

**HEAD OF STATE IMMUNITY UNDER THE ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT: AN ANALYSIS OF THE
CONTEMPORARY LEGAL ISSUES AND THE AFRICAN UNION'S
RESPONSE TO THE PROSECUTION OF AFRICAN HEADS OF STATE**

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By

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DECLARATION

I, **Phoebe Akinyi Oyugi**, declare that the work presented in this thesis is my own and has not been presented for degree or examination purposes at any other University. Where other people's works have been used, complete references have been provided.

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Abstract

This research examines the impact of head of state immunity on the relationship between Africa and the International Criminal Court (ICC). Thus, it investigates the position of heads of state immunity before international criminal tribunals with special regard to the ICC and assesses the response of African States Parties to the Rome Statute of the International Criminal Court (Rome Statute) to their cooperation obligation under article 98 (1). In addition, it seeks to ascertain the extent to which the African Union (AU) decisions impact on the decision of African States Parties to the Rome Statute to cooperate with the ICC and determine the legality of Article 46 *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Amendment Protocol). Thereafter, it appraises the possible impact of these developments on the application of the principles of international criminal justice in Africa and finally, makes recommendation on ways in which the AU-ICC relationship can be improved.

The thesis begins by discussing immunity as a rule of customary international law and the exceptions to its application with regard to international criminal law. This paves way for the analysis of the cooperation regime of the ICC and exceptions thereto with special focus on immunity under article 98 (1) of the Rome Statute. The factors arising from the AU decisions relating to cooperation with the ICC are also discussed with a view to determine their justification under international law. The thesis draws on examples from Chad, Kenya and Malawi to illustrate the manner in which African States Parties to the Rome Statute respond to their cooperation obligation and to what extent this response is affected by the AU position. Lastly, the position of article 46 A *bis* of the Amendment Protocol, which safeguards immunity based on official capacity, is analysed with a view to determine how the introduction of this new provision is likely to affect the application of international criminal law in the African continent.

Drawing on the study of the issues above, the thesis comes to the following conclusions. First, the application of immunity before a particular tribunal depends on the factors influencing its establishment and its mandate as provided for in the constitutive instrument. Secondly, states parties to the Rome Statute can rely on article 98 (1) to deny the ICC request for the arrest and surrender of President Bashir because he is the head of a non-party state. Thirdly, the AU's position does not have a direct impact on the decisions by African States Parties to the Rome

Statute on the issue of the arrest and surrender of President Bashir to the ICC. Fourthly, some of the AU grievances against the ICC have justification in international law and therefore deserve the attention of the ICC and the international community. Fifthly, article 46 A *bis* is in line with the principles of international law on immunities. Given these findings, the thesis recommends that the AU-ICC relationship should be mended in the interest of international criminal justice. And that this can be done by: strengthening the capacity of African States and Africa as a region to deal with international crime occurring in Africa; forging a deeper cooperation between the AU and the United Nations Security Council (UNSC) in ICC related matters; and by the ICC adopting a broad interpretation of its discretion during the prosecution of heads of state. This would allow the ICC to mete out justice without jeopardizing the proper functioning of the states whose heads are on trial.

Key words: Head of State Immunity, International Criminal Tribunals, ICC, African Union, African States, Articles 27 and 98 of the Rome Statute, Article 46 A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

List of Abbreviations

ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
ACHPR	African Court of Human and Peoples Rights
ACJHPR	African Court of Justice and Human and Peoples' Rights
Amendment Protocol	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights
AU	African Union
AUC	African Union Commission
ASP	Assembly of State Parties
CAR	Central African Republic
EAC	Extraordinary African Chambers
ECI	Ivorian Elections Commission
ECOWAS	Economic Community of West African States
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IDI	<i>Institut de Droit International</i>
OTP	Office of the Prosecutor
PALU	Pan African Lawyers Union
PTC	Pre-Trial Chamber
SCSL	Special Court for Sierra Leone
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

CHAPTER ONE

Introductory Chapter

1.1 Introduction

The relationship between the African Union (the AU), which enjoys membership of all the 54 African States, and the International Criminal Court (ICC)¹ is ever deteriorating. At the core of this relationship is the prosecution of African heads of state at the ICC. As will be shown in the thesis, the AU alleges that sitting heads of state, especially those of non-parties states to the Rome Statute, have immunity from prosecution before the ICC, a claim which the ICC denies. The ICC has so far indicted four sitting heads of African States: President Bashir of Sudan,² the late President Muammar Gaddafi,³ while he was the Libyan President, as well as President Uhuru Kenyatta⁴ and Deputy President William Ruto⁵ of Kenya. This situation has deeply angered the AU and prompted it to make decisions urging its members to refuse cooperation with the ICC in the arrest and surrender of President Bashir to the Court.⁶

Moreover, the AU's dissatisfaction with the ICC acted as a catalyst to the AU's move towards expanding the jurisdiction of the African Court of Justice and Human Rights (ACJHR) to deal with international crimes committed on African soil.⁷ This resulted in the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereinafter "the Amendment Protocol") by the AU Assembly in Malabo, Equatorial Guinea in June 2014. This Protocol, *inter alia*, establishes the African Court of Justice and Human and People's Rights which has an international criminal law jurisdiction and safeguards the immunity of heads of state and government as well as senior state officials. Head of state immunity and the two related actions taken by the AU: to refuse cooperation with the ICC and to expand the jurisdiction of the AJHCR, are the major focus of this thesis.

¹ Established by the Rome Statute of the International Criminal Court which was adopted in 1998 and came into force in 2002.

² *Prosecutor v Omar Al Bashir, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir*, 4 March 2009, ICC-02/05-01/09-3

³ *The Prosecutor v. Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11.

⁴ *The Prosecutor v Uhuru Muigai Kenyatta*, ICC- ICC-01/09-02/11.

⁵ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11.

⁶ See Chapter 4 of the thesis for a discussion of the same.

⁷ See Chapter 5 of the thesis for a discussion of the same.

This chapter introduces the topic of discussion by establishing the link between prosecution of African heads of state and the AU-ICC tension and lays the foundation for the discussions in the succeeding chapters. The second part of this chapter discusses briefly the issuance of the ICC arrest warrant against the Sudanese president as well as the indictment of Kenyan leaders and the AU's reaction to them. Part three deals with the problem statement and the goals of research. It outlines the main issue analyzed in this thesis which is head of state immunity before the ICC and the contemporary issues arising from the prosecution of heads of state. It also deals with the justification of the study, the research methodology and the limitations of the study. Part four briefly explains the content of every chapter; the discussions contained therein, the questions each chapter attempts to answer as well as the conclusions arrived at in the chapters.

1.2 Description and Context of the Research

The Rome Statute of the International Criminal Court (hereinafter “the Rome Statute”)⁸ ushered in a new era of criminal justice by virtue of article 27, which expressly provides that immunities, even of heads of state, do not shield them from prosecution at the ICC. The constitutive statutes of previous international tribunals provided only for individual criminal responsibility, that every person is criminally responsible for the crimes they commit irrespective of their official capacity as heads of state or government.⁹ However, the Rome Statute goes beyond that and states in article 27 (2) 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.”

This represents a significant exception to the otherwise firmly established doctrine of head of state immunity. The general rule is that a sitting head of state has both personal and functional immunity¹⁰ and is therefore not subject to any processes of a court of law.¹¹ The immunity of a

⁸ The Rome Statute of the International Criminal Court (1 July 2002) <http://www.icc-cpi.int> (accessed 13 December 2012).

⁹ See Part 4.1 of Chapter 2.

¹⁰ There are two categories of immunity under international law: functional immunity and personal immunity. Functional immunity (immunity *rationae materiae*) protects an official in the performance of his official functions but does not bar prosecution based on a charge of international crimes. On the other hand personal immunity (immunity *rationae personae*) is absolute and inviolable but expires as soon as one retires from office. See R Cryer et al *An Introduction to International Criminal Law and Procedure* 2 ed (2010) 531.

¹¹ A Watts *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers* (1994)114; Y Simbeye *Immunity and International Criminal Law* (2004) 2; D Akande “International Law Immunities and the International Criminal Court” (2004) 98 *AJIL* 407 at 409-410; B Broomhall *International Justice*

serving head of state was confirmed by the House of Lords in the *Pinochet* case.¹² In this case although the Law Lords held that Senator Pinochet, being a former head of state, was not protected by immunity under international law, they also stated that his immunity would have subsisted had he been a sitting head of state.¹³ Similarly, the International Court of Justice (hereinafter “the ICJ”) extended the immunity principle to officials of foreign states in the *Arrest Warrant* case.¹⁴ It held that a foreign minister is immune from prosecution in a foreign court for actions undertaken while acting in an official capacity and that this immunity has no exceptions even in respect of international crimes.¹⁵ From the foregoing, immunity of state officials, particularly that of heads of state, is inviolable and to date the general practice reflects the tendency of municipal courts to uphold the immunities of sitting heads of state regardless of crimes with which they are charged.¹⁶

It is for this reason that the Rome Statute is so groundbreaking in its provisions and actions. It is perhaps also for this reason that the ICC, being the first court to indict a sitting head of state, the Sudanese President in this case, has experienced obstacles in relation to the enforcement of the warrant of arrest issued against him. As is well known, the ICC has no enforcement mechanisms of its own and therefore relies entirely on states parties who have a treaty obligation to cooperate with the Court.¹⁷ However, this obligation to cooperate has an exception under article 98, which provides that the ICC may not request a state to cooperate if such cooperation would require the requested state to breach its obligations under international law with respect to state or diplomatic immunity of a third state.

and the International Criminal Court: Between Sovereignty and the Rule of Law 2 ed (2003) 129; M Shaw *International Law* 2 ed (2008) 697.

¹² *R v Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Ugarte Pinochet (Amnesty International & Others Intervening)* (No. 3) (1999) 2 All ER 97.

¹³ *Pinochet Case* (No. 3) at 112 (per Lord Wilkinson), at 119 (per Lord Goff), at 152 (per Lord Hope), at 168 (per Lord Saville), and at 171 (per Lord Millet).

¹⁴ *Case Concerning The Arrest Warrant Of 11 April 2000 (Democratic Republic of the Congo V Belgium)* 2002 3 ICJ.

¹⁵ *The Arrest Warrant Case* para 54.

¹⁶ See *Gadafi France* Court of Cassation 2001 (125) ILR 456; *Habre Senegal* Court of Cassation 2001 (125) ILR 528; *Tatchell v. Mugabe* England Bow Street Magistrates' Court 2004 (136) ILR 572. See also *Pinochet* (No. 3) at 112 (per Lord Wilkinson), at 119 (per Lord Goff), at 152 (per Lord Hope), at 168 (per Lord Saville), and at 171 (per Lord Millet) where the Law Lords held that had Pinochet been a sitting head of state, his immunity would have subsisted. See also R Cryer *An Introduction to International Criminal Law* 531-534; C Murungu *Prosecuting International Crimes in Africa* 42.

¹⁷ See Akande “International Law Immunities and the International Criminal Court” (2004) 98 *AJIL* 407 at 408.

Thus the Rome Statute, on the one hand, contains article 27 which renders immunities irrelevant in proceedings before the ICC; and on the other hand, contains article 98 which provides for immunity as an exception to cooperation with the ICC. There seems to be a conflict between articles 27 and 98 and this, as will be discussed in Chapter 3, has been the subject of debate between scholars. However, the reliance of the AU and some African States on the article 98 exception to refuse cooperation with the ICC, has brought into fore the practical challenges presented by the seeming conflict between these two articles. This therefore necessitates a discussion not only on the theoretical questions raised by the tension between the articles, but also an analysis of the practical implications of the said tension. One such implication is the failure to surrender President Bashir to the Court years after the first warrant was issued against him.

1.2.1 AU and African States Response to the ICC Indictment of African heads of state

On 31 March 2005 the United Nations Security Council¹⁸ (hereinafter “the UNSC”) passed a Resolution¹⁹ referring the Darfur Conflict²⁰ to the ICC. The ICC Prosecutor accepted the referral and launched a formal investigation into the Darfur situation. Subsequently, the Prosecutor requested the Pre-Trial Chamber to issue a warrant of arrest for President Omar Hassan al-Bashir the sitting president of Sudan.²¹ The Pre-Trial Chamber issued two warrants of arrest against him, first for two counts of war crimes and five counts of crimes against humanity²² and later on for genocide.²³ The Registrar of the ICC subsequently issued requests to all states parties to the

¹⁸ The United Nations Security Council is established under Chapter III Article 7 of the United Nations Charter as one of the organs of the UN and its primary responsibility is “the maintenance of international peace and security”. See Article 24 of the United Nations Charter.

¹⁹ Security Council Resolution 1593 of 31 March 2005, UN Doc S/RES/1593 (2005).

²⁰ About 298 271 people were estimated to have died in Darfur between the period of April 2003 to March 2008. See O Degomme and D Guha-Sapir “Patterns of Mortality Rates in Darfur Conflict” www.thelancet.com/journals/lancet/article/PIIS0140...X/abstract (accessed 11 February 2013). See also “Omar Hassan al-Bashir” the *New York Times* 23 April 2012 http://topics.nytimes.com/top/reference/timestopics/people/b/omar_hassan_al_bashir/index.html (accessed 11 February 2013).

²¹ “Prosecutor’s Application for Warrant of Arrest under Article 58 against Omar Hassan Ahmad al- Bashir” <http://www.icc-cpi.int> (accessed 11 February 2013).

²² *Prosecutor v Omar Al Bashir*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, 4 March 2009, ICC-02/05-01/09-3.

²³ *The Prosecutor V. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir of 12 July 2010, ICC-02/05-01/09.

Rome Statute asking them to comply with the warrant of arrest issued against President Bashir and to arrest and surrender him to the Court.²⁴

Most African States were displeased with the indictment of President Bashir and with the ICC's request for his arrest and surrender.²⁵ The AU reacted by issuing a communiqué requesting the UNSC to defer the case against President Bashir and when this failed it was followed by a decision to the effect that the AU member states would not comply with the Court's request to arrest and surrender President Bashir.²⁶ The AU, while supporting their decision, said *inter alia* that article 98 of the Rome Statute enabled states to refuse cooperation if the act of cooperation would be inconsistent with their obligations under international law relating to the immunity of a third state.²⁷

The reactions of AU member states have been varied as will be discussed in Chapter 4. Some African States, such as Chad and Malawi, relied on the AU decision in compliance with the Constitutive Act of the AU²⁸ to refuse cooperation with the ICC.²⁹ The ICC reacted to this by issuing reprimanding judgments against these states and referring the issue of their non-compliance to the UNSC and the Assembly of States Parties (ASP).³⁰ The Court asserted that article 98 could not be relied on to refuse compliance with the cooperation request. In relation to Malawi the Court said:

“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.”³¹

²⁴ Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir of 6 March 2009, ICC-02/05-01/09-7 and Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir of 21 July 2010, ICC-02/05-01/09-96.

²⁵ A Racota “Implications of Omar Hassan al-Bashir Indictment” www.standcanada.org/pdf/Implications_of_111008.pdf (accessed 27 February 2013).

²⁶ *Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)* para 10 UN Doc Assembly/AU/13(XIII) (3 July 2009).

²⁷ *Ibid.*

²⁸ Article 23 (2) of the African Union Constitutive Act of 2002.

²⁹ D Tladi “The ICC Decisions on Chad and Malawi on Cooperation, Immunities, and Article 98” (2013) 11 *JICJ* 199.

³⁰ See ICC-02/05-01/09-139 and ICC-02/05-01/09-140 both available at http://www.icc-cpi.int/en_menus/icc/situations_and_cases/situations/situation_icc_0205/related_cases/icc02050109/court (accessed 1 March 2013).

³¹ See ICC-02/05-01/09-139. See also “ICC Judges Dismiss Legality of African Union Decision on Bashir, Refer Malawi's Non-compliance to UNSC” *Sudan Tribune* 13 December 2011 <http://www.sudantribune.com/ICC-judges-dismiss-legality-of.40980>(accessed 8 September 2012).

On the other hand, other African States, such as Kenya, took steps towards arresting and surrendering President Bashir to the ICC. In 2010 Kenya also failed to comply with the request to arrest and surrender President Bashir and hosted him at the promulgation of the Kenyan Constitution.³² However, later on the High Court of Kenya pre-emptively issued a warrant of arrest against him.³³ He was scheduled to visit Kenya to attend the Intergovernmental Authority on Development (IGAD) meeting and so the ICC, in a bid to enforce its earlier request for cooperation, requested Kenya to give a report on any obstacle that would be likely to impede or hinder the arrest and surrender of President Bashir when he gets into the country.³⁴ As a result of the request, the Kenyan Chapter of the International Commission of Jurists³⁵ (hereinafter “the ICJ Kenya”) applied to the High Court of Kenya seeking a warrant of arrest against President Bashir in the *ICJ Kenya v AG* case. Hence a warrant of arrest was issued against President Bashir by the Kenyan High Court.

Before the AU-ICC tension arising from the *Bashir case* dissolved, in June 2011, the ICC issued a warrant of arrest against the late President Gaddafi charging him with crimes against humanity committed in Libya in February 2011. Like the situation in Darfur, the situation in Libya was referred to the ICC by the UNSC.³⁶ The AU expressed deep concern on the matter stating that the arrest warrant “seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually reinforcing way, issues relating to impunity and reconciliation.”³⁷ The AU also urged member states to refrain from executing the warrant of arrest issued by the ICC just as it had done with the warrant against President Bashir. However, the case ended prematurely because of the passing of President Muammar Gaddafi.

³² “Al-Bashir’s Presence at the Historic Event” *Daily Nation* 27 August 2010 www.nation.co.ke/News/1056/999146/-/wclnc/-/index.html (accessed 8 February 2013).

³³ *Kenya Section of the International Commission of Jurists v Attorney General & another* [2011] eKLR 2-3.

³⁴ “Arrest Bashir if He Visits Kenya – ICC” *the East African* October 2010 www.theeastafrican.co.ke/...Kenya...arrest-Bashir.../-/index.html (accessed 1 March 2012).

³⁵ The International Commission of Jurists is an international non-governmental organization, composed of judges and lawyers, that endeavors to ensure human rights protection through the rule of law. It has chapters in various countries of the world and the Kenyan Chapter is one of these. See www.ici.org/about (accessed 3 April 2013).

³⁶ Security Council Resolution 1970 (2011).

³⁷ Decision on the Implementation of the Assembly Decisions on the International Criminal Court, 30 June -1 July 2011, Assembly/AU/Dec.366(XVII) para 6.

It was the prosecution of the Kenyan leaders, as will be discussed in Chapter 4, which evinced the greatest outrage from the AU.³⁸ The ICC had commenced proceedings against both Mr. Kenyatta and Mr. Ruto in 2010 before their election as President and Deputy President respectively in March 2013.³⁹ They were both, separately, accused of bearing the greatest responsibility for the crimes against humanity committed during the Kenyan post-election violence in 2007-2008. In one of its decisions, the AU requested the ICC to refer the Kenyan cases back to Kenya for prosecution on the basis of the complementarity principle, but the ICC ruled that the cases were admissible at the ICC.⁴⁰ In March 2013, the duo was elected into office as president and deputy president of Kenya respectively.⁴¹ After their election to office, the AU became more demanding in its decisions going as far as requesting the two Kenyan leaders not to appear before the ICC until all the grievances of the AU against the ICC have been dealt with. The AU Assembly decided *inter alia* that:

“To safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office”⁴²

1.2.2 Effects of the AU-ICC tension

The AU made a lot of decisions condemning the prosecution of African heads of state at the ICC which will be discussed in Chapter 4. In short, the AU is of the view that heads of state and senior government officials, especially from states not parties to the Rome Statute, should be entitled to immunity before the ICC and other international criminal tribunals. This is in spite of article 27 of the Rome Statute, which excludes immunities based on official capacity under both national law and international law, from application before the ICC. One of the decisions taken

³⁸ “Africans urge ICC not to try heads of state” Aljazeera 12 October 2013 <http://www.aljazeera.com/news/africa/2013/10/africans-urge-icc-not-try-heads-state-201310125566632803.html> (accessed 25 August 2014)

³⁹ *The Prosecutor v Uhuru Muigai Kenyatta*, ICC- ICC-01/09-02/11, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11.

⁴⁰ Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII).

⁴¹ Kenyatta declared winner of Kenya's presidential vote” *Reuters* 9 March 2013 <http://www.reuters.com/article/2013/03/09/us-kenyan-elections-announcement-idUSBRE92717V20130309> (accessed September 2014).

⁴² Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Doc. Assembly/AU/13(XXI) para 10.

by the AU in this regard was to urge member states not to comply with the ICC request to arrest and surrender President Bashir to the ICC.

This AU decision creates a pair of conflicting obligations for African States Parties to the Rome Statute. On the one hand, these states have a treaty obligation to arrest and surrender President Bashir; and on the other hand, they have the obligation to comply with AU decisions under the AU constitutive Act. Some African States Parties to the Rome Statute continue to rely on the AU decision to avoid cooperation with the ICC therefore frustrating the ICC attempt to prosecute President Bashir. As is well known, President Bashir is yet to be arrested and surrendered to the ICC despite the fact that he has visited several African as well as non-African States.

Furthermore, it is argued in this thesis that, among other factors discussed in chapter 5, the AU dissatisfaction with the ICC prosecution of African heads of state hastened the AU's expansion of the AJCHR jurisdiction to deal with international crimes committed in Africa. Article 46 *A bis* of the Amendment Protocol safeguards the immunity of heads of state and governments as well as senior state officials based on their functions. This is contrary to article 27 of the Rome Statute which, as stated above, provides for the irrelevance of immunity. This provision, as was to be expected, has been the subject of criticism from many quarters including civil society organizations as well as some scholars.⁴³ However, it will be argued in Chapter 5 that the provision is not against international law on immunities, but should nonetheless be interpreted narrowly or repealed in the interest of international criminal justice on the continent.

1.3 Problem Statement

The main question that this thesis examines is whether the application of immunity to shield sitting heads of state and government from prosecution before international criminal tribunals is justifiable under international law on immunities; and if so under what circumstances. This question is analyzed in the context of the proceedings against sitting African heads of state at the ICC which have led to the sour AU-ICC relationship and article 46 *A bis* of the Amendment

⁴³ "AU Summit decision a backward step for international justice" Amnesty International 1 July 2014 <http://www.amnesty.org/en/news/au-summit-decision-backward-step-international-justice-2014-07-01> (Accessed 17 August 2014); "Civil Society Open Letter to Ministers of Justice and Attorneys General African Union Member States" 5 May 2014 <http://www.amnesty.org/en/library/asset/IOR53/004/2014/en/0ef6fe09-a572-4ec9-bca6-1a11b4e90025/ior530042014en.pdf> (Accessed 17 August 2014).

Protocol which safeguards immunity. The sub-questions the thesis addresses are: can article 98 (1) of the Rome Statute be used to justify the refusal of states parties to arrest and surrender President Bashir? Is article 46 A *bis* of the Amendment Protocol against international law on immunities? What is the possible impact of article 46 A *bis* of the Amendment Protocol on the exercise of international criminal justice on the African continent?

In addressing these questions, it is the goal of the present research to:

1. Examine the scope and application of the immunity of the heads of state before international criminal tribunals, especially with regard to non-parties states to the Rome Statute;
2. Ascertain the scope of the Rome Statute obligation to cooperate with the ICC and assess its relationship with states parties' obligation to respect the immunity of the heads of non-party states;
3. Analyze the factors arising from the AU's decisions not to cooperate with the ICC and assess their justification under international law;
4. Analyze African State Parties' individual response to the duty to cooperate with the ICC and assess to what extent this perception is influenced by the AU decisions on the matter;
5. Assess the legality of Article 46 A *bis* of the Amendment Protocol and its possible impact on the exercise of international criminal justice on the African continent; and
6. Recommend ways in which the deteriorating AU-ICC relationship may be improved in the interest of international criminal justice on the continent.

1.4 Justification of the Study

The importance of a discussion on heads of state immunity at the ICC lies in its contribution towards the alleviation of the tension between the AU and the ICC and the promotion of the international criminal justice project on the African continent. The prosecution of heads of state at the ICC is the major source of friction between the AU and the ICC. The AU argues that African heads of state are immune from prosecution at the ICC while article 27 of the Rome Statute provides for the irrelevance of immunity based on official capacity. Consequently, the AU has made decisions urging its member states not to cooperate with the ICC in matters relating to head of state prosecution until AU grievances have been resolved. As a result, African

States Parties to the Rome Statute are faced with a situation where they have an obligation to comply with the AU decisions which conflict with their Rome Statute obligations. This discussion investigates the legal justification of the said AU grievances; as they relate to the ICC position, with a view to clarify these conflicting obligations. Such clarity could aid African States Parties to the Rome Statute in choosing which one of the two conflicting obligations to comply with.

Further complicating the issue of cooperation with the ICC is the relationship between articles 98 and 27 of the Rome Statute. These articles seem to create a pair of conflicting obligations for states parties relating to cooperation with the ICC on the one hand and the duty to respect the immunity of third states on the other hand. The practical implication of this conflict is revealed by the reliance on article 98 by the AU and some African States to deny the ICC's request to surrender President Bashir to the Court. The result is that to this date, years after the initial warrant was issued against President Bashir, he is yet to be surrendered to the Court making it impossible for the case against him to proceed. This therefore necessitates a discussion on immunity of heads of state and its impact on states parties' cooperation with the ICC with a view to contribute towards resolution of the stalemate regarding President Bashir's surrender to the ICC.

Closely related to the issue of immunity of heads of state before the ICC is article 46 A *bis* of the recently adopted Amendment Protocol which safeguards immunities based on official position. This provision is not consistent with the provisions of the statutes of other international tribunals enacted within the last century. It therefore raises the question of whether irrelevance of immunity based on official capacity has acquired the status of customary international law from which there can be no derogation. An investigation of the legality of the said article is justified by its likely impact on the exercise of international criminal justice on the continent should the Amendment Protocol come into force.

For the above reasons the topic of head of state immunity before the ICC is justified not only due to its impact on the AU-ICC relationship but also because it directly affects the international criminal justice project in Africa in the ways explained above. This research not only contributes to the debate on the relationship between article 27 and 98 of the Rome Statute but also explores

the practical effects of this debate. This is achieved by examining the reaction of states when faced with the seemingly conflicting obligations arising from these articles. This research also provides insight into article 46 A *bis* of the Amendment Protocol, which being a new provision has not yet been the subject of much academic focus. Moreover, at the end of the study, the researcher makes recommendations which could improve the AU-ICC relationship as well as the exercise of international criminal justice in Africa.

1.5 Research Methodology

The research relies on primary sources of information such as statutes, international conventions and treaties, African Union decisions and declarations, case law from national courts and international tribunals, reports and UNSC Resolutions among other documents. Secondary sources of data consulted include textbooks, journal articles and newspaper articles. The internet is also used as a source material in the conduct of research. This entails the collection and analysis of relevant material from the indicated sources in order to arrive at a deeper understanding of the subject of immunity of heads of state before the ICC and the effect this has on the response of African States to their cooperation obligation.

A comparative analysis of the reaction of Malawi, Chad and Kenya to the ICC request to arrest and surrender President Bashir to the ICC forms part of the methodology employed in this thesis. Apart from these three, many other African States Parties to the Rome Statute as well as non-party states have had the occasion to deal with the issue of the visit of President Bashir and have reacted differently to it.⁴⁴ Since the discussion involves the reaction of African States Parties to their cooperation duty under the Rome Statute, only states which fall within this category could be considered. Therefore, the researcher considered the reactions of Botswana, South Africa, Chad, Malawi, Kenya, Zambia, Uganda, Central African Republic and Djibouti. All these states being parties to the Rome Statute have the obligation to cooperate with the ICC under article 96 of the Rome Statute. All of them being African States also have an obligation to comply with the decisions of the AU, an obligation which arises from the AU Constitutive Act. However, an in-

⁴⁴ Botswana, Chad, Central African Republic, China, Democratic Republic of Congo, Djibouti, Ethiopia, Egypt, Eritrea, France, Iran, Iraq, Kenya, Kuwait, Lybya, Malawi, Malaysia, Nigeria, Qatar, Saudi Arabia, South Africa, South Sudan, Turkey, Uganda, Zambia See “Bashir Travel Map” <http://bashirwatch.org/> (accessed 8 November 2014).

depth analysis of the reactions of all the above states, while ideal, was not possible within the time available for conducting this research.

Chad, Malawi and Kenya were therefore selected as case studies for this research. This choice is justified by the fact that all the three countries, despite having an obligation to cooperate with the ICC, have hosted President Bashir at least once in their territories after the warrant was issued against him. Similarly, all the three have changed their respective positions on the arrest of President Bashir over the years. As will be shown in chapter 4, Kenya invited and hosted President Bashir during the adoption of the country's new constitution in 2010, however, a warrant of arrest was subsequently issued against President Bashir by the High Court of Kenya. Similarly, Malawi allowed President Bashir entry into its territory in October 2011 but later changed its position and threatened to arrest him in June 2012. However, Chad was initially against the AU decision urging members not to cooperate with the ICC; but later changed this position and has allowed President Bashir into its territory five times at the time of writing. This is despite the ICC decisions entered against Chad referring its refusal to cooperate to the UNSC and the ASP.

The change in the position of these states makes them appropriate case studies to illustrate how ad hoc and conflicting the response of African States Parties have been to the ICC request to surrender President Bashir. Furthermore, because the countries have all changed their positions at least once, it is possible to investigate the impact the AU position had on these changes. This comparison serves to illustrate the direction taken by emerging state practice in the attempt to balance between the conflicting obligations illustrated above.

1.6 Limitations of the Study

The first limitation relates to the highly political nature of the topic. Prosecution of heads of state is highly controversial and brings to the fore the perennial debate on the relationship between international criminal law and the politics of power.⁴⁵ The extent to which politics affect the practice of international criminal law and more specifically the actions of the ICC and the response of Africa to the ICC have themselves been a source of controversial debate.

⁴⁵ T Zwart and A Knoops "Who is Persecuting Laurent Gbagbo?" *New African*, 4 April 2013 <http://newafricanmagazine.com/who-is-persecuting-laurent-gbagbo/> (accessed 8 November 2014).

Furthermore, the AU and the UNSC, the two organizations whose actions form an enormous part of the discussion in this thesis are by their very nature political bodies which make political decisions.

Since the researcher is not trained in the area of politics, the discussion in the thesis was restricted as much as possible to legal issues. As a result, some of the issues which may have affected the outcomes analyzed in the thesis, such as the decision of states at a particular time to cooperate with the ICC or not, fell beyond the scope of this thesis. This makes the thesis have a narrower perspective than is necessary to fully comprehend and resolve the AU-ICC relationship and improve the cooperation of African States Parties with the ICC.

The second limitation relates to the fluid nature of the topic. In the course of the writing so much development occurred on issues directly relevant to the topic of discussion. For example, in March 2013, after commencement of this research, Mr. Kenyatta and Mr. Ruto were elected as the President and Deputy President of Kenya respectively. As a result several novel issues arose from the prosecution of these two leaders at the ICC including the excusal of the accused persons from continuous presence at trial and the proposal to amend article 27 of the Rome Statute among other issues which are relevant to this research. Besides, being active cases, the ICC decisions which directly relate to the topic under discussion keep increasing. Another fundamental change relates to the adoption of the Amendment Protocol in Malabo, in June 2014, which introduced a new provision on immunity of heads of state by virtue of article 46 *A bis*. These two issues demonstrate the ever-changing and developing nature of the topic of discussion.

This factor affected the research in two ways. First, due to the ever growing number of issues to consider, it was not possible to explore all the relevant ones in sufficient depth within the time allocated for the research. Second, due to the novelty of some of the issues under discussion it was difficult to find academic writing and other reliable material to aid with the research. The information available concerning some relevant issues was mainly in the form of blog posts and newspapers articles which are not subject to peer review and therefore cannot be relied on to substantiate research claims. For example, at the time of writing the official version of the Amendment Protocol had not yet been released on the internet for public viewing.

The inability to explore issues in detail and the limited material available may have hindered a complete understanding of the research topic.

1.7 Thesis Outline

Chapter one: Introductory Chapter

The current chapter introduces the thesis and discusses the background and context of the research, states the main problem tackled by the thesis and explains the research methodology and outlines the goals of the research.

Chapter two: Heads of State Immunity under the Rome Statute of the International Criminal Court

This chapter traces the origin and basis of the doctrine of head of state immunity under international law and state practice and discusses the general principles of immunity of heads of state. This is followed by a discussion on the exception under international criminal law concerning the irrelevance of immunity based on official capacity including that of heads of state. Subsequently, the chapter discusses heads of state immunity under the Rome Statute of the ICC especially with regards to heads of non-parties states.

In this chapter it is argued that although irrelevance of immunity for international crimes is increasingly a position taken in international criminal law, it is yet to solidify as a rule of customary international law. It is argued further that the application of immunity based on official capacity to any particular international tribunal varies depending on the manner of its establishment, whether by treaty or UNSC Resolution, and the provisions of the constitutive statute of the tribunal.

Chapter 3: The impact of head of state immunity on the Rome Statute cooperation duty

With a particular focus on article 98 of the Rome Statute, this chapter deals with the obligation of state parties to cooperate with the ICC which includes arrest and surrender, waiver of immunity, investigation, among other forms of cooperation. The chapter discusses the exception created by

article 98 of the Rome Statute and possible ways to strike a balance between the obligation to cooperate with the ICC and the obligation to respect the immunity of foreign heads of state. The purpose of this discussion is to lay the foundation for the discussion on the reliance on article 98 to refuse cooperation with the ICC by the AU and certain African States.

The chapter argues that article 98 (1) can be relied on by states parties to refuse the surrender of the head of a non-party state to the Rome Statute. This form of cooperation, it is argued, would infringe on the immunities of the person of a non-party state which is the “third state” envisioned by article 98 (1).

Chapter 4: Africa’s Response to the Duty to Cooperate under the Rome Statute: Law or Politics?

This chapter discusses the reaction of the AU and individual African States to the ICC’s request to arrest and surrender President Bashir to the Court. The chapter assesses how African States Parties perceive and respond to their obligation to cooperate with the ICC; and how such perception and response are influenced by the immunity of sitting heads of state and as well as the AU’s position on the issue.

The reaction of the AU on the one hand and those of Chad, Malawi and Kenya (taken as examples of African States) on the other; demonstrate the divided way in which states parties to the Rome Statute have been responding to their treaty obligation to cooperate with the ICC. These responses are likely to shape, not just the direction of the scholarly debate concerning the conflict between articles 27 and 98 of the Rome Statute, but also, exemplify how states view their responsibility to cooperate with the ICC while respecting immunity of third states. Given that the success of the ICC largely depends on states performing their cooperation obligations, what does this state response mean for the future of ICC and international criminal justice?

The enquiry draws on the refusal of certain African States to issue a warrant of arrest against President Bashir and the contrary decision of the High Court of Kenya in the *ICJ Kenya v AG* case. This chapter makes the argument that the AU position does not directly affect the response of particular African States. Nevertheless, resolution of the AU-ICC tension would most likely increase cooperation of the African continent with the ICC.

Chapter 5: Head of State Immunity before the African International Crimes Chamber

This chapter discusses article 46 A *bis* of the Amendment Protocol which provides for immunity from prosecution for heads of state, heads of government and other senior state officials based on their functions. The chapter establishes a relationship between the dissatisfaction of the AU with the manner in which international criminal justice is exercised against African personalities and the expansion of the jurisdiction of the ACJHR to deal with international crime.

The chapter then argues that since the rule on irrelevance of immunity based on official capacity for international crimes has not solidified as a rule of customary international law, as discussed in chapter 2, article 46 A *bis* is within international law on immunities. However, the chapter argues that article 46 A *bis*, because of its scope *inter alia*, is likely to impact negatively on the exercise of international criminal justice on the African continent. The Chapter then argues for the repeal, or in the alternative, a narrow interpretation of article 46 A *bis* of the Amendment Protocol.

