials of UNSC generals enjoy absolute immunity, others only enjoy protection in so far as it relates to their official duty.

In 2015, this principle was implemented during the African Union meeting held in South Africa. It was further used as a defence where the question of the arrest and surrender of the former president of Sudan was brought before the domestic court of South Africa in the case of *South African Litigation Centre v the Minister of Justice and Development.*[74] It was a debatable decision because it only focused on the immunity accorded to agents and other state officials. However the case said little in relation to immunity accorded to "head of state," thereby failing to answer the question of whether immunity applied to heads of state.[75] In the next chapter of this research, this decision will be discussed in more detail.

While diplomatic immunity is well-defined in the Vienna Convention on Diplomatic Relations 1961, the immunity of serving heads of state and other senior state officials remains uncertain.[76] The next section of this chapter will address the immunity of senior state officials.

d) Senior State Officials

In terms of customary international law, minister of foreign affairs, heads of government and states enjoy immunity, primarily for official purposes and functions, and serves to protect them from proceedings before foreign domestic courts.[77] In other words, no prosecutions will ensue

[73] Ibid.
[74] *Minister of Justice and Constitutional Development v Southern African Litigation Centre* (867/15) [2016] ZASCA 17 and *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* (27740/2015) [2015] ZAGPPHC 402.
[75] *Minister of Justice and Constitutional Development* supra and *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* supra.
[76] Needham op cit n8 at 224.
[77] S Zappalo 'Do heads of state in office enjoy immunity from jurisdiction for international crimes?' (2001) 12 *EJIL* 595 at 597. Ghadafi case before the French *cour de cassation*.

for doing their jobs.[78] Immunity ensures smooth international relations between states and that the process of communication is effective.

e) *Types of immunity for senior state officials*

There are two kinds of immunities under international law that are recognised for senior state officials, namely, "functional immunity (*ratione materiae*)" and "personal immunity (*ratione personae*)." These kinds of immunity are conferred on officials because of their office or status of the officials. These types of immunities will now be discussed in further detail.

i. Functional Immunity (Immunity Ratione Materiae)

Functional immunity is a principle that enables an office bearer of a state to perform his or her duty without the fear of prosecution. This type of immunity extends to acts which are carried out by an official acting in an official capacity or on behalf of the state.[79] Further, there is an expectation and assumption that considers every state official's act as a respective act of the state, and contributes to the existence of "*immunity ratione materiae*." In the *Prosecutor v. Tihomir Blaškić* case,[80] this rule was confirmed and it was held that since state officials are state instruments, their actions should be credited to the state and they should not be punished for it. This rule is in terms of customary international law and has been in practice since the 18th century.[81] Thus, actions of state officials cannot be attributed to officials privately. Further, officials cannot be held responsible for a decision made on behalf of the state.

It could also be said that functional immunity is derived from the principle of sovereign equality and in terms of this principle "one sovereign state cannot, in its own court of law, call into question the acts of another. This is an obligation that states have towards each other."[82] This principle is reinforced by the notion of equality that since states are equal, interference in the internal matters of other state is not allowed. Does this imply that immunity *ratione materiae* or functional immunity promotes impunity or violations of international crimes?

[78] D Akande and S Shah 'Immunities of state official, international crimes and foreign domestic courts' (2011) 21 *Europ J Int'l L* 818.
[79] Needham op cit n8 at 224.
[80] '*Prosecutor v Tihomir Blaskic (Trial judgement IT-95-14-T) International Criminal Tribunal for the Former Yugoslavia (ICTY)',* 3 March 2000, available at https://www reworld [Accessed on 7April 2020].
[81] DAkande and Shah op cit n78 at 827, See also *Prosecutor v. Blaškić* supra para 38.
[82] Needham op cit n8 at 224.

This question could be answered by stating that immunity does not cover international crimes. Any head of state or state official found responsible for an international crime cannot invoke or rely on immunity from national or international jurisdictions even where the state official was carrying out an official duty or performing an official function. The reason for this argument is because a state official's acts cannot amount to international crimes or a violation of *jus cogens* and these international norms may never be considered as official acts or functions. In addition, states that are caught up in such controversies, are considered to have stepped outside their sphere of sovereignty, thereby implicitly waiving their rights to immunity.[83] For example, in the case of *Prosecutor v. Tihomir Blaskic*, it was pointed out that: "those responsible for [international crimes] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity .... Similarly, other classes of persons ... although acting as State organs, may be held personally accountable for their wrongdoing."[84] Therefore, a state cannot claim violation of *jus cogens* for sovereign immunity.[85] However, the perpetrator of international crimes that acts or benefits from the national measure may, nevertheless, still be held criminally responsible for torture by both domestic and international tribunals.[86]

This argument held in *Blaskic*, was dispensed by some judges in the case of *Pinochet* where it was further stated that the idea of using state functions or official acts as a defence for violation of international crimes, was rejected. This statement is in line with the rejected defence raised in the Nuremberg Tribunal. However, it was confirmed that under international law, the head of state is guaranteed functional immunity.[87]

ii. Personal Immunity (Immunity Ratione Personae)

Personal immunity or "*immunity ratione personae"* is a rule in terms of international law that is attached to a particular office. This type of immunity applies to serving heads of state, heads of government, and diplomats. Thus, this principle is dependant on the importance of position held.[88] In practice the rule is that every act performed by state or senior officials is inviolable.

[83] Akande and Shah op cit n78 at 829.
[84] *Prosecutor v Tihomir Blaskic* supra.
[85] TWeatherall '*Jus cogens* and sovereign immunity*:* Reconciling divergence in contemporary jurisprudence' (2015) 46 *Geo J Int'l L* 1181-2.
[86] Ibid.
[87] Akande and Shah op cit n78 at 832.
[88] Akande and Shah op cit n78 at 820.

Therefore, state officials that this principle of immunity applies to are exempt from foreign criminal or civil jurisdictions for any act performed.[89] The benefit of this type of immunity is that it allows heads of state or senior officials to travel freely and conduct their roles without fear of prosecution.[90]

However, it should be noted that in terms of the *Arrest Warrant*[91] case, the principle of personal immunity was guaranteed to other officials, such as the diplomatic and consular agents, high-ranking official in a state, such as the head of state, head of government and Minister for Foreign Affairs, who will enjoy immunities from jurisdiction in other states, both civil and criminal.

The Court described the official as an individual that occupies a high-ranking office, and this extends to ministers of foreign affairs.[92] The reason why such a principle is extended to ministers of foreign affairs, is because the official occupies a high-ranking position. Furthermore, such minister plays a vital role that requires immunity.

Personal immunity is absolute and applies to any judicial process in a foreign state pertaining to any form of conduct. This could include acts done from the moment the official occupies office and acts committed during their term of office. The crucial aspect of immunity in this context is that the focus is not on the type of act committed by the official, but the position the official holds. Immunity is there to enable the official to perform their duties without fear of interference or fear of prosecution and ceases to exist once the official vacates office.[93] In other words, any crimes committed while in office can still be prosecuted. The case of *Pinochet*[94] demonstrates this point well. Pinochet enjoyed both functional and personal immunity during his term of office. This immunity (personal) was absolute during his tenure as president but ceased to exist when his term ended.[95] However functional immunity only protected him from acts performed during his official capacity.[96] It must be noted that recognising a head of state

[89] *Arrest Warrant* supra para 5; see also Article 29 and 32 of the United Nations Conventions on Special Missions 1969.
[90] Ibid; see also the *Arrest Warrant* case supra para 55.
[91] *Arrest Warrant* supra paras 54-55.
[92] Needham op cit n8 at 224, see also *Arrest Warrant* supra para 51.
[93] VN Opara 'Sovereign & Diplomatic Immunity as Customary International Law: Beyond *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte*' (2003) 21 *Wisc Int'l L J* 255 at 256.
[94] *Pinochet* supra para 112-3.
[95] *Pinochet* supra para 112.
[96] *Pinochet* supra para 119.

(*immunity ratione personae*) has been controversial in nature both before international and foreign domestic courts. The reasons for such controversies are mainly centred on the following view that in terms of the customary international law position, a head of state is protected by both functional and personal immunity which occur simultaneously.

Thus, sitting heads of state are immune from all forms of prosecution irrespective of the crimes alleged and this covers international crime committed. However, this principle ceases to apply once the official leaves office. Functional immunity covers those acts done in an official capacity but does not cease when the official's term in office expires. This point is demonstrated in the *Pinochet* case where the head of state enjoys both functional and personal immunity. This aspect of the principle of immunity will be discussed in more detail in chapters 3 and 4.

In drawing a conclusion on the status of immunity under customary international law, it could be argued that under international law, heads of state and senior state officials are guaranteed both personal and functional immunity. The Vienna Convention guarantees diplomatic immunity under Article 29[97] and Article 31, and stipulates that officials will be immune from receiving state's jurisdiction in the event of criminal prosecutions.[98] However, upon closer perusal of Article 39(1& 2), immunity ceases to exist on termination of position. Acts performed during an official's term of office remains intact.[99] Perhaps it could be argued that immunity is not in fact enjoyed. Further, in light of worldwide atrocities, it is arguable that states are more likely to cede immunity to ensure prosecutions. However, this does not imply that yielding immunity to the officials for both criminal and civil prosecution has become a rule of customary international law. While the ICJ in the *Arrest warrant*[100] case rejected a

[97] Article 29 states that:

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

[98] Article 31 of Vienna Convention supra.

[99] Article 39 (1-2) of the Vienna convention supra.

> "1.Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> 2.When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

[100] *Arrest Warrant* supra.

contention that international law did not recognise immunity, it did acknowledge that such immunity was restricted it cases involving serious violations of the laws involving armed conflict. The current position appears to accept that sitting heads of state would enjoy immunity, and this continues, except when such immunity is waived by the UNSC.

2.5 Current Customary International Law Status of Immunity

Having discussed the different categories of immunity guaranteed to state officials under customary international law, it is now necessary to consider the status of personal immunity under foreign and domestic courts, to determine if such officials still enjoy such immunity.

a) Immunity Before Domestic Courts

The principle of immunity afforded to a head of state before a domestic court differs from state to state and depends on a country's national laws. Therefore, even if customary international law provides immunity, the state still has the discretion to limit or renounce such immunity. One such country that provides complete immunity to a sitting head of state is that of Sudan. In terms of Article 60(1) of the Interim Constitution of Sudan (2005), "the President of the Republic and the First Vice President is entitled to immunity before any domestic court from any legal proceedings and shall not be charged or sued in any court of law during their tenure of office."[101]

i. Personal Immunity of Sitting Senior Officials or Heads of State before Foreign Domestic Courts

Universal jurisdiction has provided domestic courts with the ability to undertake prosecution of serious international offences in a representative capacity on behalf of the international community. The reason for this is threefold. First, other states may not have an interest in the matter. Second, other states may not be able to exercise jurisdiction based on traditional doctrine and last, it is in the interests of the international community that prosecutions be undertaken. However, it needs to noted that immunity of heads of state or senior officials before foreign domestic courts is different to that of the state of origin. Prosecutions in foreign states are governed by the principles of international law as opposed to domestic law. Cases that deals

[101] The Interim Constitution of Sudan (2005).

with prosecution in foreign domestic states (or under international law) is that of *Pinochet*[102] and *Arrest Warrant*.[103]

Pinochet Case

The first case to examine the principle of immunity accorded to high ranking state officials was that of *Pinochet*.[104] This case denied a head of state immunity on the basis that immunity does not protect perpetrators of international crimes from being prosecuted for violating international law.[105]

In September 1973, General Augusto Pinochet, then Commander-in-Chief of the Chilean army, led a military coup to seize control of the country from President Salvador Allende. During Pinochet's subsequent 17 years in office as the president, his regime allegedly committed numerous human rights violations, including curtailing civil liberties, as well as perpetrating acts of torture and murder. He eventually stepped down in 1990 after losing in the first democratic election. After years of investigating his official actions, at the request of a Spanish court, an arrest warrant was issued in 1998, which alleged that Pinochet was responsible for the deaths of countless Chilean citizens, between 11Th September 1973 and 31 December 1983– during his tenure as president.[106] This occurred despite the fact that the new regime in Chile had granted Pinochet amnesty for the crimes he had committed whilst in power.[107] In this case, Spain applied for the extradition[108] of Pinochet for the crimes between January 1976 and December 1992, which comprised of "murder, torture, disappearance, illegal detention and forcible transfer."

A judicial review application was made to the Divisional Court seeking to quash the decision to issue the warrant. However, the court held that Pinochet was entitled to immunity as a former head of state. On appeal, six out of seven judges held that Pinochet had no immunity.[109] This was because international crimes were already prohibited in terms of international law and

[102] *Pinochet* supra.
[103] *Arrest Warrant* supra.
[104] *Pinochet* supra para 56.
[105] Opara op cit (n93) 255.
[106] *Pinochet* supra para 56; See also Needham op cit n8 at 227.
[107] *Pinochet* supra para 57.
[108] In terms of Section 8(1)(b) of the 1989 Extradition Act; A Bianchi 'Immunity versus human rights: The Pinochet case' (1999) 10(2) *EJIL* 237 at 243.
[109] *Pinochet* supra para 63-5.

since the conduct in question amounted to international crimes, they could not be deemed to be official acts. Therefore, he could not be protected in terms of functional immunity.[110] Although the case focus is on functional immunity, the relevance of this case for this research is that it does indicate what form of immunity a head of state charged with violating international law will be entitled to claim for.

Lord Goff in the same judgement provided an opposing view suggesting that the possibility of an offence cannot be ignored, and therefore the only immunity applicable will be that of personal immunity: "That the reason provided for disregarding functional immunity did not affect personal immunity of senior official."[111]

Arrest Warrant Case[112]

The ICJ in the *Arrest Warrant*[113]case later reaffirmed full immunity from criminal jurisdiction of an incumbent head of state. In this case, a warrant of arrest was issued by a Belgian judge against the then Congolese foreign minister, alleging grave breaches of the Geneva Conventions[114] and various other protocols including crimes against humanity or war.[115]
The actions of the Minister of Foreign Affairs were said to have led to the death of hundreds of the Tutsi population in the DRC, as a result of hate speech inciting violence.[116] However, the Congo government alleged that this action breached the immunity of the DRC.[117] Despite the fact that at the time Yerodia was no longer Minister of Foreign Affairs within the meaning of the term "the Optional Clause Declarations of the Parties" the Court accordingly lacked jurisdiction in this case".[118] The Court however, made findings in terms of the international law, stating that the immunity of the official must be respected because of the office he holds as state representative.[119] In its reasoning, the Court compared the status and functions of president with that of the minister in charge of external affairs. Thus, the ministers required the

[110] *Pinochet* supra at 114-115 (per Lord Wilkinson), at 151-152 (per Lord Hope) at 189-190 (per Lord Phillip).
[111] *Pinochet* supra para 168.
[112] *Arrest Warrant* supra.
[113] *Arrest Warrant* supra paras 29-32.
[114] Art. 50 Geneva Conventions.
[115] *Arrest Warrant* supra paras 13 -21.
[116] *Arrest Warrant* supra paras 18-19.
[117] *Arrest Warrant* supra para 50.
[118] Wirth op cit n27 at 881-2. See also *Arrest Warrant* supra paras 23-28 & 51.
[119] Knuchel op cit n6 at 157, see also *Arrest Warrant* supra para 55.

same immunity, because of the rationale of them being able to discharge their functions.[120] However, the Court qualified this statement by stating that:

> "The immunities enjoyed under international law do not represent a bar to criminal prosecution in certain circumstances. An incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain* international criminal courts, where the court have jurisdiction."[121]

The judgment from these cases which were both from a domestic court demonstrates that both heads of state and other senior state officials enjoy immunity before international courts, despite the crimes with which they are charged. However, the cases highlighted that certain circumstances do not present a bar to prosecution. These circumstances could encompass the following:

- where the incumbent or former minister does not enjoy criminal immunity under international law in their own country
- if the state the individual represents waives immunity
- when the incumbent or former minister's term of office has come to an end or when the individual vacates the office.