Chapter 6: Conclusion and Recommendations

This chapter ties together the findings from the above chapters and contains the thesis conclusions as well as recommendations. The chapter fronts four major conclusions: that the immunity of incumbent officials may be applicable before certain international tribunals depending on their manner of establishment and the provisions of the establishing statute; that article 98 (1) bars state parties to the Rome Statute from arresting and surrendering President Bashir due to his immunity as the head of a non-party state; that the AU decisions do not have a direct impact on the response of states parties to the Rome Statute to their obligation to cooperate with the ICC; that the three AU grievances discussed in Chapter 4 are legally plausible and worthy of the attention of the UNSC and the ICC; and that article 46 A *bis* of the Amendment Protocol does not contravene international law on immunities.

Based on these conclusions the Chapter makes three recommendations that may be followed for the betterment of the international criminal justice project in Africa. First, strengthening the capacity of individual African States as well as the African region to deal with international crime committed in Africa. Second, ICC exercising its discretion broadly during the prosecution of heads of state to increase the willingness of states to cooperate with the Court. Thirdly, deeper

cooperation between the UNSC and the AU whose actions have an impact on the ICC's judicial process. The author argues that the implementation of these recommendations would reduce the perception of bias and double standard that currently surrounds the work of the ICC in Africa. This then would increase the African States Parties' cooperation and the Court's contribution to international criminal justice on the African continent.

CHAPTER TWO

Heads of State Immunity under the Rome Statute of the International Criminal Court

“Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited.”⁴⁶

2.1 Introduction

This chapter discusses the origin and basis of head of state immunity as a rule of customary international law and traces the progressive development of the divergent position, which is the irrelevance of immunity for international crimes, before international criminal tribunals. To achieve this, this chapter explores the provisions of some of the constitutive statutes of international criminal tribunals enacted within the last century and the various judicial opinions issued by these tribunals on immunity. Particular attention is paid to the interpretation and implications article 27 of the Rome Statute, being one of the latest affirmations of the desire of the international community to make immunity unavailable for perpetrators of certain categories of crimes. The jurisprudence arising from these sources demonstrates a reduction of the scope of the protection offered by immunity before certain international criminal tribunals. However, this chapter argues against the assertion that immunity does not apply before all international tribunals and instead fronts the view that the application of immunity depends on the manner of the establishment of a tribunal and its constitutive statute.

Part two of this chapter deals with the discussion on immunity as one of the cardinal principles of international law, making the distinction between functional and personal immunity and discussing the scope and application of each. Part three then deals with the shifting position of immunity under international criminal law and discusses the provisions in international instruments from the Versailles Treaty to the Rome Statute and the judicial decisions that have arisen from these instruments. Subsequently, part four discusses immunity under the Rome

⁴⁶ *Case Concerning the Arrest Warrant Of 11 April 2000 (Democratic Republic of the Congo V Belgium)* 2002 3 ICJ, Joint Separate Opinion of Judges Higgins, Kooijmans And Buergethal para 75 <http://www.icjci.org/docket/files/121/8136.pdf> (accessed 8 April 2013).

Statute with particular regard to heads of non-party states and analyzes the ICC cases in which the issue has been addressed. Part five presents the concluding remarks.

2.2 Head of State Immunity as a Rule of Customary International Law

The doctrine of head of state immunity stems from a broader concept of state immunity which is based on the principle of equality of states.⁴⁷ The principle of equality of states implies that all states are equal and therefore no state can stand in judgment on the affairs of another state and this necessitates reciprocal respect for the persons authorized to represent a state in foreign states.⁴⁸ State immunity is thus necessary for at least two reasons: to ensure a state performs its functions without undue interference from foreign states; and to uphold the dignity of a state.⁴⁹ The immunity belongs to the state itself but since a state does not act by itself but only through its agents, state immunity logically extends to heads of state and other senior state officials.⁵⁰ Hence state immunity is sometimes defined as “immunity which a personal sovereign or head of state enjoys when present in the territory of another state”.⁵¹

Initially, the acts of a foreign head of state were considered as those of the foreign state itself over which courts of a state could not preside.⁵² This position was affirmed by the US Supreme

⁴⁷ P Gaeta “Does President Al Bashir Enjoy Immunity from Arrest” (2009) 7 *JICJ* 315 at 320.

⁴⁸ Article 2 of the United Nations Charter. See also I Brownlie *Principles of Public International Law* 7 ed (2008) 289-298. See *Underhill v. Hernandez* (1897) 168 US 250 where a US Court held that “The courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” See also S Wirth “Immunities, Related Problems, and Article 98 of The Rome Statute” (2001) 12 *Criminal Law Forum* 429 at 430; D Akande “International Law Immunities and the International Criminal Court” (2004) 98 *AJIL* 407 at 409; S Wirth “Immunity for Core Crimes? ICJ’s Judgment in the *Congo v Belgium* Case” (2002) 13 *EJIL* 877 at 882.

⁴⁹ Brownlie *Public International Law* 325. See also *Institut de Droit International* (IDI) Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes (2009) http://www.idi-iil.org/idiE/navig_res_chon.html (accessed 12 March 2013). Article II of the resolution provides that: “Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.” See also the statement of Lord Wilberforce said in *I Congreso del Partido* (1981) 2 All ER 1064 at 1078, [1983] 1 AC 244 at 272: “The whole purpose of the doctrine of state immunity is to prevent such issues being canvassed in the courts of one state as to the acts of another.”

⁵⁰ Wirth 2001 *Criminal Law Forum* 431; Wirth 2002 *EJIL* 882.

⁵¹ Sinclair “The law of sovereign immunity: Recent developments” (1980) II *Hague Recueil des Cours* 113 at 167.

⁵² State immunity was synonymous with head of state immunity as the state and its head were viewed as one and the same thing. See CE Hickey “The Dictator, Drugs and Diplomacy by Indictment: Head of State Immunity In *United States v Noriega*” (1988-1989) 4 *Connecticut Journal of International Law* 729 at 731.

Court in *The Schooner Exchange* case.⁵³ The dispute in this case involved a ship which, although previously owned by two US citizens, had subsequently been seized and converted into a war ship by order of Napoleon Bonaparte, the then French Emperor. When the ship subsequently docked in the US port of Philadelphia, the original owners filed action seeking to seize the ship on the claim that it had been acquired illegally. On appeal to the US Supreme Court it was held that the US courts had no jurisdiction over the actions of the French Government.⁵⁴ The actions of a head of state, Emperor Napoleon in this case, were considered as those of the state itself and as such completely immune from a foreign court's jurisdiction.

However, as the rate of international trade and interactions between states increased, a more restrictive form of state immunity developed.⁵⁵ The public acts of a state, *jus imperii*, continued to be covered by absolute immunity while the commercial acts of states, *jus gestionis*, were not.⁵⁶ As the scope of state immunity shrank so did that of head of state immunity. The acts of a head of state are no longer considered wholly as the acts of the state.⁵⁷ Instead, official acts are distinguished from private acts and are protected by two different kinds of immunity: functional immunity, also known as immunity *rationae materiae*; and personal immunity, also known as immunity *rationae personae*.⁵⁸

2.2.1 Functional Immunity and Personal Immunity

Functional immunity protects the official acts of a state agent that are performed on behalf of the state and does not cease even after the cessation of an official's tenure of office; therefore, a state agent may never be tried for official acts covered by functional immunity even after leaving office since official actions are attributable to the state.⁵⁹ However, as the international community continually accepts a restrictive form of immunity, the definition and scope of "official acts" is repeatedly being contested so that certain acts, even if they are carried out in

⁵³ *The Schooner Exchange v M'Faddon Et Al* Supreme Court of the United States (1812) 7 Cranch 116. <http://www.jstor.org/stable/2186227> (accessed 13 March 2013).

⁵⁴ *The Schooner Exchange* para 137.

⁵⁵ I Brownlie *Principles of Public International Law* 327.

⁵⁶ See the speech of Lord Denning in *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] 1 All ER 881 at 890-892, Hickey *Connecticut Journal of International Law* 732.

⁵⁷ Wirth 2002 *EJIL* 882.

⁵⁸ Wirth 2002 *EJIL* 882.

⁵⁹ Cassese *International Criminal Law* 266.

official capacity, if they amount to international crimes, may not be considered as covered by functional immunity.⁶⁰

The rationale of functional immunity is found in the maxim *par in parem non habet imperium*, which means an equal has no power over another equal.⁶¹ This maxim relates to the doctrine of equality of states which, as described above, implies that all states are equal and no state can stand in judgment of the actions of other states and consequently requires reciprocal respect by states of the actions of foreign states and their representatives.⁶² It follows therefore that the role of functional immunity is to preserve the dignity of a state as a sovereign.⁶³

On the other hand, personal immunity protects both personal and official acts of the state agent carried out both during and before his tenure but ceases as soon as the person retires from the position. Personal immunity was considered to be completely inviolable while the person was in office but after leaving office the person could be prosecuted.⁶⁴ However, as will be illustrated below, personal immunity is no longer as inviolable as there are instances under which a sitting head of state or senior state official may be prosecuted for international crime. Underpinning personal immunity is the maxim *ne impediatur legatio*, which implies that foreign state agents must be protected from interference even in their personal lives.⁶⁵ Cassese opines that the *raison d'être* of personal immunity is "...to avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of a foreign state agent under the pretext of dealing with an exclusively private act."⁶⁶ The purpose of personal immunity therefore is to "protect the functionality" of a state as the fear, by state agents, of being arrested or detained by the authorities of a foreign state would impede the proper performance of their state functions.⁶⁷

⁶⁰ B Stern "Immunities of Heads of State: Where Do We Stand?" in M Lattimer and P Sands (eds) *Justice for Crimes Against Humanity* (2003) 85.

⁶¹ M Frulli "The ICJ Judgement on the *Belgium v Congo Case* (14 February 2002): A Cautious Stand on Immunity from Prosecution for International Crimes" (2002) 3 *German Law Journal* <http://www.germanlawjournal.com/index.php?pageID=11&artID=138> (accessed 12 March 2013).

⁶² Cassese *International Criminal Law* 265.

⁶³ *Ibid.*

⁶⁴ See Akande 2004 *AJIL* 411; Wirth 2001 *Criminal Law Forum* 432.

⁶⁵ Cassese *International Criminal Law* 266.

⁶⁶ *Ibid.*

⁶⁷ Wirth 2001 *Criminal Law Forum* 432.

An insightful discussion of the scope and duration of both personal and functional immunity is provided by Cassese who states that functional immunity relates to substantive law; meaning that the immunity holder is required to obey the law, but should he break the law his actions are considered as the actions of his state and are by that fact immune from prosecution.⁶⁸ On the other hand, personal immunity relates to procedural law; that is to say that the immunity holder is responsible for the crime committed but is immune from the jurisdiction of the Court due to the immunity that accrues to his position as the representative of a foreign state.⁶⁹

However, the criteria for determining whether a particular act by a head of state is an “official act” hence covered by functional immunity or a “private act” and covered by personal immunity is presently very controversial.⁷⁰ Despite this controversy personal immunity of a head of state has been said to be absolute no matter the type of crime alleged while functional immunity can be disregarded on allegations of an international crime.⁷¹ As a general rule, the exceptions of which will be discussed in part 3 below, sitting heads of state have personal immunity which is absolute: they are immune from all forms of prosecution, execution or any other court processes regardless of the crimes alleged.⁷² This immunity however ceases when their term of office expires after which they can be charged with crimes committed in their private capacity and international crimes committed while in office.⁷³ On the other hand functional immunity covers only the acts done in official capacity but does not cease even as a person’s term in office expires.⁷⁴

The above position was affirmed in the *Pinochet* case in which the UK Law Lords agreed that a sitting head of state enjoyed both personal and functional immunity; personal immunity being

⁶⁸ Cassese *International Criminal Law* 266.

⁶⁹ *Ibid*

⁷⁰ *Pinochet* (No. 3) 6 out of 7 judges held that Pinochet was not entitled to immunity but their reasoning was varied. For a discussion on this See H Fox “The Pinochet Case No.3” (1999) 48 *The International and Comparative Law Quarterly* 687.

⁷¹ R Cryer et al *An Introduction to International Criminal Law and Procedure* 2 ed (2010) 531.

⁷² C Warbrick “Immunity and International Crimes in English” (2004) 53 *The International and Comparative Law Quarterly* 769; Wirth 2002 *EJIL* 882; JC Barker “The Future of Former Head of State Immunity after ex parte Pinochet” (1999) 48 *The International and Comparative Law Quarterly* 937.

⁷³ B Stern *Justice for Crimes against Humanity* 84.

⁷⁴ R Cryer *International Criminal Law* 532.

absolute during the term of service but ceasing soon thereafter and functional immunity only covering acts done in an official capacity.⁷⁵ Lord Wilkinson restated this position, declaring that:

“Immunity is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state... personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself... This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *rationae personae*.”⁷⁶

While Lord Goff observed that:

“...a head of state will, under the statute as at international law, enjoy state immunity *ratione personae* so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity *ratione materiae* ‘in respect of acts performed (by him) in the exercise of his functions (as head of state)’. ”⁷⁷

It is clear that head of state immunity doctrine is well established under customary international law. Moreover, diplomatic immunities and privileges provided for in the Vienna Convention⁷⁸ have been found to apply to heads of state *mutatis mutandis*.⁷⁹ The relevant articles in this Convention are articles 29, 31 and 39. Article 29 provides for the inviolability of the person of the diplomatic agent and that he shall be free from arrest and detention; while article 31 provides that a diplomatic agent will be immune from criminal jurisdiction of the receiving states as well as from civil and administrative action except in a few listed exceptions.⁸⁰ Similar immunities apply to sitting heads of state rendering them immune from arrest, detention, and both criminal and civil jurisdiction of the foreign states they visit. Lastly, article 39 of the Vienna Convention deals with the lapse of immunities and privileges upon termination of the official duties of the diplomatic agent but states that acts performed in his official capacity remain immune

⁷⁵ Pinochet (No. 3) at 112 (per Lord Wilkinson), at 119 (per Lord Goff), at 152 (per Lord Hope), at 168 (per Lord Saville), and at 171 (per Lord Millet).

⁷⁶ Pinochet (No. 3) 112.

⁷⁷ Pinochet (No. 3) 119.

⁷⁸ Vienna Convention on Diplomatic Relations of 1961.

⁷⁹ Pinochet (No. 3) 112; B Stern *Justice for Crimes against Humanity* 76. See also the obiter opinion of the Swiss Federal Tribunal in *Marcos v Federal Dept of Police* 1990 (102) ILR 198 at 202–203.

⁸⁰ The only instances where a diplomat can be subjected to the jurisdiction of the receiving state is with regards to a real action involving immovable property, action involving succession or action relating to the commercial or professional activities of the diplomat conducted outside official functions.

indefinitely. This therefore implies that sitting heads of state, by extension, are immune from criminal and civil jurisdiction for both their public and private acts but immunity related to their private acts comes to an end as soon as they leave office. Meanwhile, these officials remain immune for acts conducted in their official capacity.⁸¹

From the foregoing, the customary international law position on head of state immunity is clear: a sitting head of state is protected by both functional and personal immunity, which occur simultaneously. Personal immunity covers their private acts and is absolute during the period within which they are in office but ceases upon expiry of their term; while functional immunity only covers acts conducted in their official capacity but does not cease even as their term of office concludes. From this argument therefore, sitting heads of state are considered to be immune from prosecution at all times and under all circumstances whether at home or abroad as long as their tenure of office subsists.

However, recent developments in international criminal law, as will be presented below, reveal that this doctrine is continuously being challenged. States have over time increasingly become more willing to cede the immunity of their heads so as to ensure prosecution of the perpetrators of “unimaginable atrocities that deeply shock the conscience of humanity.”⁸² The result is that a new trend is emerging according to which the immunity based on official capacity as head of state or government or other state official, does not protect the person from prosecution for international crimes before international tribunals. The remaining parts of this chapter argue that this new trend has not yet developed into a new rule of customary international law and that the immunity of a sitting head of state accused of an international crime should be determined on a case by case basis depending *inter alia* on the manner of establishment of the tribunal and its constitutive statute.

⁸¹ Pinochet (No. 3) 113 (per Lord Wilkinson).

⁸² A reading of the Rome Statute Preamble shows state parties aspired to ensure that all the perpetrators of international crimes bear criminal responsibility and can be made accountable. This explains the inclusion of article 27 where state parties agree by way of treaty that neither the official capacity of person nor the immunities that attach thereto shall be a bar to prosecution.

2.3 Reduction of the Scope of Head of State Immunity

2.3.1 The Versailles Treaty

A desire to introduce a limitation to the deeply entrenched head of state immunity doctrine by exposing heads of state to prosecution was first exhibited in 1919 in the provisions of the Versailles Treaty.⁸³ The signing of this treaty marked the end of World War I and the final defeat of the Central Powers⁸⁴ by the Allied Powers.⁸⁵ The treaty required Germany to take full responsibility for the war and as a result article 227 provided for the public arraignment of William II de Hohenzollern, the former German Emperor, in a tribunal composed of five judges each from the countries forming part of the Allied Powers.⁸⁶ The emperor was to be tried for the commission of “a supreme offence against international morality and the sanctity of treaties”⁸⁷ and the trial was to be “guided by the highest motives of international policy.”⁸⁸ Article 227 was a reflection of the idea which reverberated through the Versailles Treaty that Germany bore the sole responsibility for the war and the damage caused by it. As was to be expected, the Germans never accepted that they bore the sole responsibility for the war and they strongly protested against the intended trial of the former Kaiser.⁸⁹ Netherlands refused to deport William II, who was living there in exile, for trial and so the intended trial did not occur.⁹⁰

The intended trial of the Kaiser has nevertheless been criticized for various reasons among them that it was based on “international policy” as opposed to international law. It has been argued in some quarters that had the proposed trial been based on international law it would have gone against the general rule under criminal law enshrined in the doctrine *nullum crimen sine lege*.⁹¹ According to this principle, one can only be tried for an offense which was already established

⁸³ Treaty of Peace between the Allied and Associated Powers and Germany (28th June 1919).

⁸⁴ The Central Powers consisted of Germany, Bulgaria, Austria- Hungary and Turkey. See J Simkin “Versailles Treaty” www.spartacus.schoolnet.co.uk/FWWversailles.htm (accessed 26 March 2013); See the *Holocaust Encyclopaedia* <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007428> (accessed 19 June 2013).

⁸⁵ The Allied Powers consisted of the United States, British Empire, France, Italy and Japan. See J Simkin “Versailles treaty”.

⁸⁶ Articles 231-248 of the Versailles Treaty.

⁸⁷ Article 227.

⁸⁸ *Ibid.*

⁸⁹ Brockdorff-Rantzau the German Delegate is reported to have said “We are required to admit that we alone are war guilty; such an admission on my lips would be a lie.” See P Hof “the Treaty of Versailles” <http://www.armchairgeneral.com/forums/showthread.php?t=127626> (accessed 08 May 2013).

⁹⁰ C Tomuschat “The Legacy of Nuremberg” (2006) 4 *JICJ* 830 at 831.

⁹¹ S E Baldwin “The Proposed Trial of the Former Kaiser” (1919) 29 *the Yale Law Journal* 75.

under written law at the time of commission and this already formed part of the national laws of the Allied Powers at the time of the Versailles Treaty.⁹² Be that as it may, this arraignment has been regarded by others as the first step towards the introduction of an exception to the head of state immunity doctrine as established under customary international law.⁹³

2.3.2 Nuremberg Trials

The next major raid on head of state immunity doctrine occurred at the end of the World War II with the signing of the London Agreement.⁹⁴ Once again the victorious countries, this time the Allies,⁹⁵ were united against Germany.⁹⁶ Annexed to the London Agreement was the Nuremberg Charter,⁹⁷ which constituted the International Military Tribunal (hereinafter “the IMT”) whose purpose was to ensure “...the just and prompt trial and punishment of the major war criminals of the European Axis countries.”⁹⁸

The Nuremberg Charter defined three categories of crimes: war crimes, crimes against peace and crimes against humanity⁹⁹ which have come to be known as part of international crimes or core crimes. Article 7 of the Charter provided that: “the official position of defendants, whether as heads of state or responsible officials in government departments shall not be considered as freeing them from criminal responsibility or mitigating punishment.” Furthermore, Article 8 provided that the fact that a defendant was acting pursuant to the orders of his government shall not free him from criminal responsibility but could mitigate his sentence if the Tribunal considers it just.

⁹² Ibid.

⁹³ Amnesty International “The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes against Humanity” www.amnesty.org/es/library/asset/.../eur450211998en.pdf (accessed 25 March 2013).

⁹⁴ The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) <http://www.icrc.org/ihl.nsf/INTRO/350?OpenDocument> (accessed 25 March 2013).

⁹⁵ Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics. See Preamble of the London Agreement.

⁹⁶ The irony of the matter is that the discontent of the Germans with the perceived unfairness of the provisions of Versailles Treaty is believed by some to have contributed to Germany’s role in World War II. Martin Gilbert, a British Historian, said “The link between the two world wars, separated by only twenty years, was this ‘war guilt’ clause as perceived by Germany, aggravated by her extremist politicians, and set up as a target to be shot down in flames and fury by Hitler” see P Hoff “the Treaty of Versailles”. In this respect, perhaps the development of this aspect of international criminal law solved one problem only to cause another much bigger one.

⁹⁷ The Charter of the International Military Tribunal- Annex to the London Agreement.

⁹⁸ Article 1 of the Nuremberg Charter.

⁹⁹ Article 6 of the Nuremberg Charter.

The provisions of article 7 and 8 of the Nuremberg Charter saw the trial, conviction and sentencing of various top ranking German officials at the IMT.¹⁰⁰ This was the first time in history that the high-ranking officials of a sovereign state who had acted on orders of their government were prosecuted. During the trials Justice Robert Jackson, the lead counsel of the US Government, stated that:

“Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal liability.... We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still ‘under God and the law’.”¹⁰¹

The Nuremberg Tribunal has been criticized for several reasons: among them its composition, the fact that all the judges came from the Allied Powers; its jurisprudence; as well as the discriminatory nature of its jurisdiction.¹⁰² The Nuremberg trials have been described by some as “a facade of authority stemming from the victor's right to justice.”¹⁰³

In spite of the criticism, the principles of international law recognized by the Nuremberg Charter and in the Tribunal judgment were adopted by the International Law Commission¹⁰⁴ and later affirmed by the UN General Assembly by Resolution 95.¹⁰⁵ In fact, Nuremberg Principle III, which stipulates that the fact that a person committed international crime in his capacity as a head of state or government does not free such person from criminal responsibility under international law; has resonated in the subsequent constitutive statutes of international criminal

¹⁰⁰ See “Famous World Trials: the Nuremberg Trials” <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm> (accessed 13 March 2013).

¹⁰¹ Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials: London, 1945 <http://avalon.law.yale.edu/imt/jack08.asp> (accessed 13 March 2013).

¹⁰² J Dugard *International Law A South African Perspective* 4 ed (2011) 320; Tomuschat 2006 *JICJ* 833.

¹⁰³ M Gordon “Justice on Trial: The Efficacy of the International Criminal Tribunal for Rwanda” (1995) 1 *ILSA Journal of International & Comparative Law* 217 at 224.

¹⁰⁴ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf (accessed 8 April 2013).

¹⁰⁵ The United Nations General Assembly passed the Resolution to comply with its obligation under Article 13 of the UN Charter whereby it is required to conduct studies for the purpose of “encouraging the progressive development of international law and its codification”. See Resolution 95 (I) of the United Nations General Assembly, 11 December 1946 <http://www.icrc.org/ihl.nsf/WebART/355-540001?OpenDocument> (accessed 8 April 2013).

tribunals.¹⁰⁶ Such a position takes away the protection of functional immunity, which ordinarily protects an official with regards to acts committed in his official capacity.

This position was affirmed in the *Eichmann* case¹⁰⁷ where the Israeli Court held that persons acting in their official capacity would not be immune from prosecution if they committed an international crime; the Court further stressed that the Nuremberg Principles have become part of the law of nations.¹⁰⁸ The same holding was made in the *Blaskic* case¹⁰⁹ and by dissenting judges in the *Arrest Warrant* case.¹¹⁰ Commentators have said that the position that functional immunity does not protect persons charged with international crime has gradually developed into a new rule of customary international law.¹¹¹ Therefore, the fact that a person committed alleged crimes during his/her tenure of office does not exclude the person's responsibility for the crimes. For this reason, former heads of state or government or senior state officials may be prosecuted or otherwise submitted to the jurisdiction of courts for international crimes committed during their tenure of office. The position was further demonstrated in the *Pinochet* case.

2.3.3 The Pinochet Case

In this case, Spain applied for the extradition of Pinochet, the former head of Chile, from the UK on the allegations of torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the "Convention against Torture"). A warrant of arrest was issued against Pinochet who then made a Judicial Review application to the Divisional Court seeking to quash the decision to issue the warrant. The Divisional Court held that Pinochet was entitled to immunity as a former head of state.¹¹² On appeal, six out of seven

¹⁰⁶ Article 6 of the Statute of the Tokyo Tribunal, Article 7(2) of the Statute of the International Criminal Tribunal For Former Yugoslavia, Article 6 (2) of The Statute of the International Criminal Tribunal for Rwanda and Article 27 of the Rome Statute of the International Criminal Court, Article 6 of the Statute of the Special Court of Sierra Leon.

¹⁰⁷ *The Attorney General V Adolf Son of Karl Adolf Eichmann*, in The District Court of Jerusalem Criminal Case No. 40/61 http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf (accessed 8 April 2013).

¹⁰⁸ *Eichmann* Case para 28.

¹⁰⁹ Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1998) para 41. While referring to war crimes, crimes against humanity and genocide, the court held that "those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity"

¹¹⁰ *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal para 85.

¹¹¹ Cassese *International Criminal Law* 267.

¹¹² *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No. 1) 1998 (4) All ER 897.

Law Lords held that Pinochet as a former head of state was not entitled to immunity. The Law Lords stated that since actions which amount to international crimes are already prohibited by international law; they cannot be presumed to be official acts for international law purposes and therefore cannot be protected by functional immunity.¹¹³ Only Lord Goff held a contrary opinion. While holding that Pinochet was entitled to immunity, he stated *inter alia* that “[o]bviously the mere fact that the conduct is criminal does not of itself exclude the immunity ... and this is so even where the crime is of a serious character.”¹¹⁴

However, the opinion of Lord Goff in this regard has not received much support from scholars, who generally agree that it has become a rule under international criminal law that functional immunity is irrelevant when one is accused of the commission of an international crime.¹¹⁵ This view is also supported by the *Institut de Droit International* (IDI) in its 2009 Resolution on the Immunity of Heads of State.¹¹⁶ Article III of the Resolution provides that “No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.”

International criminal law is slowly finding its way around the formerly well-established head of state immunity discussed above. To begin with, as illustrated in the preceding section, functional immunity is no longer considered to shield a head of state accused of international crimes from prosecution. This means therefore that a person is now criminally responsible for crimes committed during his/her tenure of office as international crimes are not considered as official acts to which functional immunity applies. While personal immunity protects an incumbent head of state, it ceases as soon as one leaves office after which the person may be charged with international crime committed before s/he entered office and while s/he was in office.

This development has seen the prosecution of former heads of state and government as well as other senior state officials for crimes committed during their tenure of office. The prosecution of former leaders, as shown below, is generally accepted by the international community. However,

¹¹³ Pinochet (No. 3) at 114-115 (per Lord Wilkinson), at 151-152 (per Lord Hope) at 189-190 (per Lord Phillips).

¹¹⁴ Pinochet (No.3) at 119 (per Lord Goff).

¹¹⁵ Akande (2004) *AJIL* 413; A Cassese When May State Officials be Tried for International Crimes? Some Comments on the *Congo V Belgium* Case (2002) 13 *EJIL* 853 at 864; Wirth 2001 *Criminal Law Forum* 433.

¹¹⁶ Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes (2009).

a similar agreement has not been arrived at with regard to sitting heads of state or government and other senior state officials. This was demonstrated in the *Arrest Warrant case*.¹¹⁷

2.3.4 The Arrest Warrant Case

In the *Arrest Warrant* case, a Belgian investigating judge had issued a warrant of arrest against Yerodia, who was then a Congolese foreign affairs minister, alleging grave breaches against the four Geneva Conventions of 1949 and their Protocols of 1977 as well as crimes against humanity.¹¹⁸ The arrest warrant had been transmitted to the International Criminal Police Organization (Interpol), which had then circulated the warrant internationally. The Republic of Congo petitioned the ICJ to declare that the actions of Belgium of issuing an arrest warrant against a Congolese minister had breached the immunity of Congo. At the time of the decision, Yerodia had ceased to be the Minister for foreign affairs and did not hold any other post in the DRC.¹¹⁹ Nevertheless, in a much criticized decision, the ICJ granted Congo's application stating that high ranking officials like heads of state and government as well as ministers for foreign affairs were entitled to immunity from both civil and criminal national jurisdiction.¹²⁰

However, the ICJ pointed out 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 they have jurisdiction.”¹²¹ (Emphasis added)

According to the judgment therefore immunities of heads of state and other senior state officials are applicable before international courts in spite of the crimes alleged. However, the ICJ states that the same immunity does not apply in relation to “certain” international tribunals where they have jurisdiction. Immunity before international criminal tribunals is discussed below.

¹¹⁷ *Case Concerning The Arrest Warrant Of 11 April 2000 (Democratic Republic of the Congo V Belgium)* 2002 3 ICJ.

¹¹⁸ *Arrest Warrant* para 13 and 14.

¹¹⁹ *Arrest Warrant* para 19.

¹²⁰ *Arrest Warrant* para 51.

¹²¹ *Arrest Warrant Case* para 61.

2.4 Immunity in proceedings before International Criminal Tribunals

The view that immunity based on official capacity should not apply to proceedings before international criminal tribunals is fronted by various scholars.¹²² However, there are differing views based on whether immunity is inapplicable in proceedings before all international tribunals at all times or whether there exists circumstances that may make immunity applicable in proceedings before some international tribunals and not others. One of the scholars that front the first view, that immunity based on official capacity is inapplicable before international tribunals is Gaeta. She argues, for instance, that the very reason for the existence of immunities excludes their application to international tribunals.¹²³ In this regard, she explains that immunities arise from the equality of states doctrine; and exist to protect horizontal relationships between states by preventing states from interfering with the representatives of other states through unduly subjecting them to foreign criminal or civil jurisdiction. The acts of international tribunals, unlike those of states, she says, are “at a purely international level” and do not involve states exercising their jurisdiction to unduly interfere with the “sovereign prerogatives” of other states.¹²⁴

On the other hand, one of the proponents of the second view, Akande, opines that the view that immunity can never be pleaded before international tribunals is overly simplistic.¹²⁵ He says that the applicability of immunities before an international tribunal depends on at least two factors: first the provisions of the constitutive statute of that particular tribunal; and second the nature of the tribunal which includes the manner in which it was established and whether the state whose official is to be tried is bound by the statute.¹²⁶

The author leans more towards the second school of thought, that the fact that a tribunal is international does not automatically exclude the defense of immunity. In fact, the very definition

¹²² Gaeta 2009 *JICJ* 321; Akande 2004 *AJIL* 416; A Cassese *International Criminal Law* (2003) 267; JH Allen “Bashir’s Immunity: Arguments In Support of the Prosecution of An Incumbent Head of A Non- State Party by the International Criminal Court” (2008) www.pulp.up.ac.za/pdf/2011_04/2011_04.pdf (accessed 8 September 2012); A Paulus “Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court” (2003) 14 *EJIL* 843 at 850–852; S Grosscup “The Trial Of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter Of Victor’s Justice” (2004) 32 *Denver Journal of International Law and Policy* 355 at 365.

¹²³ P Gaeta 2009 7 *JICJ* 321.

¹²⁴ *Ibid.*

¹²⁵ Akande 2004 *AJIL* 417.

¹²⁶ *Ibid.*

of the term international tribunal was contested in the *Charles Taylor case* before the Special Court of Sierra Leone, an issue which is dealt with below. The author argues, like Akande above, that whether or not immunity may be pleaded before a particular international tribunal depends *inter alia* on whether the statute of the international tribunal contains a provision prohibiting the applicability of immunity; and the manner of the establishment of the tribunal. Both factors are discussed below.

2.4.1 Provisions in the Statutes of International Tribunals

To begin with the first factor, a number of constitutive statutes of international criminal tribunals have provisions to the effect that the official capacity of persons shall not be a bar to the prosecution of these persons under those tribunals. The first of these provisions was formulated in 1945 in the form of article 7 of the Nuremberg Charter whose provisions are already quoted above. This provision on irrelevance of official capacity formed part of the basis of the indictment, conviction and sentencing of high-ranking German officials for international crimes defined in the Nuremberg Charter.¹²⁷

A year later, a similar provision appeared in the constitutive statute of the Tokyo Tribunal.¹²⁸ However, unlike the Nuremberg Charter, the provision in the Tokyo Tribunal Statute did not expressly subject heads of state to the jurisdiction of the Tokyo Tribunal. It merely provided:

“Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to an order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”

The phrasing of this provision may be said to be the legal justification, despite all the political reasons advanced, of the fact that the Japanese Emperor, who many thought had participated in World War II, was neither indicted nor prosecuted by the Tokyo Tribunal.¹²⁹

Similarly, articles 6 (2) and 7 (2) of the Statute of the International Criminal Tribunals for the Former Yugoslavia (hereinafter the “ICTY”)¹³⁰ as well as that of the International Criminal

¹²⁷ See the “Judgment of the International Military Tribunal” http://avalon.law.yale.edu/subject_menus/judcont.asp (accessed 13 May 2013).

¹²⁸ Article 6 of the International Military Tribunal for the Far East (IMTFE) Charter.

¹²⁹ Z Wanhong “From Nuremberg to Tokyo: Some Reflections On The Tokyo Trial (On The Sixtieth Anniversary Of The Nuremberg Trials)” (2006) 27 *Cardozo Law Review* 1673 at 1675; KC O’Neill “A New Customary Law of

¹²⁹ Head of State Immunity: Hirohito and Pinochet” (2002)38 *Stanford Journal of International Law* 289 at 298-305.

Tribunal for Rwanda (hereinafter the “ICTR”)¹³¹ both have provisions concerning irrelevance of the official capacity of the perpetrators of international crimes. Both statutes provide that “[t]he 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.” As discussed in detail below, the ICTY prosecuted Slobadan Milosevic the former president of FRY, while the ICTR tried and convicted Jean Kambanda the former Rwandan Prime Minister.

However, the Rome Statute goes beyond ascribing criminal responsibility to all persons irrespective of their official capacity and introduces a novel provision, by virtue of article 27 (2). This article expressly excludes both national law and international law immunities, including those of heads of state or government, from application before the ICC. As a result, the ICC is the first and only international tribunal so far to indict sitting heads of state, that is the Sudanese and the Kenyan leaders; and these cases, which have sparked controversy within the international community, are discussed in detail below.

From the foregoing, it is clear that the tribunals whose statutes provide for individual criminal responsibility, like the ICTY and ICTR, have only prosecuted former heads of states. On the other hand, the Rome Statute which expressly bars immunity from application has led to the ICC indictment and prosecution of sitting heads of state. However, tribunals that lack such provision, for example the Statute for the Special Tribunal for Lebanon,¹³² has neither indicted nor prosecuted any high ranking government officials but ordinary Lebanese citizens.¹³³ This supports the argument that the provisions of a constitutive statute of an international tribunal

¹³⁰ 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. See Article 1 of the ICTY Statute.

¹³¹ An international tribunal for the sole purpose of 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 neighboring states, between 1 January 1994 and 31 December 1994. See Article 1 of the ICTR Statute.