Thus, the private acts committed while in office and prior and subsequent to being in office, would be prosecuted. Fourth, immunity may not be applicable before all international tribunals that have jurisdiction.[122] Examples of such courts are the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which was established pursuant to Security Council resolutions under Chapter VI1 of the United Nations Charter, and the ICC. It is in situations such as this that the individual becomes subject to criminal proceedings.[123]

What was noteworthy about the Court's finding was that it clearly differentiated between functional immunity and procedural immunity as being distinct concepts. Criminal liability is a question of substantive law whereas jurisdictional immunity is procedural in nature.[124]

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[120] Knuchel op cit n6, see also *Arrest Warrant* supra para 53-55, See also Wirth op cit n27 at 879.
[121] *Arrest Warrant* supra para 61.
[122] *Arrest Warrant* supra para 62-64, See also Wirth op cit27 at 879.
[123] Weatherall op cit n85 at 1160,
[124] *Arrest Warrant* supra paras 25 and 60.

There is both personal and functional immunity as indicated above for a limited time in certain instances. However, is such immunity legitimate? On the one hand states may take the position of non-intervention in the affairs of other states, but this cannot bar the exercise of universal jurisdiction under conventional international law. This jurisdiction concerns acts of genocide, crimes against humanity and war crimes regardless of the nationality of the offender, nationality of the victim and where the crime was committed. Because these crimes are recognised as *jus cogens* which enjoys preferential status in international law, it is possible that it may invalidate all other rules pertaining to head of state immunity. However, this is not supported by the ICJ or most national courts. For example, according to the *Arrest Warrant*case state sovereignty still requires that universal jurisdiction is limited through complementary and immunity principles. Therefore, to exercise universal jurisdiction the conditions under which it can be exercised, and its obstacles must be considered, for instance, the presence of the accused in the territory.

The personal immunity of a senior official is not determined by their official capacity. The ICTY[125] endorsed this same view, holding that officials charged with discharge of international crimes cannot rely on immunity as a defence both under international and national jurisdiction. This rule will apply regardless of whether the crimes were perpetrated while acting within the official capacity.[126]

Thus, state officials are protected and their immunity can only be removed or lifted if the state in question waives this immunity. The *Arrest Warrant* case demonstrated the circumstances under which a state official is protected in terms of procedural immunity (personal immunity) and the circumstances under which such officials are subjected to foreign state domestic jurisdiction.[127] In that case, Belgium argued that according to the Rome Statute and the Nuremburg Charter, incumbent ministers of foreign affairs cannot rely on immunity as a defence in relation to certain serious crimes. In addition to citing domestic legislation and judicial decisions, the Court also noted that in terms of the Nuremburg Charter Article 7, courts are not allowed to conclude that "an exception exists under customary international law."[128]

b) Limitations of Personal Immunity Under Treaty Obligations

[125] See Knuchel op cit n6 at 158 footnote 45, *Prosecutor v. Blaikie* (Case No. IT-95-14), Appeals Chamber, 'Judgment on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of 18 July 1997', 41 (29 October 1997).

[126] *Arrest Warrant* supra paras 24 and 58; Knuchel op cit n6 at 158.

[127] *Arrest Warrant* supra para 58.

[128] *Arrest Warrant* supra para 98.

In terms of customary international law, it would appear that where international crimes have been committed, there is a duty to prosecute and this duty applies under treaty law. It also places a limitation on *personal immunity* for the purpose of prosecution.[129] This position was strengthened after World War II by means of introduction of various human rights conventions to prevent further such atrocities. These included the Convention on Prevention and Punishment of the Crime of Genocide.[130] In terms of this convention, "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[131]

The *Pinochet* case also set a precedent in this regard. The former president of Chile was accused of crimes such as "torture, hostage-taking, and conspiracy to commit crimes at various times" between January 1976 and December 1992.[132] The main reason was that such acts violated international law.[133] The Court also had to consider whether the crime of torture was already a crime as of 1982. It held that in terms of customary international law, the crime of torture was already considered a crime.[134] Therefore, the offender would be held liable. The Court also added that, as of 1982, not only was torture a crime in terms of international customary law but that irrespective of a person's nationality, countries have jurisdiction to prosecute for crimes committed against humanity.[135]

With regards to individual criminal responsibility, treaties under international law allow states to hold officials accountable. Further, "states parties are either competent or obliged to prosecute or extradite responsible individuals regardless of them being state officials through means of prosecution or extradition." The International Court of Justice (ICJ)[136] in this regard identified four limits to personal immunity which are discussed in detail below:

First, personal immunity can be limited if the "state decides to subjugate criminal proceeding and criminal prosecution."[137] The second limitation on personal immunity comes from the general principle under which immunities exist,[138] and which is for the benefit of the state and

[129] American Bar Association 'Limitation of sovereign immunity' (1960) 5(1) *Int'l & Compar L Bull* 28–32.
[130] UN General Assembly Convention on the Prevention and Punishment of the Crime of Genocide supra.
[131] Art. 4.
[132] M Davis (ed) *Pinochet Case: Origins, progress and implications* (2000) 3.
[133] *Pinochet* supra para 926; see also Davis ibid.
[134] *Pinochet* supra para 926-9, 931-3.
[135] *Pinochet* supra paras 926-9.
[136] The *Arrest Warrant* case supra para 61.
[137] Pinochet supra at para 61 as cited in Weatherall op cit n85 at 1152 at 1160.
[138] *Jones v The United Kingdom* supra. At para 188 the Court explained that;

not the individual.[139] This same rule was held in the *Pinochet* case, that the basis upon which the immunity of Pinochet was observed was based on the obligation towards the state of Chile and not Pinochet as an individual.[140] Thus, the state can then limit such immunity through a waiver, thereby giving foreign court's jurisdiction over the official in question.[141]

The third limitation is when a tribunal or the enabling statute of such tribunal can be used to determine the limitation of personal immunity. Therefore, if charges are brought before the ICC for instance, there are various factors that will be considered to determine the limitation of personal immunity.[142] The provision that enables such limitation is derived from Article 7 of the International Military Tribunal.[143] In terms of this provision, immunity as a defence or any other type of immunity is removed from an accused official and the official will be held personally responsible for their actions.[144]

The fourth limitation of personal immunity is when the official vacates his office, the immunity accorded to him ceases to exist. This rule is universally accepted under international law.[145] The treatment of personal immunity by Spain's National Court (Audiencia Nacional) in Madrid offers a good illustration of this limit in practice at the domestic level. Thus,

> "in criminal proceedings relating to crimes against humanity and violations of the *United Nations Convention against Torture* (CAT), Pinochet's immunity was removed because he was the former head of state to Chile but the Court during that same period acknowledged the immunity of Fidel Castro as he was currently the incumbent Head of State of Cuba."[146]

Sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty

[139] *R v Commissioner of Police for the Metropolis, Ex Parte Pinochet*, [1999] UKHL 17 (LJ Browne Wilkinson) [R v Commissioner] 8 as cited in Weatherall op cit n 1152 at 1160.

[140] Ibid.

[141] Weatherall, op cit n85 at 1160.

[142] *Arrest Warrant* case supra para 61, see also Weatherall op cit n85, at 1160.

[143] Charter of the International Military Tribunal (Nuremberg Charter) 1945, art 7.

[144] Article 7 of the Charter of the International Military Tribunal (Nuremberg Charter), stipulate that: "the official position of defendant whether head of state or responsible official in government shall not be considered as freeing them from responsibility or mitigation punishment."

[145] *Arrest Warrant* case supra para 61.

[146] *Pinochet* supra para 926.

This point was also demonstrated in the *Arrest Warrant* case. Here the ICJ made a temporal limitation to immunity.[147] Therefore, once an individual ceases to hold office, personal immunity can be limited. However, "official acts" may still be entitled to the protection of functional immunity, although this type of immunity is not the focus of this research.[148]

2.6 Immunity before International Criminal Tribunals

a) International Criminal Tribunal for The Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and Hybrid Court

It is questionable whether immunity before international tribunals will be applicable. While some theorists have argued that the principle of sovereignty and equality of states demands that immunity continue to be recognised, others are of the view that whether it exists before a tribunal will depend on the grounds and manner that the tribunal has been established.[149]
For instance, in the ICTY and ICTR situations, both have provisions that bar immunity for the purpose of prosecutions. Article 6(2) and 7(2) of ICTY stipulates that:

> "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

The manner in which tribunals developed, either through treaties or through UNSC resolutions will determine whether immunity is enjoyed, since it will ultimately determine the scope of jurisdiction. For example, Chapter VII of the UN Charter established from the ICTY and ICTR and from the statute, that immunity is barred for the purpose of the tribunal's jurisdiction. It is now necessary to briefly consider these tribunals.

b) International Criminal Tribunal for the Former Yugoslavia (ICTY)

The *ad hoc* tribunals were tribunals set up by the Security Council in 1993 through[150] Resolution 827 and were mandated to prosecute persons responsible for serious violations of

[147] *Arrest warrant* supra para 61.
[148] Page 9: *R v Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, [1999] UKHL 17 (LJ Browne Wilkinson) [R v Commissioner].
[149] P Gaeta 'Does President Al-Bashir enjoy immunity from arrest?' (2009) 7(2) *J Int'l Crim Jus* 315 at 321.
[150] WA Schabas *Introduction to International Criminal Court* (2001) 13.

international humanitarian law that took place in 1991 in Yugoslavia.[151] In *Prosecutor v. Slobodan Milosevic*[152] the head of state was charged with the crimes of genocide, crimes against humanity and war crimes committed. Although he attempted to raise a defence of immunity, it was rejected on the basis of Articles 7(1) and 7(2) of the ICTY Statute, which stated that immunity is removed on the basis that the provision of immunity had attained customary international law status. In this case, the UN document S/RES/827 points out that:

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[153]

In *Prosecutor v Dusko Tadic* it was held that the scope of powers vested in the UNSC in terms of Article 41 was so wide that the UNSC had discretion in deciding which method to employ to ensure maintenance of peace and security. Therefore, the UNSC could establish a body to deal with war crime violations. The Court held that it did have jurisdiction to hear the matter and Article 7(2) does not contradict established international law.[154]

A few years later, the ICTR was established on the basis of ICTR Resolution 955. This resolution also made immunity unavailable by:

> "...prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."[155]

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[151] Schabas op cit n150 at 11.

[152] '*Prosecutor v. Slobodan Milosevic* (Decision on Interlocutory Appeal on Kosta Bulatovic Contempt Proceedings)' (29 August 2005), available at: https://www refworld.org/ cases,ICTY,47fdfb5a0.html [Accessed 20 June 2020].

[153] Article 7(1 and 2) of the 'Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

[154] Ibid para 26 and 27.

[155] Para 1 of the ICTR resolution.

c) Hybrid Courts.

The *Charles Taylor*[156] case is an example of a case from a hybrid court, known as the Special Court for Sierra Leone (SCSL). The pretrial Chamber requested his prosecution, charging him with violations of Article 3 of the Geneva Convention and Additional Protocol II as well as crimes against humanity and other violations of international humanitarian law. These included abduction and child labour.[157] A motion was placed to quash the indictment brought by the prosecution on the basis that the indictment violated the principle of immunity as set out in Article 2(1) of the United Nations Charter and was contrary to customary international law. To reinforce this point, the defence made reference to the *Arrest Warrant* case, stating that the reason for immunity was because the arrest of such an individual while abroad would jeopardise the conduct of international affairs of the state for which the person acts as an official. Thus, the state official immunity (head of state, minister of foreign affairs) was inviolable.[158] In addition, it was argued that the Court was not established by VII of UNSC and lacked jurisdiction to try him as head of state.

In *Taylor*,[159] in terms of international law, the Court held that immunity will not apply as a defence before an international tribunal. As already stated, this was similar to the view confirmed in the *Arrest Warrant* case and the cases of the ICTY, ICTR and ICC. This was because the special court was international in nature. Article 39 and Article 41 were the basis upon which the SC was empowered to initiate the establishment of a special court by agreement with Sierra Leone.[160] Further, such court will be binding if there is an agreement between the country concerned and the UN.[161] The Court further stated that quashing the indictment on the basis that the accused person had held personal immunity at the time of the indictment would be futile, since it would only have the effect of requiring the prosecutor to issue a fresh indictment against Charles Taylor, who as a former head of state was, at the time of the

[156] *'Prosecutor v Charles Ghankay Taylor (Judgement Summary)'*, SCSL-03-1-T, Special Court for Sierra Leone, 26 April 2012, available at: https://www refworld.org/cases,SCSL,4f9a4c762.html [accessed 22 July 2020].
[157] *Taylor* supra paras 32-59.
[158] *Taylor* supra para 3.
[159] 'Special Court for Sierra Leone, *Prosecutor v. Charles Taylor* Decision on Immunity from Jurisdiction, 31 May 2004' para 37.
[160] Ibid.
[161] *Taylor* supra para 38.

decision, susceptible to the Court's jurisdiction.[162] If there is no UNSC support, then the SCSL and its statute are purely treaty based and is only binding on signatory states.

The argument therefore exists that Taylor's case does not amount to precedent indicating that immunity of a head of state can be removed before an international tribunal. This is because the SCSL was not properly established in terms of Chapter VII of SC therefore had no authority and if there was no authority then the SCSL does not have jurisdiction over the issue. Further, it does not appear as if Resolution 1315 of the UNSC used powers available under VII when developing the SCSL. In addition, the preamble of the resolution *requests* states to assist, it does not demand they do so. If the SCSL does not have the backing of the UNSC as the ICTY and ICTR did, then such tribunal and its statute remain treaty-based organisation. Thus, the implication of this is that the tribunal and it statute only binds treaty signatories, i.e. UN as an organisation and not actual individual members.