¹³² Annex UNSC Resolution 1757 - Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon

¹³³ See *The Prosecutor V. Mustaf A Amine Badreddine, Salim Jamil Ayyash, Hussein Hassan Oneissi & Assad Has San Sabra*, indictment, 10 June 2011, STL-II-OIII/PTJ F00071 AO IIPRV 120 I 108161R091733-R0917791EN/pvk; *The Prosecutor V. Hassan Habib Merhi*, Public Redacted Indictment, 5 June 2013, STL-13-041P/PTJ F00121 A01120131 004!R098548-R098582/EN/af.

plays a role in determining whether immunity based on official capacity may or may not be a bar to prosecution before a particular tribunal.¹³⁴

2.4.2 The establishment of an international tribunal and its impact on immunity

The second factor proposed by Akande, which determines the applicability of immunity before an international tribunal, is the manner of its establishment. As explained below, the way a tribunal is established determines the scope of its jurisdiction and the states that fall under its jurisdiction. In other words, there is a difference in scope of jurisdiction between tribunals established by the UNSC Resolutions, those established by way of multilateral treaties, and those otherwise established.

2.4.2.1 Tribunals Established by the UNSC

Under Chapter VII of the UN Charter, member states of the UN empower the UNSC to take actions necessary in order “to maintain and restore international peace.”¹³⁵ Although establishing international tribunals is not expressly provided for as a means of attaining this end, it is now generally agreed that it is within the UNSC’s discretion to decide what means to employ to this end including the establishment of international tribunals.¹³⁶ Due to the binding nature of the UNSC resolutions on member states¹³⁷ and the universal membership of the UN,¹³⁸ tribunals created by the UNSC have the result of binding almost all states of the world.¹³⁹ Therefore, some scholars argue that whenever the UNSC establishes tribunals that have no regard for the immunities of states, member states to the UN are considered to have waived these immunities.¹⁴⁰

¹³⁴ See also Akande 2004 *AJIL* 417.

¹³⁵ Articles 39 and 41 of the UN Charter.

¹³⁶ *Prosecutor v Dusko Tadic* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para 31-36 <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (accessed 23 April 2013). See also WA Schabas *The UN International Criminal Tribunals the Former Yugoslavia, Rwanda and Sierra Leone* (2006) at 48-53.

¹³⁷ Article 25 of the UN Charter provides that members of the UN agree to accept and carry out the decisions of the UNSC in accordance with the UN charter.

¹³⁸ Out of the 196 States of the world, 193 are members of the UN. See <http://www.un.org/en/members/index.shtml> (accessed 23 April 2013).

¹³⁹ Akande 2004 *AJIL* 417; C C Jalloh “The Contribution of the Special Court for Sierra Leone to the Development of International Law” (2007) 15 *African Journal of International and Comparative law* 165 at 187.

¹⁴⁰ Wirth 2001 *Criminal Law Forum* 442.

The UNSC has by resolution, under chapter VII of the UN Charter, established two international tribunals: the ICTY and the ICTR.

2.4.2.1.1 The International Tribunal for Yugoslavia

The ICTY was established by Resolution 827¹⁴¹ as part of the international community's response to the "bloody and protracted" conflicts that characterized the disintegration of the former Yugoslavia.¹⁴² The purpose of ICTY was for the "prosecution of persons responsible for the violation of international humanitarian law committed in the Former Yugoslavia since 1991."¹⁴³

2.4.2.1.1.1 Case against Former President Slobodan Milosevic

As has been mentioned above, Article 7 of the ICTY statute expressly subjects heads of state and government to its jurisdiction. On the basis of this provision the ICTY indicted Slobodan Milosevic, the former head of the Federal Republic of Yugoslavia (hereinafter "FRY"), and charged him with crimes against humanity and violations of the laws of war.¹⁴⁴ One of the preliminary objections raised by the defense was to the effect that the ICTY had been illegally established since Chapter VII of the UN Charter does not empower the UNSC to establish a judicial body.¹⁴⁵ In determining this issue the Tribunal relied on the *Tadic* case¹⁴⁶ in which a similar objection had been dismissed by the Appeals Chamber of the ICTY on the basis that the scope of the powers vested in the UNSC under Article 41 were so wide that the UNSC had the discretion of choosing which method to employ in the maintenance of peace and security.¹⁴⁷ The

¹⁴¹ Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law and Humanitarian Law Committed in the Territory of the Former Yugoslavia http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/827%281993%29 (accessed 22 April 2013).

¹⁴² D. Chandler "Western Intervention and the Disintegration of Yugoslavia" <http://www.davidchandler.org/pdf/chapters/Disintegration%20of%20Yugoslavia%20chapter.pdf> (accessed 16 May 2013).

¹⁴³ UNSC Resolution 827 at 2.

¹⁴⁴ *The Prosecutor of the Tribunal V Slobodan Milosevic* Case No. It-99-37 http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ii990524e.htm (accessed 22 April 2013).

¹⁴⁵ *Prosecutor v Slobodan Milosevic* Decision on Preliminary Motions (8 November 2001) para 5.

¹⁴⁶ *Prosecutor v Dusko Tadic* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para 31-36.

¹⁴⁷ *Ibid.*

chamber consequently ruled that the establishment of ICTY was legal and dismissed the objection.¹⁴⁸

The other notable objection in the case concerned ICTY's lack of jurisdiction over Milosevic on the basis that he was a former head of state. The objection challenged the legitimacy of article 7 of the ICTY Statute arguing that it contradicted well-established principles of international law.¹⁴⁹ While dismissing this objection the Tribunal traced the development of the rule on irrelevance of official capacity under international criminal law from Nuremberg to the ICC and stated that "[t]here is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law."¹⁵⁰

Be that as it may, Milosevic was found dead in his cell and the proceedings against him had to come to a premature end.¹⁵¹ Some scholars have challenged the indictment and trial of Milosevic arguing that at the time of indictment there was doubt as to whether FRY was a member of the UN.¹⁵² FRY's membership to the UN or lack thereof is relevant in this case since, as explained above, the statutes and decisions of tribunals established by the UNSC are binding on states solely on the basis of their UN membership status. Therefore, if the membership is in doubt the jurisdiction of the tribunal ought to be in doubt as well. However, this challenge was made *post facto* and this was not one of the issues dealt with during the trial.

2.4.2.1.2 The International Tribunal for Rwanda

About one year after the establishment of the ICTY, the UNSC reacting to reports on the egregious crimes committed during the genocide in Rwanda, passed a Resolution¹⁵³ establishing the ICTR for the purpose of:

“...prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for

¹⁴⁸ Decision on Preliminary Motions (8 November 2001) paras 5- 11.

¹⁴⁹ Ibid para 26 and 27.

¹⁵⁰ Ibid para 28.

¹⁵¹ “Slobodan Milosevic Found Dead in His Cell at the Detention Unit” <http://www.icty.org/sid/8794>. See also “Statement by the ICTY Prosecutor” <http://www.icty.org/sid/8793> (both accessed 14 May 2013).

¹⁵² D Akande “The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits” (2003) 1 *JICJ* 618 at 628-631.

¹⁵³ UNSC Resolution 955 of 1994 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement> (accessed 22 April 2013).

genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994....¹⁵⁴

As mentioned above, Article 6 (2) of ICTR Statute, which extends the tribunal's jurisdiction to heads of state and government, is a replica of Article 7(2) of the ICTY Statute and both are substantially similar to Article 7 of the Nuremberg Charter.

2.4.2.1.2.1 Case against Former Prime Minister Jean Kambanda

Consequently, Jean Kambanda, who was Prime Minister of Rwanda at the time of the genocide and therefore responsible for "directing government activities and policies"; was indicted by the ICTR to stand trial on charges of genocide, conspiracy to commit genocide, complicity in genocide and crimes against humanity.¹⁵⁵ By means of plea agreement signed by Kambanda and his lawyer he pleaded guilty to the all the charges leveled against him.¹⁵⁶ Because of the guilty plea, the jurisdiction of the ICTR over Kambanda was not challenged and as a result, the Tribunal did not discuss immunity related issues. The Tribunal, however, refused to accept the argument that his direct plea of guilty was to be considered as a mitigating factor in sentencing and sentenced him to life imprisonment.¹⁵⁷

Both the ICTY and ICTR have been the subjects of criticism by many scholars.¹⁵⁸ Their shortcomings and their *ad hoc* nature formed the basis of the yearning for the establishment of a permanent international criminal court.¹⁵⁹ Nevertheless, their jurisprudence has been relied on by subsequent international tribunals particularly on head of state immunity as will be shown below.

¹⁵⁴ UNSC Resolution 955 para 1.

¹⁵⁵ *The Prosecutor v Jean Kambanda* Case No. ICTR-97-23 DP <http://www.unictr.org/Portals/0/Case/English/Kambanda/indictment/index.pdf> (accessed 22 April 2013).

¹⁵⁶ *Jean Kambanda* para 39

¹⁵⁷ *Jean Kambanda* para 62.

¹⁵⁸ See H Koechler "Memorandum on the Indictment of the President of the Federal Republic of Yugoslavia, the President of the Republic of Serbia and Other Officials of Yugoslavia by 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' " <http://i-p-o.org/yu-tribunal-memo1999.htm> (accessed 17 May 2013) referring to the ICTY as "a use of judicial procedures for purposes of power politics". See also Schabas *The UN International Tribunals* 47-73 discussing the legitimacy and legality of the ICTR, the ICTY and the SCSL.

¹⁵⁹ MC Bassiouni "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 *Harvard Human Rights Journal* 11-62.

2.4.2.2 Hybrid International Criminal Tribunals

The second category of tribunals, apart from those established directly by UNSC Resolutions above, are those established by agreement between the UN and various states. The UN has over time, at the request of states, aided them in formation of courts to try international crimes that occurred in their territories. Such courts are commonly referred to as “hybrid” tribunals because by virtue of their establishment by agreements between states and the UN, they are neither international tribunals *per se* nor are they national courts in the usual sense.¹⁶⁰ Examples are: the Extraordinary Chambers in the Courts of Cambodia (ECCC);¹⁶¹ Lebanon Tribunal;¹⁶² East Timor Tribunal,¹⁶³ Kosovo Tribunal,¹⁶⁴ and the Special Court for Sierra Leone.¹⁶⁵ The latter is particularly relevant to this thesis since heads of state immunity was discussed therein at length.

2.4.2.2.1 The Special Court for Sierra Leone

On the 14th of August 2000 the UNSC, deeply concerned about the serious crimes committed against the people of Sierra Leone, requested the UN Secretary General to negotiate an agreement with the government of Sierra Leone for the establishment of “an independent special

¹⁶⁰ See S M H Nouwen “‘Hybrid courts’ The Hybrid Category of a New Type of International Crimes Courts” *Utrecht Law Review* <http://www.utrechtlawreview.org/index.php/ulr/article/download/URN%3ANBN%3ANL%3AUI%3A10-1-101051/32> (accessed 9 July 2013).

¹⁶¹ Created by the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea and The 2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC LAW) http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (accessed 9 July 2013). The ECCC had the jurisdiction to deal with persons who had committed crimes in violation of the laws of Cambodia that relate to crimes against humanity, war crimes and breaches of international humanitarian law. See article 2 and 3 of the ECCC Law. For analysis of composition and jurisdiction see D Scheffer “The Extraordinary Chambers in the Courts of Cambodia” in C Bassiouni ed *International Criminal Law* 3 ed (2008).

¹⁶² Created by agreement between the Lebanese Government and the UN pursuant to UNSC Resolution 1664 of 2006 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/290/16/PDF/N0629016.pdf?OpenElement> (accessed 9 July 2013). See also Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon <http://www.stl-tsl.org/en/documents/un-documents/un-security-council-resolutions/annex-uns-c-r1757-agreement-between-the-united-nations-and-the-lebanese-republic-on-the-establishment-of-a-special-tribunal-for-lebanon> (accessed 09 July 2013). The tribunal had the jurisdiction to try persons responsible for the attack that led to the death of Prime Minister Hariri of Lebanon and other persons.

¹⁶³ The Special Panel of Dili District Court was established by the United Nations Transitional Administration in East Timor (UNTAET) which was itself created by the UNSC vide Resolution 1271 Of 1999. See [http://www.undemocracy.com/S-RES-1272\(1999\).pdf](http://www.undemocracy.com/S-RES-1272(1999).pdf) (accessed 09 July 2013). It had the jurisdiction to try serious criminal offences including murder, rape and torture.

¹⁶⁴ United Nations Interim Administration Mission in Kosovo (UNMIK) established under UNSC Resolution 1244 of 1999 which in turn established the Kosovo tribunal.

¹⁶⁵ Established pursuant to UNSC Resolution 1315 of 14 August 2000.

court” to bring to justice all who had committed serious crimes in Sierra Leone and against the People of Sierra Leone.¹⁶⁶ After lengthy deliberations, on the 16th of January 2002, the United Nations and the Government of Sierra Leone signed an agreement establishing the Special Court of Sierra Leone (hereinafter the “SCSL”). Due to the unique manner of its establishment the SCSL has been described as a “UN-backed hybrid criminal tribunal”¹⁶⁷ and “a treaty-based *sui generis* court of mixed jurisdiction and composition”¹⁶⁸ among other terminologies. The SCSL was established for the purpose of prosecuting persons who bore the greatest responsibility for the violations of international humanitarian law that occurred in Sierra Leone from the date of 30 November 1996.¹⁶⁹

The SCSL Statute gives the SCSL jurisdiction over crimes against humanity, violations of article 3 of the Geneva Conventions and Additional Protocol II, other serious violations of international humanitarian law as well as crimes under Sierra Leonean law.¹⁷⁰ The SCSL statute also contains a provision on individual criminal responsibility irrespective of the official capacity as “head of state or government or as a responsible government official”¹⁷¹ which is similar to the provisions of the ICTY and the ICTR Statutes discussed above.

2.4.2.2.1.1 Case against Former President Charles Taylor

The SCSL indicted Charles Taylor, who at the time of the indictment was the President of Liberia; and by virtue of his office the “Head of State, Head of Government and the Commander in Chief of the Armed forces of Liberia.”¹⁷² He was charged with crimes against humanity, violations of Article 3 of the Geneva Convention and Additional Protocol II as well as other serious violations of international humanitarian law.¹⁷³ To challenge this indictment, an application was made to the Court on behalf of Charles Taylor and the Republic of Liberia seeking to quash the indictment and to cancel the warrant of arrest on the basis of state

¹⁶⁶ UNSC Resolution 1315 of 14 August 2000.

¹⁶⁷ C Jalloh “Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone” (2004) *ASIL Insights* <http://www.asil.org/insigh145.cfm> (accessed 25 April 2013).

¹⁶⁸ The Report of the Secretary-General on the establishment of a Special Court for Sierra Leone of (4 October 2000) UN Doc. S/2000/915 para 9 http://www.un.org/ga/search/view_doc.asp?symbol=S/2000/915 (accessed 16 May 2013).

¹⁶⁹ Statute of the Special Court for Sierra Leone Article 1.

¹⁷⁰ *Ibid* Articles 2, 3, 4, and 5.

¹⁷¹ *Ibid* Article 6 (2).

¹⁷² Article 50 of the Constitution of the Republic of Liberia.

¹⁷³ Indictment, *Prosecutor v Charles Ghankay Taylor* (SCSL-03-01), 3 March 2003 <http://www.scs-l.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (accessed 23 April 2013).

sovereignty and head of state immunity.¹⁷⁴ The Court granted the prosecutor's application seeking to exclude the state of Liberia from the proceedings and treated the Motion as a preliminary motion under rule 72 E of the Rules of Procedure and Evidence, which requires the Trial Chamber to refer applications which "raise a serious issue relating to jurisdiction" to the Appeals Chamber.¹⁷⁵

The applicant's main argument challenging the jurisdiction of the SCSL was that Charles Taylor enjoyed inviolable personal immunity from the jurisdiction of the SCSL arising from his position as a sitting head of state at the time of his indictment.¹⁷⁶ It was argued that the Court had not been established by Chapter VII powers of the UNSC and therefore lacked the jurisdiction to try heads of state; and also that by issuing a warrant of arrest against the President of Liberia while on an official visit to Ghana, the SCSL had not only violated the sovereignty of Liberia but also that of Ghana. It was also argued that by virtue of its establishment the Court was not an international tribunal hence lacked the powers that accrue to international tribunals in relation to the irrelevance of official capacity and immunity.

On the question of the international nature of the tribunal, the SCSL held that the powers of the UNSC under articles 39 and 41 are so wide, "as to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of a Special Court by Agreement with Sierra Leone."¹⁷⁷ The Court went on to say in this regard that:

"An agreement between the United Nations and Sierra Leone is thus an Agreement between all the members of the United Nations and Sierra Leone. This fact makes the Agreement the will of

¹⁷⁴ *Prosecutor v Charles Ghankay Taylor*, Applicant's Motion made under Protest and without waiving of Immunity requesting that the Trial Chamber do quash the approved indictment against the person of President Charles Ghankay Taylor (SCSL-03-01-I-015) 23 July 2003.

¹⁷⁵ *Prosecutor v Charles Ghankay Taylor*, Order Pursuant To Rule 72(E) - Defense Motion To Quash The Indictment And To Declare The Warrant Of Arrest And All Other Consequential Orders Null And Void (SCSL-03-01-I-024) Trial Chamber, 19 September 2003.

¹⁷⁶ *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction (SCSL-2003-01-I) 31 May 2004 paras 6-16
<http://www.scsl.org/CASES/ProsecutorvsCharlesTaylor/AppealsChamberDecisions/tabid/191/Default.aspx> (accessed 24 April 2013).

¹⁷⁷ Decision on Immunity from Jurisdiction Para 37.

the international community. The special court established in such circumstances is truly international”¹⁷⁸

Having held that the SCSL was “truly international” the Court proceeded to say that it is an established rule of international criminal law that head of state immunity does not apply to international tribunals.¹⁷⁹ The Court added that in the *Arrest Warrant* case, discussed above, the ICJ held that the ministers and heads of state could be tried in certain international tribunals, such as the ICTY, the ICTR and the ICC, where they had jurisdiction. Based on this argument, the Court concluded that since the clause on the irrelevance of official capacity in the SCLC Statute was the same as those in the ICTR, ICTY and the ICC Statutes, all which have jurisdiction over head of states; it followed that the SCLC too had jurisdiction over the Charles Taylor as a head of state.¹⁸⁰

Regarding the personal immunity of Charles Taylor at the time of the indictment, the Court held that at the time of the decision the accused person was no longer a sitting head of state therefore did not enjoy personal immunity.¹⁸¹ The Court stated further that quashing the indictment on the basis that the accused person had held personal immunity at the time of 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 decision, susceptible to the Court’s jurisdiction.¹⁸²

On the issue of violation of the sovereignty of Liberia and Ghana, the Court held in relation to the former that Liberia as a state was not a party to the case; merely Charles Taylor its former president, therefore Liberia’s sovereignty could not have been breached. Furthermore, the Court held that being an international court the actions of the SCSL were incapable of violating the sovereignty of a state since such actions did not involve one state adjudicating in the matters of a foreign state.¹⁸³ From the foregoing, it is possible to argue that by holding that the SCSL was an international court, the Court aimed to set the *Charles Taylor* case apart from the *Arrest Warrant* case where the ICJ held that the issuance and the circulation of an arrest warrant by a Belgian

¹⁷⁸ Ibid para 38.

¹⁷⁹ Ibid para 52.

¹⁸⁰ Ibid paras 50-54.

¹⁸¹ Ibid para 59.

¹⁸² Ibid para 59

¹⁸³ Ibid para 56.

Court against Yerodia, the Congolese Minister, amounted to a breach of Congo's sovereignty by Belgium.¹⁸⁴

In relation to Ghana, the Court held that, the mere circulation of an arrest warrant in Ghana did not breach Ghana's sovereignty. Moreover, the Court said that had it been the case that Ghana's sovereignty had indeed been breached, it was not for the accused person to raise the issue; but rather Ghana would have had to do that on its own and before an appropriate court which was not the SCLC.¹⁸⁵

2.4.2.2.1.2 Critique of the Charles Taylor Immunity Decision

The above decision of the SCSL Appeals Chamber has been hailed by some as an affirmation of the fact that "the long hands of international criminal law" now extend to heads of state whenever they are accused of international crimes and that head of state immunity can no longer shelter them from prosecution.¹⁸⁶ However, the decision has also attracted criticism from some scholars who disagree with the Court's assertion that the SCSL was established under Chapter VII powers of the UNSC.¹⁸⁷ The implication of such finding, that the SCSL lacks the backing of Chapter VII powers, is grave since it challenges the jurisdiction of the SCSL over Charles Taylor who at the time of the indictment was the sitting head of state of Liberia. As already discussed above, it is submitted in this thesis, in agreement with Akande's view, that the manner of establishment of an international tribunal is one of the factors that determine whether or not the tribunal can claim jurisdiction over heads of state.

Concerning the establishment of the SCSL, Deen-Racsmany posits that the terminology used in the UNSC Resolution 1315 reflects no intention of the UNSC using its powers under Chapter

¹⁸⁴ *Arrest Warrant* case para 95.

¹⁸⁵ *Ibid* Para 57.

¹⁸⁶ C Jalloh "Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone" (2004) *ASIL Insights* <http://www.asil.org/insights/insigh145.htm> (accessed 30 April 2013).

¹⁸⁷ M Frulli "The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?" (2004) *12 JICJ* 1118 at 1124; CP Romano and A Nollkaemper "The Arrest Warrant Against the Liberian President, Charles Taylor," *ASIL Insights* <http://www.asil.org/insights/insigh10.html> (accessed 29 April 2013); Z Deen-Racsmany "Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity" (2005) *18 Leiden Journal of International Law* 299 at 307; R Cryer "A 'Special Court' For Sierra Leone?" (2001) *50 ICLQ* 435 at 436.

VII in relation to establishing the SCSL.¹⁸⁸ She says in reference to the preamble of the Resolution that:

“Instead of using classical Chapter VII verbs such as ‘demands’, or the imperative ‘shall’, the language falls even short of ‘calling upon’ states to undertake certain measures. The resolution contains mere requests (addressed to the UN Secretary-General) and recommendations (concerning the Court). Its semantics can hardly be claimed to signal any intention on the part of the SC to act under Chapter VII.”¹⁸⁹

According to this argument, therefore, since the establishment of SCSL lacked the backing of chapter VII powers, the SCSL remains a treaty based organization whose decisions only bind the treaty signatories, that is the UN as an organization as such (not its individual members) and Sierra Leone.¹⁹⁰ Individual members of the UN and other third states including Ghana and Liberia are therefore, following this argument, not bound by the SCSL Agreement.¹⁹¹ The proponents of this view therefore argue that a Court whose establishment is not based on the Chapter VII powers cannot legitimately invoke powers such as those invoked by tribunals established under Chapter VII; especially with regards to heads of non-party states.¹⁹² From the foregoing it follows logically that the SCSL, having been established by an agreement between Sierra Leone and the UN and not under the UNSC Chapter VII powers, had no jurisdiction to indict and try Charles Taylor while he was still the president of Liberia. It has, in this regard, been argued that “what Sierra Leone could not have done unilaterally, it cannot do by participating in the creation of an international court.”¹⁹³

It is noteworthy that the proponents of this view merely contest the indictment of Charles Taylor by the SCSL at the time when he was still the sitting president of Liberia arguing that due to the manner of its establishment the SCSL lacked jurisdiction over a sitting head of state. Put differently, these commentators argue that the SCSL could not over rule the personal immunity

¹⁸⁸ Deen-Racsmany 2005 *Leiden Journal of International Law* 307.

¹⁸⁹ Ibid. See also LM Goodrich et al *Charter of the United Nations Commentary and Documents* 3ed (1969) 306-308 “The ‘force’ the Council intends to give to its resolutions is sometimes reflected in the terms it uses.”

¹⁹⁰ Being an agreement between the United Nations and Sierra Leone, the SCSL Agreement only binds states not party to it. Under the doctrine of *pacta tertiis nec nocent nec prosunt* treaty agreements only bind the parties thereto and cannot bind non-parties without their consent. See Article 26 of the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (adopted 21 March 1986 though not yet in force) http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf (accessed 1 May 2013); See also M Frulli 2004 *JICJ* 1124.

¹⁹¹ M Frulli 2004 *JICJ* 1124; Romano and Nollkaemper “The Arrest Warrant Against the Liberian President”.

¹⁹² Deen-Racsmany 2005 *Leiden Journal of International Law* 309; Cryer 2001 *ICLQ* 439-440.

¹⁹³ Romano and Nollkaemper “The Arrest Warrant Against the Liberian President”.

of Charles Taylor which accrued to him as a sitting head of state. It is however agreed that after his resignation, the SCSL then had jurisdiction over Taylor.¹⁹⁴ This supports the view that the mere fact that a tribunal has been termed international, as the SCSL held itself to be, does not automatically mean that immunities are inapplicable before such Court but instead that the manner of establishment of a tribunal determines its jurisdiction over persons who otherwise hold immunity.

2.4.2.3 Establishment by Way of Treaty

Unlike international criminal tribunals established under Chapter VII powers of the UNSC which bind all members of the UN, those established by way of treaty bind only the states that have expressed their intention to be bound. This is justified by the customary international law rule that only parties to a treaty are bound by its provisions.¹⁹⁵ It follows, therefore, that international criminal tribunals which exclude the application of immunities only remove the immunities of the officials of states parties to that treaty. By ratifying such treaty, a state is considered to have waived the immunity of its officials.¹⁹⁶

The position of non-party states is more complicated. As a general rule, the provisions of a treaty do not usually apply to non-party states. In this regard, Akande says:

“... since only parties to a treaty are bound by its provisions, a treaty establishing an international tribunal cannot remove immunities that international law grants to officials of states that are not party to the treaty. Those immunities are rights belonging to the non-party states and those states may not be deprived of their rights by a treaty to which they are not party.”¹⁹⁷

However, as will be discussed in part 2.5.3 below, the ICC which is one such tribunal having been established by the Rome Statute, has excised its jurisdiction over the heads of non-party states. This has been a great source of the AU-ICC tension.

¹⁹⁴ M Frulli 2004 *JICJ* 1129.

¹⁹⁵ Articles 34-38 of the Vienna Convention on the Law of Treaties, 23 May 1969.

¹⁹⁶ Akande 2004 *AJIL* 417; Wirth 2002 *EJIL* 882; Wirth 2001 *Criminal Law Forum* 429.

¹⁹⁷ Akande 2004 *AJIL* 417.

2.5 Immunity before the International Criminal Court

Article 27 of the Rome Statute is one of the latest provisions on the inapplicability of immunity based on official capacity before international criminal tribunals. Apart from the provision on individual criminal responsibility like in previous tribunals, article 27 (1) further provides that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” This is a novel provision since, as discussed above, the statutes of the earlier international tribunals stop at extending criminal responsibility to all persons and do not expressly prohibit immunity and other procedural rules from application. This initial provision only affected functional immunity so that if a person commits a crime in his/her official capacity, the act is not attributable to the state but to the individual and the individual can be prosecuted for it. Therefore, the international tribunals discussed above only tried former leaders, after the expiry of their personal immunity. However, article 27 (2) of the Rome Statute for the first time, 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.

2.5.1 Immunity of leaders of state parties to the Rome Statute

This additional provision is in line with the state parties’ goal of ensuring that all the perpetrators of the “most serious crimes of international concern” are brought to justice regardless of their official capacity and the immunities that attach thereto.¹⁹⁸ By this addition, state parties to the Rome Statute are considered to have waived the immunity that may apply to their agents including their heads.¹⁹⁹ It follows that the ICC undoubtedly has jurisdiction over all the officials of state parties including heads of state.

¹⁹⁸ The Rome statute Preamble states that: “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”

¹⁹⁹ Akande (2004) *AJIL* 420.

2.5.1.1 The cases against Kenyan President and Deputy President

On 31 March 2010, the Pre-Trial Chamber granted the ICC Prosecutor's request to launch an investigation into the Kenyan situation²⁰⁰ arising from the 2007-2008 post-election violence (PEV).²⁰¹ As a result of this investigation six Kenyans, who were considered to have borne the greatest responsibility for the crimes committed during PEV, were indicted by the ICC. Among those indicted were Mr. Uhuru Kenyatta, who at the time of the indictment was the Finance Minister doubling as the Deputy Prime Minister; and Mr. William Ruto who was the Minister for Higher Education.²⁰² President Kenyatta was accused of being responsible, as an indirect co-perpetrator, for the crimes against humanity of murder, deportation and forcible transfer, rape, persecution and other inhumane acts.²⁰³ Similarly, Deputy President Ruto is also accused of being responsible, as an indirect co-perpetrator, for crimes against humanity of murder, deportation or forcible transfer of population and persecution.²⁰⁴

In a subsequent election held in March 2013, the two accused persons, President Kenyatta and Deputy President Ruto, were elected in a highly contested election as President and Deputy President of Kenya respectively.²⁰⁵ It is noteworthy that to date there has been no official application petitioning the Court to dismiss the cases against the two on the basis of head of state immunity. Instead, in March 2011 even before the election of the two into as president and deputy president, Kenya challenged the admissibility of all the Kenyan cases before the ICC under article 19 requesting that the cases be found to be inadmissible on the basis that investigations were underway in Kenya.²⁰⁶ The cases were, however, held to be admissible on the basis that Kenya failed to prove that the investigations being conducted in Kenya were

²⁰⁰ Situation in the Republic Of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09.

²⁰¹ Violence erupted in Kenya after the 2007 elections causing the deaths of over 1000 people and the displacement of about 600,000 people. See S Elhawary "Crisis in Kenya: land, displacement and the search for 'durable solutions'" *HPG Policy Briefs* <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2263.pdf> (accessed 05 July 2013).

²⁰² "6 Prominent Kenyans Accused of Crimes against Humanity" *Voice of America* 14 December 2010 <http://www.voanews.com/content/six-prominent-kenyans-accused-of-crimes-against-humanity/111924229/132303.html> (accessed 20 May 2014).

²⁰³ *The Prosecutor v Uhuru Muigai Kenyatta*, ICC- ICC-01/09-02/11.

²⁰⁴ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11.

²⁰⁵ "Kenya's Election: What Uhuru Kenyatta's Victory Means for Africa" *Time* 9 March 2013 <http://world.time.com/2013/03/09/kenyas-election-what-uhuru-kenyattas-victory-means-for-africa/> (accessed 20 May 2014).

²⁰⁶ Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ICC-01/09-02/11-26.

against the same persons and for the same conduct as the ICC investigations, a decision which was upheld on appeal.²⁰⁷

The next step taken by the two leaders, albeit separately, was to request that they be excused from continuous presence during their trial in order to effectively perform their official functions. On 18 June 2013 the trial chamber granted Deputy President Ruto a conditional excusal from attending trial.²⁰⁸ The Chamber was however quick to add that the excusal had nothing to do with his immunity as deputy head of state but was merely for the practical reason of allowing him to perform his state functions. The Court held that:

The Chamber is of the view that the main aim of Article 27(1) is to align the ICC Statute with the contemporary norm of international law according to which public officials are no longer entitled to immunity for violation of international criminal law. Notably, some of the more highly qualified legal publicists appear to be of the same view.²⁰⁹

On 18 October 2013, a similar decision was entered in the case of President Kenyatta.²¹⁰ The Trial Chamber noted that the president in his capacity as head of state and government was required to perform various functions to keep the country running and yet modern international law required that the actions of all persons be subject to judicial scrutiny on allegation of international crime.²¹¹ In this regard the Court held as follows:

Yet, it is entirely possible to conduct such an inquiry in this Court, in a manner that permits the concerned head of state or government reasonable leeway to manage the affairs of his or her nation, when compatriots have given him or her that sovereign mandate—through the democratic process—in full knowledge of any criminal charge laid against that individual as an accused person, enjoying the presumption of innocence, before this Court. The Rome Statute, when construed properly, implicates no jural dissonance that necessarily precludes such an

²⁰⁷ Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-02/11 O A.

²⁰⁸ *The Prosecutor V. William Samoei Ruto and Joshua Arap Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777.

²⁰⁹ *Ibid* para 66. Furthermore the court adds that: “In the circumstances, the Chamber is satisfied that Article 27 is mainly intended to accomplish (i) the (now usual) removal of immunity from jurisdiction on grounds of official position; and (ii) the removal of any special immunity or procedure that impedes effective exercise of jurisdiction of the Court over a public office holder in relation to his individual criminal responsibility.” See *ibid* para 70.

²¹⁰ *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defense Request for Conditional Excusal from Continuous Presence at Trial, 18 October 2013, ICC-01/09-02/11.

²¹¹ *Ibid* para 1.

arrangement. In the circumstances, it is correct to conditionally grant the Defense request of the Chamber to excuse Uhuru Kenyatta from continuous presence at trial, in order to permit him to discharge his functions of state as the executive President of Kenya; while his trial proceeds, as it must do, in this Court.²¹²

Following this argument the Trial Chamber, just as it had done in the *Ruto case* above, conditionally excused President Kenyatta from continuous presence at trial.

However, both these decisions were later reversed. The decision to excuse Deputy President Ruto from continuous trial was overruled unanimously by the Appeals Chamber on the basis that the Trial Chamber had interpreted the scope of its discretions too broadly.²¹³ As a result, the decision regarding President Kenyatta's excusal was reconsidered by the majority of the Trial Chamber with Judge Chile Eboe-Osuji dissenting.²¹⁴ The Appeals Chamber held that in exercising its discretion under article 63, which relates to the accused person's presence at trial, the Trial Chamber is to be limited by the following factors: the need to be absent from trial has to be absolutely necessary; the accused person must waive his/her right to be present; the accused person's right must be protected in his/her absence; it has to be determined on a case by case basis; and other options such as change of dates have to be exhausted first.²¹⁵

The AU has expressed its disapproval of the continuance of the two cases. In one of its decisions concerning the issue, made in May 2013, the AU expressed concern that the indictment of the President and Deputy President of Kenya would interfere with the reconciliation and peace building process in Kenya.²¹⁶ The AU regretted the fact that Kenya's petition against the admissibility of the cases in 2011 had been dismissed and stated that Kenya has the right to try its own cases under the principle of complementarity. Under the same principle of complementarity, the AU endorsed the petition of the East African region for the cases to be

²¹² *Ibid* para 3 & 4

²¹³ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 25 October 2013, ICC-01/09-01/11 OA 5.(hereinafter "judgment on appeal")

²¹⁴ *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11.

²¹⁵ Judgment on Appeal para 2

²¹⁶ Decision On International Jurisdiction, Justice And The International Criminal Court (ICC)1 Doc. Assembly/Au/13(XXI).

referred back to Kenya.²¹⁷ The ICC responded to this by calling the move by the AU a political one with no legal consequences.²¹⁸

Later on, the AU Contact group and a Kenyan representative presented a petition to the UNSC requesting the deferral of the case against the two Kenyan leaders.²¹⁹ The argument was that Kenya had been long involved in the fight against terrorism and a trial would distract the leaders from continuing in this fight hence endangering the peace and security of Kenya and Africa by extension.²²⁰ However, this motion failed with Seven Council members voting in favor of the draft resolution (Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo), none voted against, and 8 abstentions (Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom, and United States).²²¹ The general argument presented by those who voted for the draft resolution was that the Contact Group had presented a strong case for the deferral and indeed the continuation of the case would impede the Kenyan government's attempt to fight against terrorism; and that deferral was indeed in the interest of peace and security in Kenya and the African continent. They further stated that the UNSC had the power to defer cases under article 16 of the Rome Statute and that power ought to be used to help solve African problems.²²²

On the other hand, those who abstained from the vote stated that the Security Council was not the ideal forum to deal with the issues raised by the Contact Group and that the better avenue of redress would be at the ASP and the ICC. They further stated that the threat to peace and security threshold required for deferral of a case under article 16 had not been attained. There also seemed to be concerns that the use of article 16 to defer the cases would make the article vulnerable to abuse in the future.²²³

²¹⁷ For an analysis of the legitimacy or otherwise of the AU decision see S Dersso "The International Criminal Court's Africa problem" <http://www.aljazeera.com/indepth/opinion/2013/06/201369851918549.html> (accessed 05 July 2013).

²¹⁸ "ICC Underlines Impartiality, Reiterates Commitment to Cooperation with the African Union" ICC-CPI-20130529-PR908.

²¹⁹ Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, 22 October 2013, S/2013/624.

²²⁰ *Ibid.*

²²¹ Security Council Resolution Seeking Deferral Of Kenyan Leaders' Trial Fails To Win Adoption, With 7 Voting In Favour, 8 Abstaining, 15 November 2013, SC 11176.

²²² *Ibid.*

²²³ *Ibid.*

2.5.1.1.1 Immunity of the Kenyan leaders

As at the time of writing, the trial against Deputy President Ruto has already commenced at the ICC while President Kenyatta was the first sitting head of state to appear before an international criminal tribunal.²²⁴ Despite all the objections that have been raised petitioning the Court to dismiss the cases against the two leaders, none have been on the basis of immunity. The AU has referred to the immunity of the two leaders in its decisions expressing concern that the cases against them violates international law but this issue has not been considered directly by the Court.²²⁵

It is difficult to find justification for immunity of the Kenyan leaders before the ICC within the Rome Statute and the Kenyan Constitution. Being a party to the Statute, Kenya is bound by article 27 of the Rome Statute, which as discussed above provides that immunity based on official capacity shall not bar proceedings before the ICC. Furthermore, Kenya has domesticated the Rome Statute vide International Crimes Act of 2008 which also provides in article 27 (1) that:

“The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for—

- (a) Refusing or postponing the execution of a request for surrender or other assistance by the ICC;
- (b) Holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or
- (c) Holding that a person is not obliged to provide the assistance sought in a request by the ICC.”

The Kenyan Constitution 2010, which is the supreme law in Kenya, provides under Article 2 that all treaties signed and properly ratified by Kenya will form part of the laws of Kenya. This therefore means that the Rome Statute which has been signed and ratified by Kenya forms part of the Kenyan laws including article 27 which excludes immunity based on official capacity. More specifically, Article 143 (4) of the Constitution is an exception to the immunity of the Kenyan president that is otherwise provided for in the article 143 (1), (2) and (3). It provides that “[t]he

²²⁴ *The Prosecutor v. Uhuru Muigai Kenyatta*, Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters, 19 September 2014, ICC-01/09-02/11.

²²⁵ See section 3.4 of Chapter 4 of this thesis.

immunity of the President under this article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity”

For the above stated reasons there is no legal justification supporting an argument that the two Kenyan leaders are immune from prosecution at the ICC. Being citizens of a state bound by the Rome Statute, and also by the International Crimes Act enacted to implement the Rome Statute, the two Kenyan leaders are subject to the jurisdiction of the ICC. The Kenyan Constitution, which was approved by Kenyans in a referendum, also provides that its president shall not be immune from prosecution for crimes under a treaty ratified by Kenya that prohibits immunity and the Rome Statute is one such treaty.

2.5.1.1.2 Challenges arising from the prosecution of a head of state

Despite the above, the challenges faced by the OTP during the prosecution of President Kenyatta led to the eventual termination of the proceedings against him.²²⁶ The fact that Kenyatta was the first sitting head of state to be on trial before an international tribunal evokes the question whether it is feasible to successfully prosecute a sitting head of state. As has been shown in the *Kenyatta case* the prosecution of the head of a state hinders the willingness of that state to cooperate with the ICC. States parties have the obligation to cooperate with the ICC in a number of ways listed in part 9 of the Rome statute including the provision of records and documents.²²⁷ In this regard, the date set for the commencement of President Kenyatta’s trial was changed more than four times leading to as indefinite postponement to allow time for the government of Kenya to comply with the prosecutor’s request to produce President Kenyatta’s financial and other records.²²⁸ Since the witnesses that the OTP relied on at the confirmation of charges stage either withdrew from the case or recanted their statements, these records were indispensable to the survival of the case.²²⁹

²²⁶ *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr Kenyatta, 13 March 2015, ICC-01/09-02/11-1005.

²²⁷ See Article 93 of the Rome Statute.

²²⁸ *The Prosecutor v. Uhuru Muigai Kenyatta*, Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters, 19 September 2014, ICC-01/09-02/11.

²²⁹ “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following an application seeking an adjournment of the provisional trial date” http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-19-12-2013.aspx (accessed 23 September 2014).

In a statement issued in December 2013 the ICC Prosecutor stated:

“In the last two months, one of the Prosecution’s key witnesses in the case against Mr. Kenyatta has indicated that he is no longer willing to testify. More recently, on 4 December 2013, a key second witness in the case confessed to giving false evidence regarding a critical event in the Prosecution’s case. This witness has now been withdrawn from the Prosecution witness list. Having carefully considered my evidence and the impact of the two withdrawals, I have come to the conclusion that currently the case against Mr. Kenyatta does not satisfy the high evidentiary standards required at trial. I therefore need time to complete efforts to obtain additional evidence, and to consider whether such evidence will enable my Office to fully meet the evidentiary threshold required at trial.”²³⁰

However, according to the prosecution, the government of Kenya refused to cooperate with the Court, and this lack of co-operation blocked part of the investigation in this case.²³¹ Kenya’s “lack of co-operation can be imputed to the accused in light of his position as the head of government.”²³² The OTP while admitting lack of sufficient evidence in the *Kenyatta case* sought an adjournment, instead of a withdrawal, arguing that the latter would undermine the Court’s earlier decision urging the government of Kenya to cooperate. The OTP further argued that the accused is the head of government therefore obliged by the Kenyan Constitution to cooperate with the ICC.²³³

The entire OTP case lay on the production of documents it had requested from the Government of Kenya.²³⁴ The Government of Kenya was requested to perform its cooperation duty under the Rome Statute and produce documents which would be used as evidence in the trial of the accused person. This is an ordinary procedure in the proceedings of an international tribunal, except in this case the accused person was the head of state and government of Kenya. How likely is it that such government, headed by a person who is on trial, would cooperate with the ICC in providing evidence that could possibly be incriminating? As was to be expected, the

²³⁰ Ibid.

²³¹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Prosecution opposition to the Defense request for the termination of the Kenyatta case, 31 January 2014, ICC-01/09-02/11-892.

²³² Ibid.

²³³ *The Prosecutor v. Uhuru Muigai Kenyatta*, Prosecution notice regarding the provisional trial date, 5 September 2014, ICC-01/09-02/11-944.

²³⁴ J Hennop “New setbacks shrink Kenyatta trial chances” *Yahoo News* 5 September 2014 (<http://news.yahoo.com/war-crimes-court-delays-kenyatta-trial-133210537.html>) (accessed 23 September 2014).

Government of Kenya showed little willingness to cooperate despite the Court's order to comply with the prosecutor's request.²³⁵ Being that the survival of the case lay solely on these records, the Prosecutor was eventually forced to withdraw the case against President Kenyatta.²³⁶ It is most likely that had the accused person not been the sitting Kenyan head of state and government, Kenya would have been more inclined towards cooperating with the ICC. This shows one of the practical challenges relating to the institution of proceedings against a sitting head of state if the cooperation of that state is required during the proceedings. This will always be the case since the ICC, lacking enforcement mechanism, relies heavily on state cooperation.

Apart from the cooperation of the state whose head is on trial, the cooperation of other states is also difficult to achieve. As demonstrated in the *Bashir case* states are very reluctant to exercise their jurisdiction over the head of a non-party state. This would bring into question the issue of state sovereignty and equality which are the very basis of international law on immunities. The arrest and surrender of President Bashir by another state would most likely be a very politically motivated move and would lead to a high level of international relations fall out between the arresting state and Sudan.²³⁷ As a result, the ICC is unlikely to gain custody of President Bashir while he is still the sitting Sudanese president and the Kenyatta case was frustrated by Kenya's unwillingness to cooperate. This gives rise to the question whether the prosecution of a sitting head of state by the ICC, or other international tribunal, is a worthwhile endeavor.

2.5.2 Immunity of leaders of non-parties state to the Rome Statute

As explained above, it is clear that immunity cannot be pleaded before the ICC by heads of state parties to the Rome Statute. The controversial issue, however, relates to the application of article 27 to nationals and senior state officials of non-party states. This issue came to fore with the indictment of President Bashir of Sudan and the late President Gaddafi of Libya following UNSC referrals of situations in the two countries to the ICC. However, the case against President

²³⁵ *The Prosecutor v. Uhuru Muigai Kenyatta*, Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya originally due on 30 April, 23 May 2014, ICC-01/09-02/11-922.

²³⁶ Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014, ICC-O1/09-02111-983.

²³⁷ See discussion in part 4.4 where it is concluded that the decision of African States Parties to arrest and surrender President Bashir is more motivated by political factors that are not related to their commitment to their Rome statute cooperation obligation.

Gaddafi was terminated due to his demise and for that reason only the immunity of President Bashir will be discussed below.

2.5.2.1 The case against President Bashir of Sudan

The Situation in Darfur, Sudan was referred to the ICC by a UNSC resolution after being qualified as a threat to peace and security.²³⁸ The prosecutor after conducting investigations instituted proceedings against five Sudanese nationals, among them the Sudanese President Omar Bashir.²³⁹ The prosecution later applied for a warrant of arrest against President Bashir and three other accused persons.²⁴⁰ The Court granted the application for a warrant against President Bashir on the ground that it was necessary to ensure that he would appear for trial, that he would not interfere with the on-going investigations and that he would not continue with the commission of crimes alleged.²⁴¹

While issuing the warrant, the Pre-trial Chamber stated that “the current position of Omar Al Bashir as the head of a state, which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case”.²⁴² The Court based this decision on the fact that the Darfur situation had been referred to it by the UNSC under its Chapter VII powers and on the provisions of Article 27 *inter alia*.²⁴³ The issuance of a warrant of arrest against President Bashir elicited vehement protests from some Sudanese nationals who stated that the Court had no jurisdiction over President Bashir or any other Sudanese nationals since Sudan had not ratified the statute of the ICC.²⁴⁴ There was also uproar in many other African countries which culminated in the AU passing a resolution urging its members to disregard the ICC warrant against President Bashir.²⁴⁵

²³⁸ Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005 S/RES/1593 (2005).

²³⁹ See “the Situation in Darfur Sudan” http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx (accessed 18 May 2013).

²⁴⁰ *Ibid.*

²⁴¹ *Prosecutor v Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 (4 March 2009) <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> (accessed 18 May 2013). See also article 58 of the Rome Statute.

²⁴² *Prosecutor v Omar Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber 1, 4 March 2009 para 41.

²⁴³ *Ibid.*

²⁴⁴ The Sudanese Ministry of Information stated that “There will be no recognition of or dealing with the white man's court, which has no mandate in Sudan or against any of its people.” See the “Uproar in Sudan over Bashir war crimes warrant: Protests erupt and government attacks 'white man's court' after president is charged with Darfur war

Scholars are divided on the issue of whether the immunity of President Bashir would apply before the ICC. Some scholars argue that President Bashir's immunity would not apply before the ICC but it is noteworthy that these scholars espouse different arguments to arrive at this conclusion.²⁴⁶ For example, Akande argues that UNSC referral of the Darfur situation to the ICC under Chapter VII of the UN Charter effectively removes the immunities that would otherwise apply to President Bashir as a sitting head of state.²⁴⁷ While Gaeta argues that the UNSC merely serves to trigger the jurisdiction of the ICC but the immunity of President Bashir is removed by the fact that the provisions of article 27 of the Rome Statute represent a new position of customary international law that immunities cannot apply in prosecutions before international criminal tribunals.²⁴⁸

On the other hand, some scholars argue that President Bashir as the head of a non-party state is immune, despite the UNSC referral, from prosecution at the ICC. Members of this school of thought also present different reasons for arrival at this conclusion. To name a few, Wardle opines that although the UNSC has the power to abrogate immunities under chapter VII of the UN Charter this cannot be accomplished impliedly by the referral of a situation to the ICC and not a particular case.²⁴⁹ He argues that the removal of immunities must be done in an explicit and unequivocal manner which was not the case during the UNSC referral of the Darfur situation.²⁵⁰ While Kiyani states that the UNSC referral of a situation to the ICC cannot remove the immunities applicable to the head of a non-party state since "the Security Council itself does not have the authority to revise the rules of public international law in order to negate al-Bashir's immunity".²⁵¹

crimes" *The Guardian* 4 March 2009 <http://www.guardian.co.uk/world/2009/mar/04/sudan-demonstrators-support-bashir> (accessed 18 May 2013).

²⁴⁵ The AU decisions are discussed in detail in Chapter 4.

²⁴⁶ J Needham "Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law" 17 (2011) *Auckland University Law Review* 219.

²⁴⁷ D Akande "The Legal Nature of Security Council Referrals to the ICC and its impact on Al Bashir's Immunities" (2009) 7 *JICJ* 333.

²⁴⁸ P Gaeta "Does President Al Bashir Enjoy Immunity from Arrest?" (2009) 7 *JICJ* 315 at 324-325.

²⁴⁹ P Wardle "The survival of Head of State Immunity at the International Criminal Court" (2011) 18 *Australian Journal of International Law* 181 at 196. See also a different argument from D Mainak "Presidential Immunity and the International Criminal Court's 'Exception' - A Critique" (2012) *Juris Gentium Law Review* 19 at 20.

²⁵⁰ *Ibid.*

²⁵¹ A G Kiyani "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12 *Chinese Journal of International Law* 467.

The ICC agrees with the first school of thought that the immunities of President Bashir are inapplicable before the ICC. This is shown through the issuance of two warrants of arrest against him, cooperation requests to states parties and the judgments against states parties that have refused or failed to comply with the requests.²⁵² The PTC stated, as already been mentioned above, that the position of President Bashir as a sitting head of state does not interfere with the jurisdiction of the ICC over him.²⁵³

In the author's view, the position of the ICC that the UNSC, a political body, is able to render the immunity of the head of a non-party state inapplicable before the ICC is very problematic. This is especially because three out of the five permanent members of the UNSC; China, Russia, and the US, are not parties to the Rome Statute. This strengthens the already prevalent perceptions of bias and double standard of the ICC against Africa and contributes to the ever worsening AU-ICC relationship.

2.6. Conclusion

It cannot be disputed that the previously absolute protection offered by the head of state immunity doctrine has been slowly adjusted from the Versailles Treaty to the Rome Statute. As has been shown by the successful prosecution of Slobodan Milosevic, Jean Kambanda, and Charles Taylor; functional immunity does not cover international crimes committed during incumbency. It is also uncontested that the ICC has jurisdiction over the heads of states parties to the Rome Statute. By ratifying the Rome Statute, states parties are considered to have waived the immunities of their officials including their heads and given the ICC the jurisdiction to prosecute them. Besides, in the *Arrest Warrant* case, the ICJ stated that immunity could not be pleaded before "certain" international tribunals with jurisdiction such as the ICC, the ICTR and the ICTY.²⁵⁴

However, despite the widely supported argument that immunity is not applicable before all international criminal tribunals, this author argues for the more restricted view, that the

²⁵² The cooperation requests and the judgments entered against states parties for refusal to cooperate will be discussed in detail in Chapter 4

²⁵³ Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09).

²⁵⁴ *Arrest Warrant* Case para 61.

applicability of immunity before a particular tribunal depends on the manner of establishment of a tribunal and the provisions of its constitutive statute.²⁵⁵ In this regard, tribunals established by the UNSC under Chapter VII of the UN Charter have jurisdiction to try the heads of UN member states while those established by treaty can only have jurisdiction over heads of states parties. The exception in the latter case can occur by referral of a situation in a non-party state, like Darfur, to the ICC by the UNSC under Chapter VII of the UN Charter. Such referral gives the ICC jurisdiction over all the persons allegedly responsible for the crimes committed including heads of state like President Bashir.

A discussion of immunity under the Rome Statute goes hand in hand with a discussion of the controversial article 98. The article provides that the ICC should respect the immunities of third states while requesting for states parties' cooperation. The interpretation of Article 98 and the position of immunity of heads of state before municipal courts complicates the cooperation duty of states parties. The fact that President Bashir has not been arrested years after the first warrant of arrest was issued against him goes to show the complexity of the relationship between immunity and cooperation of states with the ICC. It is against this backdrop that the next chapter discusses the relationship between articles 27 and 98 of the Rome Statute. The next Chapter examines the scope of states parties' obligation to cooperate with the ICC and the exceptions thereto with particular regard to article 98. The chapter also explores the seemingly conflicting obligations of state parties; on the one hand, the duty to cooperate with the ICC and on the other hand, the obligation to respect the immunity of the heads of third states. It seeks to answer the question whether article 98 has been justifiably relied on by certain states parties to refuse cooperation with the ICC.

²⁵⁵ See discussion in part 2.4 above.

CHAPTER THREE

The Impact of Head of State Immunity on the Rome Statute Cooperation Duty

“...whenever state sovereignty explodes onto the international scene, it may demolish the very bricks and mortar from which the Law of Nations is built. It is for this reason that international law aims to build devices to withstand the seismic activity of states: to prevent or diminish their pernicious effect. This metaphor is particularly apt in relation to an international tribunal. The tribunal must always contend with the violent eruptions of state sovereignty: the effect of states' lack of cooperation is like lava burning away the foundations of the institution.”²⁵⁶

3.1 Introduction

Chapter 2 established that the formerly robust protection offered by head of state immunity has considerably shrunk with regard to certain international tribunals like the ICC. However, the Rome Statute provides under article 98 that the ICC may not request a state party to cooperate if by carrying out the required act, the requested state would be violating the immunity of a person or property of a third state. Some state parties to the Rome Statute, such as Chad and Malawi, have relied on article 98 to deny ICC's request for the arrest and surrender of President Bashir. The ICC has responded by issuing judgments against these states arguing that article 98 cannot be interpreted in such a way as to prevent the arrest and surrender of President Bashir. This stalemate persists to date as President Bashir has not been arrested despite the fact that he has visited many states parties and this highlights the practical relevance of the relationship between articles 27 and 98 of the Rome Statute.

This chapter examines the scope and binding nature of the state parties' obligation to cooperate with the ICC; as well as the implications of exceptions to this duty, with particular reference to immunity under article 98. This chapter assesses the relationship between state parties' obligation to cooperate with the ICC, upon request, and the seemingly competing obligation to respect the immunity of the heads of third states. The discussion is with a view to establish whether states are justified to rely on immunity of the head of a non-party state, as some have done, to avoid surrendering an accused person to the ICC.

²⁵⁶A Cassese “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” (1998) 9 *EJIL* 2 at 12.

To lay a foundation for this discussion, part two of this chapter discusses the concept of interstate cooperation in criminal matters which focuses mainly on extradition as it is the concept from which surrender to international tribunals is derived. This part also discusses how interstate cooperation compares with state cooperation with international tribunals. Part three deals with cooperation between states and international tribunals. It is worth mentioning that the term “international tribunals” in this chapter is limited only to the ICTY, ICTR and the ICC which are the only international tribunals considered in this discussion. This part compares and contrasts the cooperation regimes of the ICTY and the ICTR on the one hand, and that of the ICC, on the other hand.

Part four then discusses the cooperation obligation of states parties under part 9 of the Rome Statute with particular regard to the duty to arrest and surrender accused persons to the ICC. This part also discusses some of the limitations of the cooperation duty. The next section, part five, then deals with article 98 of the Rome Statute which bars the ICC from requesting cooperation if this involves a breach of immunity of the person or property of a third state. This part also contains a discussion of the interplay between article 27, which renders immunities inapplicable before the ICC, and article 98 which protects the immunity of the persons or property of third states. Finally, part six deals with the chapter conclusion.

3.2 Interstate Cooperation in Criminal Matters

One of the cardinal principles of public international law is that a state’s jurisdiction is generally confined within the territory of that state and therefore a state is unable to exercise its jurisdiction on the territory of another state.²⁵⁷ This was affirmed in the *Lotus case*²⁵⁸ where the Permanent Court of International Justice (PCIJ) held *inter alia* that:

“Now the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by

²⁵⁷ M C Bassiouni *International Extradition and world public order* (1974) 206-259.

²⁵⁸ S.S. Lotus (France v. Turkey) 1927 PCIJ (ser. A) No. 10
http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm (accessed 03 March 2014).

a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”²⁵⁹

As a result of this limitation no single state is capable of dealing with transnational or international crimes on its own and this therefore creates the need for a concerted effort by the international community to combat crime that is beyond the reach of individual states.²⁶⁰ This is the basis of international cooperation.

International cooperation “encompasses every kind of activity regarding crime and justice, namely; mutual legal assistance, extradition, transfer of proceedings and prisoners, as well as technical cooperation.”²⁶¹ It is therefore too broad a subject to be discussed in its entirety in this chapter. For that reason, this chapter will focus on extradition as a form of interstate cooperation not only because it is the basis of the concept of surrender of persons to international tribunals, but also because it is the most important instrument of interstate cooperation.²⁶²

3.2.1 Extradition

Historically, as a show of friendship and good will, states would return fugitives who were mostly religious and political offenders to other states without being requested to do so.²⁶³ The earliest recorded extradition provision is found in the Treaty of Qadesh entered into between the Hittite King and the Egyptian Pharaoh in the year 1280 BC.²⁶⁴ In this treaty both leaders agreed to transfer back for prosecution any political fugitives and dissenters who had fled one region to seek refuge in another.²⁶⁵ However, early treaties, such as this were mainly peace treaties and extradition provisions were merely incidental as “the effective beginnings of modern international cooperation in the suppression of crime lie in the 18th Century”.²⁶⁶ From the 18th Century to date, states have entered into numerous bilateral and multilateral extradition treaties

²⁵⁹ Ibid Para 45.

²⁶⁰ See S Tiyapan “Extradition and Mutual Legal Assistance in Thailand” *114th International Training Course Visiting Experts’ Papers* http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-10.pdf (accessed 24 February 2014) at 108.

²⁶¹ Ibid at 108.

²⁶² Bassiouni *International Extradition* 5.

²⁶³ S Z Feller “The Scope of Reciprocity in Extradition” (1975) 10 *Israel law Review* 427 at 442.

²⁶⁴ I A Shearer *Extradition in International Law* (1971) 5-6.

²⁶⁵ T Bryce “The ‘Eternal Treaty’ from the Hittite perspective” (2006) 6 *BMSAES* 1-11 <http://www.thebritishmuseum.ac.uk/bmsaes/issue6/bryce.html> (accessed 27 February 2014).

²⁶⁶ Ibid at 6.

which vary in scope and content.²⁶⁷ Bilateral treaties form the main basis of extradition law in the absence of which extradition is governed by reciprocity and comity.²⁶⁸

Extradition refers to: “the act or process by which one sovereign state in compliance with a formal demand surrenders to another sovereign state for trial the person of a criminal who has sought refuge within the first state... or to the act delivering up of a fugitive criminal from one state to another.”²⁶⁹ Extradition is said, by some, to have derived its name from the fact that returning a person who has sought refuge in one’s territory negates the traditional practices of hospitality which therefore makes it “extra-tradition”.²⁷⁰ However, Bassiouni, says that the word extradition evolved from the Latin word *extradere* which means “to forcefully return a person to his sovereign”.²⁷¹

3.2.2 General requirements of Extradition

3.2.2.1 Extraditable offences

Extraditable offences are those that are either listed in or designated by the extradition treaty and in the absence of a treaty, those offences which both the requesting state and requested state have recognized as being extraditable.²⁷² There are two common ways of designation of offences in treaties. First, the enumerative method where the offences are expressly listed and defined and extradition is limited to the said list; second, the eliminative method where the treaty qualifies as extraditable all the offences under the laws of the parties which are punishable by sentences of certain severity which is usually the minimum sentence.²⁷³

3.2.2.2 Dual Criminality

Closely related to the extraditable offence is the requirement of dual criminality, also referred to as the double criminality, under which the act for which extradition is sought should be

²⁶⁷ M Zgonec-Rožej and J Foakes “International Criminals: Extradite or Prosecute?” http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713bp_prosecute.pdf (accessed 20 February 2014).

²⁶⁸ Bassiouni *International Extradition* 2.

²⁶⁹ See C Parry and J P Grant “*the Encyclopaedic Dictionary on International Law*” (1988).

²⁷⁰ Bassiouni *International Extradition* 3.

²⁷¹ *Ibid* at 3.

²⁷² *Ibid* at 312.

²⁷³ *Ibid* at 316.

considered a crime in both the jurisdictions of the requested and requesting states.²⁷⁴ The double criminality principle developed with the need to protect the offenders' rights during extradition which, as stated above, was historically more of a political than a legal process; as well as to prevent states from extraditing persons for acts which were not considered as crimes if performed in their jurisdiction.²⁷⁵

An early example of this principle appears in the Jay Treaty of 1794 between the US and Britain concerning the regulation of navigation and commerce between the two states.²⁷⁶ The parties to this Treaty agreed that:

“His Majesty and the United States on mutual Requisitions by them respectively or by their respective Ministers or Officers authorized to make the same will deliver up to Justice, all Persons who being charged with Murder or Forgery committed within the Jurisdiction of either, shall seek an Asylum within any of the Countries of the other, this shall only be done on such Evidence of Criminality as according to the Laws of the Place, where the Fugitive or Person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.”

The requirement of dual criminality was included in subsequent treaties both in the United States and in Britain as well as the rest of the world so that today the provision of double criminality is found in almost all multilateral and bilateral treaties in existence all over the world.²⁷⁷ Some commentators argue that the principle has acquired the status of customary international law.²⁷⁸

The application of this principle in Britain was shown in the *Pinochet Case*.²⁷⁹ As already discussed at length in chapter two, the case involved the request by Spain for the extradition of the former Chilean President Augusto Pinochet, for the offences of torture and conspiracy to commit torture. One of the main issues that arose during the proceedings was whether the requirement of dual criminality had been met with regards to the offences for which Spain

²⁷⁴ *Ibid* at 326.

²⁷⁵ J O Hafen “International Extradition: Issues Arising Under the Dual Criminality Requirement” (1992) *Brigham Young University Law Review* 191 at 193-194.

²⁷⁶ See article 27 of the Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and The United States of America, by Their President, with the advice and consent of Their Senate of 19 November 1794.

²⁷⁷ Haffen *Brigham Young University Law Review* 194. Also Bassiouni *international extradition* 326

²⁷⁸ SK Gupta “Extradition Law and the International Criminal Court” (2000) 3 *Berkeley Journal of Criminal Law* 12-14.

²⁷⁹ *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No 3) 1999 (2) All ER 97.

sought extradition. Section 2 (1) (b) of the British Extradition Act 1989 requires that in order to qualify as an extraditable offence, an extraterritorial offence has to be a crime under both the law of the foreign state (Spain in this case) and that of Britain.²⁸⁰ The question in *Pinochet*, however, was whether the offence had to have been a crime in Britain at the time of commission or merely at the time of extradition.²⁸¹ Majority of the Law Lords agreed that the offence had to be a crime under British law at the time of commission and not at the time of the request for extradition.²⁸² The result was to hold that acts related to torture and conspiracy to commit torture which had been committed before 1988 were held not to be extraditable crimes since torture only became a crime under British law in 1988 by virtue of the UK Criminal Justice Act that was enacted to domesticate the provisions of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁸³ The Court held that since these crimes were not part of the UK law, the double criminality test had not been satisfied and they had to be removed from the extradition request.

3.2.2.3 Specialty Rule

This principle is incorporated in most extradition treaties and requires that once the request for extradition has been granted under a treaty, the requesting state will prosecute the offender only for the crimes for which the extradition request was made.²⁸⁴ This excludes all other pre-extradition crimes except those specific ones for which extradition was sought. However, the rule is not absolute; one of its exceptions is that the rule may be waived by the requested state.²⁸⁵ For this reason it has been argued by some scholars that the principles' main objective is to protect the processes and interests of the extraditing state and the protection of the rights of the extraditee is merely incidental.²⁸⁶ The question that arises from the foregoing is whether an extraditee can claim a right under this rule.²⁸⁷

²⁸⁰ The Act has since been amended by virtue of UK Extradition Act 2003 but this provision still remains.

²⁸¹ *Pinochet* No 3 at 105.

²⁸² *Ibid* Lord Browne-Wilkinson at 106-107, Lord Goff at 118, Lord Hope at 136.

²⁸³ *Ibid.* however Lord Millet argued that torture was a crime of universal jurisdiction even before the Torture Convention therefore the British Courts extra territorial jurisdiction over it.

²⁸⁴ K E Levitt "International Extradition, the Principle of Specialty, and Effective Treaty Enforcement" (1991-1992) 76 *Minnesota Law Review* 1017 at 1022.

²⁸⁵ *Ibid* at 1026.

²⁸⁶ J Dugard and C Van den Wyngaert "Reconciling Extradition with Human Rights" (1998) 92 *AJIL* 187 at 188.

²⁸⁷ Bassiouni *International Extradition* 355.

The rule was claimed by the appellant in the case of the *United States v Joel Davis*.²⁸⁸ The appellant had been indicted on the crimes of conspiracy to murder an Internal Revenue Service (IRS) agent, mail fraud, and interstate transportation in aid of racketeering (ITAR) among other crimes. At the time of the indictment, Davis was residing in Israel and thus the US requested Israel, based on an extradition treaty between the two states, to extradite Davis to the US. Israel extradited Davis for the crimes of conspiracy to murder, one count of mail fraud, and arson which was Israel's interpretation of the racketeering crime. The crime of conspiracy to commit murder was subsequently severed from the charge and Davis was convicted on the two remaining crimes and sentenced. He later appealed against the conviction and sentencing using the principle of speciality as one of the grounds of appeal. His argument was that in the sentencing memorandum the government referred to illegal accounting practices which, though present in the original charge, were not in the extradition request. He said that these references meant that he had been sentenced for offences which were more than he had been extradited for.²⁸⁹ The Court held that the defence ought to have been raised in the lower courts and proceeded to confirm the sentencing of the lower court.²⁹⁰ The Court however went on to say that the mere reference to his past illegal practices, which were not on the extradition request, in the sentencing memorandum, did not mean he had been punished for those offences hence did not offend the speciality principle.²⁹¹

3.2.3 *Aut dedere aut judicare*

Closely related to extradition is the principle of *aut dedere aut judicare* (extradite or prosecute) which now appears in numerous multilateral conventions entered into by states in the 20th Century in an attempt to prevent certain types of crimes.²⁹² The principle is formulated differently in various treaties but generally provides that states have the obligation to extradite if they do not prosecute; or prosecute if they do not extradite an offender found within their territories.²⁹³ Some commentators argue that this principle has been elevated to a rule under

²⁸⁸ *United States v Joel Davis* 954 F.2d 182 (4th Cir. 1992).

²⁸⁹ *Ibid* para 16.

²⁹⁰ *ibid*

²⁹¹ *Ibid* para 20

²⁹² M C Bassiouni and E M Wise *Aut Dedere Aut Judicare: the Duty to Extradite or Prosecute in International Law* (1995) 3.

²⁹³ These obligations in the treaties have been classified into four categories depending on their formulation of the *aut dedere aut judicare* principle :a) The 1929 International Convention for the Suppression of Counterfeiting

customary international law since, among other reasons; international crimes offend against the whole of the “international community” therefore states as members of this community have the responsibility to either prosecute the perpetrators of such crimes or extradite them to other states for prosecution.²⁹⁴

The principle was enforced by the ICJ in the case of *Senegal v Belgium*.²⁹⁵ This case will be discussed in detail in chapter five²⁹⁶ but for the purposes of this section the brief summary of the facts are as follows: Habre, who was the former Chadian president, sought asylum in Senegal after he was deposed in 1990.²⁹⁷ His reign in Chad was alleged to have constituted major human rights violations including torture and extrajudicial executions. From the year 2000 the victims of the alleged violations filed proceedings before both Senegalese and Belgian courts seeking redress for the human rights violations. A warrant of arrest was issued against Habre *in absentia* in Belgium and consequently Belgium, relying on the duty to prosecute or extradite provided for in the Torture Convention,²⁹⁸ to which both Senegal and Belgium are signatories; requested Senegal to extradite Habre to Belgium. In response to this request, however, Senegalese courts held that they could not exercise jurisdiction over a former head of state for offences alleged to have been committed during his time in office as these were protected by head of state immunity. After a series of exchange of communication between the two countries, Belgium eventually submitted an application to the ICJ for adjudication of the matter. The ICJ unanimously ordered Senegal to promptly submit the *Habre case* to its authorities for the purpose of prosecution or in the alternative to extradite him to Belgium.²⁹⁹

Currency and other conventions following the same model; (b) The 1949 Geneva Conventions and the 1977 Additional Protocol I; (c) Regional conventions on extradition; (d) The Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions following the same model; See “Survey of multilateral conventions that may be of relevance for the work of the International Law Commission on the topic: ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’” UN Doc.A/CN.4/630 of 18 June 2010 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/412/77/PDF/N1041277.pdf?OpenElement> (accessed 21 February 2014).

²⁹⁴ M Zgonec-Rozej and J Foakes “International Criminals: Extradite or Prosecute?”

http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713bp_prosecute.pdf (accessed 20 February 2014). See also Bassiouni and Wise *Aut Dedere Aut Judicare* 20-22.

²⁹⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I C J Reports (2012) 422.

²⁹⁶ See section 5.3.3.

²⁹⁷ *Ibid* paras 15-41.

²⁹⁸ Article 7 of the the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

²⁹⁹ *Ibid* paras 118-121.

This case illustrates the application of the *aut dedere* principle in practice. The multilateral treaties that contain this principle are entered into by states due to the increasing eagerness to ensure that under no circumstances should the perpetrators of certain serious offences go unpunished. This gives rise to the requirement that a state, in whose territory the alleged offender is found, should either exercise its jurisdiction over the person or extradite him to another country with jurisdiction over the alleged offences.³⁰⁰ A similar concept surrounds, albeit with some variation, the obligation of states parties to the Rome Statute to surrender persons to the ICC upon request.

3.2.4 Interstate cooperation and cooperation between states and International tribunals

Both interstate cooperation and the cooperation between states and international tribunals can be said to have the same objective: that the location of an alleged offender outside the territorial jurisdiction of a state, or outside the custody of an international tribunal, should not impede the prosecution of the offender. From this common objective arises the need of interstate cooperation as well as cooperation between states and international tribunals. However, despite similar objective the regimes that govern these two types of cooperation are substantially different.³⁰¹

At least two of these differences are pointed out here. Firstly, there is a difference in the terminologies used in the two regimes. For example, while the term “extradition” is used to refer to the rendition of accused persons from the jurisdiction of one state to that of another state; the terms “surrender” or “transfer” are preferred with reference to international tribunals.³⁰² The difference in terminology was deliberately coined in order to exclude some of the exceptions to extradition, especially non-extradition of nationals, from application in the cooperation between states and international tribunals.³⁰³ As will be discussed below, the cooperation regimes of the

³⁰⁰ See para 68 where the court said in relation to the Torture convention that “The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity.” A similar argument is discussed in Bassiouni and Wise *Aut dedere aut judicare* 26-30. While explaining the aims of extradition they say *inter alia* that “it helps to ensure that criminals do not escape the punishment they deserve, that the preventive, educative or expressive uses of criminal law are not diluted by the recurrent spectacle of offenders managing to avoid trial by fleeing to a foreign sanctuary.”

³⁰¹ B Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* 2 ed (2003)151-162.

³⁰² See Articles 19(2) and 29(2)(e) of the ICTY Statute and articles 18(2) and 28(2)(e) of the ICTR Statute and Rules 57 and 58 in the Rules of Procedure and Evidence of both Tribunals; Article 102 of the Rome Statute.

³⁰³ W A Schabas *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2006) 386.