The next tribunal that will be discussed, although of more recent origin, is that of the African Court of Justice and Human Rights (ACJHR). Although not yet in force, this tribunal was founded in 2004 and is important because it became a tool used to further promote the decision to boycott the ICC by the members of the African Union.

d) African Court of Justice and Human Rights (ACJHR).

The relationship between the African states and the ICC was intensified with the arrest warrant issued against Al-Bashir. In 2009, the Pre-Trial Chamber (PTC) issued an arrest warrant against Al-Bashir for crimes against humanity and war crimes. The AU criticised the warrant and stated that the decision to issue an arrest warrant against the former president of Sudan would jeopardise the peace process. The African Union then requested the UN Security Council in terms of Article 16 of the Rome Statute to defer the indictment against Al-Bashir.[163] However, the UNSC failed to respond to their request of a deferral and continued with its mission to bring Al-Bashir to trial. It is arguable that this refusal to react to the AU's request that soured the relations between the African Union and the ICC. As a result, in 2009 at the 13th annual summit

[162] *Taylor* supra para 59.
[163] 'Decision on the Meeting of African States Parties to Rome Statute of the International Criminal Court' (AU Assembly /13(XIII)) (1-3 July 2009) para 5.

of the Assembly of Heads of State and Government, the AU urged all its member states to abide by the decision of the African Union, not to cooperate with the ICC.[164]

The relationship further deteriorated after the African Union's demand for the deferral of the case against the current Kenyan president Uhuru Kenyatta and his deputy William Ruto was refused. All these subsequent events between the AU and the ICC, convinced African leaders to replace the ICC with a court of their own creation. Therefore, in the quest to address the violation of international law and serious crime in 2014 in Malabo, the AU adopted a protocol that extends jurisdiction of the African Court of Justice and Human Rights.[165]

However, the establishment of such a proposed court is not without its problems. It has been argued that the reason for establishing the African Court on Human and People's Rights has nothing to do with the Al-Bashir conflict, but in fact pre-dates the African Union-ICC conflict. Initially, the idea to establish the court was initiated by legal experts before any disputes arose , back in 2006, in the case of *Hissene Habre*.[166] A committee of African jurists were mandated to examine the options that would be available for a trial as well as provide concrete recommendations on how such issues can be dealt with in the future. Therefore, it is argued that one of the recommendations made was to grant the African court the jurisdiction to prosecute criminal cases and for the African union to lead the process involved in establishing such court.[167]

The second reason advanced for the proposed establishment of the African Court of Justice had to do with the principle of universal jurisdiction and the warrant of arrest for Al-Bashir. In fact, it was argued that the indictment of a African high-ranking official by a European court was seen by the African Union as an abuse of the principle of universal jurisdiction. As a result, the AU adopted a decision requesting the commission, in consultation with the African Commission on Human and People's Rights and the African Court on Human and People's Rights to examine the implication of extending its criminal jurisdiction.[168]

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[164] Ibid.
[165] Ibid.
[166] 'Decision on the *Hisshne Habre* Case and the African Union' (Doc. Assembly/AU/8 (VI)) Add. 9, (Assembly/AU/Dec.103 (VI)), para 2.
[167] ZB Abebe 'The African Court with a criminal jurisdiction and the ICC: A case for overlapping jurisdiction' (2017) 25(3) *Afr J Int'l & Compar L* 418 at 420.
[168] Abebe op cit n167 at 421, African Court on Human and People's Rights 1998.

The third reason advanced for the proposed establishment of the African Court of Justice relates to Article 25(5) of the African Charter on Democracy, Elections and Governance. The Article requires "the trial of perpetrators of unconstitutional change of government before the competent court" of the Union and it is argued that the aim of giving effect to this provision, was so that the jurisdiction of the court could be expanded to include the crime along with other international crimes.[169]

> Despite all these arguments, the reason for establishing the African court seems to have gained momentum only during the time when the relationship between the African Union and the ICC soured. Furthermore, "Article 46*Abis"* of the Amendment protocol also seems to be the crux of the issue regarding the establishment of this court, or alternatively, extending the criminal jurisdiction of the court. The amendment protocol in terms of Article 46*bis* reads as follow: "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."

This provision has been criticised, not only because it supports the establishment of the proposed African court but because it also confers personal immunity and makes such immunity absolute. Furthermore, this principle of immunity in terms of this article, remains vague with regards to its beneficiaries and is open to include all state officials.[170]

e) International Criminal Court (ICC)

The last type of court, which is the central focus of the discussion of this dissertation, is the International Criminal Court (ICC) which is also an international tribunal, created for "the prosecution of persons responsible for the violation of crimes of genocide, crimes against humanity, war crimes, and crimes of aggression."[171] The Court was created in terms of the Rome Statute, the same Statute that set down the rules that govern the Court's jurisdiction over crimes committed either within the territory of a state party or by another of the state parties. Similar arguments could be made, such that heads of state and senior state officials may not

[169] 'Decision on the *Hisshne Habre* Case and the African Union' supra para. 2.
[170] Abebe op cit n167 at 421
[171] DL Rothe and VE Collins 'International Criminal Court: Pipe dreams to end impunity' (2013) 13 *Int' Crim L Rev* 191.

necessarily enjoy personal or functional immunity under this Court. These arguments will be further discussed in Chapter 3 and analysed in Chapter four.
However, for the purpose of this chapter, the following factors with regards to the Court must be noted. This statute contains an article that removes immunity accorded to state officials and in terms of Article 27(2) a country loses its sovereign immunity by signing the Rome Statute.

> "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[172]

However, this is not the case for non-state parties, to implement such restriction in terms of Article 98(1), the article requires that the official's state waive the official's immunity or covering.

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

However, the tensions between the different articles in the Rome Statute will be discussed in more detail in Chapter 3.

Conclusion

This chapter has sought to critique the interpretation of the principle of immunity in terms of customary international law. What is apparent is that immunity is granted in terms of the principle of *par in parem non habet imperium* and this has been demonstrated through case law. Officials could execute their duties without fear of prosecution. However, it would appear as if, for the purpose of universal jurisdiction, immunity can be limited to ensure that domestic courts are able to execute international prosecutions if necessary. This point was demonstrated in the *Pinochet* case, where personal immunity was still in operation, despite the fact that

[172] Article 27(2) of Rome Statute.

functional immunity was not recognised by the Court. However, this cannot be used as a precedent for all cases, since it appears as if the liability of each state official or head of state is decided on a case by case basis. In addition, the liability and procedure used for prosecution is dependent on the nature of the tribunal or court involved.

In conclusion, although states are more likely to cede immunity to ensure prosecutions, the rule of customary law remains the same and does not change the fact that sitting heads of state enjoy immunity, and this continues except when such immunity is waived by the states or the Security Council.

CHAPTER THREE

Immunity of a Head of State before the International Criminal Court

3.1 Introduction

The Rome Statute is an agreement between consenting states. However, regarding the statute, not every state is signatory to this agreement. The implication of this is that the jurisdiction of the treaty can be extended to non-member states only through a UNSC resolution. In discussing the immunity of heads of state before this international tribunal, the main focus of this chapter is on the International Criminal Court (ICC). The chapter will examine the rule of law pertaining to immunity for both non-state parties and state parties under the Rome Statute. The reason for taking this approach is that state party's obligation towards the International Criminal Court is dissimilar to that of the non-state party ordinarily. This chapter will commence by providing the rationale for the existence of the ICC and a brief overview of the Court and its structure. The possible conflicting relationship between Articles 27 and 98 in the context of a state party to the Rome Statute before domestic courts will be canvassed in light of case law developments.

3.2 Structure and Purpose of ICC

The ICC was established by means of the United Nations General Assembly Rome Statute of the International Criminal Court in July 1998. The Court was created with an aspiration to achieve justice for all, end impunity, help end conflicts, deter future war criminals and remedy the shortfalls of the *ad hoc* tribunals.[173] In the words of Kofi Annan, former Secretary-General of the United Nations, "the promise of universal justice lies in the prospect of an International Criminal Court."[174] The Court was therefore established by a means of an agreement between states in terms of Article 1 of the Rome Statute. It is a permanent institution, and it is not restricted by geographical location, as was the case previously with other courts that were established by the UNSC; the ICTY[175]and the ICTR.[176] The Court's statute has been signed by 123 countries, 33 of those countries are African states, while 19 are from Asia-Pacific. It has

[173] Anoushirvani op cit n21 at 213 -14.
[174] Anoushirvani op cit n21 at 213-14.
[175] Schabas op cit n150 at 13; The first *ad hoc* tribunal was established in Yugoslavia (ICTY) in 1993.
[176] Schabas op cit n150 at 11-12; a Council created a second *ad hoc* Tribunal, the ICTR, in November 1994.

been reported that only 18 countries from Eastern Europe are signatory to the statute, and 28 from Latin America and the Caribbean states.[177] Countries that are accountable to the Court have to agree to ratify the Rome Statute.[178] With regards to the Court's jurisdiction, it has the power to exercise jurisdiction by investigating and trying the individuals accused of serious violations of international crimes as set out in Article 5.[179] The crimes stipulated in terms of Article 5 of the Rome Statute, as confirmed by the Preamble of the Rome Statute "are affirmed as the most serious crimes of concern to the international community as a whole. Such crimes must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

The statute is divided into 13 parts, which deal with the creation of the Court and stipulate its powers, functions and duties. Articles 1-4 establish the Court, while Articles 5-21 speak to its jurisdiction, admissibility and applicable law. The general principles of criminal law set out in Articles 22-33; and the composition and administration of the Court in found in Articles 34-52. The procedural aspects of the Court's functions are set out in Articles 53-111. The investigation and prosecution process is described in Articles 53-61; the trial in Articles 62-76; penalties in Articles 77-80; and the appeal and revision procedure in Articles 81-85. International cooperation and judicial assistance regarding complaints and investigations are discussed in Articles 86-102; while enforcement of the statute's provisions is found in Articles 103-111. The Assembly of States Parties is outlined in Article 112, financing provisions in Articles 113-118; and the final clauses in Articles 119-128.[180]

This jurisdiction which the Court has is complementary to member states' national courts criminal jurisdiction. This means that the Court will only have jurisdiction over a case if the state in question is not willing to prosecute or judge the individuals.[181] The Court is an example of the profound revolution that has taken place across the international community, the purpose of which was to ensure that justice was not sacrificed at the altar of political expediency.[182]

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[177] United Nations Treaty Collections: Rome Statute of International Criminal Court. https://treaties.un.org/Pages/ViewDetails [Accessed on 26 February 2020].
[178] Art. 125 (1-2) of the Rome Statute.
[179] Schabas op cit n150 at 11-12.
[180] United Nations Treaty Collections: Rome Statute of International Criminal Court. https://treaties.un.org/Pages/ViewDetails [Accessed on 26 February 2020].
[181] AM Mangu 'The International Criminal Court, Justice, peace and the fight against impunity in Africa: An overview' (2015) 40 *Africa Devel*'t 7 at 10.
[182] P Lumumba 'The Rome Statute and Omar Al-Bashir's indictment by the International Criminal Court' (2009) 39(2) *Africa Insight* 91, available at https://doi.org/10.4314/ai.v39i2.51006.

However, despite the Court's position and jurisdiction over disputes, it has no police force; and because of this, it is at times referred to as "a giant without limbs."[183]

Further, since the establishment of the ICC, it is debatable whether immunity of heads of state and senior state officials before the ICC and domestic tribunals continues to exist.[184] Thus for the purpose of personal immunity, obtaining the cooperation of all the state parties will be challenging, since the immunity accorded under the principle of customary international law remains. This is because not every state is a member to this treaty. Therefore, their obligations towards the ICC will differ. However, non-member states can be subjected to the jurisdiction of the Court, in terms of Article 13 of the Rome Statute. This is because ICC can create obligations for non-state parties such as Sudan if it is brought before the ICC by way of a Security Council referral.

It is therefore necessary to examine the tension that exists between Articles 27 and 98 of the Rome Statute to determine whether a head of state enjoys immunity before both the ICC and domestic courts. The remaining sections of this chapter will be grouped into two parts addressing this debate. The first part of the chapter discusses the immunity of a head of state before the international court and the second part focuses on the immunity of a head of state before the domestic courts.

3.3 State Party Immunity before International Tribunal (ICC)

At first glance, it would appear that Article 27(1) of the Rome Statute addresses the question of whether immunity is applicable to heads of state in both domestic and international law contexts. Article 27(1) states that:

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

[183] D Tladi 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 34(1) *SAYIL* 57 at 58-59.
[184] Rothe and Collins op cit n171 at 191.

In addition, Article 27(2) of the Rome Statute goes beyond this and targets personal immunity, thereby subjecting to the jurisdiction of the ICC, sitting heads of state and government and other state officials who would otherwise be protected from prosecution by personal immunity. Article 27(2) reads as follows:

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

Therefore, in terms of Article 27, the immunity enjoyed by the heads of state of member states to the Rome Statute will no longer prevent prosecution before the ICC. Based on this rule, removing the immunity accorded to state party officials by another state to assist the ICC will be possible. However, as stated in the beginning of this section, it has been observed that the power in Article 27 to remove immunity of a head of state before an international criminal court, is only based on one section of article 27.

It should also be noted that unlike customary international law, where distinction was made for both domestic and international tribunals, the ICC bars both personal and functional immunity of state officials at both the domestic and international tribunal. Therefore, the Court cannot impose such obligations on a state without obtaining proper consent.
In terms of the Vienna Convention on the Law of Treaties, obtaining the consent of a state is crucial for the creation of obligations or rights. Further, as already established in the introduction of this chapter, the Rome Statute is a treaty, and thus this same rule will apply.
Therefore, for Article 27 to apply it must operate within the laws of treaties. This also explains why consent was one of "the most delicate topics" during the establishment of the Court and why the Court's jurisdiction is restrained or defined in terms of the following: subject matter (*ratione materia*), time (*ratione tempris*), space (*ratione loci*) and individuals (*ratione personae*), and through a referral by the Security Council, and anything outside of this will be a violation of law.[185] Therefore, in the next section the jurisdiction of the International Criminal Court and its statute over non-state parties is examined.

[185] L Timbreza (2006-2007). 'Captain Bridgeport and the maze of ICC jurisdiction' (2006-7) 10 *Gonzaga J Int'l L* 348-368.

3.4 Non-State Party Immunity before the International Tribunal (ICC)

Where a state is not a member to the Rome Statute, it is unclear whether the provisions of Article 27 of the Rome Statute can become binding on that state. However, the Rome Statute created an exception to this rule and there are instances whereby Article 27 can extend jurisdiction to non-state parties regardless of treaties or consent given.[186] In essence, this means that the Rome Statute jurisdiction will apply to any states and individuals, regardless of their own state's policy, judicial institutions, or fundamental laws, and without its consent.[187]This exception can take the form of a Security Council referral.

The Security Council's primary responsibility and duty as the executive body of the United Nations is to ensure the existence of international peace and security.[188] Furthermore, Article 28 of the Rome Statute stipulates the power that the Security Council has to take decisions that are binding on all member states.[189] Article 13 of the Rome Statute gives the Court jurisdiction with regards to crimes listed in Article 5 of the statute.[190]

Therefore, this is a legal means for positive political intervention, and the Rome Statute allows the Security Council to influence the decision making of the Court to ensure world peace.[191] In terms of Article 13 of the Rome Statute, there are three trigger mechanisms for the ICC, namely state party referral, referrals by the United Nations Security Council acting under Chapter VII

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[186] Article 13.

[187] LA Casey & DB Rivkin 'The limits of legitimacy: The Rome Statute's unlawful application to non-state parties' (2003) 44 *Virg Int'l L* 63 at 72.

[188] Art. 13 of the Rome Statute.

[189] Art. 28.

[190] Art. 13. stipulates that:

> "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
> (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."

[191] Art. 13(b) states that:

> "The court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this statute if…(b) A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the security council acting under Chapter VII of the Charter of the united nations (: which stipulates that "the security council shall determine the existence of any threat to the peace breach of the peace, or act of aggression and shall make recommendations, or decide which measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security."

of the UN Charter and *proprio motu* investigation by the ICC Prosecutor. In the next paragraph the referral and its implications will be discussed.

The existence of both personal and functional immunity either under customary international law or in terms of the Rome Statute has been the subject of debate. This is because countries are expected to uphold customary international law principles. This section of the chapter therefore aims at discussing the Darfur situation, with a view to examining how the Security Council extended the jurisdiction of the ICC over a non-state party to the Rome Statute.

a) Referral of Darfur Situation by the UNSC

In 2009, an arrest warrant against Al-Bashir was issued by the Pre-trial Chamber (PTC) of the ICC after conflict erupted in Darfur that arose back in 2003. This occurred as a result of the Sudanese government, backed by militias who attacked the civilian population.[192] As a result, millions of citizens were raped, tortured and executed.[193] This caused the Secretary General of the United Nations, Kofi Annan, to establish a commission of inquiry (International Commission of Enquiry on Darfur)[194] to investigate all the allegations of violence and to determine if international crimes in terms of Article 5(a) of the Rome Statute had taken place.[195] The Commission concluded that not only did the crimes occur between 2003 and 2005, but further that the Sudanese government was unwilling or unable to investigate or prosecute the crimes committed in Darfur[196] which could be attributed to various factors such as lack of adequate infrastructure or authority.[197] As a result of the report, the Commission approached the Security Council in light of the fact that the matter constituted a threat to international peace and security, to refer the matter to the ICC for further investigation and prosecution.[198] The Security Council by applying Article 13(b) of the Rome statute of the ICC and Chapter VII of

[192] 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmed Al-Bashir' (ICC-02/05-01/09), and Pre-trial chamber I, (4 March 2009).
[193] Saxum 'The ICC versus Sudan: How does the Darfur case impact the principle of complementarity, 6 years on' (2009-10) 1 *Eyes on the ICC* 6.
[194] 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005) available at http://www.un.org/News/ dh/sudan/com_inq_darfur.pdf] [Accessed on 22 October 2018].
[195] Saxum op cit n193 at 1.
[196] Saxum op cit n193.
[197] 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' supra at 5.
[198] Saxum op cit n193 at 1.

the United Nation Charter, adopted Resolution 1593,[199] thereby making it the first case to be referred by it to the ICC.[200]

A referral as already indicated earlier on this chapter is one of the ways in which the Rome statute and the Court can exercise its jurisdiction over a state party without violating the law of treaties as stipulated in Article 34 of the Vienna Convention on the law of treaties. However, despite the provision and such referral being made, the warrant of arrest for the former president of Sudan was pending and is still pending.[201]

One of the arguments and explanation for the failure to execute his arrest and commence trial despite the referral by the Security Council was that the Security Council was a political body, and half of it permanent members (three out of the five members) are not even signatories to the statute. Thus, the argument is that such referral was more political in nature and it questions the legitimacy and the integrity of the Court.[202]

Although the Court is an independent institution, due to the structure and nature of the Security Council, there is a likelihood of its being influenced with regards to certain decision. In addition, the Court gets its support from the Security Council and there is a likelihood that the Council can use such support as a bargaining chip should the ICC refuse to a referral made by them for their own or some of the permanent members' political ties or their political interests.[203]

b) Al-Bashir Warrant of Arrest Issued by Pre-Trial Chambers

On 14 July 2008, the prosecution filed an application and the Pre-trial Chamber issued a warrant of arrest for Al-Bashir. In terms of Article 25(3)(a) of the Statute, the Pre-trial chamber noted that Al-Bashir played a significant role in indirectly committing war crimes and crimes against humanity. This could be attributed to the fact that he was in charge of Sudan's security institutions such as the National Intelligence and Security Service, which also included militia groups, "the Janjaweed Militia."[204]

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[199] M Ssenyonjo 'The International Criminal Court and the Warrant of Arrest for Sudan's President Al-Bashir: A crucial step towards challenging impunity or a political decision?*'* (2009) 78 *Nordic J Int'l L* 397.

[200] Ssenyonjo op cit n199 at 397.

[201] United Nations Convention on the Law of Treaties 1969.

[202] B Aregawi 'The politicisation of the International Criminal Court by the United Nations Security Council referrals' (2017) 2 *Conflict Trends* 27-32.

[203] Ibid.

[204] Ibid; 'Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir',(ICC-ICC-02/05-01/09-95) (12 July 2010).

In March 2009, an arrest warrant was issued against Al-Bashir, charging him with two counts of war crimes and five counts of crimes against humanity. The warrant issued against Al-Bashir was noteworthy since it was the first to be issued against an incumbent president.[205] A second application was filed for a second warrant of arrest to be issued for the crime of genocide.[206] The chamber was again satisfied that Al-Bashir was an indirect co-perpetrator in this crime.[207]

A number of reasons are proffered for the investigation including international peace and security which triggered the SC jurisdiction in terms of Article 13(b).[208] Since peace and reconciliation was a priority in war torn Sudan, it was necessary to foster conditions to create such peace and also ensure that members of government did not receive preferential treatment.[209] In addition, since the Security Council gave its support for the prosecution by issuing the resolution, the state would have to comply.[210] It could also be argued that since the ICC is well-established, in terms of its rules and procedures,[211] the trial would be fair.[212] Last and most importantly, the ICC would bring justice by immediately prosecuting the accused.[213] In light of the arrest warrants being issued, it is now necessary to consider Sudan's position in relation to the extension of the ICC's jurisdiction over Al-Bashir.

c) Sudan's Position on Al-Bashir's Immunity.

In considering the position of Sudan, the ICC's legal framework is not explicit on how the Court should act when the Security Council refers a situation of a non-party to the Prosecutor under Article 13(b). It appears as if the Security Council's referral means that the Rome Statute applies in its entirety as stipulated in terms of Article 1 of the Rome Statute.[214] In other words, Sudan is now viewed as a state party to the Rome Statute. The reason this could be problematic is that there is a difference from a legal perspective, between state parties and non-state parties to the Rome Statute. Further, a referral merely extends the Court's jurisdiction, it does not change the nature of a non-state party. Further, any obligation that arises for Sudan merely requires that Sudan fully cooperates in terms of the UN charter referral to arrest Al-Bashir. It

[205] Ibid.
[206] 'Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir' op cit n.
[207] Art. 25(3)(a), 'Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir'supra.
[208] 'Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir' supra para 648.
[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.
[214] Article 1: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."

creates similar obligations to that for a state party. It does not make it a state party. Therefore, Article 27(2) which completely removes the immunities of state parties, does not remove the immunity of non-state parties and therefore is not applicable to non-state parties. This was the position not only in Sudan but also in the cases of Malawi and the DRC, where the states could have executed arrest warrants, but Sudan refused to waive Al-Bashir's immunity. This meant that the Court is bound by its own statute that provides for Article 98(1) which state parties can raise. Article 98(1) also provides clarity on how non-state parties are to be treated, noting that:

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

The conclusion that could be drawn is that the Security Council has explicitly waived the immunity of Al-Bashir. This position raises some important considerations. Since Sudan not a state party, the ICC can hold Al-Bashir accountable in terms of the United Nations Charter and can compel Sudan to waive immunity. Does this now imply that Sudan is a state party and therefore any customary international law which accords heads of state immunity has been removed? This would essentially violate the principle of sovereignty. It could also be argued that since Sudan is a signatory to the Genocide Convention, immunity of the head of state has been waived. In addition, the Court's actions have left the meaning of Article 98 unclear.[215]

In conclusion, the confusion and questions surrounding the scope of head of state immunity remains. In addition, the ICC argument on immunity has not been developed or extended to fit into the traditional public international law. Therefore, it needs to properly define the relationship between the immunity of a head of state and the ICC as well as whether immunity applies before prosecutions in foreign domestic states. It should also be noted that the implication of the referral made by the Security Council[216] in the Darfur case, is different from that of the International Court Tribunal of Yugoslavia (ICTY) and International Court Tribunal of Rwanda (ICTR). The *ad hoc* tribunal, which was the creation of the Security Council had

[215] E De Wet 'The implications of the visit of Al-Bashir to South Africa for international and domestic law' (2015) 13(5) *J Int'l Crim Jus*10-13.
[216] United Nation Security Council Resolution 1593 (2005).

broad authority to safeguard international peace and security, a power previously invoked to override immunities respectively in both the former Yugoslavia ("ICTY") and Rwanda ("ICTR").[217] Therefore, it could be argued that the referral made for the *ad hoc* tribunal was binding and placed obligations on all member states of the United Nations.[218] However, the referral made in 2005[219] is only binding on Sudan and urges member states to assist with the arrest of the wanted person.[220] On this basis then it could be said that urging states to act does not give rise to an obligation, rather it is simply a recommendation that the state party can either choose to obey or ignore.[221] This is because "the referral is explicitly an obligation on one non-party (Sudan) and not explicit obligation for other states to cooperate with the court."[222]

Further, countries that have been accused of non-cooperation, specifically African countries[223] have been required to appear before the Bureau of the Assembly of States Parties to the ICC to explain their non-cooperation in arresting and detaining al-Bashir.[224] Such an explanation is crucial in light of the fact that the ICC is heavily reliant on state cooperation in terms of Article 86 which provides that "state parties shall in accordance with provision of statute cooperate fully with the court in its investigation and prosecution of crimes within the jurisdiction of the court." This cooperation, a general treaty obligation, is applicable not only to state parties but also non-state parties.[225] The statute also requires all member states to ensure that their national laws also provide for the necessary procedures and cooperation that may be needed. Therefore,

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[217] AKA Greenawalt 'Introductory note to the International Criminal Court: Decisions pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi and 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 & African Union response' (2012) 5192) *Int'l Legal Mat* 393 at 394.

[218] MA Du Plessis *A critical appraisal of Africa's response to the world's first permanent international criminal court* LLD (University of KwaZulu-Natal) (2011) 110.

[219] The Security Council, acting under Chapter VII of the U.N. Charter and pursuant to article 13(b) of the Rome Statute, referred the situation in the Darfur region of Sudan to the ICC in 2005, thereby bringing the crimes committed in Darfur within the jurisdiction of the court, Art.13 of the Rome statute Supra (n 8).

[220] Du Plessis op cit n218 at 110-112.

[221] D Akande 'The legal nature of Security Council Referrals to the ICC and its impact on Al-Bashir's immunities' (2009) 7 *J Int' Crim Jus* 342-3.

[222] Akande op cit n221 at 343.

[223] *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*: 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court' (ICC-02/05-01/09-195) (09 April 2014); *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*: 'Decision Pursuant to Article 87(7) on the Failure of the Republic of Chad to comply with the cooperation Request issued by the Court with respect and Surrender of Omar Hassan Ahmed Al-Bashir'; *The Prosecutor v Al-Bashir*, Pre-Trial I, 13 December 2011 (ICC-02/05-01/09).

[224] R Schwartz '*South Africa Litigation Centre v Minister of Justice & Constitutional Development:* Balancing conflicting obligations-prosecuting Al-Bashir in South Africa' (2016) 24 *Tulsa J Compar & Internat L* 407; See also *Southern Africa Litigation Centre v Minister of Justice* supra 402.

[225] Ibid.

countries' reliance on conflicting obligations such as membership of the AU can no longer be regarded as an excuse. In addition, the issue of referrals such as Resolution 1593 that emanates from the Security Council referral, makes it clear that Article 25 of the UN Charter comes into play. This brings Sudan under the jurisdiction of the Rome Statute; it is expected of the member state to accept and carry out the decision of the Council.

3.5 Immunity of Head of State before Domestic Courts in Relation to Cooperation with the ICC

a) State Party Immunity before Foreign Domestic Court

In terms of Article 86 of the Rome Statute, a member state has the obligation to cooperate fully by investigating and prosecuting offences. According to this section:

> "States parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court"

Cooperation can take different forms. This can include transfer of persons, setting up of national legislation or offering of technical assistance. Furthermore, Article 88 of the *Rome Statute* creates procedures under national law that will enable state parties to cooperate with the Court in the manner provided for by Part 9 of the Rome Statute. So, while it indicates that cooperation is needed it does not indicate how it must go about doing so. For example, in terms of Article 89(1) there is a duty to surrender persons to the ICC:

> "States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender" and Article 89(3) provides that "A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered."

Therefore, while legislation must be enacted to ensure cooperation, a state is unable to rely on national legislation to avoid its responsibility. Should the person being transferred bring a challenge before the national courts of a state party on the basis of *ne bis in idem* and is the state party required to consult with the Court to determine whether an admissibility ruling has

been made?[226] However, while there are extensive sections that regulate cooperation, it should be noted that there are certain exceptions to cooperation. These include competing requests, the *ne bis in idem* principle as stated in Article 20,[227] and specifically immunity under Article 98(1) and international agreements under Article 98(2).

Article 98 also falls under Part 9 of the Rome Statute, a section that deals with cooperation of the member states. In terms of Article 98(1), the courts are prohibited from requesting cooperation in the form of surrender, especially if the request for surrender will be a violation of obligations towards another state or a violation of the rights of a representative of another state under international law. The intention of the drafters was to avoid creating conflicting obligations for state parties. The Article therefore, foresees and prohibits the Court from issuing requests that would put a state party in such a position of conflicting obligations unless waiver of immunity by the third state can be sought and obtained by the ICC.

b) Non-State Party Immunity before a Foreign Domestic Court.