ICTY and ICTR allow no exceptions while that of the ICC is a *sui generis* form of cooperation that incorporates the varying national extradition laws of the state parties and therefore allows certain exceptions.³⁰⁴

The second fundamental difference between these two regimes is found in the manner in which they are structured. On the one hand, cooperation between states is governed by the two intrinsically intertwined principles of sovereignty and non-intervention according to which states are all free and equal and therefore states are not allowed to exercise their jurisdiction in the territory of other states without the permission of the latter.³⁰⁵ The relationship is of mutual respect and understanding; therefore the laws and interests of the requested state are always taken into consideration when an extradition request is made. For instance, according to the double criminality rule, discussed above, a requested state cannot extradite a fugitive for acts which are not crimes in its own jurisdiction. Due to the relationship of states as equals some scholars have referred to this form of cooperation as horizontal cooperation.³⁰⁶

On the other hand, cooperation between states and international tribunals can take either one of two forms. First, the interest of an international tribunal is prioritized over that of states and therefore a state is not permitted to use its internal rules, its constitution or national security concerns to avoid cooperation with the international tribunal.³⁰⁷ This is the kind of regime employed by the ICTY and the ICTR as will be explained in part 3 below. Some scholars have referred to this cooperation model as vertical or supranational cooperation due to the presumed superiority of international tribunals over states.³⁰⁸

Alternatively, an international tribunal can be considered to be at the same footing with the state. As a result, the conflicting laws and interests of the requested state are taken into consideration when a request for surrender is made to a state by an international tribunal. This model of cooperation imitates the interstate cooperation and extradition regime, discussed above, and

³⁰⁴ See V Oosterveld, M Perry and J McManus “The Cooperation of States with the International Criminal Court” 25 (2001) *Fordham International Law Journal* 767 at 669-775; Schabas *An Introduction to The International Criminal Court* 132-136.

³⁰⁵ See D E Stigall “Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law” 1 (2013) *Notre Dame Journal of International & Comparative Law* 6 at 6-13.

³⁰⁶ *Ibid.*

³⁰⁷ A Cassese “The Statute of the International Criminal Court: Some Preliminary Reflections” (1999) 10 *EJIL* 144 at 165.

³⁰⁸ Sluiter *The Library of Essays in International Law: International Criminal Court* 288.

“emphasizes state sovereignty and correspondingly attributes decisive weight to the interests of the requested state if they are at variance with the execution of the request.”³⁰⁹ This kind of cooperation model has been referred to by some as horizontal cooperation. This is because the requested state is considered to be at the same level with the international tribunal and the Rome statute, as will be explained below, adopts this kind of a cooperation regime.

Whereas interstate cooperation is always governed by the principle of sovereignty; cooperation between states and international tribunals is often either based on the presumption of superiority of international tribunals over states, like in the ICTY and ICTR; or based on a presumption of equality and mutual respect between states and the international tribunal in question as in the ICC. These relationships have given rise to the terms vertical and horizontal cooperation respectively.

Notwithstanding these differences, cooperation of states is vital to the effectiveness of international tribunals. International tribunals generally lack enforcement mechanisms of their own; therefore without state cooperation an international tribunal would be like a “giant without arms and legs”.³¹⁰ In the same vein, the ICTY Appeals Chamber said that:

“However, it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal.”³¹¹

3.3 Cooperation regimes of the ICTR and ICTY

The UNSC Resolutions 827 and 955 which create the ICTY and ICTR, respectively, provide that states shall cooperate fully with these two tribunals.³¹² Since these resolutions were both made

³⁰⁹H P Kaul and C Kreß “Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises” in O Bekou and R Cryer (eds) *The Library of Essays in International Law: International Criminal Court* (2004) 158. See also article 4 of the UN Model Treaties on Extradition and Mutual Assistance in Criminal Matters http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf (accessed 1 July 2013).

³¹⁰ Cassese 1999 *EJIL* 165. Cassese says ICTY would be like a “giant without arms and legs” but for the cooperation of states.

³¹¹ *Blaskic case* para 26.

³¹² UNSC Resolution 827 para 4 (ICTY) and UNSC Resolution 955 para 2 (ICTR).

under the Chapter VII powers of the UNSC, they are binding on all the UN member states.³¹³ It follows therefore that all the UN states parties have a duty to cooperate fully with the ICTY and the ICTR. The duty to cooperate with these two international tribunals is “absolute and unconditional”.³¹⁴

Articles 29 and 28 of the ICTY and the ICTR, respectively, provide that a state party has the duty to promptly and without undue delay cooperate with the Courts upon request. The cooperation required include identification and location of persons; taking of testimony and the production of evidence; service of documents; arrest or detention of persons; and surrender or the transfer of the accused to the tribunals. Furthermore Rules 56 and 58 of the Rules of Procedure and Evidence of the ICTY further confirm that the obligation is primary and is without exceptions. Rule 58 provides that:

“The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.”

3.3.1 The “Vertical” Nature of Cooperation

In the above provisions it is evident that the cooperation regimes of the ICTY and ICTR allow no defences or exceptions based on national laws or extradition treaties. As a result, neither the exceptions applicable to interstate extradition nor the exceptions applicable to the ICC, as will be discussed below, are applicable in relation to cooperation in the ICTY and ICTR.³¹⁵ From this arises the term “vertical cooperation” which was employed by the ICTY in the *Blaskic* case.³¹⁶

3.3.1.1 The *Blaskic* case

The brief facts of this case were as follows: Tihomir Blaskic a military officer of the Yugoslav People's Army was indicted by the ICTY and charged with grave breaches of the Geneva Conventions, violations of the laws or customs of war and crimes against humanity in the

³¹³ Article 25 of the Charter of the United Nations where states parties agree to be bound by the decisions of the UNSC under the Charter.

³¹⁴ G Sluiter “Case Analysis: To Cooperate Or Not To Cooperate? The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal” (1998) 11 *Leiden Journal of International Law* 383 at 386.

³¹⁵ K J Harris and R Kushen “Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the US Constitution” (1996) 7 *Criminal Law Forum* 561-604.

³¹⁶ *Prosecutor v Tihomir Blaskic* Case No. IT-95-14 <http://www.icty.org/case/blaskic/4> (accessed 27 July 2013).

FRY.³¹⁷ Following a request by the ICTY prosecutor, Judge McDonald issued *subpoenae duces tecum*³¹⁸ to Croatia and its defence minister as well as to Bosnia and Herzegovina to present evidence that would be used in the *Blaskic case*. Croatia responded by indicating its willingness to cooperate in the terms applicable to all states but challenged the authority of the ICTY to issue a *subpoena duces tecum* to states and the naming of state officials in the request. Croatia stated further that while cooperating with the Court, it had the right to modify the means of cooperation in order to conform to its national security needs. The ICTY's Trial Chamber II confirmed the judge's decision stating that the ICTY had jurisdiction to issue subpoena to states, to state officials and to individuals within a state.³¹⁹ The Court held further that, although a state was to decide on the mode of fulfilling its international obligation to cooperate, a state was not allowed to enact legislation putting conditions on the fulfilment of such obligation particularly where the obligation arose from Chapter VII of the UN Charter.³²⁰

On appeal, the ICTY Appeals Chamber held first, that the ICTY did not possess the jurisdiction to issue a *subpoena* to states and high ranking state officials and the Court proceeded to quash the said *subpoena*.³²¹ It was also held that although the Tribunal had the jurisdiction to issue binding orders to states and individuals acting in their private capacity, under article 29 of the ICTY Statute, it could not issue orders to state officials acting in an official capacity.³²² The Tribunal further held that a state would not be allowed to use national security reasons as a blanket basis to refuse cooperation.³²³ Instead, the Appeals Chamber set out practical measures that the Court in consultation with the state concerned would abide by in order to ensure that national security interests of a state are not jeopardised.³²⁴ Ultimately, it was held that the

³¹⁷ *Prosecutor v Tihomir Blaskic, Second Amended Indictment* <http://www.icty.org/x/cases/blaskic/ind/en/bla-2ai970425e.pdf> (accessed 31 March 2014).

³¹⁸ A type of writ that orders a party who is summoned to bring with it documents or other type of evidence to be used in court. See Black's Law Dictionary 2 ed.

³¹⁹ *Prosecutor v. Tihomir Blaskic* Decision on the objection of the Republic of Croatia to the issuance of *subpoena duces tecum* (18 July 1997) <http://www.icty.org/case/blaskic/4> (accessed 27 July 2013).

³²⁰ *Ibid* para 150.

³²¹ *Prosecutor v. Tihomir Blaskic* Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 para 38 <http://www.icty.org/case/blaskic/4> (accessed 27 July 2013).

³²² *Ibid* para 39-45.

³²³ *Ibid* para 61-66.

³²⁴ *Ibid* para 67-68. First the claim of the state is to be scrutinized by the court to determine whether it is based on the principle of good faith. Second, the state concerned may be asked to submit the documents to the scrutiny of only one judge of the Trial Chamber. Third, if the evidence is in a language that is not one of the languages of the ICTY the state would be required to provide certified translated copies in order to minimize the exposure by avoiding the use of translators. Fourth the use of in camera or ex parte proceedings, and lastly if a state considers a

decision lay with the Court and not with the state to decide on the sensitivity of the said documents and whether they posed a risk to the states national security.

Concerning the superiority of the Court's cooperation regime the Court held *inter alia* that:

“If a national court intends to bring to trial an individual subject to the jurisdiction of another State, as a rule it relies on treaties of judicial cooperation or, if such treaties are not available, on voluntary interstate cooperation. Thus, the relation between national courts of different States is "horizontal" in nature....the (ICTY) Statute granted the International Tribunal the power to address to States binding orders concerning a broad variety of judicial matters (including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of indictees to the International Tribunal). Clearly, a "vertical" relationship was thus established, at least as far as the judicial and injunctory powers of the International Tribunal are concerned”³²⁵

This case demonstrates the unconditional nature of the cooperation regime of the ICTY and ICTR. The Tribunal held further that the ICTY has the jurisdiction to give binding orders to states with which states have the duty to comply. It is clear, according to the Court's holding, that a state cannot use its internal laws to avoid cooperation with the ICTY and the ICTR. This view was however not shared by the US in the case below.

3.3.3.2 The Ntakirutimana case

In the *Ntakirutimana* case,³²⁶ the US Courts seemed to disagree with the assertions made in *Blaskic* concerning the presumed superiority of the tribunals over states and the inapplicability of national law as a defence to cooperation. The brief facts of this case were as follows: Upon the establishment of the ICTR after the Rwandan genocide, the US had signed an agreement³²⁷ with

particular document to be highly delicate for national security reasons and yet not of significant relevant to the proceedings, the minister responsible may present a signed affidavit to the court explaining why the contents of the document are considered so delicate and if the court is convinced by the reason, the document may be exempted.

³²⁵Ibid para 47. For a critical analysis of the Blaskic decision see R Wedgwood “Case Analysis: International Criminal Tribunals and State Sources of Proof: the Case of Tihomir Blaskic” (1998) 11 *Leiden Journal of International Law* 635-654.

³²⁶ In United States District Court for the Southern District Of Texas —Laredo Division: In The Matter of Surrender of Elizaphan Ntakirutimana (1998) 37 *International Legal Materials* 398.

³²⁷The Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of 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. A similar agreement was signed between

the ICTR according to which, upon the request of the ICTR, the US would surrender any accused or convicted persons in its territory.³²⁸ Following this agreement and the ICTR Statute, the ICTR requested the US for the surrender of Ntakirutimana³²⁹ who was at that time residing in Texas. The US Government applied to the Southern District of Texas for the surrender of Ntakirutimana to the ICTR. However, the judge denied this request on the basis that the agreement for cooperation between the US and ICTR was unconstitutional since cooperation required a treaty and that the request did not provide probable cause supporting the charges.³³⁰ The Federal Magistrate held *inter alia* that:

“The Constitution calls for the Executive to make treaties with the advice and consent of the Senate. Throughout the history of this Republic, every extradition from the United States has been accomplished under the terms of a valid treaty of extradition. In the instant case, it is undisputed that no treaty exists between the United States and the Tribunal. This is so even when, the Government insists, and the Court agrees, the Executive has the full ability and right to negotiate such a treaty. The absence of a treaty is a fatal defect in the Government's request that the Extraditee be surrendered. Without a treaty, this Court has no jurisdiction to act, and Congress' attempt to effectuate the Agreement in the absence of a treaty is an unconstitutional exercise of power. Accordingly, the Court finds that the provisions of Section 1342 of Public Law 104 106 are unconstitutional as they are applied to the Tribunal, and the Court dismisses the Government's request.”³³¹

In reaction to this, the US Government added two declarations clarifying the charges against the accused person and witness statements and re-applied to the same Court for surrender. The

the ICTY and the US a year earlier. For an analysis of the legal effect of these agreements see J AF Godinho “the Surrender Agreements between the ICTY and the ICTR: a Critical View (2003) 1 *JICJ* 502 at 507-516.

³²⁸ Article 1 of the Agreement (the Agreement).

³²⁹ Ntakirutimana was a senior pastor of the Seventh Day Adventist Church in Rwanda was charged with the crimes of genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto. He was alleged to have colluded with other members of the Hutu tribe to attack the refugees from the Tutsi tribe who had sought refuge in his church. He further sent soldiers after the survivors of the church attack to hunt them down and kill them. See *Prosecutor v. Elizaphan Ntakirutimana, Gérard Ntakirutimana, and Charles Sikubwabo* (“the Mugonero Indictment”) Indictment no. ICTR-96-10-I and the *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana* (“Bisesero Indictment”) Indictment no. ICTR-96-17-I.

³³⁰ In United States District Court for the Southern District Of Texas —Laredo Division: In The Matter of Surrender of Elizaphan Ntakirutimana (1998) 37 *International Legal Materials* 398.

³³¹ *Ibid.*

District Court finally permitted the surrender of the accused person to the ICTR and denied his application for a writ of *habeas corpus*. He appealed to the Fifth Circuit Court of Appeal.³³²

In the majority decision given by Judge Garza it was held that there is no particular requirement for a treaty provision for the extradition from the US and that practice showed that persons had before been extradited without treaty provisions. The request for surrender was then granted. However, in the dissenting opinion, Judge DeMoss, stated that extradition treaties fell under the category of agreements that required two thirds approval by the US Congress according to article II of the US constitution.³³³ He said:

“The executive and legislative branches of government erroneously disregarded their obligation to respect the structure provided by the Constitution when they purported to enter this extradition agreement. We should issue a writ of *habeas corpus*, and Ntakirutimana should not be surrendered. The extradition agreement in place between the United States and the Tribunal is unenforceable, as it has not been properly ratified.”³³⁴

Following the majority decision, Ntakirutimana was eventually surrendered to the ICTR³³⁵ and was tried, convicted and sentenced to ten years in prison taking into account the time he had already spent in detention³³⁶ and was released on the 6th of December 2006.³³⁷

It is noteworthy that in this case the US Courts did not seem to take into account the “vertical” relationship between the ICTY and states that was held in the *Blaskic case* above.³³⁸ Instead, in the words of Sluiter, “the tribunal is treated as if it were a foreign court and constantly reference

³³² *Elizaphan Ntakirutimana v. Janet Reno et al* United States Court of Appeals for the Fifth Circuit, 5 August 1999, <http://www.refworld.org/docid/3ae6b6f68.html> (accessed 2 July 2013).

³³³ *Elizaphan Ntakirutimana v. Janet Reno et al*, dissenting opinion part II B.

³³⁴ *Ibid* at part III.

³³⁵ His appeal to the Supreme Court was unsuccessful since the Supreme Court refused to consider the case on its merits “Way Clear for the US to Deliver Rwanda War Crimes Suspect” *New York Times* 25 January 2000 <http://www.nytimes.com/2000/01/25/world/wav-clear-for-us-to-deliver-rwanda-war-crimes-suspect.html> (accessed 27 August 2013).

³³⁶ See *The Prosecutor V. Elizaphan Ntakirutimana And Gérard Ntakirutimana*, the Appeals Chambers Decision of 13 December 2004 Cases Nos. ICTR-96-10-A and ICTR-96-17-A http://www.unict.org/Portals/0/Case/English/NtakirutimanaE/decision2/041213_appeal_judgement_summary.pdf (accessed 27 August 2013).

³³⁷ “Elizaphan Ntakirutimana Released After Serving Sentence” ICTR/INFO-9-2-502.EN <http://www.unict.org/tabid/155/Default.aspx?ID=92> (accessed 27 August 2013).

³³⁸ See Sluiter 2000 *Leiden Journal of International Law* 466. See also P J Magnarella “Is US Cooperation with the UN Criminal Tribunal for Rwanda Unconstitutional?” (1998) 1 *African Studies Quarterly* 57.

is made to ‘extradition’ whereas it has been generally recognized that inter-state legal assistance concepts, such as extradition, do not apply with regard to international tribunals.”³³⁹ This decision therefore challenged the notion that the ICTR (and the ICTY by extension) is “superior” to states in cooperation matters.

3.4 Cooperation under the Rome Statute of the ICC

The ICC, like other international tribunals, cannot exercise its jurisdiction fully without the cooperation of states.³⁴⁰ Consequently, the Rome Statute sets aside one part of the statute, part 9, to regulate the duty to cooperate and offer judicial assistance to the ICC. Article 86 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.”

3.4.1 Types of cooperation required of states parties

3.4.1.1 Setting up national legislation

There are many forms of cooperation that may be required of states parties by the Court under the Rome Statute. State parties are under obligation to create procedures under national law that will enable them to cooperate with the Court in the manner provided for by Part 9 of the Rome Statute.³⁴¹ The Rome Statute cooperation regime provides for the substantive law and leaves the procedural part to the state: in other words it instructs a state party on its cooperation duty owed to the ICC but not how to go about fulfilling the said obligation.³⁴² A state is therefore given the flexibility of putting together procedures that will enable it to cooperate as required of it under Part 9 of the Rome Statute.³⁴³ By virtue of this article state parties are required to enact legislation that encompasses the unique mode of cooperation which, as will be explained below,

³³⁹ See Sluiter 2000 *Leiden Journal of International Law* 466.

³⁴⁰ G Sluiter “The Surrender of War Criminals to the International Criminal Court” in O Bekou and R Cryer (eds) *The Library of Essays in International Law: International Criminal Court* (2004) 608; Cassese 1999 *EJIL* 165.

³⁴¹ Article 88 of the Rome Statute

³⁴² An example is the duty to surrender persons to the ICC. Article 89 (1) provides that “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...” (Emphasis added in both instances).

³⁴³ O Bekou “A Case for Review of Article 88, ICC Statute: Strengthening A Forgotten Provision” (2009) 12 *New Criminal Law Review* 468 at 470.

relates to but departs from the conventional state to state extradition.³⁴⁴ A state party would therefore be estopped from using its national law to avoid cooperation with the ICC.³⁴⁵

3.4.1.2 Cooperation by transfer of persons

A state party is also required to cooperate by complying with the ICC request to arrest and surrender persons to the ICC.³⁴⁶ Should the person being transferred bring a challenge before the national courts of a state party on the basis of *ne bis in idem* the state party is required to consult with the Court to determine whether an admissibility ruling has been made.³⁴⁷ If the case has been held admissible the state is required to proceed with the transfer but if not the state is to postpone the transfer pending an admissibility decision. In the same vein, the state is required to allow transportation of the person through its territory.³⁴⁸

3.4.1.3 Technical assistance

A state party has a duty to cooperate by providing assistance in investigation or prosecution for example: by helping with the identification and whereabouts of persons or the location of items, the taking of evidence and the production of evidence, including expert opinions and reports necessary to the Court, the questioning of any person being investigated or prosecuted; identification, tracing and freezing or seizure of assets of suspects, facilitating the voluntary appearance of persons as witnesses or experts before the Court; the examination of places or sites, including the exhumation and examination of grave sites; the execution of searches and seizures; evidence gathering, provision of records and documents, protection of victims and witnesses, service of documents; as well as other forms of cooperation not prohibited by the laws of the requested state.³⁴⁹

Should a state party fail to cooperate with the Court, the ICC may make a finding to that effect and refer the matter to the ASP or to the UNSC if the case was referred to the Court by the

³⁴⁴ Ibid.

³⁴⁵ The exception is where the request violates a “fundamental legal principle of general application. See Article 93 (3) of the Rome Statute.

³⁴⁶ Article 89 (1) of the Rome Statute.

³⁴⁷ Article 89 (2) of the Rome Statute.

³⁴⁸ Article 89 (3) (a) of the Rome Statute.

³⁴⁹ Article 93 (1)

latter.³⁵⁰ However, the Rome Statute does not provide for penalties to be imposed on a state party that refuses cooperation and article 112 merely provides that the ASP shall consider the non-cooperation issues brought before it under Article 87 of the Rome Statute. Therefore, some states parties like Chad and Malawi have repeatedly refused to cooperate with the ICC despite the reporting of the situation to the ASP and UNSC.³⁵¹

Unlike state parties, non-party states have no obligation to cooperate unless they accept the ICC's jurisdiction on an *ad hoc* basis.³⁵² If after making a cooperation agreement with the ICC they should fail to cooperate, the ICC is to make a decision on that and report the matter to the ASP or the UNSC if the situation was referred to the Court by the Security Council.³⁵³ The UNSC may also impose a cooperation duty on non-state parties to the Rome Statute who are members of the UN by virtue of a resolution under Chapter VII of the UN Charter.³⁵⁴

3.4.2 The scope of the Rome Statute Cooperation Regime

The cooperation regime of the Rome Statute is a lot more comprehensive and detailed compared to those of the ICTY and ICTR. While the statutes of the two UN *ad hoc* tribunals had one article each dealing with cooperation of states, the Rome Statute has a whole part consisting of 17 articles dealing with the same, as well as an entire chapter of the ICC Rules of Procedure and Evidence. However, unlike the mandatory terms used in the cooperation regime of the *ad hoc* tribunals, the Rome Statute uses more flexible terms and appreciates the competing obligations owed by the state parties to international law and other extradition treaties.³⁵⁵ The “horizontal” nature of the ICC cooperation regime, as opposed to the “vertical” one of the ICTY and ICTR discussed above, is demonstrated by the various exceptions to the duty to cooperate provided for under the Rome Statute. By incorporating these exceptions, the drafters of the Statute desired to ensure that by complying with its duty to cooperate with the ICC, a state is not placed in a

³⁵⁰ Article 87 (7) of the Rome Statute.

³⁵¹ See a discussion of Chad and Malawi's refusal to cooperate with the ICC in the arrest and surrender of Bashir in parts 4.3.1 and 4.3.2 of this thesis.

³⁵² Articles 87 (5) and 12 (3) of the Rome Statute. Also the doctrine of *Pacta tertiis nec nocent nec prosunt* prevents the ICC cooperation regime from extending to non party states without their consent to it. See Article 34 of the Vienna Convention on the Law of Treaties.

³⁵³ Article 12 (3) of the Rome Statute.

³⁵⁴ See G Sluiter *The Library of Essays in International Law: International Criminal Court* 286.

³⁵⁵ Cassese 1999 *EJIL* 166.

position where it has to contravene the rules of international law especially its obligations towards non-parties states.³⁵⁶

3.4.2.1 Limitations to the Duty to Cooperate

The exceptions discussed below are: competing requests, *ne bis in idem* principle, existing fundamental principle of general application, postponement of assistance, international agreements under article 98 (2) and immunity under article 98 (1). The intention of this discussion is to place the immunity exception under article 98 (1), which is the main area of focus in this chapter, within the context of other exceptions to cooperation provided for by the Rome Statute.

3.4.2.1.1 Competing Requests

Article 90 deals with situation where by a state party receives a cooperation request from the ICC as well as an extradition request from another state concerning the same person for the same conduct. It provides for the guidelines a state party should follow in deciding whether to surrender the person to the ICC or extradite him to the requesting state. The state party is first required to notify both the ICC and the requesting state of the competing requests.³⁵⁷ If the requesting state is a state party, the requested state is required to give preference to the ICC's request if the ICC, while factoring in the investigation or prosecution conducted by the requesting state in line with their extradition request, has decided that the case is admissible.³⁵⁸ But where such admissibility decision has not been made, the requested state is has the discretion to deal with the extradition request pending the admissibility decision. The requested state is, however, not permitted to extradite the person until the ICC has ruled the case inadmissible.³⁵⁹

On the other hand, if the requesting state is not a party to the Rome Statute and the requested state is under no international obligation to cooperate with the requesting state, the requested state party is required to give preference to the ICC's request if the case has been held to be admissible.³⁶⁰ However, if the requested state is under international obligation to extradite the

³⁵⁶Gaeta 2009 *JICJ* 327.

³⁵⁷Article 90 (1).

³⁵⁸Article 90 (2).

³⁵⁹Article 90 (3).

³⁶⁰Article 90 (4).

person to the requested state, the requested state party shall decide on whether to surrender the person to the ICC or to extradite him to the requesting state.³⁶¹

If the competing requests concern the same person but different conducts, the requested state, if under no international obligation to extradite the person to the requesting state, shall give priority to the Court's request.³⁶² However, if the requested state is under an international obligation to extradite the person, the state shall decide whether to surrender to the ICC or to extradite him to the requesting state.³⁶³ In making this decision the requested state shall consider factors such as the nature and gravity of the crimes among other factors.³⁶⁴

3.4.2.1.2 The *Ne Bis in Idem* Principle

The *ne bis in idem* principle, otherwise known as the double jeopardy rule, is included in the Rome Statute by virtue of article 20. The principle has three tiers: first, except as provided for in the Statute no person shall be tried by the ICC for an offence for which the person had previously been acquitted or convicted by the ICC. Second, no person shall be tried by any court for an offense which is under the jurisdiction of the ICC and for which the person has already been convicted or acquitted. Third, no person shall be tried by the ICC for offences for which the person has been tried in another court in a way that is independent and impartial.³⁶⁵

In relation to cooperation, if a person who is sought to be surrendered to the Court brings a challenge before the national court of the requested state under the *ne bis in idem* principle the requested state is required to consult with the Court and if the case has been ruled as admissible, the requested state should proceed with surrender. However, if admissibility ruling is yet to be issued the requested state is to postpone the surrender pending the admissibility decision.³⁶⁶

³⁶¹ Article 90 (6).

³⁶² Article 90 (7) (a).

³⁶³ Article 90 (7) (b). The other factors a state should consider include: a) The respective dates of the requests; (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and (c) The possibility of subsequent surrender between the Court and the requesting State. See article 90 (6).

³⁶⁴ *Ibid.*

³⁶⁵ For a comparison of the application this principle between the ICC and the ad hoc tribunals see G Conway "Ne Bis in Idem and the International Criminal Tribunals" (2003) 14 Criminal Law Forum 351 at 351-361.

³⁶⁶ Article 89 (2).

3.4.2.1.3 Existing Fundamental Principle of General Application

If the Court's request contravenes an existing principle of general application in the requested state, the state is required to consult with the Court regarding the matter; giving considerations as to whether the assistance can be offered in another manner or subject to conditions.³⁶⁷ However, if after consultation they are unable to resolve the matter the ICC is required to modify the request.³⁶⁸

3.4.2.1.4 Postponement of Assistance

A requested state is permitted to postpone assistance for a period of time agreed on by the ICC if the immediate execution of the said assistance might hinder an ongoing prosecution or investigation, in the requested state, of a different case from that which is before the Court.³⁶⁹ The requested state may also postpone the execution of assistance pending the Court's determination of an admissibility challenge.³⁷⁰

3.4.2.1.5 National security

A state may deny the Court's request in part or in whole if the request concerns disclosure of documents or information that stand to jeopardise the national security of the requested state.³⁷¹ The state is however required to take all necessary measures "acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means."³⁷²

The ICC cannot require a state to cooperate if the cooperation will prejudice the national security interests of that state. This provision with the position taken by the ICTY in the *Blaskic case*, discussed above, where the Trial Chamber II made it clear that a state was not permitted to use national security reasons to evade their cooperation obligations. One commentator suggests that this difference is due to the different roles of the two tribunals: that the ICTY had jurisdictional latitude over states therefore states were required to defer cases to it while the ICC, under the

³⁶⁷ Article 93(3).

³⁶⁸ *Ibid.*

³⁶⁹ Article 94.

³⁷⁰ Article 95.

³⁷¹ Article 93 (4). See also Article 72

³⁷² Article 72 (5).

complementarity doctrine, gives first priority to state jurisdiction unless the state is unwilling or unable to prosecute.³⁷³

3.4.2.1.5 Obligations under International Agreements

Article 98 (2) provides that:

“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.”

This article the Court is prohibits the Court from putting a requested state in a position of conflicting obligations: to cooperate with the ICC and to respect international agreements under which the consent of the sending state is required before surrender. The term “international agreements” has been interpreted to encompass any type of agreement which requires the consent of the sending state before the extradition of a person to a third state or entity.³⁷⁴

Although some commentators argue for a narrower construction of the term “international agreements” in this proviso, it is generally agreed that the term “international agreements” here refers to the Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs)³⁷⁵ and other stand-alone agreements entered into by a sending state to protect its nationals in a receiving state generally known as “article 98 agreements”.³⁷⁶

One of the contentious issues regarding this provision is whether it was intended to refer to agreements already in existence at the time of the conclusion of the Rome Statute or at the time

³⁷³ See R Wedgwood “Case Analysis: International Criminal Tribunals and State Sources of Proof: the Case of Tihomir Blasckic” (1998) 11 *Leiden Journal of International Law* 635 at 647.

³⁷⁴J Crawford, P Sands and R Wilde “Joint Opinion: In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute” at 18 http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf (accessed 22 August 2013).

³⁷⁵ SOFAs and SOMAs are bilateral or multilateral agreements signed between a state or an international organization and a foreign state in whose territory the forces or mission members of the former are for the protection of their rights and privileges while on the territory of the foreign state. See RC Mason “Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?” *Congressional Research Service* <http://www.fas.org/sgp/crs/natsec/RL34531.pdf> (accessed 29 August 2013). See also A Sari “Status of Forces and Status of Mission Agreements under the ESDP: The EU’s Evolving Practice” (2008) 19 *EJIL* 67 at 68-70.

³⁷⁶ D Scheffer “Article 98(2) of the Rome Statute: America’s Original Intent” 3 (2005) *JICJ* 333 at 338; See D Akande, “The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits” (2003) 1 *JICJ* 618 at 645 he says US SOFAs are currently worded are outside article 98.

of its entry into force; or whether article 98 (2) was intended to cover new agreements entered into after the Rome Statute. Some commentators contend that the provision was meant to cover only pre-existing arguments,³⁷⁷ while others say that the provision covers pre-existing agreements as well as new agreements “negotiated from scratch” after the entry into force of the Rome Statute.³⁷⁸

The other controversial issue relates to the category of persons that fall under the protection of these agreements. State practice and academic position suggests that the term “sending state” in the provision refers to persons sent by the sending state on official capacity to represent the sending state and not merely all nationals of the sending state living in a receiving state.³⁷⁹ However, it is clear that the US, which has made numerous of these agreements, intends that these agreements to shelter all US nationals from arrest and surrender to the ICC.³⁸⁰ This stand has sparked a lot of criticism against the world super power from many quarters.³⁸¹ It has also been said that states parties to the Rome Statute which enter into such agreements with the US breach their obligations under the Rome Statute.³⁸²

3.5 Immunity

Article 98 (1) provides that:

³⁷⁷ See “Coalition for the International Criminal Court, Fact Sheet: US Bilateral Immunity Agreements or So-Called ‘Article 98’ Agreements”http://www.iccnw.org/documents/FS-BIAs_O&A_current.pdf (accessed 22 August 2013). HP Kaul and C Kreß *The Library of Essays in International Law: International Criminal Court* 213;

J Crawford, P Sands and R Wilde “Joint Opinion: In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute” at 18 http://www.humanrightsfirst.org/international_justice/Artt98_061403.pdf (accessed 22 August 2013). However in the Joint Opinion the legal explain why confining article 98 to pre-existing agreements only is unjustifiable

³⁷⁸ Scheffer 2005 *JICJ* 341; see also S Zappala “the Reaction of the US to the Entry into Force of the ICC Statute: Comments on UNSC Resolution 1422 (2002) and Article 98 Agreements” (2003) 1 *JICJ* 114 at 122.

³⁷⁹ Zappala 2003 *JICJ* 114; J Crawford et al Joint Opinion para 43.

³⁸⁰ J Crawford *et al* Joint Opinion para 44 & 45. They say at paragraph 45 that:

“Article 98(2) concerns the relationship between the relevant person and the ‘sending State’: the person who is present on the territory of the requested State Party must have a nexus with the ‘sending State’ which goes beyond mere nationality, and his or her presence must have been occasioned by some positive act of the sending State.”

See also EU Guiding Principles Concerning Arrangement between a State Party of the Rome Statute of the International Criminal Court and the US Regarding the Surrender of Persons to the Court <http://www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf> (accessed 22 August 2013).

³⁸¹ “Coalition for the International Criminal Court, Fact Sheet: US Bilateral Immunity Agreements or So-Called ‘Article 98’ Agreements”http://www.iccnw.org/documents/FS-BIAs_O&A_current.pdf (accessed 22 August 2013).

³⁸² *ibid*

“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.”

By including this article, the drafters intended to avoid creating conflicting obligations for state parties: the obligation to respect the immunities due to another state and the obligation to cooperate with the ICC under the Rome statute.³⁸³ 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.

The interpretation of the immunity exception provided for in article 98 has been the subject of debate for many scholars, the African Union as well as African States. The debate derives from the fact that article 27 excludes the application of immunities and special procedures under both national and international law; which would otherwise shield state officials from the jurisdiction of the ICC.³⁸⁴ Since article 98 (1) seeks to protect the immunities of “a person or property of a third state”, part of the debate has been centered on the meaning of the term “third state” in the provision.

Some commentators argue that the term “third state” in this context refers to any non-requested state whether state party to the Rome Statute or otherwise. In support of this argument it has been stated that throughout the Rome Statute the term “a state not party to the statute” is used to refer to non-party states and not “third state” and therefore in the context of article 98 (1) the term “third state” cannot be referring only to non-party states but to all non-requested states.³⁸⁵ In the same vein, Kaul and Kreb argue that the other justification for this kind of interpretation is

³⁸³ Sluiter *the Library of Essays in International Law: International Criminal Court* 307.

³⁸⁴ This is in line with the goal of the Rome Statute which is to ensure that all the perpetrators of international crimes are punished regardless of their official capacity. See Preamble of the Rome Statute. The achievement of this goal highly depends on the interpretation of article 98 since the ICC has no enforcement mechanism of its own and has to rely on states for cooperation. See also J Crawford, P Sands and R Wilde “Joint Opinion: In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute” at 18 http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf (accessed 22 August 2013) para 26. They discuss the purpose of the Rome Statute albeit in relation to Article 98 (2) but this explanation is relevant here.

³⁸⁵ Paola Gaeta “Official Capacities and Immunities” in *A Cassese, P Gaeta, and J RWD Jones (eds) The Rome Statute of the International Criminal Court: A Commentary* Vol 1 975 at 983-989. (It is noteworthy that Gaeta does not support the view that the term “third state” in article 98 (1) refers to all non-requested states whether states parties to the Rome Statute or otherwise)

that the main reason for the inclusion of article 98 was to protect the inviolability of diplomatic premises and this is an obligation borne by the requested state to any unrequested state whether state party to the Rome Statute or otherwise.³⁸⁶ They, however, add that article 98 (1) should under no circumstance be interpreted to give life to immunities that have ceased to exist under public international law.³⁸⁷

A better case is made for the interpretation of the term “third states” to refer only to non-party states. This view has received the support of scholars³⁸⁸ as well as state practice.³⁸⁹ First, the earlier interpretation departs from the meaning of the term “third state” as employed in article 2(h) of the Vienna Convention on the Law of Treaties, according to which the term refers to a state not party to a treaty. Second, since article 27 takes away immunities that would attach to persons because of their official position, state parties to the Rome statute are therefore considered to have waived the immunities of their officials by way of treaty.³⁹⁰ A requested state would be under no obligation to respect the immunities of officials including heads of states parties who are on trial at the ICC since their immunities do not apply to proceedings before the ICC by virtue of article 27 of the Rome Statute. The result is that a serving head of a state party

³⁸⁶ H P Kaul and C Kreß *The Library of Essays in International Law: International Criminal Court* 212; D Scheffer “Article 98(2) of the Rome Statute: America’s Original Intent” (2005) 3 *JICJ* 333 at 337; Scheffer envisages a situation where article 98 applies to the national of a party state to the ICC and the suspect then has to be deported to his country of nationality so that the latter can surrender him to the ICC.

³⁸⁷ *Ibid* at 213.

³⁸⁸ See Akande 2004 *AJIL* 422. Broomhall *International Justice and the International Criminal Court* 144-145; Schabas *An Introduction to The International Criminal Court* 132-136; S Wirth “Immunities Related Problems, and Article 98 of the Rome Statute” 12 (2001) *Criminal Law Forum* 429 at 452-454; Du Plessis *International Criminal Court that Africa Wants* 77; M du Plessis “An African Example: South Africa’s Implementation Of The Rome Statute Of The International Criminal Court” at 18 http://www.issafrica.org/anici/uploads/Du_Plessis_An_African_example.pdf (accessed 12 August 2013); S Williams and L Sherif “The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court” (2009) 14 *Journal of Conflict & Security Law* 71 at 86; H King “Immunities And Bilateral Immunity Agreements: Issues Arising From Articles 27 And 98 Of The Rome Statute” (2006) 4 *NZJPIL* 269.

³⁸⁹ This view is also reflected in the act ratifying the Rome Statute in various states. See sec 23 of the United Kingdom’s International Criminal Court Act 17 of 2001, Malta’s International Criminal Court Act 24 of 2002 and Section 26s of Malta Extradition Act No 18 of 1978 and the amendments therein, Sec 61 of Ireland International Criminal Courts Act. The Acts however conspicuously fail to provide for the course of action to be taken in case a request is made by the ICC for the surrender of a person whose immunities arise by virtue of his connection to a state that is not party to the statute.

³⁹⁰ See discussion in part 2.5.1 of the thesis.

to the Rome Statute may be arrested and surrendered to the ICC should s/he visit a state that has been requested to do so.³⁹¹

3.5.1 Interplay between articles 98 (1) and 27 of the Rome Statute

It seems difficult to reconcile the fact that article 98 (1) prohibits the ICC from requesting a state to cooperate by arresting a person if the state, by that arrest and surrender, stands to breach its immunity obligations towards a third state; with the fact that article 27 of the Rome Statute provides that both national and international law immunities are irrelevant to prosecution before the ICC. If article 27 is interpreted to remove all kinds of immunities, both national and international, of officials of both state parties to the Rome Statute and non-parties this would render article 98 (1) redundant; on the other hand if article 98 is interpreted to prohibit the ICC from requesting states to arrest and surrender all persons bearing immunity, the purpose of the Rome Statute would be defeated.³⁹² This provides some insight as to why there has been so much debate concerning the relationship between articles 27 and 98 of the Rome Statute.

The debate culminated with the ICC's request of state parties to cooperate by arresting and surrendering President Bashir to the ICC. The argument is whether the ICC goes against article 98 by requiring states to arrest and surrender the Sudanese President. As discussed in chapter 4, the AU and some Africa states like Chad and Malawi refused cooperation relying on Article 98 (1). Their argument is that arresting and surrendering President Bashir would constitute a violation of international and national law on immunities enjoyed by a sitting head of state. However, other states showed the intention to arrest President Bashir in spite of article 98.

In the decision against Malawi, discussed in detail in Chapter 4, the Court did not discuss the relationship between the controversial articles 27 and 98.³⁹³ This has led to speculation by some that by avoiding this discussion, the PTC was simply seeking an "easy-out strategy" and

³⁹¹ Akande 2004 *AJIL* 423.

³⁹² See D Akande "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" (2009)7*JICJ*333 at 337-339; Van der Vyver 2011 *African Human Rights Law Journal* 691.

³⁹³ See *The Prosecutor V. Omar Hassan Ahmad Al Bashir* 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 http://www.icc-cpi.int/en_menus/icc/situations_and_cases/situations/situation_icc_0205/related_cases/icc02050109/court (accessed 1 March 2013). See discussion in part 4.3.1.2 of this thesis.

postponing the issues arising from this conflict to a later day.³⁹⁴ The consequence of this omission by the PTC is that analysts have continued to write and debate on the relationship between the two articles with no agreement in sight.

Some commentators argue that there is no conflict between articles 27 and 98 of the Rome statute.³⁹⁵ For example, Broomhall opines that:

“...it is important to note that articles 98 (1) and 27(2) are not necessarily contradictory. Rather Article 27(2) makes clear that immunities under national or international law ‘shall not bar the Court from exercising its jurisdiction...’. Article 98 (1) instead pertains to the obligations under international law of the requested state as well as the exercise of jurisdiction by such states, rather than by the Court.”³⁹⁶

However, other commentators say there is some tension between the two articles and the arguments espoused by this group of scholars may be loosely classified into two categories. The first group argues that the scope of immunities has shrunk considerably over time therefore article 27 should be interpreted to have a wider scope as it embodies the position of international criminal law.³⁹⁷ According to this view, therefore, article 98 should be given a narrow interpretation to cover only non-party states so that cooperation may be favored over immunity. One of the scholars belonging to this school of thought, Akande, opines that the UNSC referral of the Darfur situation to the ICC put Sudan in an “analogous position to a party to the Rome Statute” therefore the Rome Statute is binding to it as it is to a state party to the Rome Statute.³⁹⁸ As a result, all the provisions of the Rome Statute are applicable to Sudan including article 27

³⁹⁴Van der Vyver 2011 *African Human Rights Law Journal* 697.

³⁹⁵ See Broomhall *International Justice and the International Criminal Court* 141. See also A Dworkin & K Iliopoulos ‘The ICC, Bashir, and the immunity of heads of state’ *Crimes of war* 3 <http://www.crimesofwar.org/commentary/the-icc-bashir-and-the-immunity-of-heads-of-state/#sthash.LWgK6lsL.dpuf> (accessed 21 August 2013). They say “It would appear at first glance that this provision conflicts with Article 27. However Article 27 is concerned with the question of the Court’s jurisdiction, whereas Article 98 is concerned with international co-operation and judicial assistance.”

³⁹⁶ Broomhall *International Justice and the International Criminal Court* 141.

³⁹⁷ See Van der Vyver 2011 *African Human Rights Law Journal* 693. He argues that precedence should be given to article 27 since unlike article 98 it endorses a “salient norm of international criminal law”.

³⁹⁸ Akande 2009 *JICJ* 342. See also D Akande “The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?” Oxford Transitional Justice Research Working Paper Series <http://otir.csls.ox.ac.uk/materials/papers/40/Akande.pdf> (accessed 21 August 2013). For a contrary view see S Williams and L Sherif “The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court” (2009) 14 *Journal of Conflict & Security Law* 71 at 81.

which concerns the irrelevance of both national and international law immunities.³⁹⁹ This not only gives the ICC jurisdiction over President Bashir, the head of a non-party state, but also permits states parties to cooperate by arresting and surrendering him to the ICC without triggering the immunity exception under article 98 (1).⁴⁰⁰

The second group of scholars oppose this view. The general argument is that although the mandate of the ICC is vital to international criminal justice, immunities are just as important as cooperation is, and should not be eroded easily.⁴⁰¹ Gaeta, for example, views the conflict between article 27 and article 98 as a clash between two conflicting values.⁴⁰² On the one hand, the need to protect state sovereignty and inter-state relations; and on the other hand, the need to prosecute the most serious crimes of international concern.⁴⁰³ The former should be held up and above the latter, she argues, since personal immunities are not permanent but are terminated as the person's term of office is terminated. This, she says, creates the need to respect personal immunity since "quashing of personal immunities would be extremely dangerous for inter-state relations."⁴⁰⁴ She opines, elsewhere, with regard to the request to arrest and surrender President Bashir that:

"The steps taken by the ICC in this respect are *ultra vires* and at odds with Article 98(1). Therefore, states parties to the Statute are not obliged to execute the ICC request for surrender of President Al Bashir, and can lawfully decide not to comply with it."⁴⁰⁵

The above debate illustrates the controversy surrounding the conflicting obligations faced by states parties to the Rome Statute. On the one hand, the duty to arrest and surrender President Bashir to the ICC; but on the other hand, another obligation to respect the immunities that accrue to President Bashir as the head of a non-party state. The question is whether states parties to the Rome Statute can arrest and surrender President Bashir without breaching international law on immunity. As shown above, some scholars argue that states parties can and should arrest

³⁹⁹ Akande (2009) *JICJ* 342.

⁴⁰⁰ Akande (2009) *JICJ* 342.

⁴⁰¹ See for example VM Blommestein and C Ryngaert "Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity" (2010) 6 *ZIS* 428 at 428-430.

⁴⁰² P Gaeta "Official Capacity and Immunity" in A Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 985-986.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Gaeta 2009 *JICJ* 329.

President Bashir while others argue that should a state arrest him that state would be in contravention of international law on immunities. African States Parties are also divided on their interpretation of article 98 (1) with some taking measures to arrest and surrender him while others relying on the said article to refuse cooperation as will be shown in the next chapter.

3.5.1.1 ICC interpretation of article 98 (1)

In the ICC decisions on the cooperation of states parties, the Court states that article 98 cannot be used by states parties to deny the request to arrest and surrender President Bashir but does not state under what circumstances the controversial article may be used.⁴⁰⁶ Some commentators argue that the decision on whether the article 98 (1) exception would apply to a particular request lies entirely with the ICC and not the requested state.⁴⁰⁷ This is based on an interpretation article 97 of the Rome Statute which precedes the controversial article 98. Article 97 provides that:

“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.”

Similarly, Rule 195 of the Rules of Procedure and Evidence provides that:

“When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.”

According to these provisions, it seems that it is not for the requested state to decide on its own whether the reasons that exist warrant denial of the ICC’s cooperation request under article 98.

Concerning this issue, Sluiter says that:

“party states conceded to the ultimate interpretation of the extent of the duty to cooperate when they ratified the Statutes and accepted article 119⁴⁰⁸ in particular. This ratification included their

⁴⁰⁶ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 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, ICC-02/05-01/09, para 41.

⁴⁰⁷ Broomhall *International Justice and the International Criminal Court* 145; S Wirth 2001 *Criminal Law Forum* 454.

⁴⁰⁸ Article 119 deals with the settlement of disputes and provides that: “Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.”

concession to the interpretation of the duty to arrest and surrender war criminals to the requesting side, which is typically the ICC.”⁴⁰⁹

This argument is supported by the ICC Pre-Trial Chamber which stated that when a state arrests an accused person pursuant to a request by the ICC, the state is not acting in its own right but as a representative or agent of the Court therefore immunities do not apply.⁴¹⁰

In relation to the immunity exception under article 98 (1), the Court reserves the right to determine whether presenting a particular request to a state will put a state in a position of conflicting obligations.⁴¹¹ The fact that the Court proceeds with such request shows that, in the Courts view, the request would not make the requested state act in a manner that would be inconsistent with its immunity obligations towards third states.

Despite the continuing debate among scholars on the issue, the ICC regrettably declined to pronounce on the apparent tension between the two articles when the occasion presented itself in the decisions against African States Parties. In the Malawi decision, the Court merely stated that there was no conflict between Malawi’s obligations to the Court and its obligations to Sudan, therefore article 98 (1) did not apply.⁴¹² However, the Court did not give an explanation as to why article 98 did not apply to Sudan. This is clearly an insufficient holding considering the disagreement on the issue among scholars, discussed above, and the disparity in state practice to be discussed below. As a result of the Court’s elusive manner of dealing with the matter, no agreement has been reached concerning the interpretation and scope of article 98 (1) in view of article 27 especially. The AU keeps relying on the article 98 (1) argument to urge African States not to arrest President Bashir and as will be discussed in the next chapter, some African States have sided with the AU on the matter.

3.6 Conclusion

In this authors view, article 98 indeed prevents states parties to the Rome Statute from arresting and surrendering President Bashir to the ICC. As concluded in the chapter 2, the ICC has

⁴⁰⁹ Sluiter *The Library of Essays in International Law: International Criminal Court* 291.

⁴¹⁰The Prosecutor V Omar Hassan Ahmad Al Bashir, 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 decision) para 46.

⁴¹¹ Ibid.

⁴¹² Ibid para 43.

jurisdiction over President Bashir due to the referral of the Darfur situation to the ICC under Chapter VII of the UN Charter.⁴¹³ However, for a state party to arrest and surrender President Bashir, the arresting state would have to subject a sitting president of a foreign state to its national jurisdiction. The fact that the ICC has jurisdiction over President Bashir does not automatically mean that states parties also have jurisdiction over him. The scope of immunity applicable before international tribunals is very different from that applicable before municipal courts. While the former has reduced in scope over the years, the latter is still very well established as held by the ICJ in the *Arrest Warrant case*. Therefore, to subject a sitting head of state to the jurisdiction of another state would be contrary to international law on immunities even if it is for the purpose of surrender to the ICC. The general rule, as discussed in chapter 2, is that sitting heads of state are immune from prosecution and the irrelevance of immunities, before certain international tribunals, is an exception which should be interpreted narrowly. This is because the principles underpinning immunity, sovereignty and equality of states, which should be favored above cooperation with the ICC.⁴¹⁴

Due to the complexity of the matter, it is no wonder that states have been reluctant to arrest and surrender President Bashir to the ICC. While some states parties, like Chad, have hosted him severally without attempting to take measures to arrest him, others like Kenya have taken such measures. Of relevance in this issue also are the AU decisions urging member states to refuse cooperation with the Court. This has created an interesting phenomenon where African States Parties to the Rome Statute have to choose between their treaty obligation to cooperate with the ICC on the one hand and the duty to comply with AU decisions on the other hand. The next chapter analyses the reaction of the AU to the ICC's request as well as that of three African States. The aim is to establish: first, whether the AU grievances have any justification under international law; and to what extent the AU decisions influenced the African States Parties' decision to cooperate with the ICC or otherwise.

⁴¹³ Also as noted in chapter 2, this is problematic because of the ability of the UNSC, a political body, to give the ICC jurisdiction over the head of a non-party state without the consent of that state.

⁴¹⁴ See part 2.2 of the thesis. See also P Gaeta "Official Capacity and Immunity" in A Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 985-986.

CHAPTER FOUR

Africa's Response to the Duty to Cooperate under the Rome Statute: Law or Politics?

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.⁴¹⁵

4.1 Introduction

The previous chapter discussed the scope of state parties' duty to cooperate, with particular focus on the surrender of persons, under the Rome Statute. In that discussion, the circumstances under which a state can legally deny a cooperation request from the ICC were assessed and analysed with particular reference to head of state immunity under article 98 (1). This chapter examines, in light of the law on head of state immunity and the cooperation duty under the Rome Statute, African States Parties' perception of the duty to cooperate with the ICC. This will be achieved by analysing the AU's response as well as that of three selected African States Parties to the Rome Statute: Malawi, Chad and Kenya. This discussion is with a view to: first, establish whether the AU's reasons for the refusal to cooperate with the ICC are justifiable under international law. Secondly, to assess the extent to which AU decisions influence the reactions of African States Parties to their cooperation obligation.

Part two analyses three themes arising from AU decisions: the reliance on article 98 (1) to refuse cooperation, request for deferral of the *Bashir Case*, and the peace versus justice debate in Darfur. Part three, using Chad, Malawi, Kenya as examples; deals with how individual African States Parties to the Rome Statute have responded to the ICC cooperation request in view of the AU decisions urging them to refuse cooperation. Part four then discusses the ICC's response to the African States Parties' failure to comply with the duty to cooperate and the effect that these ICC decisions. Lastly, part five deals with the chapter conclusion.

⁴¹⁵ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 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 decision) para 41 <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf> (accessed 5 August 2013).

4.2. The African Union Response

Since 2008 the AU has made a number of decisions that seek to regulate the relationship between African States Parties to the Rome Statute and the ICC. One common denominator that prevails through the AU decisions is that the AU urges its member states to refuse cooperation with the ICC by not arresting and surrendering President Bashir to the Court. An examination of the AU response reveals a complex web of legal and political issues most of which are beyond the scope of this chapter. This section will discuss three of the reasons the AU gives in the decisions urging member states to refuse cooperation. First, is the fact that the AU has repeatedly and consistently sought the deferral of the case against the Sudanese President under article 16 of the Rome Statute; a request, which has not been responded to by the UNSC. Second, the AU expresses the concern that the trial of the Sudanese president stands to jeopardize fragile peace and reconciliation processes in the Sudan as well as in the whole continent. In this regard, the AU repeatedly expresses the need to balance the need to achieve international criminal justice, on the one hand; and long lasting peace and reconciliation in Africa, on the other hand. And lastly, the assertion by the AU that heads of state, especially those of non-party states to the Rome Statute, should be immune from prosecution at the ICC.

The AU's stance complicates African States Parties to the Rome Statutes' decision to comply with the ICC request in fulfilment of their cooperation duty. This is because by virtue of their AU membership they have an obligation to comply with the decisions and policies of the AU,⁴¹⁶ which in this case translates to non-cooperation with the ICC; while on the other hand, they have a treaty obligation to cooperate with the ICC. The second source of the duty to cooperate with the ICC, in relation to the Darfur Situation, comes from UNSC Resolution 1593 which is binding on all UN member states.⁴¹⁷ African States Parties to the Rome Statute are therefore faced with a dilemma: to arrest and surrender President Bashir or not to. As a matter of fact, the AU shows

⁴¹⁶ Article 23 of the Au constitutive Act provides that "...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."

⁴¹⁷ See Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005 S/RES/1593 (2005) which referred the Sudan Situation to the ICC and urged all states concerned to cooperate fully with the ICC.

appreciation for this conflict and in one of its decisions requests member states to balance, where applicable, their obligations to the AU and those owed to the ICC.⁴¹⁸

It is common knowledge that since warrants of arrest were issued against President Bashir in 2009 he is yet to be arrested and surrendered to the ICC despite his visits to various African States. While this may not be wholly attributable to the AU's reaction, AU's stance was relied on by some African States, for example Chad and Malawi, in their decision to refuse cooperation with the ICC.⁴¹⁹ Therefore, the AU's response merits discussion for at least two reasons. Firstly, as explained in the previous chapter, the ICC is entirely dependent on the cooperation of states and so the decision by the AU to urge its member states to refuse cooperation stands to derail proceedings at the ICC.

Secondly, the AU decisions as will be discussed below, demonstrate a deteriorating relationship between the AU and the ICC. This relationship is worthy of attention due to the fact 34 of the 120 member states to the Rome Statute are African States;⁴²⁰ and all the situations currently before the ICC are from the African continent. Although the AU decisions do not always represent the views of individual African States, as will be demonstrated below, a good relationship between the AU and the ICC will most likely increase cooperation of African States Parties.⁴²¹ This part, therefore, analyses the above mentioned themes that run through the AU responses with a view to establish whether they have any justification under international law; and to recommend ways in which the grievances may be resolved in the interest of international criminal justice in Africa.

⁴¹⁸ Decision On The Progress Report Of The Commission On The Implementation Of Decision Assembly/AU/Dec.270(Xiv) On The Second Ministerial Meeting On The Rome Statute Of The International Criminal Court (ICC) of July 2010 Doc. Assembly/AU/10(XV).

⁴¹⁹ See "*Rapport du Greffe relatif aux observations de la République du Tchad*" quoted in the 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 of 13 December 2011, ICC-02/05-01/09-140 and 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 of 12 December 2011, ICC-02/05-01/09 para 8. In these decisions Chad and Malawi rely on the AU decisions to refuse cooperation with the ICC

⁴²⁰ "[Rome Statute Ratification Chart by Region \(based on UN General Assembly regional groupings\)](http://www.iccnw.org/documents/RATIFICATIONS%20by%20UNGA%20Groups%202APRIL2012_eng.pdf)" 2 April 2012 [http://www.iccnw.org/documents/RATIFICATIONS by UNGA Groups 2APRIL2012_eng.pdf](http://www.iccnw.org/documents/RATIFICATIONS%20by%20UNGA%20Groups%202APRIL2012_eng.pdf) (accessed 25 March 2014).

⁴²¹ The AU Assembly is a meeting of African heads of state and government who are decision makers in their respective countries.

4.2.1 Request for the deferral of *Bashir case* under Article 16 of the Rome Statute

On 21 July 2008, only a week after the OTP applied to the PTC for an arrest warrant against President Bashir, the AU Peace and Security Council met in Addis Ababa, Ethiopia and issued a communiqué concerning the OTP request.⁴²² One of the requests in this communiqué was that the case against President Bashir be deferred since prosecution at that time would not be in the interest of peace and justice for the victims. The UNSC took note of the above communiqué and expressed the intention to address the issues raised therein further⁴²³ but nothing came of this. Subsequently, the PTC issued a warrant of arrest against President Bashir.⁴²⁴ In spite of the warrant, the AU continued to request that the case against President Bashir be deferred but nothing came of this.⁴²⁵ The AU has not been alone in the call for the deferral of the *Bashir case*. Other regional organizations such as the Arab League, the Non-Aligned Movement, and the Organization of Islamic Conference, as well as individual countries have also called for the deferral of the case against President Bashir.⁴²⁶

Be that as it may, the UNSC is yet to act on the matter and no reasons have ever been advanced by the UNSC explaining its inaction towards the constant and repeated request made by the AU.⁴²⁷ The silence of UNSC on the deferral issue is limited only to the *Bashir case* since the more recent request for deferral of the cases against the Kenyan leaders has already been decided on notwithstanding the denial of the request.⁴²⁸ It is curious that even though the AU has been

⁴²² Communiqué of the 142nd Meeting of the Peace and Security Council of 21 July 2008 Psc/Min/Comm(CXLII) para 11.

⁴²³ Resolution 1828 (2008) Adopted by the Security Council at its 5947th meeting on 31 July 2008, S/RES/1828 (2008).

⁴²⁴ *Prosecutor v Omar Al Bashir (Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir)* Case No ICC-02/05-01/09-3 (4 March 2009).

⁴²⁵ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) of 1-3 July 2009, Doc. Assembly/AU/13(XIII); Decision On Africa's Relationship With The International Criminal Court (ICC), October 2013, Ext/Assembly/AU/Dec.1

⁴²⁶ "Darfur: Possibility of Art.16 Deferral of ICC's Investigation in Darfur, Debate at the 63rd UNGA and Related Deliberations by the UN Security Council" 22 Sept 2008 <http://www.iccnw.org/?mod=newsdetail&news=3093> (accessed 05 March 2014).

⁴²⁷ See Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), 26-27 May 2013, Doc. Assembly/AU/13(XXI) where the AU says the UNSC has ignored the AU request for deferral. See also "AU appalled over UNSC failure to defer ICC cases of Sudan, Kenyan leaders" *Sudan Tribune* 4 February 2014 <http://www.sudantribune.com/spip.php?article49831> (accessed 8 April 2014).

⁴²⁸ "Africa 'humiliated' as UN SC refuses to defer Kenya cases" *the London Evening Post* 17 November 2013 <http://www.thelondoneveningpost.com/africa/africa-humiliated-as-un-sc-refuses-to-defer-kenya-cases/> (accessed 22 November 2013).

repeatedly requesting for the deferral of the case against President Bashir for several years, the UNSC has neither officially deliberated on the matter nor issued an official statement.⁴²⁹ The UNSC merely noted the AU concerns in one of its Resolutions and expressed the intention to discuss it further which has never materialised.⁴³⁰ This points to the involvement of UNSC politics in the proceedings before the ICC and reinforces the perception of bias against the African continent. This view is reaffirmed by the previous application of article 16 by the UNSC in July 2002 discussed below.

4.2.1.1 UNSC power to defer cases and its previous application

The power of the UNSC to defer cases before the ICC is provided for by Article 16 of the Rome Statute which states that:

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

While in some quarters this power is considered as interference by the UNSC, which is a political body, with the independence of the ICC; others view it as a preferable improvement of the initial proposal that had been made by the International Law Commission (ILC) concerning the powers of the UNSC.⁴³¹ In 1994, article 23 of ILC Draft Statute of the International Criminal Court provided that:

No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.⁴³²

This proposal drew debate from the delegates, who felt that the UNSC would have too much power over the ICC especially because there was no agreement on the meaning of the phrase “being dealt with by the Security Council”.⁴³³ For instance, Schabas says, in retrospect, that the

⁴²⁹ This is especially because the relatively recent cases against the Kenyan President and his deputy have already been deliberated. See “AU appalled over UNSC failure to defer ICC cases of Sudan, Kenyan leaders” *Sudan Tribune* 4 February 2014 <http://sudantribune.com/spip.php?article49831> (accessed 29 April 2014).

⁴³⁰ See UNSC Resolution 1828 (2008).

⁴³¹ WA Schabas *An Introduction to the International Criminal Court* 2ed (2004) 82.

⁴³² “Report of the Working Group on the question of a draft statute for an international criminal court – Revision of 2 May -22 July 1994” A/CN.4/L.491/Rev.2 <http://legal.un.org/ilc/sessions/46/46docs.htm> (accessed 7 March 2014).

⁴³³ See A Abass “The Competence of the Security Council to Terminate the Jurisdiction of the International

effect of this initial provision would have been to allow any member of the UNSC to hinder prosecution of a matter at the ICC by simply placing an issue on the UNSC Agenda, in order to fulfil the “being dealt with by the Security Council” criteria.⁴³⁴ Such an action, he says, could only be reversed by the decision of the UNSC; which can itself be vetoed by the permanent members.⁴³⁵ In other words, had the initial ILC proposal formed part of the Rome Statute, the UNSC would have had more enormous powers to determine which situations were investigated and prosecuted by the ICC and which ones were not. After much debate and controversy, a compromise was proposed by the Singaporean delegation suggesting the limitation of the UNSC to deferral of proceedings at the ICC.⁴³⁶ That proposal, coupled with certain modifications proposed by various other delegations, gave rise to the construction of article 16 as it currently appears in the Rome Statute.⁴³⁷

The UNSC has previously used its article 16 deferral power to pass Resolution 1422 in July 2002.⁴³⁸ This very controversial Resolution provided that, for a renewable period of 12 months from the date of the Resolution, the ICC shall not start or proceed with investigation or prosecution of a former or current member of a UN peace keeping mission, who is a national of a non-party state, for acts or omissions arising from such mission. The Resolution further expressed the intention of the UNSC to renew the Resolution for as long as it would be necessary and barred states parties to the Rome Statute from taking action that was inconsistent with the Resolution. The passing of this resolution attracted criticism from a number of states and the civil society movements which expressed the view that the UNSC had misused its deferral power.⁴³⁹ Nevertheless, in June 2003 the UNSC passed Resolution 1487⁴⁴⁰ as a renewal of Resolution 1422 and both have identical provisions. An attempt to further renew the Resolution

Criminal Court” (2005) 40 *Texas International Law Journal* 263 at 269-273.

⁴³⁴ Schabas *An Introduction to the International Criminal Court* 82.

⁴³⁵ *Ibid.*

⁴³⁶ See Abass 2005 *Texas International Law Journal* 271. See also a discussion of “the US sticky position” that further complicated the debates in D Scheffer “The Security Council's Struggle over Darfur and International Justice” <http://www.genocidewatch.org/sudanarchives.html> (accessed 07 March 2013).

⁴³⁷ Abass 2005 *Texas International Law Journal* 271.

⁴³⁸ United Nations Security Council Resolution 1422 of 12 July 2002, S/RES/1422 (2002).

⁴³⁹ See the letters addressed to the UNSC president over the renewal of Resolution 1422 by countries such as Brazil, Canada, DRC, Argentina, South Africa and the EU as well as non-governmental organizations such as the Coalition for the International Criminal Court (CICC) and Human Rights Watch (HRW) all available at <http://www.iccnw.org/?mod=res1422&idudctp=13&show=all#13> (accessed 08 March 2014).

⁴⁴⁰ United Nations Security Council Resolution 1487 of June 2003, S/RES/1487 (2003).

failed however, in 2004 since the US, which had been its major proponent withdrew its support.⁴⁴¹

Conversely, UNSC deferral power was sought but denied with regards to the deferral of the cases against President Kenyatta⁴⁴² and Deputy President Ruto.⁴⁴³ The motion to defer the cases failed in November 2013.⁴⁴⁴

4.2.1.2 Application of Article 16 to the *Bashir* case

In general, the request for deferral of the case against President Bashir is based on the argument that prosecution would jeopardize peace processes in Darfur and plunge the area into more violence.⁴⁴⁵ On the other hand, the opponents of the deferral request argue that by referring the Darfur situation to the ICC, the UNSC already chose the judicial method of resolving the crisis in Darfur therefore, by deferring the case, the UNSC would be reneging on its earlier commitment to ensure peace and security in Darfur.⁴⁴⁶ Another view, in this regard, is that deferral would undermine the ICC's deterrence objective and would expose the UNSC powers under article 16 to future abuse for political purposes.⁴⁴⁷

One of the opponents to deferral, Scheffer, says that the intention of Article 16, as shown by the *travaux preparatoires*, was to enable the UNSC to defer situations brought before the ICC by way of states parties self referral or the prosecutor's *proprio motu* investigations.⁴⁴⁸ He says that it was not anticipated during the negotiations of the Rome Statute, that the UNSC would be

⁴⁴¹ "Secretary-General Says United States Decision Not To Seek Security Council Resolution On ICC Will Help Maintain Council Unity, 23 June 2004" UN Press Release SG/SM/9379 .

⁴⁴² *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11. Mr Kenyatta is accused of crimes against humanity of murder, deportation or forcible, rape, persecution and other inhumane acts. While the case against him at the ICC commenced in 2011 he was subsequently elected president of Kenya in March 2013.

⁴⁴³ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11. Mr Ruto is on trial for the crimes against humanity of: murder; deportation or forcible transfer of population; and persecution. He too was elected Deputy President in March 2013 after the case against him had commenced in 2011.

⁴⁴⁴ See part 2.5.1.1 of the thesis.

⁴⁴⁵ A Heavens "China urges deferral of Bashir war crimes case" *Reuters* January 2009 <http://www.reuters.com/article/2009/01/07/us-sudan-darfur-china-idUSTRE5063YN20090107> (accessed 08 April 2014).

⁴⁴⁶ J Falligant "The Prosecution of Sudanese President Al Bashir: Why a Security Council Deferral Would Harm the Legitimacy of the international Criminal Court" (2009-2010) 27 *Wisconsin International Law Journal* 727 at 755.

⁴⁴⁷ L Oette "Peace and Justice, or Neither? The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond" (2010) 8 *JICJ* 345 at 355-357.

⁴⁴⁸ D Scheffer "The Security Council's Struggle over Darfur and International Justice" <http://www.genocidewatch.org/sudanarchives.html> (accessed 07 March 2013).

requested to defer a case referred to the ICC by the UNSC itself as happened in the case of President Bashir.⁴⁴⁹ For these reason, he argues that “Security Council members should neither reverse their own commitment to international justice in Darfur nor defy the original intent behind the Article 16 power....”⁴⁵⁰

Three experts on the ICC and African perspective issues: Akande, Jalloh and du Plessis; after consultation with a group of other African and international experts from both civil society and government; recommend that:

“...any calls for deferrals under article 16 of proceedings initiated by the ICC need to demonstrate that continuing ICC investigations and prosecutions will constitute a bigger impediment or threat to peace and security than deferring the proceedings. Therefore it is imperative that such a case be set out clearly and carefully. For such a case to be made effectively, the states or organizations concerned will need to engage fully with key actors within the UN. Credible evidence will need to be presented to the UNSC in a timely manner in accordance with the rules of procedure and other relevant protocols of the UNSC.”⁴⁵¹

This recommendation could apply not only to cases initiated by the ICC, as the experts suggest, but also to cases arising from situations referred to the ICC by the UNSC like the *Bashir case*. The justification for this argument is that according to Article 16, the decision by the UNSC needs to be based on Chapter VII of the UN Charter which is entitled “action with respect to threats to the peace, breaches of the peace, and acts of aggression”. This has been interpreted to mean that the UNSC would employ its powers under Chapter VII to defer a case only if its prosecution at the ICC would be a threat to the peace, a breach of peace or an act of aggression.⁴⁵² Since the UNSC referred the Darfur Situation to the ICC after “determining that

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid. See Oette 2010 *JICJ* 350 and R Cryer “The Security Council, Article 16 and Darfur” 29 October 2008 <http://www.csls.ox.ac.uk/documents/CrverFi.pdf> (accessed 07 April 2014) for a contrary opinion. Both Oette and Cryer disagree with Scheffer’s supposition that article 16 was meant to be limited to *proprio motu* investigations and self referrals but agree with Scheffer’s conclusions that it would be ill advised for the UNSC to defer the case against Bashir

⁴⁵¹ D Akande et al “An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC” *International Security Studies* http://www.iura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Verwaltungsrecht/de_Wet/PositionPaper_ICC.pdf (accessed 07 April 2014).

⁴⁵² Ibid at 10.

the situation in Sudan continues to constitute a threat to international peace and security”⁴⁵³, then it is necessary for the AU and other organizations and states seeking deferral to demonstrate how the deferral of the case against President Bashir would be in the interest of achieving international peace and security. As one of the scholars says “exceptional circumstances would have to be identified, turning a situation already considered as warranting effective prosecution by the ICC into one in which the Court’s exercise of jurisdiction threatens the peace and security of the world”.⁴⁵⁴ Faced with such evidence demonstrating how deferral, as opposed to prosecution, would be in the interest of security and peace in Darfur, perhaps the UNSC would be more inclined towards deciding on the matter.⁴⁵⁵

So far, even after years of persistent requests by the AU, the UNSC is yet to issue an official decision on the deferral of the case against President Bashir.⁴⁵⁶ This inaction by the UNSC has led the AU to urge its members to “speak in one voice” in support of the proposal to amend article 16 of the Rome Statute. This amendment proposes the empowerment of the UN General Assembly to defer cases where the UNSC has failed to respond to a request within a specified timeframe. This move by the AU has, however, been deemed to be unlikely to succeed.⁴⁵⁷ This then takes the matter back to the beginning, with the AU requesting for deferral, and the UNSC not giving any kind of response to the request.

4.2.2 Impact of President Bashir indictment on the Darfur peace process

The second theme running through the AU decisions relates to the peace and justice debate. In the decisions, the AU Assembly repeatedly states that the prosecution of the three African

⁴⁵³ See UNSC Resolution 1593 (2005), Adopted by the Security Council at its 5158th meeting, on 31 March 2005 S/RES/1593 (2005).

⁴⁵⁴ A Ciampi “The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute” (2008) 6 *JICJ* 885 at 890.

⁴⁵⁵ There is opinion that Bashir is not genuinely committed to achieving peace in Darfur and is merely using it as a bargaining chip to ensure deferral see Oette 2010 *JICJ* 355.

⁴⁵⁶ In Security Council Resolution 1828 the UNSC merely took note of the AU Peace and Security Council communiqué discussed above, requesting deferral of the case against Bashir, and took note of its (UNSC’s) intention to consider the matter further which at the time of the writing of this thesis was yet to be done. See “AU appalled over UNSC failure to defer ICC cases of Sudan, Kenyan leaders” *Sudan Tribune* 4 February 2014 <http://www.sudantribune.com/spip.php?article49831> (accessed 08 April 2014).

⁴⁵⁷ D Akande et al “An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC” *International Security Studies* http://www.iura.unibonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Verwaltungsrecht/de_Wet/PositionPaper_ICC.pdf (accessed 07 April 2014) 12-17.

leaders: President Bashir, President Kenyatta and Deputy President Ruto, interferes with the peace and reconciliation processes in Sudan as well as in Kenya respectively.⁴⁵⁸ In a decision made in May 2013, for example, the AU Assembly stated *inter alia that* it:

“Further reaffirms its previous decisions on the activities of the ICC in Africa, adopted in January and July 2009, January and July 2010, January and July 2011, January and July 2012 respectively, in which it expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace...”⁴⁵⁹

The AU also requested that the matter of indictment of African heads of state and its consequence on peace to be discussed in the ASP in November 2013.⁴⁶⁰

The AU’s concern that the prosecution of African leaders is an obstacle to peace, brings to fore one of the oldest and most controversial debates in international criminal law, that is, the peace versus justice debate. The AU fervently opposes the prosecution of leaders alleged to bear responsibility for orchestrating international crimes when the situation in question is ongoing or just concluded.⁴⁶¹ In relation to the *Bashir case*, the AU is not alone on the “peace first” side of the argument. Some commentators have also expressed concern that the issuance of an ICC warrant of arrest against President Bashir and the subsequent request for his arrest and surrender was “ill-timed and seeks to tamper with an essential element of the Sudan’s peace processes”.⁴⁶² The processes often referred to as “Sudanese peace process” refers mainly to the signing and implementation of two Peace Agreements. First, the 2005 Comprehensive Peace Agreement (CPA),⁴⁶³ which is an amalgamation of peace agreements and protocols seeking to peacefully

⁴⁵⁸ Decision On Africa’s Relationship With The International Criminal Court (ICC), October 2013, Ext/Assembly/AU/Dec.1

⁴⁵⁹ Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), May 2013, Doc. Assembly/AU/13(XXI).