As already mentioned, where non-member states have not ratified the Rome Statute, they have not renounced their official right to immunity. This is confirmed by Article 34 of the Vienna Convention which provides that a treaty obligation cannot be extended to a third state. Therefore, Article 27 of the Rome Statute remains applicable to a non-state party before an international tribunal only when there is a UNSC referral. In addition, since Article 98(1) of the Rome Statute has clearly stipulated that assistance need only be given if the requested state does not act inconsistently with its obligations under international law or where the Court can obtain a waiver of immunity by a third state. Further, Article 98(2) directly addresses the host state obligations, authority, or jurisdiction over a third state official or property. In terms of this paragraph, the sending state, that is, the third state and its officials, will remain under its own jurisdiction and not under the jurisdiction of the host state unless the sending state or third states waives the immunity accorded to its officials or the host state obtains the consent of the sending or third state.[228]

[226] L Yang 'On the principle of complementarity in the Rome Statute of the International Criminal Court' (2005) 4 *Chinese J Int'l L* 121; see Art. 17 Rome Statute.
[227] Rome Statute.
[228] MH Arsanjani 'The Rome Statute of the International Criminal Court' (1999) 93 *Amer J Internat L* 22 at 41.

There is a clear tension between Article 98(1) and 98(2) and Article 27(2). If the purpose of Article 98(1) was to prevent states from having competing obligations towards the ICC and other states, what purpose then does Article 98(2) serve? If an arrest warrant is issued to a state party in terms of Article 58 of the Rome Statute, requesting a foreign state court to arrest and surrender a non-state party official, it will be violating Article 98. Further, it is difficult to reconcile the possibility that Article 98(1) prohibits the ICC from requesting a state party to cooperate with it through arrest and surrender on the basis of its customary law obligations towards a third state. Article 27(2) grants the Court jurisdiction with regards to state officials and waives both personal and functional immunity before the international tribunal, regardless of the international rule of law in place. Therefore, immunities are irrelevant in cases before the ICC and would also then render Article 98 superfluous. While the main purpose of Article 13 of the Rome Statute is to maintain peace and security, it can be brought about by giving the Security Council power in terms of Article 28 to make decisions that are binding on all member states such as ordering arrests. But again, Article 34 of the Vienna Convention clearly stipulates that treaties cannot be extended to third parties. This leaves the position unclear. It is therefore necessary to address the question of a multilateral agreement on personal immunity which is accorded to a non-state party under customary international law. Various case law developments demonstrate the tension between Articles 27 and 98. Some of these cases will now be discussed.

3.6 The Republic of Malawi[229]

In October 2011 President Al-Bashir visited Malawi to attend the Common Market for Eastern and Southern African (COMESA) summit. During his visit, a request was made in terms of Article 86 of the Rome Statute to Malawi's embassy in Brussels by the ICC requesting the arrest and surrender of Al-Bashir within their territory.[230] The Statute also requires all member states to ensure that their national laws provide for the necessary procedures and cooperation that may be needed.

[229] *Prosecutor v Al-Bashir, Pre-Trial I,* 12 December 2011 (ICC-02/05-01/09): 'Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir'(*Malawi* case).
[230] Ibid.

Malawi did not comply with the ICC request for two reasons. First, Malawi had a duty to respect Al-Bashir's immunity in terms of the Immunities and Privileges Act of Malawi. [231] Second, as a member of the African Union Malawi had to align itself with the African Union concerning indictment.[232] It should also be noted that although Malawi ratified the Rome Statute, because it was a dualist state, international agreements entered into would not automatically form part of country's laws unless domesticated.[233]

The Court held that Malawi did not respect the Court's authority, despite the fact that Article 119(1) of the Rome Statute states that the Court has sole authority to decide issues of immunity.[234] The Court was of the view that Malawi's arguments were not persuasive since any immunity enjoyed was already rejected by the Court at the time it issued its first arrest warrant in 2009 in terms of Article 27 of the Rome Statute.[235]

The Pre-trial chamber analysed the arguments advanced by Malawi. It noted that Article 98(1) of the Rome Statute only refers to international law and because immunity of a head of state is an international proceeding, it excludes any possibility for the requested state to rely on its national law.[236] It therefore focused on the first part of the first argument advanced by the Court. The Court held that "customary international law creates an exception to the head of state immunity when an international court seeks a head of state's arrest for the commission of international crimes."[237]

Immunity was rejected in terms of the Versailles Treaty and thus following this same reasoning with regards to the Al-Bashir case, the Pre-trial chamber held that his immunity no longer existed.[238] In terms of the international rule of law, immunity of the head of state (Al-Bashir) cannot be raised to preclude prosecution before the international court.[239] The Chamber also

[231] *Malawi* case para 8.
[232] *Malawi* case para 13.
[233] Section 211 of the Constitution of Malawi 1996 provides that: "(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by or under an Act of Parliament; (2) Binding international agreements entered into before the commencement of this Constitution shall, continue to bind the Republic unless otherwise provided by an Act of Parliament; (3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic."
[234] *Malawi* case para 11.
[235] *Malawi* case para 14.
[236] *Malawi* case paras 20 and 21.
[237] *The Prosecutor v Al-Bashir*, supra para 43.
[238] *Malawi* case para 36.
[239] *Malawi* case para 36.

acknowledged the tension that existed between Articles 27 and 98 and argued that Malawi cannot prioritise not following its obligations to the Rome Statute on Article 98.[240]

The Court, after examining Articles 86, 87(7) and 89 of the Statute, came to the conclusion that the Republic of Malawi failed to meet its obligations in not bringing the issue of Al- Bashir's immunity before the Chamber for determination and failed to cooperate by arresting and surrendering him, therefore impeding the Court's ability to exercise its powers and functions under the Rome Statute.[241] The Court also went on to state that by ratifying the Rome Statute, the state had implicitly waived immunity of the head of state under Article 27(2) where Article 5 crimes are committed, thereby rendering customary international law exceptions to head of state immunity inapplicable.[242]

The case was thus decided solely on the basis of Article 27, stating that immunities cannot be raised if the state has ratified the Rome Statute, since ratification meant that the defence provided in Article 98 was included in the purview of such ratification. This conclusion was arrived at by the Pre-trial chamber without providing any explanation as to what circumstances apply to prevent the ICC from requesting a state to cooperate. The lack of proper justification begs the question as to whether the ICC is biased against African states.

3.7 The Republic of Chad in Conflict of Obligation towards the ICC

This case involved an arrest warrant issued after Al-Bashir's second visit to Chad requesting Chad to surrender him for the crime of genocide. On his first visit, the Pre-trial chamber issued a decision informing the UNSC of Al-Bashir's visit to Chad. The Pre-trial chamber also noted that on the basis of Resolution 1593 of 2005 as well as Article 87 of the Rome Statute, Chad had an obligation to cooperate. Despite the fact that both Sudan and Chad were required to take the necessary steps to ensure the arrest of Al-Bashir, instead of arresting him, the security minister indicated that Al- Bashir cannot be subjected to an arrest by a host country. As a result, he visited the country for the presidential inauguration in 2011 without incident. [243]

[240] *Malawi* case paras 37-43.
[241] *Malawi* case para 47.
[242] *Malawi* case para 43.
[243] '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) at paras 6-9. (*Chad* case).

The registrar of the ICC sent a note verbally indicating that Chad had a duty of cooperation under the Rome Statute to arrest Al-Bashir, but Chad did not respond.[244] Chad's failure to arrest and surrender Al-Bashir was once again condemned by the Pre-rial chamber and the matter was referred to the UNSC and the Assembly of States Parties.[245] Instead, Chad used Article 98 as a defence which was rejected by the Pre-trial chamber.[246]

Chad once again failed it obligation towards the ICC in 2013 during a further visit by Al-Bashir. This time the country did not provide any reason for its failure to arrest him. Chad was again reprimanded[247] by the ICC. Two more visits occurred after this incident and no arrest or surrender was made to the ICC. What is interesting about this case is that when the AU told countries not to cooperate, Chad did raise an objection in relation to a particular paragraph:

> "…decides that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al-Bashir of the Sudan."[248]

Although Chad initially did not cooperate, it eventually explained to the ICC why it did not cooperate. This was based on the common position adopted by the African Union, therefore politically motivated in respect of the international warrant of arrest issued by the Prosecutor against Al-Bashir.[249]

Instead of developing or resolving the conflict pertaining to the issue of immunity relating to Articles 27 and 98, the Pre-trial chamber,[250] applied the reasoning adopted in the Malawi Court.[251] The Court chose to emphasise the obligation which Chad had to abide by the ICC cooperation request and arrest President Al-Bashir.[252] This same pattern was demonstrated in the DRC and South Africa cases. Thus, it appears as if the approach adopted by the Court rendered the meaning of Article 98(1) superfluous.

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[244] *Chad* case para 9.
[245] *Chad* case para 14.
[246] *Chad* case para 10.
[247] Ibid.
[248] *Chad* case para 8.
[249] *Chad* case.
[250] *Chad* case para 12.
[251] *Chad* case para 13.
[252] *Chad* case paras 12-14.

3.8 The Democratic Republic of Congo[253] *in Conflict of Obligation towards the ICC*

In 2014, the Chamber was notified of the possibility of Al-Bashir travelling to the DRC for the Common Market for Eastern and Southern Africa (COMESA) summit in Kinshasa. The Chamber requested the DRC to take the necessary steps to ensure that the two arrest warrants issued against Al-Bashir were executed, in line with its obligations in terms of the Rome Statute.[254] However, the DRC failed in its obligations in terms of Articles 86 and 89 of the Security Council resolution[255] stating that due to the delay in notifying attendees at the summit made it difficult to determine the legal implications of diplomatic immunity.[256]

The Pre-trial chamber did not accept the court's reasoning since the DRC was a signatory state and expected the DRC to execute the arrest warrant issued against Al-Bashir.[257] This was because the DRC had known for years that they were under this obligation. In addition, given the nature of the situation, the DRC should have notified the Court of the situation.[258] Although the Court acknowledged that heads of state are entitled to immunity, Article 27(2) effectively removes this customary law immunity before the ICC.[259] Therefore, the DRC's failing to cooperate had rendered the Security Council decision useless.[260]

The Pre-trial II chamber also noted that since Sudan is not a party to the Rome Statute its obligation towards the statute will be in terms of the UN Charter and the Security Council Resolution 1593.[261] This stance is questionable in light of the fact that states should have a choice as to whether to enter into treaty obligations as well as violating the principle of *parem non habet imperium.* This principle is one of the pillars of the United Nations and sovereign

[253] '*The Prosecutor V. Omar Hassan Ahmad Al-Bashir:* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court' (9 April 2014) (ICC-02/05-01/09) para 5. (*DRC* case).

[254] *DRC* case para 5.

[255] See note 10. This resolution is meant to remove any impediment to the proceedings and article 103 of the UN Charter does answer the issue of obligations. (Article 103 notes that "in the event of a conflict of obligation between member of the United Nations under the present charter and their obligations under any other international agreement, their obligations under present charter shall prevail.")

[256] *DRC* case paras 11-14, 32, and 34.

[257] *DRC* case para 34.

[258] Ibid.

[259] N Dyani-Mhango 'South Africa's dilemma: Immunity laws, international obligations, and the visit by Sudan's President Omar Al-Bashir' (2017) 26 *Wash Int'l L J* 535 at 553. See Also *DRC* case para 25.

[260] *DRC* case at para 33.

[261] Dyani-Mhango op cit n259 at 552, See Also *DRC* case para 24.

equality.[262] Thus, by looking at the language used in the referral, it is clear that the United Nations did not bind all states but Sudan.[263]

3.9 SALC: South Africa in Conflict of Obligations towards the ICC

In *South African Litigation Centre v the Minister of Justice and Development*[264] the court dealt with the failure of the South African government to arrest and surrender President Al-Bashir to the ICC during his visit to the 25th African Union Summit in Johannesburg, in pursuance of its obligations to arrest and surrender him.[265] As a result of the government's failure to act, the South African Litigation Centre (SALC) instituted legal action against the Minister of Justice in the Gauteng High Court requesting an interim order preventing Al-Bashir from leaving the country. The order further compelled the government to arrest the Sudanese president and surrender him to the ICC. However, at the time that the verdict was delivered, Al- Bashir had already left the country.[266] The South African Litigation Centre then applied to the high court regarding the government's failure to act. The high court was of the view that the South African government's obligations in terms of the Rome Statute, was that Al-Bashir's immunity was not excluded and therefore could be arrested and subject to the court's jurisdiction.[267]

In addition, the court made reference to Security Council Resolution 1593, which implicitly waived immunity of the President.[268] The court also canvassed the contents of the Host State Agreement.[269] In this respect, it noted that the agreement itself does not confer immunity on member states or their representatives but rather to delegates of intergovernmental organisations.[270] The high court was of the view that any justification given by the South African government to explain failure to obey the court order of 14 June 2015, was a failure to meet its obligations in terms of the Rome Statute. [271] Therefore, immunity had been waived.[272]

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[262] Dyani-Mhango op cit n259 at 557.
[263] Dyani-Mhango op cit n259 at 559.
[264] *Minister of Justice and Constitutional Development v Southern African Litigation* (867/15) [2016] ZASCA 17 and *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* (27740/2015) [2015] ZAGPPHC 402.
[265] Dyani-Mhango op cit n259 at 561.
[266] *Southern Africa Litigation Center* supra paras 25.
[267] *Southern Africa Litigation Center* supra paras 25- 33.
[268] *Southern African Litigation Center* supra paras 28 and 29.
[269] 'General Convention on the Privileges and Immunities of the Organization of African Unity' (OAU Convention) art VIII (2010).
[270] *Southern African Litigation Center* supra para 29.
[271] *Southern African Litigation Center* supra para 25- 33.
[272] *Southern African Litigation Center* supra.

On appeal to the Supreme Court of Appeal (SCA), the following arguments were raised and addressed. First, immunity granted to the head of state in terms of Section 4(1)(*a*) of the Diplomatic Immunities and Privileges Act (DIPA) 37 of 2001 is irrelevant in relation to the immunity of the ICC. Rather, it was only concerned with section 10(9) which deals with the surrender of a person properly arrested pursuant to an ICC warrant.[273] Such a person (whose acts falls under the crime in terms of Article 5 of the Rome Statute) is precluded from raising immunity as a defence to surrender.[274] Regarding the issue of the content of the Host Agreement, which formed the primary agreement at the high court, the SCA concluded that the definition of an organisation in terms of Section 1 of the *DIPA* did not apply to member states but to inter-governmental organisations.[275]

Therefore, in conclusion, the SCA granted the application for leave to appeal. It held that the conduct by the government, when it failed to arrest and surrender Al-Bashir during his visit for the AU meeting, was inconsistent with South Africa's obligations in terms of the Rome Statute and Section 10 of the Implementation of the Rome Statute of the ICC Act 27 of 2002 and therefore was unlawful.[276]

3.10 Prosecutor v Omar Hassan Ahmad Al-Bashir (Jordan)

In the case of *Prosecutor v Omar Hassan Ahmad Al-Bashir*, dealt with non-compliance by Jordan regarding a request to arrest and surrender Al-Bashir. The appeal chamber, in following the reasoning of the Malawi case, dismissed head of state immunity, arguing that there is neither state practice nor an impelled sense of such a practice as law, which would support the existence of head of state immunity under customary international law, in relation to an international criminal court in the exercise of its proper jurisdiction. On this basis, customary international law could not serve as a basis failing in its obligations.[277]

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[273] *Southern African Litigation Center* supra para 44.
[274] *Southern African Litigation Center* supra paras 43-45.
[275] *Southern African Litigation Center* paras 41-43.
[276] *Southern African Litigation Center* para 113; see also A Mukuditi, 'Judicial integrity and independence: The South African Omar Al-Bashir Matter' available at https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Mudukuti.pdf 21.
[277] '*Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal' (6 May, 2019) (No. ICC-02/05-01/09 OA2) para 39. (*Jordan* case).