⁴⁶⁰ See Special Segment as requested by the African Union: “Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation” ICC-ASP/12/61, Twelfth session, The Hague, 20-28 November 2013.

⁴⁶¹ R J V Cole “Africa’s Relationship with the International Criminal Court: More Political than Legal” (2013)14 *Melbourne Journal of International Law* 1 at 13-14.

⁴⁶² S Odera “Politics of International Criminal Justice, the ICC’s Arrest Warrant for Al Bashir and the African Union’s Neo-Colonial Conspirator Thesis” in C Murungu and J Biegon (eds) *Prosecuting International Crimes in Africa* (2011)145 at 148.

⁴⁶³ See the 2005 Comprehensive Peace Agreement (CPA) between the Government of Sudan and the Sudan People’s Liberation Movement otherwise known as the Sudan People’s Liberation Army (SPLM/SPLA),

resolve the conflict between north and south Sudan;⁴⁶⁴ and second, the Darfur Peace Agreement signed in 2006 in Abuja⁴⁶⁵ as well as the subsequent 2011 Doha Agreement.⁴⁶⁶

One commentator, De Waal, argued that the issuance of an arrest warrant against President Bashir stood to encourage the government of Sudan to contravene the provisions on the CPA and intensify the violence and cruelty already being meted out by the President Bashir government against civilians in Darfur and in South Sudan.⁴⁶⁷ In his view, the risks to peace posed by the commencement of a case against President Bashir far outweigh the benefits that could accrue from the process. He says:

“He (President Bashir) carries responsibility (for the international crimes in Darfur), not only in his capacities as head of state and commander in chief of the armed forces, but also in a more personal capacity in the specific actions he has taken to incite, encourage and organise excessive violence in war and against the political opponents of his government. It is precisely because such grievous violations of human rights have been perpetrated, and because a ruthless government which is ready to disregard human rights remains in power, that it is important to be especially careful in framing any charges against senior members of that government, and ensuring that a strategy for pursuing justice is fully aligned with strategies for securing peace, defending human rights and promoting democracy.”⁴⁶⁸

<http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf> (accessed 19 November 2013). This agreement was signed by the two parties in Kenya before representatives from IGAD, the AU, the European Union, the League of Arab states, the UN as well as those from the Governments of Egypt, the United States of America, Italy, the Netherlands, Norway, the United Kingdom and Northern Ireland.

⁴⁶⁴ The CPA is an amalgamation of Machakos Protocol (2002), Power Sharing (2004), Wealth Sharing (2004), The Resolution of the Abyei Conflict (2004), The Resolution of Conflict in Southern Kordofan and Blue Nile States (2004) Security Arrangements (2003 & 2004). In the CPA protocols the government of Sudan and the SPLA agreed on various issues pertinent to the Sudanese conflict resolution such as representation in government, referendum for the self determination of the people of South Sudan as well as the equitable distribution of oil revenue, and they promised to work together to foster peace in the Sudan.

⁴⁶⁵ This Agreement was never implemented see D Lanz “Sudan/Darfur, Abuja Negotiations and the DPA” <file:///C:/Users/USER/Desktop/chapter%204/peace%20v%20justice/david%20Lanz%20darfur-overview-summary.pdf> (accessed 16 April 2014)

⁴⁶⁶ See the Doha Document for Peace in Darfur (2011) <http://www.smallarmssurveyssudan.org/fileadmin/docs/facts-figures/sudan/darfur/peace-process-chronology/DDPD.pdf> (accessed 29 April 2014).

⁴⁶⁷ See “Should President Omar al-Bashir of Sudan be charged and arrested by the International Criminal Court? An Exchange of Views by Alex de Waal and Gregory H. Stanton” *Genocide Studies and Prevention* 4 (2009) www.genocidewatch.org/images/ByStanton_Should_President_Omar_al-Bashir_of_Sudan_be_charged_and_arrested_by_the_International_Criminal_Court.doc alex de waal sudan icc (accessed 19 November). See also A Natsios “A Disaster in the Making” *Social Science Research Council (SSRC)* <http://africanarguments.org/2008/07/12/a-disaster-in-the-making/> (accessed 19 Dec 2013).

⁴⁶⁸ Ibid. see also J Flint and De Waal “To put justice before peace spells disaster for Sudan” *the Guardian* 6 March 2009 <http://www.theguardian.com/commentisfree/2009/mar/06/sudan-war-crimes> (accessed 19 November 2013).

This is the same position held by the AU, that the prosecution of President Bashir and other senior Sudanese government officials will have a negative impact on the peace process in Darfur region in particular and Sudan in general, and will lead to the commission of more grave hostilities against the civilian population.

However, there are those who are utterly opposed to this notion. Members of the latter school of thought hold that the President Bashir government has over the years demonstrated its lack of commitment to the peace process and therefore “it beguiles the imagination to accept the argument that after years of massive atrocities against civilians, all that stands in the way of peace” is the prosecution of President Bashir at the ICC.⁴⁶⁹ In Mendes’ view, the fact that President Bashir has continuously defied the terms of the peace agreements clearly indicate that he is not committed to restoration of peace in the Darfur region.⁴⁷⁰ According to this view, President Bashir’s defiance of peace agreements has been demonstrated by: the killing of peacekeepers and deterring humanitarian intervention to the people in refugee camps; as well as the appointment of Ahmed Haroun as chair of a committee investigating human rights violation in Darfur, soon after he had been charged with international crimes committed in the region, and an ICC warrant of arrest was pending against him.⁴⁷¹ For these reasons and more Mendes says that: “to sacrifice the millions of civilians in Darfur and fail to secure justice for those who have suffered the most serious crimes for a peace, that al Bashir may not want himself as discussed above, is to perpetrate a much greater injustice”⁴⁷²

In the same vein, Stanton, in an opinion given in 2009 pending the issuance of an arrest warrant against President Bashir, supported the ICC intended prosecution of the president by drawing on past examples. He stated that the indictment and subsequent trials of Slobodan Milosevic and Charles Taylor for crimes committed in their positions as heads of state of FRY and Liberia

⁴⁶⁹ P Akhavan “Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism” (2009) 31 *Human Rights Quarterly* 624 at 651.

⁴⁷⁰ EP Mendes *Peace and Justice at the International Criminal Court a Court of Last Resort* (2010) 49-93.

⁴⁷¹ The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") ICC-02/05-01/07; See also “Darfur, Part I: NGO Statements condemning appointment of Harun to human rights committee; OTP press release calling for arrests.”

12 Sept 2007 <http://www.iccnw.org/?mod=newsdetail&news=2039> (accessed 25 November 2013).

⁴⁷² *Ibid* 92.

respectively, hastened the peace process in the respective countries and proved many pessimists wrong.⁴⁷³ He believed the same would apply to President Bashir and that the arrest warrant would be a deterrent to the his regime against further commission of international crimes. He added that despite threats by the President Bashir regime to instigate more violence after the issuance of the warrant, it would not cripple the implementation of the peace agreements in the Sudan.⁴⁷⁴

It is true that the issuance of the warrant was immediately followed by the expulsion of humanitarian aid organizations, and a threat to intensify the violence against the people of Darfur.⁴⁷⁵ However, it is also true that some of the salient provisions of the CPA, that is, the agreement to hold general elections⁴⁷⁶ and the a referendum for the self determination of South Sudan,⁴⁷⁷ have both since been complied with. Despite these implementations, the human rights abuses and population displacement is still ongoing in Darfur as well as other parts of both South Sudan and Sudan.⁴⁷⁸ Be that as it may, it is difficult to establish whether the violence has intensified, in contravention to the above peace agreements, as a direct impact of the two standing arrest warrants against President Bashir.⁴⁷⁹

The peace versus justice debate is always a difficult one and the Darfur situation is no exception.⁴⁸⁰ The AU has over the years been involved in Sudanese peace initiatives.⁴⁸¹ These

⁴⁷³ See An Exchange of Views by Alex de Waal and Gregory H. Stanton *Genocide Studies and Prevention* 4 (2009).

⁴⁷⁴ Ibid.

⁴⁷⁵ "Sudan to expel foreign aid groups" *Aljazeera* 16 March 2009 <http://www.aljazeera.com/news/africa/2009/03/2009316131925285761.html> (accessed 25 November 2013).

⁴⁷⁶ Sudanese general election was held in April 2010, although its credibility was highly contested. See "President Omar al-Bashir declared winner of Sudan poll" *BBC News* 26 April 2010 <http://news.bbc.co.uk/2/hi/africa/8643602.stm> (accessed 25 November 2013).

⁴⁷⁷ The referendum for self governance of South Sudan occurred in July 2011 "It's official: South Sudan a new country" *CNN* 9 July 2011 <http://edition.cnn.com/2011/WORLD/africa/07/08/sudan.new.nation/> (accessed 25 November 2013).

⁴⁷⁸ "300,000 displaced in Darfur conflict, UN says" *Sudan Tribune* 23 May 2013 <http://www.sudantribune.com/spip.php?article46679> (accessed 16 April 2014).

⁴⁷⁹ "Sudan profile" *BBC News Africa* 10 December 2013 <http://www.bbc.com/news/world-africa-14095300> (accessed 16 April 2014). (The article contains a chronological illustration of major events that have occurred in Sudan including the Darfur region from 1881 to December 2013. From this chronology it is not easy to conclude that the violence has either intensified or reduced from the time the warrants were issued.

⁴⁸⁰ N Grono and A O'Brien "Justice in Conflict? The ICC and Peace Processes" in N Waddell and P Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) 13.

⁴⁸¹ A Sarjoh Bah "The African Union In Darfur: Understanding The Afro-Arab Response To The Crisis" http://fride.org/download/OP_Responses_arab_world_ENG_feb10.pdf (accessed 17 October 2014).

have included: repeated condemnation of the violence in Darfur, coordination of various peace talks and the deployment of peace keepers in collaboration with the UN.⁴⁸² For this reason, it has been argued that the AU's concern that the prosecution of President Bashir threatens these peace initiatives should not be merely disregarded by the international community.⁴⁸³

A possible remedy could be the establishment of a commission, similar to the earlier Commission of Inquiry on Darfur⁴⁸⁴ whose recommendation led to the referral of the Darfur situation to the ICC.⁴⁸⁵ Such a commission would be mandated to investigate the AU's assertion that the prosecution of President Bashir threatens the delicate peace process in Darfur. Based on the factual findings of this commission, the UNSC could determine whether to defer the case in favour of peace or otherwise. A similar recommendation was made by the AU Peace and Security Council in the 2008 communiqué, discussed above. It suggested the appointment of a panel of Africans of high integrity to investigate and propose means of obtaining justice without jeopardizing peace processes in Sudan. Adoption of this course of action by the UNSC would demonstrate an appreciation of the difficult relationship between the much needed peace and justice in Darfur and foster a better relationship between the AU and the ICC.

4.2.3 Heads of State Immunity at the ICC

The third issue arising from the AU decisions is head of state immunity. The AU was outraged by the issuance of an arrest warrant against the Sudanese President, a sentiment that was later exacerbated by the proceedings against the president and deputy president of Kenya.⁴⁸⁶ In fact, in the October 2013 decision, the AU decided:

“That to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving

⁴⁸² Ibid.

⁴⁸³ See Odera “Politics of International Criminal Justice” (2011) 159.

⁴⁸⁴ International Commission of Inquiry on Darfur established by the UN Secretary General pursuant to UNSC Resolution 1564 of 2004 to investigate the human rights in Darfur and whether the international crimes committed there amounted to genocide.

⁴⁸⁵ See the “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004” http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (accessed 16 April 2014).

⁴⁸⁶ See for example Decision On The Progress Report Of The Commission On The Implementation Of Decision Assembly/Au/Dec.270(XIV) On The Second Ministerial Meeting On The Rome Statute Of The International Criminal Court, 25-27 July 2010, Doc. Assembly/Au/10(XV) para 4; Decision on The Progress Report Of The Commission On The Implementation Of The Assembly Decisions On The International Criminal Court (ICC) of 29-30 January 2012, Doc. EX.CL/710(XX).

AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office”⁴⁸⁷

The applicability of head of state immunity at the ICC has been a contentious issue discussed in Chapter 2 of this thesis. Contrary to the AU’s opinion, Chapter 2 concluded that the ICC has jurisdiction over President Kenyatta and his deputy, as heads of a state party. This jurisdiction arises from the Kenyan Constitution, the International Crimes Act as well as the Rome Statute.⁴⁸⁸ Similarly, the ICC also has jurisdiction over President Bashir due to the UNSC referral of the Darfur situation to the Court under Chapter VII of the UN Charter. This referral, the Chapter argued, makes all the persons accused of international crime in the region subject to the Court’s jurisdiction despite their official capacity. For that reason, unlike the AU, this author argues that the ICC rightfully exercised its jurisdiction over President Bashir.

4.3.2.1 Reliance on Article 98 (1) to Discourage Arrest of President Bashir

After concluding that President Bashir’s immunity does not apply before the ICC, the question then relates to whether article 98 (1) may be relied on by states to refuse cooperation.⁴⁸⁹ Closely related to the issue of head of state immunity is the AU’s reliance on article 98 of the Rome Statute to urge its member states to refuse cooperation with the ICC.⁴⁹⁰ In one of the decisions the AU stated that:

“(the Assembly) Reaffirms its understanding that Article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and by referring the situation in Darfur to the ICC, the UN Security Council intended that the Rome Statute would be applicable, including Article 98.”⁴⁹¹

⁴⁸⁷ Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Doc. Assembly/AU/13(XXI) para 10.

⁴⁸⁸ See part 2.5.1 of this thesis.

⁴⁸⁹ See discussion in part 3.5.1 of this thesis.

⁴⁹⁰ See for example Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) of 1-3 July 2009, Doc. Assembly/AU/13(XIII) paras 9 & 10; Decision on The Progress Report Of The Commission On The Implementation Of The Assembly Decisions On The International Criminal Court (ICC) of 29-30 January 2012, Doc. EX.CL/710(XX) paras 7 & 8. Decision on The Implementation Of The Decisions On The International Criminal Court (ICC) of 15-16 July 2012, Doc. EX.CL/731(XXI) para 7.

⁴⁹¹ Decision on The Progress Report Of The Commission On The Implementation Of The Assembly Decisions On The International Criminal Court (ICC) of 29-30 January 2012, Doc. EX.CL/710(XX).

The AU's argument, therefore, is that a state that arrests and surrenders President Bashir would be acting inconsistently with its obligations under international law owed to Sudan as a non-party state to the Rome Statute and in that sense breaching article 98 (1). The AU, therefore, supported the decisions of Kenya, Malawi, Djibouti and Chad, all States Parties to the Rome Statute; not to arrest President Bashir when he visited their territories.⁴⁹²

This gives rise to the debate on the scope of article 98's immunity exception to cooperation and its relationship with article 27. On the one hand, article 27 provides that the official capacity of an accused person shall not be a bar to prosecution at the ICC and that immunity as formerly established under international law, including head of state and government immunity, is irrelevant before the ICC. On the other hand, article 98 provides that the Court shall not request a state to cooperate if by such cooperation the requested state would breach the immunity of the person or the property of a third state. The debate relating to the correlation of these two articles has been dealt with extensively in Chapter 3 of this thesis.⁴⁹³

Like the AU, this author argues in Chapter 3, that States parties are barred from arresting and surrendering President Bashir because of his immunity as the head of another state. Article 98 (1), it is argued, should be interpreted by the ICC to preserve the immunities of persons or properties of a non-party state to the Rome Statute, like Sudan, from breach by requested states. This is unless the ICC can first seek and obtain waiver of immunity from the state concerned as provided by the article.

4.3 African States' Reaction to the Rome Statute cooperation duty

As discussed above, the AU urges its member states, both parties and non parties to the Rome Statute, to refuse cooperation with the ICC by not arresting and surrendering President Bashir. According to article 23 (2) of the Constitutive Act of the African Union, the Union can take punitive action against any member states that does not comply with AU decisions. African States Parties to the Rome Statute therefore find themselves in a situation of conflicting obligations: the obligation to comply with the AU decisions which urge non-cooperation with the ICC; and the duty to arrest and surrender President Bashir to the ICC.

⁴⁹² Ibid.

⁴⁹³ See part 3.5.1 of the thesis.

African States Parties to the Rome Statute have reacted differently to the AU decisions in the light of their obligations under the Rome Statute. Some, like Chad and Malawi, have cited the AU decisions in their refusal to arrest and surrender President Bashir to the ICC. While others, like Kenya, sought to comply with their obligations under the Rome Statute by taking measures to arrest and surrender President Bashir to the Court. This part analyses the reactions of these three states, Kenya, Malawi and Chad with a view to shed light on African States Parties' perception of the duty to cooperate with the ICC and to assess to what extent the AU decisions have influenced individual African States decisions to cooperate or otherwise.

4.3.1 Malawi

Malawi signed the Rome Statute on 2 March 1999 and later ratified it on 19 September 2002.⁴⁹⁴ However, Malawi is yet to domesticate the provisions of the Rome Statute into its municipal law. Being a dualist state, international agreements entered into by Malawi do not automatically form part of the country's laws unless they have been domesticated.⁴⁹⁵ An analysis of some of the substantive and procedural provisions of the laws of Malawi; including the Penal Code, the Immunities and Privileges Act as well as the Extradition Act reveals that it would be difficult for Malawi to cooperate with the ICC without a domesticating instrument.⁴⁹⁶ This factor shows that, even before the President Bashir issue arose, Malawi was already in contravention of its obligations as a state party to the Rome Statute. This is because article 88 requires states parties to enact legislations to enable them to cooperate with and offer judicial assistance to the ICC.

⁴⁹⁴ See <http://www.icc-cpi.int/> (accessed 1 May 2014).

⁴⁹⁵ 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.”

⁴⁹⁶ S A Kalembera *The Implementation of International Criminal Law in Malawi* (LLM thesis, University of Western Cape, 2010) 64-71.

4.3.1.1 President Bashir's visit to Malawi and the ICC decision

On 14 October 2011, President Bashir visited Malawi in order to attend the Common Market for Eastern and Southern Africa (COMESA) Summit.⁴⁹⁷ However, contrary to the earlier request to states parties by the PTC, Malawi refused to arrest and surrender President Bashir to the ICC. A day before the visit, the ICC Registrar sent a *note verbale* to the Embassy of Malawi in Brussels reminding Malawi of its obligation under the Rome Statute to surrender President Bashir and strongly urging it to cooperate.⁴⁹⁸ The note further warned that if Malawi failed to cooperate, the Court may make a finding to that effect and refer the matter to the UNSC and the ASP.⁴⁹⁹ However, Malawi did not respond to this note, neither did it hold any consultations with the ICC concerning the obstacles that may have hindered it from cooperating as required of states parties by the Rome Statute.⁵⁰⁰

After President Bashir's visit, the PTC then asked Malawi to give observations regarding its alleged failure to cooperate.⁵⁰¹ In response to this request, Malawi confirmed that President Bashir had indeed visited its territory and stated *inter alia* that:

“The Ministry wishes to state that in view of the fact that His Excellency Al Bashir is a sitting Head of State, Malawi accorded him all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.”⁵⁰²

Apart from this, Malawi also stated that it had “fully aligned itself” with the AU decisions, urging its members not to arrest and surrender President Bashir on account of Article 98 of the Rome Statute.⁵⁰³

⁴⁹⁷ “Hague court questions Bashir's visit to Malawi” *Reuters* 19 October 2011 <http://www.reuters.com/article/2011/10/19/ozatp-warcrimes-bashir-idAFJ0E79I0K520111019> (accessed 11 September 2013).

⁴⁹⁸ 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 of 12 December 2011, ICC-02/05-01/09 para 5.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ Decision requesting observations about Omar Al-Bashir's recent visit to Malawi of 19 October 2011, ICC-02/05-01/09.

⁵⁰² Decision Pursuant to Article 87(7) of the Rome Statute para 8.

⁵⁰³ *Ibid* para 13.

In relation to the assertion that immunities were available to President Bashir, the Chamber responded by stating that the doctrine of immunity for heads of state before international tribunals has been rejected from as early as 1919 in the Versailles Treaty.⁵⁰⁴ The Court further stated that it is now an established rule of international law that immunities “cannot be invoked to oppose prosecution by an international court”.⁵⁰⁵ The Chamber conceded, however, that there is tension between articles 27 (2) and 98 (1) of the Rome Statute but proceeded to state that Malawi could not rely on Article 98 to refuse cooperation with the ICC.⁵⁰⁶

The Court stated further that Malawi was in contravention of its duty to cooperate and gave five reasons for this decision: first, that head of state immunity had been continuously rejected over the years. Second, that various heads and former heads of state have been tried by international tribunals showing that prosecution of heads of state has received international recognition and acceptance. Third, that the Rome Statute had been (at the time) ratified by 120 states all which implicitly accepted to waive the immunities of their heads under article 27 (2) of the Rome Statute. Fourth, that it was inconsistent for Malawi to ratify a treaty that gives the ICC jurisdiction to try persons responsible for crimes of international concern then refuse to surrender a person charged with genocide, crimes against humanity and war crimes. The Court further stated in this regard that:

“...The Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.”⁵⁰⁷

The Court added that this inapplicability of head of state immunity applies also in relation to all activities done by states in cooperation with the international courts. Since the ICC has no enforcement mechanism of its own, the Court said, a state enforcing ICC orders would be acting as a representative of the Court hence head of state immunity would not be applicable.⁵⁰⁸ The

⁵⁰⁴ Decision Pursuant to Article 87(7) of the Rome Statute para 36.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid paras 37-43.

⁵⁰⁷ Ibid para 43.

⁵⁰⁸ Ibid para 44 and 45.

Chamber concluded by referring Malawi's failure to cooperate to the UNSC and the ASP for political reaction.

4.3.1.2 Critique of the ICC decision against Malawi

This decision against Malawi has been subjected to sharp criticism by scholars for several reasons, one of the major ones being the PTC's failure to delineate the scope of article 98 (1) of the Rome Statute in relation to article 27.⁵⁰⁹ The PTC did not seem to fully appreciate the tension between these two articles. In the words of Tladi:

“The fundamental flaw of the Court's approach is thus that it treats the subject of the unavailability of immunity as a defense before the ICC under Article 27 of the Statute as co-extensive with the question of immunity as a limit to cooperation under Article 98(1). The subject of Article 98(1), to the extent that it refers to immunities, is obviously related to the subject of Article 27 but it is not the same. There is obvious tension between the two provisions, which the Court concedes. However, instead of addressing the tension between Articles 98(1) and 27, the Court simply proceeds to decide the case as if Article 27 is dispositive of the issue, ignoring completely Article 98(1). The Court asserts, for example, that the requested states cannot raise immunities as they ratified Article 27 of the Statute, as if the requested states did not, at the same time, ratify Article 98.⁵¹⁰

This view implies that the unavailability of head of state immunity as a defence before the ICC, provided for by article 27, does not necessarily result in unavailability of immunity before national courts that seek to arrest and surrender a head of a non state party, like President Bashir, to the ICC. This is in line with the author's conclusion in Chapter 3, that although President Bashir has no immunity in relation to indictment and prosecution at the ICC, his position as the head of a non party state entitles him to immunity from arrest and surrender by states parties.

The Court simply stated that article 98 did not apply to Malawi without explaining why or under what circumstances article 98 (1) would apply to prevent the ICC from requesting a state to cooperate. The scope of article 98 (1) is still contentious, as discussed above, and is the question whether the article can be relied on to deny the ICC request to surrender president Bashir. Tladi notes that the AU's interpretation of article 98 (1) as preventing President Bashir's arrest and

⁵⁰⁹ C Gevers “The ICC Pre-Trial Chamber's Non-Cooperation Decision on Malawi” 16 Feb 2012 <http://warandlaw.blogspot.com/2012/02/icc-pre-trial-chambers-non-cooperation.html> (accessed 22 April 2014)

⁵¹⁰ Tladi 2013 *JICJ* 207.

surrender to the ICC is “legally plausible”- although he does not agree with it.⁵¹¹ He states further that the PTC’s dismissal of the same, without proper justification could reinforce the notion that the ICC is prejudiced against African leaders; a view which underpins the deteriorating ICC-AU relationship.⁵¹²

4.3.1.3 Malawi’s change of position

Nonetheless, in June 2012, amidst enticement from the AU to host President Bashir for the second time, Malawi refused to do so and threatened to arrest and surrender him to the ICC should he visit the country.⁵¹³ The Malawian change of attitude towards President Bashir coincided with a change in Malawi presidency, from Bingu wa Mutharika to Joyce Banda. This has led to the speculation that the change was driven by the desire of the new administration to regain favour with the international community.⁵¹⁴ However, Maunganidze cautions that these political speculations should not make commentators lose sight of the legal implications of the new stance which, in his view, means that Malawi has opted to comply with its obligations under the Rome Statute and the UN Charter as represented by UNSC Resolution 1593.⁵¹⁵

Malawi’s reaction exemplifies the dilemma of African States Parties’ in relation to the conflicting obligations, alluded to earlier in the chapter. At first Malawi chose to “fully align itself with AU decisions”. But more recently Malawi has changed its position becoming more inclined towards cooperating with the ICC. It is interesting to note that while Malawi changed its position on the President Bashir issue, the AU’s stance still remains the same. This shows that, although Malawi previously chose to align itself with AU decisions, the AU’s position on the matter did not directly determine Malawi’s decision. If it did, Malawi’s position would not have changed while that of the AU remained the same.

⁵¹¹ Ibid 207-209

⁵¹² Ibid.

⁵¹³ “Botswana condemns the African Union on Sudan's al Bashir” *Malawi Today* 12 June 2012 <http://www.malawitoday.com/news/125605-botswana-condemns-african-union-sudans-al-bashir> (accessed 8 October 2013).

⁵¹⁴ O A Maunganidze “Malawi’s Stance on al-Bashir is in Line with its International Obligations” *Institute for Security Studies* <http://www.polity.org.za/article/malawis-stance-on-al-bashir-is-in-line-with-its-international-obligations-2012-06-14> (accessed 19 October 2013).

⁵¹⁵ Ibid.

4.3.2 Chad

4.3.2.1 President Bashir's visit to Chad and the ICC decisions

Chad signed the Rome Statute on 20 October 1999, ratified it on 1 November 2006 and it came into force in relation to Chad on 1 January 2007.⁵¹⁶ Chad has hosted President Bashir in its territory five times now without attempting to arrest and surrender him to the ICC. The first of these visits was on 22 July 2010, the same month after the issuance of the second warrant of arrest against President Bashir on charges of genocide. On this visit, it is reported that the Chadian President met President Bashir at the N'djamena airport and gave him a symbolic key to the city.⁵¹⁷ Chad's Interior and Security Minister is also reported to have said that "Bashir is a sitting president. I have never seen a sitting president arrested on his travels by the host country."⁵¹⁸ In reaction to this visit the Pre-Trial Chamber issued a decision informing the UNSC of President Bashir's visit to Chad.⁵¹⁹ In the decision, the chamber noted that Chad had an obligation to cooperate which arose from UNSC Resolution 1593 of 2005 and article 87 of the Rome Statute and referred the matter to the UNSC and the ASP requesting both organizations to "take any action they deem appropriate."⁵²⁰

The second visit was between 7 - 8 August 2011 when President Bashir attended the swearing in of the new Chadian President, Idriss Deby, and once again no attempt was made to arrest him. The Registrar of the ICC sent a *note verbale* reminding Chad of its cooperation duty under the Rome Statute and imploring it to perform this duty by arresting and surrendering President Bashir to the ICC, to which Chad never responded.⁵²¹ The PTC made a short decision once again condemning Chad's refusal to cooperate and referring the issue to the UNSC and the ASP.⁵²² In

⁵¹⁶ See <http://www.icc-cpi.int/> (accessed 1 May 2014).

⁵¹⁷ "Chad refuses to arrest Omar al-Bashir on genocide charges: Sudanese president on his first visit to a member state of the ICC since it issued a warrant for his arrest in March 2009" *the Guardian* 22 July 2010 <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir> (accessed 20 September 2013).

⁵¹⁸ *ibid*

⁵¹⁹ Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad of 27 August 2010, ICC-02/05-01/09-109.

⁵²⁰ *Ibid*.

⁵²¹ 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 of 13 December 2011, ICC-02/05-01/09-140 para 9.

⁵²² *Ibid*.

this decision, the Chamber reiterated the reasons given earlier in the decision against Malawi, discussed above, and rejected Chad's attempted reliance on article 98 (1) of the Rome Statute.⁵²³

President Bashir visited Chad for the third time on 16 - 17 February 2013.⁵²⁴ Once more Chad failed to arrest him despite not having discussed with the ICC the reasons that were likely to impede the arrest as required by article 97 of the Rome Statute. The ICC made a decision asking Chad to give observations on its alleged failure to arrest and surrender President Bashir and its failure to consult with the ICC concerning problems that may have impeded the arrest.⁵²⁵ For the third time, the ICC made a decision reprimanding Chad for its failure to cooperate and referring the matter to the UNSC and ASP.⁵²⁶

The fourth and fifth visits occurred in May 2013 and March 2014 respectively and once again Chad failed to arrest and surrender President Bashir to the ICC.⁵²⁷ The Court is yet to make decisions concerning these two visits.

4.3.2.2 The politics between Chad and Sudan

In view of the foregoing, it is interesting that in July 2009, when the AU made the first decision urging States to refuse cooperation with the ICC, Chad was the only country that entered a reservation to the decision.⁵²⁸ The specific paragraph to which Chad entered a reservation provided that the AU Assembly:

“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

⁵²³ Ibid paras 13 & 14.

⁵²⁴ “Sudan: Chad must arrest ICC-indicted President al-Bashir” *Amnesty International* <http://www.amnesty.org/fr/node/37292> (accessed 30 September 2013).

⁵²⁵ Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad of 22 February 2013, ICC-02/05-01/09-145.

⁵²⁶ Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir of 26 March 2013, ICC-02/05-01/09-151.

⁵²⁷ See “Bashir Travel Map” <http://bashirwatch.org/#chad> (accessed 10 September 2013); See also “Darfur Victims Ignored as Chad Hosts Al-Bashir Yet Again: Chad defying international obligation to arrest Sudanese president wanted by ICC for grave crimes in Darfur” *Coalition for International Criminal Court* http://www.iccnw.org/documents/CICC_PR_ALBASHIR_CHAD_MAY2013_FINAL-1.pdf (accessed 30 September 2013).

⁵²⁸ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) of 1-3 July 2009, Doc. Assembly/AU/13(XIII).

Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.”⁵²⁹

In July 2009, Chad opposed the above paragraph in an AU Decision and President Deby of Chad is reported to have vowed to arrest President Bashir and surrender him to the ICC.⁵³⁰ However, later on in 2011, on an observation addressed to the ICC explaining why it did not cooperate by arresting and surrendering President Bashir, Chad based its refusal to cooperate on “the common position adopted by the African Union in respect of the international warrant of arrest issued by the Prosecutor against Mr Omar Al Bashir.”⁵³¹ This drastic change in Chad’s position towards President Bashir begs an examination of the relationship between the two countries between July 2009, when Chad entered a reservation to the AU decision urging states to refuse cooperation and July 2010 when President Bashir visited Chad for the first time. Such an examination reveals an intricate web of politics that bound Chad and Sudan at the time.

The tension between Chad and Sudan commenced in 2005 when there was an attack on Adre Town in Chad for which the Chadian president blamed his Sudanese counterpart, President Bashir.⁵³² In April 2006, there was an attempt by rebels to oust the Chadian president, and once again he blamed it on President Bashir and cut diplomatic ties with Sudan.⁵³³ Later on, in March 2008 a peace accord was signed between the presidents of Sudan and Chad but this did not result in immediate peace between the two countries.⁵³⁴ It is reported that there was continued violence between Chadian and Sudanese militia which made President Bashir in his turn sever diplomatic ties with Chad.⁵³⁵ The blame game continued between the two presidents as violence between

⁵²⁹ Ibid Para 8.

⁵³⁰ See also “Chad urged to execute arrest warrant against Sudanese leader” *Sudan Tribune* 16 March 2013 <http://www.sudantribune.com/spip.php?article45845> (accessed 10 September 2013).

⁵³¹ “Rapport du Greffe relatif aux observations de la République du Tchad” quoted in the 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 of 13 December 2011, ICC-02/05-01/09-140.

⁵³² “Chad Profile: A Chronology of Key Events” *BBC News Africa* <http://www.bbc.co.uk/news/world-africa-13164690> (accessed 30 September 2013).

⁵³³ Ibid.

⁵³⁴ “Sudan cut diplomatic relations with Chad on Sunday after an attack on the capital Khartoum by Darfur rebels which it said was supported by Chadian President Idriss Deby” *Reuters* <http://www.reuters.com/article/2008/05/11/us-sudan-darfur-idUSMCD02400920080511> (accessed 30 September 2013).

⁵³⁵ Ibid.

their respective militias heightened.⁵³⁶ A final peace agreement was signed in N'Djamena in January 2010 which saw the cessation of violence between the two countries.⁵³⁷

In view of the above, there seems to be a connection between Chad's stance in 2009, opposing the AU decision not to arrest President Bashir, and its current position. In 2009, there was bitter conflict between the two countries with each president accusing his counterpart of sponsoring rebels seeking to oust the governments in the respective countries. This is most likely to have caused Chad to enter a reservation to the AU decision which urged members not to arrest President Bashir. As indicated above, the Chadian president soon thereafter made a statement to the effect that President Bashir would be arrested if he visited Chad. However, after the return of peace between the two countries, in January 2010, Chad then stated that President Bashir has immunity and article 98 prevented Chad from arresting and surrendering him to the ICC. Chad also stated that it was "aligning itself fully" with the AU decisions to refuse cooperation.

The relationship between Chad's reaction to its duty to arrest and surrender President Bashir and the political climate between the two countries leads to the conclusion that Chad's reaction has more to do with the politics of the day than its belief in the legality of the AU's decisions. At the time of writing this thesis, Chad has allowed President Bashir to visit its territory five times without attempting to arrest him. This has attracted criticism from the international community as well as civil society but incurred support from the AU.⁵³⁸

4.3.2.3 AU's reaction towards the Chad and Malawi ICC decisions

As discussed above, in three out of the five times President Bashir has visited Chad, the ICC has made decisions against Chad referring the matter to the UNSC and the ASP as required by article 87 (7) of the Rome Statute. However, the article only gives the ICC the jurisdiction to make a decision on a states' lack of cooperation and refer the matter to the UNSC and ASP but does not

⁵³⁶ K F Hansen "Chad's relations with Libya, Sudan, France and the US" <http://www.peacebuilding.no/layout/set/print/Regions/Africa/Publications/Chad-s-relations-with-Libya-Sudan-France-and-the-US> (accessed 30 September 2013).

⁵³⁷ "AU welcomes Sudan and Chad peace agreement" *Afrol news* 21 January 2010 <http://www.afrol.com/articles/35124> (accessed 30 September 2013).