In relation to the above discussion, the following points are salient. The arguments raised by the courts in the cases of Chad and Malawi seems to attest to the fact that many African states have viewed Article 98(1) as redundant in light of their obligations towards the AU not to cooperate. In addition, whether states cooperate or at least are able to enforce their obligations, is dependent upon domesticating legislation such as in the Malawi case. Matters are further exacerbated by the political relations between states, especially in the case of Sudan and Chad which was advanced as one of the central reasons for failure to cooperate. In the *SALC* case, the chambers adopted a different reason and according to the Chambers the referral by the United Nation Security Council, placed Sudan in similar position as a state party to the ICC. The predominant view of the ICC over the span of the decided cases seems to be that heads of state have no immunity before the international tribunal in terms of Article 27(1) and Article 27(2) and the same rules apply to every foreign domestic court that failed its obligation to arrest and surrender Al-Bashir. However, the manner in which the chambers arrived at this conclusion has not always been well grounded. In light of the tension between Articles 27 and 98 because of the duty of African states to the AU, it is now necessary to consider what impact this relationship has on states obligations in terms of the ICC.

3.11 The Relationship between the AU and the ICC

Most African states seem to have an issue with the ICC, including the African Union. Thus, if immunity were to be excluded, the question then is whether Article 98 (1) may be relied upon by states to refuse cooperation. This point is salient in light of the fact that Africa is the biggest bloc of state parties to the Rome Statute.[278] Furthermore, all of the active cases that the ICC is prosecuting are in Africa and these cases are relatively uncontroversial—they certainly did not appear to trouble the African state parties.[279] However, this changed with the referrals of the Sudan-Darfur crisis to the UNSC and once the arrest warrant against Al-Bashir was issued, the hostility grew among many African states. Most African leaders have criticised the ICC's constant targeting of the African countries as primary sources of prosecutions. These actions have undermined African sovereignty.[280] This coupled with the fact that half of the African

[278] M Swart & K Krisch 'Irreconcilable differences? An analysis of the standoff between the African Union and the International Criminal Court' (2014) 1 *Afr J Int'l Crim Jus* 38 at 40.
[279] K Mills 'Bashir is dividing us: Africa and the International Criminal Court' (2012) 34 *Hum Rts Q* 40.
[280] SJ Tilden 'Africa's conflict with the International Criminal Court: The African Court of Justice and Human and Peoples' Right as an alternative to the ICC'" (2018) 27 *Tulane J Int'l &Comp L* 201.

states are not signatories to the Rome Statute as well as the fact that the ICC lacks jurisdiction to undertake investigations and prosecutions is problematic.

Various decisions have collectively sought to regulate the relationship between African state parties to the Rome statute and the ICC. What is apparent is that the African Union urges its member states to refuse cooperation with the ICC by not arresting and surrendering President Al-Bashir to the court. There are various reasons for this which will only briefly be discussed as this falls outside the scope of this discussion.

The first reason given was that trying Al-Bashir and demanding his arrest has jeopardised the peace and reconciliation process in Sudan and the continent at large. Furthermore, it also led to the failure to uphold the ICC obligations by most members of the Rome Statute.[281] Second, the African Union, believes that head of states, particularly those of non-state parties to the Rome Statute, should be immune from prosecution. However, the ICC prosecutor seems to disagree with such a view. According to the prosecutor, the Darfur situation was categorised as "ongoing genocide" and Al-Bashir was said to be the mastermind behind such crime, including crimes against humanity, and war crimes. Therefore, the Court had jurisdiction over Sudan through Security Council Resolution 1593 of March 2005. The Sudanese government has seemed reluctant and consistently refused to investigate allegations of such crimes committed by its high-ranking officials.[282] The third reason as to why the AU has urged its members not to cooperate with the ICC, is because the African union as an organisation has constantly sought deferral of the case against Al-Bashir in terms of Article 16 of the Rome Statute. The AU Peace and Security Council, in an emergency meeting, expressed concern over Southern Sudan splitting if the peace process were interrupted by ICC action against Al-Bashir. Furthermore, the Nigerian Minister of Foreign Affairs, Ojo Maduekwe, predicted that if Al-Bashir were to be arrested, the whole country could turn into 'one huge graveyard'. Despite these concerns, the UNSC has not responded to these concerns and most of these predictions have materialised.[283] Instead of seeing Africa as a place where national reconciliation, political settlement of crisis and the consolidation of peace in Sudan can be achieve and promoted, it has fuelled the tension between the ICC and African states.

[281] R Pati 'The ICC and the case of Sudan's Omar Al-Bashir: Is plea-bargaining a valid option' (2009) 15 *U C Davis J Int'l L & Pol'y* 265.
[282] Pati op cit 267.
[283] Pati op cit n 268.

Furthermore, by virtue of their African Union membership, most African states have an obligation in terms of Article 23 to comply with policies of African Union. Article 23 compels member states to comply with the policies of the AU:

> "...any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly."[284]

This has complicated the relationship between the ICC and the African union, as the same African Union members are also members of the ICC. Therefore, such provision will result in non-cooperation with the ICC. On the other hand, there is another source of duty to cooperate with the ICC in the form of the UNSC Resolution 1593 which is binding on all UN member states. Despite this resolution, the AU continues to rely on Article 98 to urge its members to refuse to cooperate despite the ICC decision that the Article cannot be relied on in this manner.

In addition to the role of the African Union, the African Court of Justice influenced various Rome Statute state parties from the African continent to submit applications for withdrawal of its membership. Further, it has pushed the idea of establishing an African court with jurisdiction over international crime.[285]

Conclusion

The International Criminal Court as discussed within the chapter was established for the purpose of fighting crime and promoting peace within the international community. However, in its attempt to achieve its purpose and function the court did encounter various difficulties and one of such was with regards to personal immunity.

Personal immunity has been problematic and hence the subject of much debate. There are conflicting views as to whether it still exists in international law. While arguments have been advanced in Chapter 2 suggesting that personal immunity still exists, Chapter 3 demonstrates that the ICC has seemingly renounced personal immunity for crimes committed under international law. This is demonstrated by the fact that the ICC lacks its own enforcement mechanisms and relies heavily on its member states and their cooperation in the executing of

[284] Article 23 of Constitutive Act of the African Union (2000).
[285] Swart & Krisch. op cit n279 at 43.

arrest warrants. In addition, Article 27(2) suggests that immunity is no longer in operation. However, the question of immunity is still exacerbated by the conflict that exists between Articles 27 and 98 of the Rome Statute, most notably Article 98 citing a 'dilemma between two conflicting obligations' of state parties as a reason. In addition, the extension of the Court's jurisdiction to non-state parties, such as that of Sudan and its former President Omar Al-Bashir, has led to the reluctance of state parties to the Rome Statue to execute the arrest and surrender. The referral by the Security Council could have facilitated the process and enabled the arrest. However, the integrity of the Court by most state parties, including the African Union was questioned. As a regional organisation the institution facilitated and encouraged state parties into boycotting the Court, thus, highlighting the delicate nature of the Court's jurisdiction.

Furthermore, the two articles within the statute that create two opposing obligations, also seem to be a contributing factor. If the drafters of the Rome Statute could draft two conflicting Articles, i.e. 27 and 98, is it also not possible that the interpretation of personal immunity before the international tribunal and a foreign domestic court was drafted with such intention in mind? It is now necessary to consider the tensions between these two Articles with a view to clarifying the legal position.

CHAPTER FOUR

Potential Conflicts of Various Rules at both the Domestic and International Levels

4.1 Introduction

The Rome Statute is a treaty and in terms of the interpretation provisions relating to immunity, it could be argued that it only binds state parties, that is, those parties who are signatories to it. Therefore, non-state parties such as Sudan, cannot be subject to the jurisdiction of the International Criminal Court except when certain proceedings are followed. This however, is problematic in light of the overall mandate of the Rome Statute with regards to immunity, which is set out in Article 27, which aim is to end impunity for heads of state who are accused of committing serious crimes as set out in Article 5.[286] It is also problematic in light of the manner in which the courts arrived at their conclusion that a sitting head of state could forfeit immunity. It is these decisions, to which we now turn to discuss this potential conflict, with a view to resolving this conflict.

4.2 No Tension between Article 27 And 98 of the Rome Statute

Whether Article 27 of the Rome Statute removes immunity, has significant consequences for interstate relations. This is because heads of state and other state officials are entitled to both functional and personal immunity,[287] the latter being the focus of this dissertation. This position is compounded by the fact that many countries, such as South Africa, although members of the Rome Statute of the International Criminal Court, have other conflicting obligations by which they are bound, thereby making arrests and surrender of an indicted head of state difficult. For example, many African states are also members of the African Union or other treaties.[288] Some

[286] Tladi op cit n18 at 307.
[287] Needham op cit n8 at 219.
[288] *Malawi* case supra para 8.

of these conflicting obligations have been analysed in the cases of *Malawi* (2011),[289] *Chad* (2011 and 2013),[290] the *Democratic Republic of Congo* (2014), and *South Africa* (2015).[291]

What is clear is that the purpose of Article 27 has been to remove immunities not only at national but also international level for state and non-state parties alike. This renders the purpose of Article 98(1) unclear because in cases where states were asked to cooperate with requests for arrest and surrender of heads of state, such as in the case of Al-Bashir, they could simply refuse on the basis of their customary law obligations, as well as the right to immunity. By including Article 98(1), the intention of the drafters, it could be argued, was to avoid creating conflicting obligations for state parties. The Article, therefore, foresees and prohibits the Court from issuing requests that would put a state party in such a position of conflicting obligations unless waiver of immunity by the third state can be sought and obtained by the ICC. In addition, Article 98(2) directly addresses the host state's obligations, authority, or jurisdiction over a third state official or property. In terms of this Article, the sending state, that is, the third state and its officials, will remain under its own jurisdiction and not under the jurisdiction of the host state unless the sending state or third state waives the immunity accorded to its officials or the host state obtains the consent of the sending or third state.[292]

This Article is problematic, since it could not have been the intention of the drafters of the *Rome Statute*. As was noted in the *Malawi* case, "to interpret article 98(1) in such a way so as to justify not surrendering Omar Al-Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified."[293] Further, the lack of clarity surrounding the meaning of Article 27 was further compounded by the findings in *Malawi* and *Chad*, where the courts did not even address the conflict between Articles 27 and 98 but simply focused on Article 98, arguing that the state cannot rely on Article 98 to justify its failure to comply with the arrest and cooperation request. Although the reason Malawi failed in its obligation towards the Court, had to do with the obligation it had in terms of national and international law, which was to grant heads of state

[289] *Malawi* case supra para 34.
[290] *Chad* case.
[291] *Jordan* case; Prosecutor v. Al-Bashir: Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir (Int'l Crim. Ct.)' (2017) 56(6) *Int'l Legal Mat* 1061.
[292] Arsanjani op cit n229 at 4.
[293] *Malawi* case para 41.

immunity.[294] In addition, since Malawi was a dualist state, although it had ratified the Rome Statute, this did not mean that such an international agreement would automatically form part of a country's laws unless domesticated,[295] which was not the case here. Therefore, as a member of the AU, Malawi had to comply with the AU's decisions, which urged it member states not to arrest and surrender Al-Bashir in terms of Article 98 of the Rome Statute.[296] In the case of *Chad,* the Pre=trial chamber,[297] instead of developing the law to address the issues around immunity, simply chose to follow the same line of reasoning applied in the *Malawi* case.[298] The main issue was the conflict between Articles 27 and 98, and this was not addressed.[299] This was also the position adopted in the *DRC* case. The Chamber did not see any conflict of obligations between Article 27(2) and 98. Instead, the chamber held that Article 98(1) was rather the solution to the conflict because it provided the Court with procedures or steps of arresting a non-state party.[300] The Chamber's argument was that Article 98(1) provided state parties with an exception that enabled cooperation and provided the Court with procedures which enabled state parties and the Court to secure cooperation of a third state (non-state party) through a waiver of the head of state personal immunity. In addition, such a procedure also prevented and protected the requested state from acting inconsistently with its international obligations towards the non-state party. The Chamber further added that since the Security Council had issued Resolution 1593(2005), such a resolution was sufficient to subject a head of state to the Court's jurisdiction.[301]

What became clear was that Malawi and the other state parties cannot use Article 98, to not follow its obligations to arrest Al-Bashir or fulfill its obligations towards the Court. As the Court noted:

> "[t]he fact that the PTC in most of the cases mentioned denied the application of Article 98 as a defence and offered little or insufficient explanation or under what

[294] *Malawi* case paras 37 & 38.
[295] Section 211 of the Constitution of Malawi 1996. See chapter 3 at.45.
[296] *Malawi* case supra para 13.
[297] *Chad* case supra para 12.
[298] *Malawi* case supra para 43, the court held that, "customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply."
[299] *Chad* case supra paras 12-14.
[300] *DRC* case supra para 25.
[301] *DRC* case supra paras 26-30.

circumstances Article 98 (1) would apply to prevent the ICC from requesting a state to cooperate, was also criticised. This is because, such dismissal from the PTC without proper justification somewhat reinforces the notion that the ICC is prejudiced against African leaders". [302]

This explains the impetus for the creation of the African Court of Justice. The conflict between Articles 27 and 98 led to a deterioration of the relationship between the African Union and the ICC and may have contributed towards the push for an extension to the jurisdiction of the African Court of Justice.[303]

To summarise, a direct reading of Article 27 indicates that state parties have waived any immunities in relation to the application of the Rome Statute. This would include the cooperation regime in Part IX[304] which was raised in the *Malawi* and other cases already discussed.[305] Further, Article 27 is therefore a waiver for the immunities provided for in Article 98. In other words, there is no conflict between Articles 27 and 98 and the sections are complementary. Article 27(2) makes it clear that immunities under national or international law 'shall not bar the Court from exercising its jurisdiction.'[306]

This was the view held by the Pre-trial chamber decision in the *Malawi* case, where the Court argued that Sudan in fact had no defence; even the customary international law defence of head of state immunity, hadin fact been rejected since World War I. [307] In addition, the Court was of the view that immunity had been removed where countries were members of to the Rome Statute.[308] This is noteworthy, because if Article 27(2) does not remove immunity before foreign domestic states, the ICC would only be able to exercise jurisdiction in exceptional cases, such as where a home state has waived immunity by voluntarily surrendering its head of state.

[302] *Malawi* case supra paras 37-43.
[303] 'Decision on the Meeting of African States Parties to Rome Statute of the International Criminal Court' op cit n163 para 5.
[304] Ibid.
[305] *Malawi* case supra para 8.
[306] EY Omorogbe 'The crisis of international criminal law in Africa: A regional regime in response?' (2019) 66 *Neth Int'l L R* 289.
[307] *Malawi* case supra paras 38-42.
[308] *Malawi* case supra paras 38-42.

In addition, it could be argued that the meaning is clearly set out when one views the Rome Statute in its entirety. In relation to Article 98, which makes use of the word 'requested state' the rest of the Rome Statute makes use of the phrase 'non-contracting state' in reference to 'non state party'. This means third party states and not the requested state. However, this would result in the heads of state who enjoyed personal immunity never being brought to trial. Further, if Article 27(2) does not remove immunity before domestic foreign courts and the ICC, then why does it specifically state that "criminal proceedings instituted before the Court cannot be prevented by the fact that the accused enjoys immunities deriving from International Law"?

Theorists such as Tladi still hold the view that Article 98 does have a role to play. He rejected the Pre-trial chamber's argument that immunity was removed during World War 1.[309] If this had been the case, then why has precedent in the form of the *Pinochet* and *Arrest Warrant* cases clearly indicate that they are entitled to immunity. In addition, why did the drafters of the Rome Statute include Article 27(1) which deals with immunity? Further, it could be argued that heads of state only enjoy immunity during their term of office and this is subsequently removed after they exit office.

4.3 Tension between Articles 27 And 98

The second view is that there is tension between Article 27 and 98. Article 27 should be widely interpreted and Article 98 narrowly interpreted in order to include non-state parties such as Sudan to ensure cooperation. This was the view held in the *SALC* case by the Pre-trial chamber that held that South Africa failed in its obligation to arrest and surrender Al-Bashir whose immunity was removed on the basis of the referral which was made by the UNSC. In addition, the Chamber pointed out that the reason why Sudan also did not enjoy immunity, was because it was a party to the Genocide Convention.[310]

Regarding referrals, it was previously stated that one of the main purposes of Security Council referrals is to "promote peace and security." Therefore, in terms of Article 28, the Security Council has the power to take decisions that are binding on all member states.[311] Since the

[309] *Malawi* case supra para 38-42, Tladi as cited in Dyani-Mhango op cit260 footnote 208.
[310] De Wet op cit n215 at10-13.
[311] J Dugard *International law: A South African perspective* 4th ed (2013) 190. Art. 28 Rome Statute.stipulates that :

resolution is issued in terms of Chapter VII of the United Nations Charter, Article 103 of the United Nations Charter, will also be applicable. Article 13(b) is thus important in relation to intra-state conflicts involving states that are not party to the Rome Statute (such as Sudan); because these states could be directly or indirectly involved in atrocities and would be beyond the reach of the ICC.[312] On this basis then, the referral placed Sudan (a non-member state) in a similar position of a state party to the Rome Statute. Accordingly Article 13(b) of the Rome Statute, is binding on all member states,[313] giving the Court jurisdiction with regards to crimes listed in Article 5 of the Statute that were committed in Darfur. By extending the ICC jurisdiction over a non-state party, it could be argued that the aim therefore is to end impunity in terms of Article 27(1) and (2) of the Statute.[314] In addition, Article 86 provides that states parties must fully cooperate with the investigation and prosecution of crimes within the jurisdiction of the court."[315] Therefore, had the South African Court in the *SALC* case, assigned a 'narrow' interpretation to Article 27(2), it would never be able to exercise jurisdiction over Sudan. Similarly, "requiring special procedural rules - outside and additional to Article 27(2), as South Africa asserted - to cooperate with the International Criminal Court with regard to persons who enjoyed official immunity would create "an insurmountable obstacle to the Court's ability to exercise its jurisdiction"[316]

"In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[312] Ibid.

[313] Art. 28 Rome Statute.

[314] S Bullock 'Prosecuting President Al-Bashir and the short arms of justice' (2013) 25 *Denning LJ* 197 at 198.

[315] Art. 86 Rome Statute.

[316] CF Swanepoel 'The *Prosecutor v Omar Hassan Ahmad Al-Bashir*, International Criminal Court, July 2017' (2018) 51 *De Jure* 173 at 178.

On the basis of the above reasoning, it could be argued that Sudan was also bound to the Statute, Article 27 included.[317] This was also the stance taken by the Pre-trial chamber II in the *DRC* case where the court held that since Sudan is not party to the Rome Statute, it's obligation towards the statute will be in terms of the UN Charter and the Security Council Resolution 1593.[318] It is also worth noting that unlike *ad hoc* tribunals such as the ICTY and ICTR,[319] which were created by the UNSC, and broad authority to ensure international peace, this would supersede any immunity enjoyed by those heads of states. This also accords with the Amnesty International view that the Security Council has accepted that the legal regime of the ICC in its entirety will be applicable to Darfur. In relation to Resolution 1593,[320] it was only applicable to Sudan.[321] In other words, member states could assist with arrest but were not compelled to do so.[322] The end result is that Article 103 trumps any reliance on any AU decisions that no sitting head of state shall be required to appear before an International Court or tribunal or any customary law provision that hinders the Court from exercising its power.[323] When the ICC has jurisdiction over a matter, the SC referral is used merely as a means through which the ICC obtains jurisdiction over a matter.[324] Therefore, the SC referral falls away and any obligation will now emanate from the Rome Statute itself. As Swanepoel notes, "the process that would ensue was always to be undertaken in terms of the Court's legal framework. Put differently, the Court was to exercise its jurisdiction, according to the provisions of its statute in its entirety"[325] It could be argued that such a view is problematic since it goes against the rules of international law, which require states to enter a treaty before such a treaty becomes binding on them.[326] It also does not give them the option to enter one, depriving them of their autonomous choice, and leading to abuse of power over weaker states.

[317] South Africa PTC II Judgement op cit n293.
[318] Dyani-Mhango op cit n260 at 552, See Also *DRC* Case supra para 24.
[319] Greenawalt op cit n217) at 394.
[320] The Security Council, acting under Chapter VII of the U.N. Charter and pursuant to article 13(b) of the Rome Statute, referred the situation in the Darfur region of Sudan to the ICC in 2005, thereby bringing the crimes committed in Darfur within the jurisdiction of the court, Art. 13 The Rome Statute..
[321] Ibid 343.
[322] Du Plessis op cit n at 110-112. The minority judgment in the PTC provided a different reasoning as to why Al-Bashir immunity cannot bar his arrest and surrender. Since Al-Bashir was charged with genocide and Sudan is also party to the Genocide convention, Al-Bashir immunity can be removed in terms of the Convention
[323] Swanepoel op cit n317 at 50; Bullock op cit n at 198.
[324] Swanepoel op cit n317 at 180.
[325] Swanepoel op cit n317 at 180.
[326] Dyani-Mhango op cit n260 553, 554.

However, at this juncture, it should be noted that there are human rights obligations which must be respected and are in accordance with customary law treaties and rules, which supportthe argument that Sudan is obliged to cooperate with the ICC.[327] For example, it has already been noted that state parties like South Africa and non-state parties such as Sudan are members of the Genocide Convention and Article VI requires suspects be tried in national or international courts. Therefore, where a country has ratified the Convention, they have an obligation to cooperate with the ICC even where they are not signatories to the Rome Statute. In doing this, states could have the ICJ determine the dispute about non-cooperation.[328] In addition, Article VI states that when an international tribunal is established, contracting parties "which shall have accepted its jurisdiction" must cooperate with it. Therefore, it calls into question the seeking of a deferral of ICC investigations in terms of Article 16, which is a provision that requires the ICC to refrain from commencing with an investigation or proceeding with a prosecution, for a period of 12 months (renewable), if the Security Council so requests in a resolution adopted under Chapter VII of the UN Charter. It also calls into question the independence of the ICC,[329] since peace efforts were only intensified in that region at the time of request for the arrest of Al-Bashir, and made nonsense of the 2010 Kampala Review Conference which held that siting head of state could jeopardise effective cooperation with the ICC.[330]

Another view suggests that the matter concerns procedural issues. There are two opposing views here. For example, just because immunity does not apply before the ICC in terms of Article 27, it does not mean that the customary international law position is affected. Although the North Gauteng High Court in the *SALC* case, attempted to emphasise this point by noting the 'serious nature of the crimes committed' and the obligation owed towards Sudan in terms of customary international law dispensed with immunity, it could be argued that case law confirms the existence of customary international law.[331] This was notable in the *Arrest Warrant* case where the Court held that it 'has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according

[327] A Ciampi 'The proceedings against President al-Bashir and the prospects of their suspension under Article 16 Rome Statute' (2008) 6 *J Int'l Crim Jus* 885 at 896.
[328] G Sluiter Using the Genocide Convention to strengthen cooperation with the ICC in the Al-Bashir case' (2010) 8(2) *J Int'l Crim Jus* 365 at 370-372.
[329] C Jalloh, D Akande & M Du Plessis 'Assessing the African Union concerns about Article 16 of the Rome Statute of the International Criminal Court' (2015) 4 *Afr J Legal Stud* 5 at 11.
[330] Ciampi op cit n328 at 887.
[331] D Tladi 'The duty on South Africa to arrest and surrender President Al-Bashir under South African and international law: A perspective from international law' (2015) 13 *JICJ* 1027-1047.

immunity from criminal jurisdiction and inviolability." In addition, the ICJ noted that immunity is "one of the fundamental principles of the international legal order".[332]

The opposite conclusion could also be reached. It could also be argued that article 98, while limiting cooperation, does not remove criminal liability. In other words, the state must cooperate, but is not compelled to extradite the accused. Essentially this will mean the state must prosecute the accused themselves. Only when the state is unwilling or unable then the principle of complementarity requires that the state extradite the accused to face prosecution before the ICC. Alternatively, it could be argued that by virtue of Article 27 and the nature of the crimes for which A1-Bashir stands accused, the obligation owed to Sudan to respect A1-Bashir's immunities no longer exists.

4.4 Reconciling Articles 27 and 98

It is necessary to consider the ways in which Articles 27 and 98 can be reconciled. One suggestion is that Article 27 be viewed as a waiver of diplomatic immunities. This means that customary law would provide an exception to functional and personal immunity, by applying to treaty-based states. Therefore, case law decisions, *opinio juris* and state practice would crystalise into a customary law. Non-state parties could be brought within the jurisdiction of the Court by claiming *jus cogens,* as these rules trump all other rules pertaining to head of state immunity. However, this view could pose implementation problems by non-aligned states.[333]

Another possible option could be that Article 98(1) is not applicable, when Article 97 and rule 195 of the Rules of Procedure and Evidence are read together with other provisions of the ICC. According to Article 97:

> "Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter Rule 195 makes clear that if a state has a problem adhering to request in terms of article 98, it needs to provide relevant information to assist the court in making a decision."

[332] Tladi op cit n333 at 1041. See *Arrest Warrant* supra para 58.
[333] C Bassiouni 'International crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law & Contemp Probs* 63.

This was the position in the Al-Bashir case, when state parties were requested to cooperate, they had already agreed to allow the Court to settle any dispute relating to judicial functions in terms of Article 119. Therefore, the Court would decide whether a request creates conflicting obligations.

For example in the cases of *Malawi*, *Chad*, *DRC* and *SALC*, the courts tried to claim customary law status to avoid arresting Al-Bashir. In *Malawi*, the Court simply indicated there was no conflict between its obligations to Sudan and to the ICC and chose not to apply Article 98. It also did not give a valid reason as to why this was so. Similarly, in the *DRC* and *SALC* cases, the Pre-trial chamber II of the ICC endorsed this customary law position. While the chamber noted that personal immunity can arise at national level, Article 27(2) applies to state parties. This claim to customary law status is problematic in light of absent state practice and also the blatant dismissal of Article 98. De Wet is of the view that the reason for the failure of the Pre-trial chamber in the *DRC* case and failure to openly criticise the decision of the Pre-trial chamber in *Malawi*'s case is because a chamber of an international criminal court and tribunal does not openly criticise a decision of a different chamber even for the appeal chamber. As this author has noted, "this reality might be unsatisfactory from an intellectual point of view but it is the reality of international adjudication".[334] What is clear is that it does not appear as if these cases provide uniform agreement as to how Article 98 should be interpreted.[335]

In the *SALC* case, two reasons were provided for conceding that Al-Bashir enjoyed immunity: both customary law and also on the basis of the Article VIII (1) of the host agreement concluded with the African Union.[336] In terms of the South Africa government, "section C and D, Article V& and VI of the agreement" did authorise them to observe head of state immunity. Second, the agreement demanded immunity, both personal and functional. Irrespective of the fact that the host Agreement did grant immunity for a head of state, South Africa as a state party to the Rome Statute cannot rely on such an agreement as a source of defence. The reason for such view is because South Africa, unlike some other countries, had implemented the statute into domestic legislation and therefore in terms of Section 4(3) of the Implementation Act of the

[334] De Wet op cit n215 at 8, 9.
[335] De Wet op cit n215 at 8, 9.
[336] Swanepoel op cit (n317) 177, see also *SALC* case para 42.

Rome Statute of the International Criminal Court, the domestic court of South Africa is provided with certain jurisdictions.[337]

The host agreement cannot override the agreement which South Africa had entered into in terms of the Rome Statute and subsequent Implementation Act. The Court's response to the customary international law argument was very clear. Not only does section 4(1)(*a*) of DIPA provide that 'a head of state enjoys the immunity that heads of state enjoy in accordance with the rules of customary law' but further section 232 clearly set out that customary international law is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament.[338] Although this contention was rejected by the North Gauteng High Court, since immunity can never be recognised for crimes of a serious international nature, it still renders the meaning of certain sections of DIPA unclear. Does section 4 of DIPA still recognise customary international law immunity for heads of state?[339] Section 6(1)(*b*) seems to suggest so. According to this section, "representatives of any state, participating in an international conference or meeting convened in the Republic enjoy **...** such privileges and immunities as **...** are specifically provided for in any agreement entered into for that purpose."[340] The above discussion suggests a clear conflict in the different pieces of legislation at domestic level.[341]

Further, in terms of section 233, it should be noted that this section requires both domestic law and international law to be in alignment. This essentially means that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." There should also be "consistency in interpretation". Therefore, the purpose of section 233 is to ensure that South Africa complies with its international obligations. South Africa's obligations are similar to that of Malawi's. For example, South Africa is also dualist in nature, thus this means that international agreements entered into must automatically form

[337] In terms of this section, South Africa would have jurisdiction over a crime committed outside its territory if;
1. That person is a South African citizen or
2. That person is not a South African Citizen but is ordinarily resident in the republic or
3. That person, after the commission of the crime, is present in the territory of the republic or that person has committed against a South African citizen or against a person who is ordinarily resident in the Republic."

[338] Section 4(1)(a) of the DIPA provides that a head of state enjoys the immunity that 'heads of state enjoy in accordance with the rules of customary international law'.

[339] Tladi op cit n333 at 1045.

[340] Tladi op cit n333 at 1046.

[341] Tladi op cit n333 at 1046.

part of the country's laws unless domesticated.[342] Article 231(4) confirms the dualist character of the national legal order in terms of treaties. Further, section 172 also allows the court to set aside unconstitutional subordinate legislation without requiring subsequent confirmation of the unconstitutionality by the Constitutional Court. Therefore, it is upon such basis that South Africa became bound to the obligations under the ICC Statute, both at international and national level. Further, there is still a duty placed on South Africa in terms of Article 86 as a member state to the Rome Statute to cooperate with the Court. The host agreement although important, was seen as subordinate to the Implementation Act and was implemented at domestic level This is further confirmed by section 10(9) of the Implementation Act which states that the "fact that a person is, inter alia, a head of state 'does not constitute a ground for refusing to issue an order' for surrender" and "thereby excluding the effects of article 98."[343]

Apart from the Implementation Act of the Rome Statute, DIPA in section 5(3) also sets the extent to which immunity in terms of customary international law can be relied upon. The state host agreement was never domesticated through a parliamentary process. Instead, immunity was implemented throughout the duration of the AU summit, along with the host state agreement, by means of subordinate legislation.[344] Further, with regards to the Security Council resolution, the argument was that such rules are not applicable to domestic rules or legal orders, and the main reason for this was because the Security Council resolutions did not stem from an act of Parliament. However, it could be argued that an exception can be made, and that the resolution be applied on an *ad hoc* basis.[345]

Such a resolution is argued to have significant persuasive power in line with section 233 of the Constitution, as well as its own Chapter VII-based character. From the above discussion, it would seem as if theorists such as De Wet are of the view that the position is not yet settled. This is because as a proper pattern has not yet emerged, and this was discussed after re-

[342] Section 211 of the Constitution of Malawi 1996 provides that:
> "(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by or under an Act of Parliament; (2) Binding international agreements entered into before the commencement of this Constitution shall, continue to bind the Republic unless otherwise provided by an Act of Parliament; (3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic."

[343] Section 10(9) of the implementation Act, discussed in Tladi op cit n333 at 1046.

[344] Section 5(3) of the DIPA permits the Minister of International Relations and Cooperation to engage in ad hoc immunity agreements and implement them by means of ministerial notice.

[345] De Wet op cit n215 at 9.

examining the Pre-trial chamber II and the domestic law decision. Therefore, in line with the Resolution 1593, the Court's interpretation should be in line with the judicial decisions and be reasonable. In the North Gauteng High Court, it was noted that the unincorporated African Union decisions, such as "the refusal to surrender sitting heads of state, would, at best, hold persuasive power in South Africa. However, whatever persuasive character such a decision may have is diminished in light of Resolution 1593".[346]

Therefore, it was required of South Africa to interpret its obligation in terms of Article 103 of the United Nations Charter. Further, the same procedure would be implemented during the interpretation of domestic law. In other words, such laws must be interpreted in accordance with the international obligations. Further, in case of a conflict of obligations, it will be required at international level for South Africa to give precedence to the implications of the Resolution in accordance with Article 103 of the United Nations Charter.

Thus in conclusion, the international obligations which South Africa has in terms of immunities contained in the OAU Convention, and which were referred to by the host state agreement, was seen as secondary legislation. Therefore, any conflict between these immunities (host agreement) and Article 10(9) of the Implementation Act necessarily means that the latter would prevail and South Africa would not be relieved of its obligation to arrest and surrender A1-Bashir on his attendance at the African Union summit.

Conclusion

The Sudan case raised many questions in relation to the principle of immunity accorded to a head of state, as well as the relationship of non-state parties to the ICC and other states. The above discussion demonstrates that the courts have not been able to arrive at an agreement with state parties on the interpretation of Article 98 and its relationship with Article 27 and the obligations that this article presents to member states to the ICC. Furthermore, customary international law head of state immunity could no longer be raised as a defence. Thus, what has become apparent is that state parties to the Rome Statute, are expected to abide by their duties to the Court, in an effort to end impunity for crimes of the most serious nature in international community. Therefore, it could be expected that countries such as Malawi, Chad,

[346] De Wet, op cit n215 at 8, 9, see *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* (27740/2015) [2015] ZAGPPHC para 28.

DRC and Jordan and South Africa had an obligation to arrest Al-Bashir and were expected to utilise any method necessary to meet their obligations. It has also been demonstrated that any obligations that state parties have, are subordinate to the precepts of the Rome Statute. This has been demonstrated in the case of South Africa, where their obligation towards the ICC has been clarified by means of various pieces of legislation, which have been implemented, such as the Implementation Act, and the Genocide Convention, signalling its commitment towards the ideals of the Rome Statute.

This leaves states parties with one other option, that of withdrawing membership to the ICC. What is apparent from the above discussion is that both state parties and non-state parties alike have now been brought within the purview of the jurisdiction of the Rome Statute of the International Criminal Court.

CHAPTER FIVE

Conclusion and Recommendations

5.1 Introduction

The primary objective of this research was to address the following: the current position in customary international law on sovereign immunity in the context of international criminal law; the circumstances under which the ICC can exercise jurisdiction over a non-state member; Security Council Resolution 1593 over Sudan, and the effect of this resolution on the sovereign immunity that Al-Bashir as a former head of state enjoyed under customary international law. Finally, the interrelationship between Articles 27(2) and 98(1) of the Rome Statute, and how Security Council Resolution 1593 resolves the apparent tension between these articles was considered.

On an analysis of the development of international law since World War II, the following conclusions can be drawn. The *Arrest Warrant* case played a critical role in developing the principles of personal immunity. The problem with this case was that its importance could be found in an *obiter* remark, poorly explained and elaborated on by the ICJ, whereby it created an implied exception, in terms of customary international law, whereby personal immunity was not available before international courts such as the ICTR, ICTY and ICC.[347] Instead of focusing on this remark, international courts chose to rely on other legal bases upon which to hold perpetrators liable.[348]

Further, the lack of clarity surrounding whether personal immunity was excluded, was compounded by a lack of state practice on the matter. However, with regards to the question of sovereign immunity and its application, it can be concluded that sovereign immunity is applicable and still applies.

Further, the statutes of various international tribunals/courts have, however, "eliminated" immunity, and therefore it is expected of member states to align their domestic law with their responsibilities towards the ICC. This has been demonstrated by confusing cases such as *Malawi*,[349] *Chad*,[350] *DRC* [351] and *SALC*.[352] The reason for this could be ascribed to the ICC

[347] See Footnote 159, 160.
[348] See Footnote 121,122.
[349] *Malawi* case supra..
[350] *Chad* case supra.
[351] *DRC* case supra.
[352] *South Africa* case supra.

commitment to ending impunity for perpetrators who have committed crimes of the most serious nature, rather than the nature of the tribunal that is prosecuting the offence. This position is demonstrated through Article 27 of the Rome Statute. While it is apparent that many African states face a difficult choice between ending impunity on the one hand and maintaining peace on the other, it is clear that any problems that the international criminal justice system faces, do not diminish the importance of holding perpetrators such as Al-Bashir responsible.[353] Further, it should be noted that in light of the fact that international criminal courts and tribunals are not judicial organs of a particular state, it cannot be argued that they exercise undue influence over the sovereign activities of states.[354]

It could be stated that since the ICC is the primary international criminal court, provisions are enforceable against state parties. In addition, the Court is dependent on the support of its member states, since it has no independent powers of arrest, no police force to enforce such arrests, or execute any warrants of arrest. It is therefore reliant on member states for such execution.[355] According to Oguno, subjecting non-state parties to ICC or domestic court's jurisdiction only where there is a waiver by state parties, is considered a 'lazy' development on the part of the drafters of the Rome Statute.[356] This is because no head of state wanted for the crime of genocide, for example, will waive his or her own immunity. In addition, it has been acknowledged that since the ICC is a treaty-based court, it cannot create obligations for non-state parties such as Sudan.[357] unless such obligations are created and the non-state party such as Sudan is brought before the ICC by way of a Security Council referral. This answers the questions with regards to the circumstances under which the ICC can exercises jurisdiction over a non-state party.

The Security Council as discussed in Chapter 3, has the power to refer a case to the jurisdiction of any court, whether domestic or that of the ICC, thereby bringing Sudan within the realm of the ICC's jurisdiction. This could be done through the delegation of the Security Council's Chapter VII power to the ICC, thereby demanding cooperation from Sudan. It could bind Sudan to the Rome Statute and Article 27(2) through a Chapter VII Resolution of the Security

[353] See footnote 26 of chapter 2.
[354] See *Charles Taylor* case, Taylor/Appeal/059/SCSL-03-01-I-059. para 1.
[355] Ibid 339.
[356] Oguno op cit n34. See footnote 293.
[357] Footnote 184.

Council. Last, it had the option of removing the immunity of Al-Bashir through direct action by the Security Council itself.[358]

The problem was that by issuing an arrest warrant against the Sudanese head of state, the ICC Pre-trial chamber did not specify how the Security Council resolution might bind Sudan to the Rome Statute and remove Al-Bashir's immunity.[359] This was Akande's argument and therefore, I am likely to agree with his view that the Security Council should have been specific with the wording used in its referrals as this would have assisted in ensuring Sudan's cooperation.[360] In addition, the role of Article 105(2) in in the United Nations General Convention on Privileges and Immunity [361] must be scrutinised. It could be argued that since immunities under this Convention emanate from the Charter, they are binding on the Security Council. In practice, this means that if President Al-Bashir travelled to any country to attend a UN General Assembly meeting, he would be immune from arrest.[362] This is clearly contradictory to the principle that no immunity be enjoyed in case of serious violations of international law.

It therefore becomes necessary to find a way to resolve the conflict that exists, for both state and non-state parties alike in terms of their obligations towards the ICC. This is particularly salient in light of the responses received by international organisations such as the AU in relation to the issuance of the arrest warrants for Al-Bashir. One of those actions was to demand that in terms of Article 16 of the Rome Statute the Security Council suspend the process which was in motion and initiated by the ICC.[363] However, there was no response forthcoming from the Security Council. Therefore, in 2009, the AU further directed its entire membership to withhold cooperation from the Court in respect of the arrest and surrender of Al-Bashir, thus adversely affecting the relationship between the AU and the ICC.[364]

[358] Art. 27 of the Rome Statute.
[359] Du Plessis op cit n218 at 110.
[359] Akande op cit n221 340-1; see also The Security Council, acting under Chapter VII of the U.N. Charter and pursuant to article13 (b) of the Rome Statute supra note 8: referred the situation in the Darfur region of Sudan to the ICC in 2005, thereby bringing the crimes committed in Darfur within the jurisdiction of the court, the Rome statute.
[360] Akande op cit n221 at 340-1.
[361] United Nations (Privileges and Immunities) Act, 1947.
[362] Akande op cit n221 at 342.
[363] Dugard op cit n312 at 565.
[364] Dugard op cit n312 at 565.

Where jurisdiction is triggered by Article 13(a) or 13(c) of the Rome Statute, the situation for a non-state party such as Sudan, would be the same as it would be before other international criminal courts such as SCSL. That is, treaty provisions that remove personal immunity can only be applied to state parties to the Rome Statute and therefore not applicable to Sudan.[365] However, this argument could be dispensed with since although Sudan is a non-state party, it is a member of the UNSC. In addition, Article 25 of the United Nations Charter provides that "all members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[366] Therefore, such resolution will take precedence over other sources of law such as customary international rules of head of state immunity. In event of any conflict, Article 103 determines that "the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, or obligations under the present Charter prevails."

By analogy it could be argued that the ICC has the same authority as that of the ICTR and ICTY since Resolutions 827[367] and Resolution 955[368] empowered it to carry out its activities under the auspices of Chapter VII of the UN Charter.[369] Therefore, since the Rome Statute and by implication Article 27(2) which deals with personal immunity is applicable, Sudan is in an analogous position as a state party to the Rome Statute. It should be noted that this section does not eliminate personal immunity under customary law but rather prevents Sudan from raising it as a procedural bar since a SC resolution has brought Sudan under its authority. If immunity did exist with regards to arrest warrants, then the purpose of the ICC would be derailed. The Rome Statute therefore trumps customary international law and therefore it could be argued this is one way of resolving the conflict that exists.[370]

In addition, the AU position in relation to the Security Council is that of a subordinate organisation and therefore must comply with the requests of the Security Council. In addition,

[365] Wardle 'The survival of head of state immunity at the International Criminal Court' (2011)18 *Australian International Law Journal* 198.

[366] R Liivoja 'The scope of the supremacy clause of the United Nations Charter' (2008) 57 *Int'l & Comp. .Q* 583 at 585-589. See also A Boyle & C Chinkin *The making of international law* (2007) 232-233 "where it could be argued that obligations in terms of treaties and customary international law run parallel to each other. It would be counterproductive to article 103 if it precluded states responsibility for failing to abide by a treaty and not by same customary international law rule."

[367] UN Security Council, Security Council Resolution 827 (1993), 25 May 1993.

[368] UN Security Council, Security Council Resolution 955 (1994), 8 November 1994.

[369] Footnote 313.

[370] See Footnote 333.

Article 4(o) of the Constitutive Act of the AU 2000 emphasises the fact that the AU must operate in a manner that is conducive with respecting human rights and rejecting impunity.[371]

In conclusion, it could be said that in light of the fact that that many African Nations have been involved in the creation of the ICC and make up the largest regional block of members, it is a clear indicator that these member states are not in fact opposed to the operation of the ICC.[372] In addition, it would follow that more cases will derive from the African continent. It is therefore essential that the ICC, SC and AU cooperate to enable the ICC to operate and carry out its duties and functions.[373] Such cooperation could take the form of ratifying the Rome Statute, or ensuring that states have domestic legislation in place to meet their obligations.

It is also suggested that the AU countries do not request an amendment of Article 16, in light of the fact that not all countries will ratify the Rome Statute. It is therefore considered necessary to ensure the effective functioning of the international criminal justice system. Further, the Security Council already plays a role in triggering the jurisdiction of the ICC where necessary. Rather, it could be suggested that Article 98 be removed from the Rome Statute and Article 27 alone would govern the position relating to Sudan. This would be in accordance with the purpose and aims of the Court: to end impunity and ensure international criminal justice by co-operating with the ICC in terms of Article 86.[374]

Therefore, to conclude, although it could be argued that personal immunity is only ceded when an official leaves office, it would go against the purpose and the aims of the International Criminal Court to end impunity. It would also detract from the serious nature of the crimes committed, if heads of state were only prosecuted when out of office. It is therefore argued that both personal and functional immunity should no longer be enjoyed by heads of state, sitting or otherwise.

[371] Constitutive Act of the African Union 2000.
[372] See Footnote 15,16.
[373] See Footnote 178.
[374] Van der Vyver 'The Al-Bashir debacle' (2015) 15 *Afr Hum Rights L J* 559 at 565.

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