⁵³⁸ See Decision on The Progress Report Of The Commission On The Implementation Of The Assembly Decisions On The International Criminal Court (ICC), 29-30 January 2012, Doc. EX.CL/710(XX) where the AU Assembly repeatedly stated that Chad, Malawi and the other countries that had refused to arrest Bashir had acted in compliance with the AU decisions and should not be penalized.

provide for possible action to be taken by either of the organizations. At the time of the writing no action has been taken by either of the two organizations against either Chad or Malawi thus revealing a shortcoming of the enforcement mechanism of the Rome Statute cooperation regime.⁵³⁹ Furthermore, the Chad decisions, being similar to the Malawi decision, have faced similar criticisms from scholars, as discussed above, regarding the Courts lack of interpretation of article 98 (1) of the Rome Statute.⁵⁴⁰

On its part, the AU responded to the decisions against the two countries by stating *inter alia* that they had the effect of “rendering Article 98, of the Rome Statute redundant, non-operational and meaningless”.⁵⁴¹ According to this argument, article 98 was included in the Rome Statute following the recognition that article 27 was not capable of removing immunities of non-parties states which are bestowed by customary international law.⁵⁴² The AU also regretted the fact that in the decisions, the PTC had completely disregarded the obligation of Chad and Malawi, arising from the AU Constitutive Act, to comply with the decisions of the Union. The AU stated further that “it would be wrong to seek to coerce them (Malawi and Chad) to violate or disregard their obligations to the African Union.”⁵⁴³ Finally, the AU said it shall “oppose any ill-considered, self-serving decisions of the ICC, as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa.”⁵⁴⁴

The PTC’s failure to pay due attention the apparent tension between article 27 and 98 (1), which has been the subject of debate for many scholars and which states rely on to urge members not to cooperate is curious. Besides, the casual inclusion of the AU in the PTC decisions as if the PTC

⁵³⁹ See also A K A 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)51 *ILM* 393 at 395

⁵⁴⁰ Greenawalt 2012 *ILM* 395.

⁵⁴¹ International Criminal Court Decisions Pursuant To Article 87(7) Failure By Malawi and 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, 9 January 2012 (2012) 51 *ILM* 415.

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*

decisions are also binding on the AU as an organization is very problematic.⁵⁴⁵ These factors seem to deepen the AU's ever increasing perception that the work of the ICC in Africa is motivated by political factors rather than the quest for justice.⁵⁴⁶ In fact, in its decisions, issued after the ICC's decisions against Chad and Malawi, the AU decided to refer the issue of immunities of officials of non-party states to the ICJ for interpretation.⁵⁴⁷ The AU also continues to rely on article 98 to urge member states to refuse cooperation despite the ICC's decision that the article cannot be relied on in that manner.⁵⁴⁸ This move indicates the ever deepening discontentment and mistrust with which the AU views the ICC's assessment of the situations in Africa.

4.3.3 Kenya

Kenya deposited its ratification instrument on 15 March 2005 and a result became a state party to the Rome Statute on 1 June 2005. Three years after the ratification, Kenya domesticated the Rome Statute through the International Crimes Act (ICA) of 2008 which is defined as:

“an act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to cooperate with the International Criminal Court established by the Rome Statute in the performance of its functions.”⁵⁴⁹

The Act contains, in part III, general provisions and procedures relevant to Kenya's compliance with requests made under part 9 of the Rome Statute. Interestingly, article 27 of the Act, just like article 27 of the Rome Statute, provides for the irrelevance of immunities in prosecutions at the ICC. It states as follows:

“The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for—

- (a) Refusing or postponing the execution of a request for surrender or other assistance by the ICC;
- (b) Holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or
- (c) Holding that a person is not obliged to provide the assistance sought in a request by the ICC.”

⁵⁴⁵ See C Gevers “The ICC Pre-Trial Chamber's Non-Cooperation Decision on Malawi” 16 Feb 2012 <http://warandlaw.blogspot.com/2012/02/icc-pre-trial-chambers-non-cooperation.html> (accessed 22 April 2014).

⁵⁴⁶ Tladi 2013 *JICJ* 221.

⁵⁴⁷ Decision on The Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) of 29-30 January 2012, para 11.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ See Preamble of the Kenyan International Crimes Act, 2008.

Apart from the ICA, Kenya's obligations under the Rome Statute are further solidified by an integration into the municipal laws of Kenya by virtue of the Kenyan Constitution 2010 which provides, under article 2 (6), that all treaties and conventions ratified by Kenya shall form part of the laws of Kenya. The promulgation of this constitution transformed Kenya from being a state where treaties and conventions had to be domesticated in order to form part of its laws, to a state where all treaties properly ratified become part of the laws of Kenya.⁵⁵⁰ Therefore, the obligation of Kenya to cooperate with the ICC has four sources: the Rome Statute, the ICA, the Kenyan Constitution and UNSC Resolution 1593 of 2005.⁵⁵¹

4.3.3.1 President Bashir's Visit to Kenya

A test to Kenya's commitment to its above obligation was provided by the ICC's request to states parties for the arrest and surrender of President Bashir. On 27 August 2010, about a year after the request was made; President Bashir was invited to and visited Kenya in order to attend the promulgation of the Kenyan Constitution 2010.⁵⁵² The PTC in a short decision, made on the same day, noted that President Bashir had been invited to Kenya and stated that Kenya had a responsibility to cooperate with the ICC.⁵⁵³ The PTC referred Kenya's failure to cooperate to the UNSC and the ASP asking both organizations to take appropriate action against Kenya.⁵⁵⁴

When President Bashir was to visit Kenya for the second time, in the same year, to attend an Intergovernmental Authority on Development (IGAD) Conference, the ICC made an urgent decision making the following requests:

“the Republic of Kenya to inform the Chamber, no later than 29 October 2010, about any problem which would impede or prevent the arrest and surrender of Omar Al Bashir in case he visits the Republic of Kenya on 30 October 2010; and the Republic of Kenya to take any

⁵⁵⁰ M Du Plessis and J Ford “[Unable or unwilling?: Case studies on domestic implementation of the ICC Statute in selected African countries](#)” *Institute for Security Studies paper* March 2008 http://0reference.sabinet.co.za.wam.seals.ac.za/webx/access/electronic_journals/ismono/ismono_n141a.pdf (accessed 29 March 2014).

⁵⁵¹ Security Council Resolution 1593 of 31 March 2005, UN Doc S/RES/1593 (2005) which referred the Darfur situation to the ICC and urged states as well as regional and international organizations to cooperate with the ICC.

⁵⁵² “Al-Bashir's Presence at the Historic Event” *Daily Nation* 27 August 2010 www.nation.co.ke/News//1056/999146/-/wclncn/-/index.html (accessed 8 February 2013).

⁵⁵³ Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya of 27 August 2010 ICC-02/05-01/09.

⁵⁵⁴ Ibid.

necessary measure to ensure that Omar Al Bashir, in the event that he visits the country, be arrested and surrendered to the Court in accordance with its obligations under the Statute.”⁵⁵⁵

This request prompted the Kenyan Section of International Commission of Jurists (hereinafter “ICJ Kenya”), a civil society organization, to apply to the High Court of Kenya for a warrant of arrest against President Bashir.

4.3.3.2 The ICJ Kenya v AG case

ICJ Kenya made an application to the High Court of Kenya naming the Attorney General and the Minister of State for Provincial Administration and Internal Security as the first and second Respondents, respectively.⁵⁵⁶ Another civil society organization, the Kenyans for Justice and Development Trust, subsequently applied to the High Court to be included as the third respondent and this request was allowed. Basing its application on Articles 2⁵⁵⁷ and 3⁵⁵⁸ of the Constitution of Kenya 2010, as well as Section 32 of the International Crimes Act⁵⁵⁹, the Applicant requested the Court to issue an arrest warrant against President Bashir and to order the first and second Respondents to execute that warrant should President Bashir visit Kenyan territory. The applicant argued; first, that by virtue of Article 2 of the Constitution and the International Crimes Act, the Rome Statute formed part of the Laws of Kenya. Second, that two warrants of arrest had been issued against President Bashir and the ICC had requested states parties to arrest and surrender him to the ICC. And lastly, that the Government of Kenya had refused, neglected, and/or ignored arresting President Bashir when he had visited the country during the constitutional inauguration in October 2010. The Applicant expressed concern that

⁵⁵⁵ Decision requesting observations from the Republic of Kenya of 25 October 2010 ICC-02/05-01/09.

⁵⁵⁶ *Kenya Section of the International Commission of Jurists v Attorney General & another* [2011] eKLR 2-3.

⁵⁵⁷ The relevant part to this application, article 2 (6), states that: “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

⁵⁵⁸ Article 3 (1) provides that: “Every person has an obligation to respect, uphold and defend this Constitution.”

⁵⁵⁹ Article 32 provides that:

“A Judge of the High Court may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him that:(a) a warrant for the arrest of a person has been issued by the ICC or, in the case of a convicted person, a judgment of conviction has been given in relation to an international crime;(b) the person named in the warrant or judgment is or is suspected of being in Kenya or may come to Kenya; and(c) it is necessary or desirable for an arrest warrant to be issued urgently. (2) A warrant may be issued under this section even though no request for surrender has yet been made or received from the ICC.”

without a Court Order, the Government of Kenya would not arrest President Bashir if he visited the country as she was expected to.⁵⁶⁰

The first and second Respondents issued a joint statement of defence in which they argued that according to article 92 of the Rome Statute, read together with articles 32 and 33 of the International Crimes Act, a request for a provisional warrant of arrest, which the Applicant had applied for, should be made by the ICC itself and not the Applicants, therefore the Applicant lacked *locus standi* in the case.⁵⁶¹ The Respondents argued that the Applicant envisaged in article 29 of the International Crimes Act is the minister responsible for matters of national security, who would be required to apply to the High Court, and not a civil society organization like the ICJ Kenya.⁵⁶² For these reasons, the Respondents argued that the High Court lacked jurisdiction to hear and determine the case. They argued further that the application was “moribund and fruitless” since the IGAD meeting would not be happening in Kenya but in Adis-Ababa, Ethiopia therefore President Bashir would not be visiting.⁵⁶³

The third Respondent separately argued that the International Crimes Act contravenes the Vienna Convention on Diplomatic Relations but did not explain how. It further argued that Kenya, by virtue of its membership to the AU, was bound by the cooperation decision made by the AU in July 2009.⁵⁶⁴ It also argued that the issuance of a warrant against the Sudanese President may jeopardize stability in Sudan and threaten peaceful relations between Sudan and Kenya.⁵⁶⁵

The Court held that the Rome Statute, and by extension the International Crimes Act, was in conformity with the Kenyan Constitution. The Court further stated that according to the principle of universal jurisdiction, domestic courts have the jurisdiction to try persons accused of

⁵⁶⁰ *ICJ Kenya v AG* 8-9.

⁵⁶¹ *Ibid* 11-12.

⁵⁶² Article 29 (1) provides that

“If a request for surrender is received, other than a request for provisional arrest referred to in section 28 (2), the Minister shall, if satisfied that the request is supported by the information and documents required by article 91 of the Rome Statute, notify a Judge of the High Court in writing that it has been made and request that the Judge issue a warrant for the arrest of the person whose surrender is sought.”

⁵⁶³ *ICJ Kenya v AG* 12.

⁵⁶⁴ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), 1-3 July 2009, Doc. Assembly/AU/13(XIII).

⁵⁶⁵ *ICJ Kenya v AG* 13.

committing international crimes irrespective of the nationality of the offender or the place of the commission of crime. After presenting a discussion on the establishment and wide acceptance of the universal jurisdiction principle, the Court stated that:

“The duty to prosecute international crimes has developed into *jus-cogens* and customary international law, thus delegating States to prosecute perpetrators wherever they may be found. The State parties to the ICC are under a duty to prosecute or extradite perpetrators to the ICC for prosecution.”⁵⁶⁶

The Court therefore ruled that the High Court had jurisdiction to hear and determine the matter.

On the issue of the *locus standi* of the Applicant, the Court took a three-pronged approach:

- “i) Is there a serious issue raised by the applicant?
- ii) Has it been established by evidence that the Applicant is directly affected by the issue raised? In other words, is it within the mandate of the applicant?
- iii) Does the Applicant have a genuine interest in the matter at hand?”

The Court found that ICJ Kenya was genuinely interested in the matter since its mandate included the “development, championing and strengthening of the rule of law” and human rights.⁵⁶⁷ After adopting a comparative approach with other common law jurisdictions: the United Kingdom, Australia and Canada, the Court held that the applicant had passed the three-pronged test and held that it had *locus standi* in the matter.⁵⁶⁸

The Court proceeded to issue a warrant of arrest against President Bashir and stated that should the Applicant be unable to execute the warrant, the Applicant could apply to the Court for an order of mandamus to be issued against the Minister of Internal Security; ordering the minister to arrest President Bashir should he visit Kenya.⁵⁶⁹

4.3.3.3 Critique of the ICJ Kenya v AG case

The Judgment in the above case may be criticised mainly because of the Court’s failure to tackle contentious issues under international law. The first one is the conflicting obligations Kenya faces arising from AU decisions and Rome Statute cooperation obligation, an objection that was raised by the third Respondent. Secondly, although this was not raised by the Respondents, the

⁵⁶⁶ ICJ Kenya v AG 17-18.

⁵⁶⁷ Ibid.

⁵⁶⁸ Ibid 21-23.

⁵⁶⁹ Ibid 24.

Court should have taken the opportunity to pronounce on the issue of the applicability of article 98 (1) to President Bashir as the head of a non state party.⁵⁷⁰ this is because the issue is widely debated by scholars, as discussed in Chapter 3, and states still rely on article 98 (1) to refuse cooperation with the ICC.

Besides, it is difficult to justify the judge's complete reliance on universal jurisdiction, a principle whose application to the ICC is highly contentious.⁵⁷¹ There are more direct sources of Kenya's obligation to cooperate with the ICC; such as part 9 of the Rome Statute, the International Crimes Act as well as the Kenyan Constitution which were raised by the applicant. By taking the universal jurisdiction approach, the judge did not help in developing the jurisprudence relating to cooperation and immunity under the Rome Statute especially with regard to the head of a non party state, as well as the conflicting obligations faced by African States Parties arising from the AU Constitutive Statute and the Rome Statute regarding the arrest and surrender of President Bashir.

Furthermore, Chapter 3 concluded that article 98 (1) can be relied on by a state party to refuse the surrender of the head of a non-party state to the ICC without that state's consent. Following this argument therefore, the issuance of a warrant of arrest by the High Court of Kenya against a sitting president of Sudan was contrary to international law on immunity. President Bashir, because of his immunity as a head of a third state, cannot be lawfully subjected to the jurisdiction of the Kenyan Courts, or those of other states parties.

4.4. Conclusion

The above discussions reveal that African States Parties' decisions to perform their treaty obligations or not to, was not directly influenced by AU decisions. Instead, their decisions seemed to be more influenced by the politics of the day in the respective countries rather than the state's commitment to their Rome Statute obligations. This is demonstrated by the fact that all the three countries, discussed above, changed their positions on the President Bashir issue, despite the fact that the AU's position has been the same since 2009.

⁵⁷⁰ P A Kasaija "Kenya's provisional warrant of arrest for President Omar al Bashir of the Republic of Sudan" (2012) 12 *African Human Rights Law Journal* 623 at 631.

⁵⁷¹ *Ibid* at 639.

To begin with, Chad disagreed with the earlier AU decision urging members to refuse cooperation at a time when there was political strife between Sudan and Chad. Later after the resolution of this conflict, Chad has welcomed Bashir into its territory five times at the time of writing. Conversely, Malawi allowed President Bashir to visit its territory according to the AU decisions, but later changed its stance on the issue despite the fact that the AU decision remains the same. This change was preceded by the change of leadership in Malawi leading to the possible conclusion that the change had more to do with the leadership in the country than with AU decisions relied on earlier. Like Malawi, Kenya allowed President Bashir into its territory during the adoption of its Constitution in 2010, but later a warrant of arrest was issued against him by the High Court of Kenya. This happened despite the fact that the AU continued to urge members not to cooperate with the ICC. The trend in these three countries shows that the decisions of African States Parties are not directly influenced by the AU position on the same. Instead, the reactions of these states are very subjective and dependent on the political atmosphere in the particular countries at a specific time.

Be that as it may, an examination of the AU position is important not only because it is at the core of the deteriorating AU-ICC relations; but also because the resolution of some of the issues raised in the AU decisions may lead to the development of jurisprudence concerning application of article 98 (1) of the Rome Statute. Admittedly, some of the grievances expressed in the AU decisions are outside the law, like the claim that the two Kenyan leaders have immunity from prosecution at the ICC. However, three AU grievances analysed in the chapter: reliance on article 98 (1) to refuse cooperation, request for deferral of the *Bashir case* and the related debate on peace versus justice in Darfur were found to be legally plausible arguments, hence worthy of the attention of the ICC and the international community. The ICC's failure to consider the legal issues arising from the AU decisions deepens the already existing AU-ICC tension.⁵⁷²

The next chapter discusses another major decision taken by the AU in relation to the exercise of international criminal justice in Africa. That is the expansion of the jurisdiction of the African Court of Justice and Human Rights to deal with international crime committed in Africa. The chapter will focus particularly on article 46 A *bis* of the newly passed Amendment Protocol

⁵⁷² See Tladi 2013 *JICJ* 201.

which provides for immunity from prosecution for heads of state and government as well as senior government officials. This Amendment Protocol if passed is likely to influence how international crime will be dealt with in Africa in the future, which makes it worthy of consideration.

CHAPTER FIVE

Immunity before the New African International Crimes Chamber

5.1 Introduction

The AU's belief that African sitting heads of state should not be prosecuted for international crimes, either at the ICC or before the municipal courts of non-African States, led the AU to make at least two decisions. The previous chapter dealt with the first of these, which was the AU decision urging its member states to refuse cooperation with the ICC. In this regard, the AU relied on article 98 (1) of the Rome Statute to state that President Bashir, being a sitting head of state, could not be arrested and surrendered to the ICC without breaching international law on immunities. The issue continues to be relevant because more than five years after the first warrant of arrest was issued against President Bashir, he is yet to be arrested and surrendered to the ICC despite his visits to a number of African (and non-African) states.

This chapter deals with the second decision, which is the inclusion of article 46 A *bis* in the recently adopted Amendment Protocol⁵⁷³ which safeguards immunity in the newly created international crimes chamber. The earlier drafts of this Protocol contained a provision which, like article 27 of the Rome Statute, provided for the irrelevance of immunity based on official capacity.⁵⁷⁴ However, article 46 A *bis* of the Amendment Protocol, as adopted in Malabo, provides that heads of state or government and other senior state officials shall not be liable to prosecution before the new African chamber. This provision reintroduces immunity based on official capacity and is contrary to general practice of modern international criminal law discussed in chapter 2. This chapter discusses this development - or setback as others have referred to it⁵⁷⁵ - and its implications on international criminal justice on the continent.

Part two of the chapter contains a brief discussion of the four African courts: African Court on Human and People's Rights (ACPHR), the African Court of Justice (ACJ), the African Court of Justice and Human Rights (ACJHR), and finally the African Court of Justice and Human and

⁵⁷³Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights adopted in Malabo, Equatorial Guinea during the Twenty Third Ordinary Session of the AU Assembly held in June 2014.

⁵⁷⁴ Decision On The Draft Legal Instruments, 26-27 June 2014, Assembly/AU/Dec.529(XXIII).

⁵⁷⁵ "AU Summit decision a backward step for international justice" *Amnesty International* 1 July 2014 <http://www.amnesty.org/en/news/au-summit-decision-backward-step-international-justice-2014-07-01> (Accessed 17 August 2014).

People's Rights (ACJHPR). The objective of this discussion is to put the new African criminal chamber within the context of the continent's existing judicial structure. Part three discusses the immunity of African heads of state and other high ranking officials in relation to the international crimes chamber. This section discusses three factors that are believed to have hastened the process of the creation of the African international crimes chamber and the later inclusion of article 46 A *bis*. These are: the perceived abuse of universal jurisdiction against African leaders by European States; the ICC prosecution of African heads of state; and the difficulty in finding an African forum for the prosecution of Habre, the former Chadian President. Part four further discusses the possible impact of article 46 A *bis* of the Amendment Protocol on international criminal justice on the African continent. Part five contains the chapter summary and conclusions.

5.2 The African Human Rights Courts

African Charter on Human and Peoples' Rights (the Banjul Charter)⁵⁷⁶ was adopted in 1981 by the Organization of African Unity (OAU), an organization which later gave way to the AU in 1999.⁵⁷⁷ This Charter guarantees basic human and people's rights to all the inhabitants of the AU member states and mandates the African Commission on Human and Peoples' Rights (hereinafter "the African Commission") to oversee the promotion and protection of these rights on the continent and to ensure compliance with the Charter.⁵⁷⁸ However, the inadequacies of African Commission in its role as the overseer of the implementation of the Banjul Charter⁵⁷⁹ necessitated the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights in 1998. This Protocol established the African Court on Human and Peoples' Rights (ACHPR)⁵⁸⁰ which was intended "to complement and reinforce the functions of the African Commission."⁵⁸¹

⁵⁷⁶ African (Banjul) Charter On Human And Peoples' Rights (Adopted 27 June 1981, OAU Doc. Cab/Leg/67/3 Rev. 5, 21 I.L.M. 58 (1982), Entered Into Force 21 October 1986).

⁵⁷⁷ "AU in a Nutshell" <http://au.int/en/about/nutshell> (accessed 28 July 2008).

⁵⁷⁸ Article 30 of the Banjul Charter.

⁵⁷⁹ See V O Nmeihelle "Towards an African Court of Human Rights: Structuring and the Court" (2000) 6 *Annual Survey of International & Comparative Law* 27; M Mutua "The African Human Rights Court: A Two-Legged Stool?" 21 (1999) *Human Rights Quarterly* 342 (for a discussion of the shortcomings of the African Commission on Human and Peoples' Rights that the ACHPR intended to solve).

⁵⁸⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) adopted on 9 June 1998.

⁵⁸¹ See the preamble of the Protocol *ibid*.

It was not until 2004, that the ACPHR Protocol attained the number of ratifications required for it to enter into force. However, by that time the Protocol of the Court of Justice of the African Union had been adopted by the AU Assembly, on 11 July 2003 in Maputo, Mozambique. This Protocol established the African Court of Justice (ACJ) which was intended to be the “principal judicial organ of the Union”.⁵⁸² Before the ACJ came into force, a decision was made at the third Ordinary Session of the African Union, held in Addis Ababa, Ethiopia on 6 - 8 July 2004, where the AU Assembly decided to merge the two AU Courts, the ACPHR and the ACJ, to form one court.⁵⁸³ This decision was followed up on, by a subsequent decision made during the fifth Ordinary Session of the AU Assembly held in Sirte Libya on 5 and 6 July 2005, where the Assembly decided that a draft instrument relating to the establishment of the merged court should be tabled in the next ordinary sessions of the AU Executive Council and the Assembly for consideration.⁵⁸⁴

The desire to merge the Court was effectuated by the adoption of Protocol on the Statute of the African Court of Justice and Human Rights at the AU Summit held on 1 July 2008 in Sharm El-Sheikh, Egypt. Article 2 of this Protocol merges the ACPHR and the ACJ and establishes the African Court of Justice and Human Rights (ACJHR).⁵⁸⁵ The ACJHR has been subjected to criticism by scholars as well as other public institutions.⁵⁸⁶ The ACJHR Protocol will only come into force thirty days after the deposit of the instruments of ratification of 15 member states and as of February 2014 only 5 African States had ratified the Protocol.⁵⁸⁷

With the adoption of the Amendment Protocol, the AU has now established the African Court of Justice and Human and Peoples’ Rights (ACJHPR) which is mandated to try international crimes that occur in Africa. It is noteworthy that the African Court of Justice and the African Court of

⁵⁸² Article 2 of the Protocol of the Court of Justice of the African Union.

⁵⁸³ Decision on the Seats of the African Union, 4-6 July 2004, Assembly/AU/Dec.45(III).

⁵⁸⁴ Decision on the Merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union, 5-6 July 2005, Assembly/AU/Dec.83 (V).

⁵⁸⁵ Protocol on the Statute of the African Court of Justice and Human Rights http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf (accessed 30 July 2014).

⁵⁸⁶ For a summary of these discussions see M Schulman “The African Court Of Justice And Human Rights: A Beacon of Hope or A Dead-End Odyssey?” (2013) 2 *Inkundla* <http://www.inkundlajournal.org/inkundla/2013-inkundla-2> (accessed 30 July 2014).

⁵⁸⁷ “Ratification Status: Protocol on the Statute of the African Court on Justice and Human Rights” 12 July 2014 http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12 (accessed 30 July 2014).

Justice and Human Rights may never come into existence and that “there could very easily be a ‘transition’ from the existing Court (ACHPR) to the fourth Court (ACJHR)”.⁵⁸⁸ However, if the rate of ratifications of the ACJHR Protocol is anything to go by,⁵⁸⁹ it is likely to be a long time, if ever, before the Amendment Protocol adopted in Malabo receives the required 15 ratifications for it to come into force.

The ACHPR continues to function as if the Protocol to merge it with the ACJ was not adopted. The Court has, as at the time of writing, received twenty eight applications in contentious matters and five requests for advisory opinion. Twenty-three of these cases have been finalised, one request for advisory opinion is pending while three requests have been struck out and one withdrawn.⁵⁹⁰

5.2.1 The Establishment of the African Criminal Chamber

The idea of expanding the jurisdiction of the African human rights courts was one of the recommendations of the Committee of Eminent African Jurists on the Case of Hissene Habre (hereinafter “the Committee”). This Committee was established by the AU in a decision made during the African Union Heads of State and Governments Summit held in Khartoum on 24 January 2006. The Committee was mandated “to consider all aspects and implications of the Hissène Habré Case as well as the options available for his trial” and to make recommendations on how Africa would deal with the prosecution of international crime committed in Africa in future.⁵⁹¹ One of the Committee’s recommendations, with regard to the future, was that the African Union should consider empowering the ACJHR with the jurisdiction to try international crimes. The recommendation read *inter alia* as follows:

“The Committee proposes that this new body (African Criminal Court) be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention

⁵⁸⁸ D Deya “Is the African Court worth the wait” 06 March 2012 <http://www.osisa.org/openspace/regional/african-court-worth-wait> (accessed 15 August 2014).

⁵⁸⁹ It has taken up to 6 years for the African Court of Justice and Human Rights to receive 5 ratifications “List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights” 3 February 2014 http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR_0.pdf (accessed 15 August 2014).

⁵⁹⁰ African Court on Human and People’s Rights <http://www.african-court.org/en/index.php/about-the-court/quick-facts-menu> (accessed 30 July 2014).

⁵⁹¹ Decision on the Hissene Habre Case and the African Union, 23-14 January 2006, Assembly/AU/Dec.103 (VI).

against Torture. The Committee also notes that there is room in the Rome Statute for such a development and that it would not be a duplication of the work of the International Criminal Court.⁵⁹²

5.2.2 AU building on the Idea

At its Twelfth Ordinary Session held in Addis Ababa, Ethiopia from 1 to 3 February 2009, the AU Assembly requested the AU Commission (AUC) to investigate, in consultation with the African Commission and ACHPR, the practicability of empowering the latter with the jurisdiction to try international crimes.⁵⁹³ In a subsequent decision, made at the Fifteenth Ordinary Session in Kampala, Uganda in July 2010, the AU Assembly requested the AUC to finalise the process of assessing the implications of empowering the ACHPR to try international crime and submit a report to the next ordinary session through the Executive Council.⁵⁹⁴ Following this decision, the AUC contracted the Pan African Lawyers Union (PALU) to carry out an extensive study on the above issue and draft a legal instrument amending the Protocol on the Statute of the African Court of Justice and Human Rights.⁵⁹⁵

At the Seventeenth Ordinary Session of the African Union Assembly in 2011, the Assembly requested the AUC “to actively pursue the implementation of the Assembly’s Decisions on the African Court of Justice and Human and Peoples’ Rights being empowered to try serious international crimes committed on African soil”.⁵⁹⁶ In November the same year, a meeting of government experts and Ministers of Justice/Attorneys General held in Addis Ababa, Ethiopia provisionally adopted the Draft Protocol on the Amendment of the Statute of the African Court of Justice and Human Rights (hereinafter “the Draft Amendment Protocol”). The Draft

⁵⁹² Report of the Committee of Eminent African Jurists on the Case of Hissene Habre http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Report0506.pdf (accessed 31 July 2014) paras 34-35.

⁵⁹³ Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, 1-3 February 2009, Assembly/AU/Dec.213 (XII).

⁵⁹⁴ Decision on the Abuse of the Principle of Universal Jurisdiction, 25-27 July, Assembly/AU/Dec.292 (XV) para 5.

⁵⁹⁵ D Deya, “Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes, International Criminal Justice” February 2012 http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deva.pdf (accessed 14 August 2014).

⁵⁹⁶ Decision on the Implementation of the Assembly Decisions on the International Criminal Court, 30 June -1 July 2011, Assembly/AU/Dec.366 (XVII) para 8.

Amendment Protocol established the African Court of Justice and Human and People's Rights and endowed it with the jurisdiction to try a number international crimes.⁵⁹⁷

The Draft Amendment Protocol was reviewed and further changes incorporated into it and was provisionally adopted at the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters held in Addis Ababa Ethiopia in May 2012.⁵⁹⁸ At the Nineteenth Ordinary Session, the AU Assembly and the Executive Council asked for further financial implications of expanding the jurisdiction of the ACJHR and asked that this be reported in 2013.⁵⁹⁹ The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights was finally adopted during the Twenty-Third Ordinary Session held in Malabo Equatorial, Guinea in June 2014.

5.3 Immunity for African Heads of state and Senior Government Officials

The Amendment Protocol provides for immunity from prosecution not just for heads of state and government but also for senior state officials. The controversial article 46A *bis* provides that:

“No charges shall be commenced or continued before the Court against any serving African Union 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.”⁶⁰⁰

This provision has generated a lot of criticism especially from human rights civil societies.⁶⁰¹ The critics argue: first, that the provision entrenches impunity thereby going against the AU

⁵⁹⁷ The Draft Protocol on the Amendment of the Statute of the African Court of Justice and Human Rights, 9 November 2011, Legal/ACJHR-PAP/3 (II) REV.5.

⁵⁹⁸ Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7-11 and 14-15 May 2012 Exp/Min/IV/Rev.7.

⁵⁹⁹ Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 15–16 July 2012, Assembly/AU/Dec.427(XIX).

⁶⁰⁰ As at the time of writing there is no copy of the Protocol on Amendment online and this provision lacks in the earlier drafts. See report of the same at “African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights’ Statute” *International Justice Resource Centre* 2 July 2014 <http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/> (accessed 17 August 2014).

⁶⁰¹ “Immunity proposal for African Leaders in the African Court of Justice and Human Rights” African Legal Aid <http://www.africalegalaid.com/news/immunity-proposal-for-african-leaders-in-the-african> (Accessed 17 August 2014); “AU Summit decision a backward step for international justice” Amnesty International 1 July 2014 <http://www.amnesty.org/en/news/au-summit-decision-backward-step-international-justice-2014-07-01> (Accessed 17 August 2014); “Civil Society Open Letter to Ministers of Justice and Attorneys General African Union Member States” 5 May 2014 <http://www.amnesty.org/en/library/asset/IOR53/004/2014/en/0ef6fe09-a572-4ec9-bca6-1a11b4e90025/ior530042014en.pdf> (Accessed 17 August 2014).

Constitutive Act.⁶⁰² The second point of criticism, which this part will focus on, is the claim that the article goes against modern international criminal law under which immunity based on official capacity is unavailable before international criminal tribunals.

In the last century there has been a widespread view that immunity cannot be pleaded before certain international tribunals.⁶⁰³ Initially, the AU shared this view and this is shown by article 10 of the Statute of the Extraordinary African Chambers (EAC) ,which the AU played a major role in establishing as will be discussed below. Article 10 of the EAC Statute provides for irrelevance of official capacity in relation to offences of genocide, torture, war crimes and crimes against humanity which fall within the jurisdiction of the EAC. Moreover, the earlier drafts of the Amendment Protocol had provisions excluding immunity based on official capacity from application before the new African international crimes chamber. Article 46 B of the Draft Amendment Protocol provided:

“Without prejudice to the immunities provided for under international law, the official position of any accused person, whether as Head of State or Government, Minister or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”⁶⁰⁴

This draft was provisionally adopted by Government Experts and Ministers of Justice/Attorneys General representing African Union member states in a meeting held on 7 to 11 and 14 to 15 May 2012 in Addis Ababa, Ethiopia.

This clearly demonstrates that in the past the AU was supportive of an international crimes chamber which has jurisdiction over heads of state and government just like the ICC. However, in the Amendment Protocol, as passed in Malabo in June 2014, the position of the AU changed to allow immunity for the perpetrators of international crime by virtue of Article 46 A *bis*. This necessitates an investigation of the possible reasons for the AU’s change of position and some answers to this may lie in the events preceeding the establishment of the African international crimes chamber. Three of these are discussed below: exercise of universal jurisdiction against African personalities by Western States, the prosecution of African heads of state at the ICC and

⁶⁰² See Article 4 (o) and (h) of the Constitutive Statute of the African Union.

⁶⁰³ See part 2.4 of this thesis.

⁶⁰⁴ Draft Protocol on Amendments on the Statute of the African Court of Justice and Human Rights, 15 May 2012, Exp/Min/IV/Rev.7.

the difficulty faced by the AU in finding a suitable African forum for the Habre trial. A discussion of these factors reveal that while the AU seems committed to dealing with international crime in Africa, it is against the prosecution of African sitting heads of state.

5.3.1 The perceived misuse of universal jurisdiction principle against African leaders

Between 1998-2009, European States including France, Belgium, Britain, Netherlands and Spain; at various times instituted proceedings on the basis of universal jurisdiction and sometimes issued warrants of arrest against up to 60 African personalities.⁶⁰⁵ Some of these cases have been against African heads of state or government or other senior government officials who ordinarily bare immunity from prosecution in national courts of foreign states.⁶⁰⁶ National courts of different states have made varied decisions on the issue of immunity for these African leaders with some arguing that immunities do not apply for international crimes, while others dismissing the cases on the basis of immunity.⁶⁰⁷ The AU made various decisions protesting these indictments, which are discussed below. Furthermore, some African States instituted proceedings against the concerned European States before the ICJ which upheld the immunities of African States' officials, as discussed below.

5.3.1.1 The AU Assembly Decisions on Universal Jurisdiction

The AU Assembly made three decisions protesting against this exercise of universal jurisdiction. The first of these decisions was made during the Assembly's Eleventh Ordinary

⁶⁰⁵ AU-EU Technical Ad hoc Expert Group Report on the Principle of Universal Jurisdiction, 16 April 2009 paras 24-26.

⁶⁰⁶ See Murungu 2011 *JICJ* 1069-1072 (this author deals with this topic in great detail explaining which heads of state or leader was indicted, when and how the case against them proceeded).

⁶⁰⁷ See AU-EU Technical Ad hoc Expert Group Report para 24 for the list the cases. The summary is as follows:
“At least one Member State (Belgium, 1999-2003) has, in the past, statutorily abrogated the availability of international immunities in respect of genocide, crimes against humanity and war crimes. In a second (the Netherlands), one court has held that international immunities pose no bar to prosecution for international crimes. In a third (Italy), the highest court of appeal has held that state immunity, an immunity *ratione materiae* or functional immunity, is unavailable in respect of international crimes that violate *jus cogens*, such as war crimes. In yet another state (the UK), the highest appellate court has held that state immunity does not bar the prosecution of a former head of state for torture pursuant to the Convention against Torture 1984. On the other hand, other courts (*e.g.* the Belgian Court of Cassation and lower courts, the French Court of Cassation, the UK magistrates' courts and the Spanish Audiencia Nacional) and prosecutorial authorities (*e.g.* the Danish prosecuting authorities, the prosecutors of the Tribunal de Grande Instance and Court of Appeal of Paris and the German Federal Prosecutor) have upheld immunities in these or similar circumstances.”

Session held in Sharm El-Sheikh, Egypt in July 2008.⁶⁰⁸ In this decision, the Assembly, while recognizing that universal jurisdiction is a useful tool in the fight against impunity, regretted that the exercise of universal jurisdiction by the western states against African leaders was politically motivated and infringed on the sovereignty and territorial integrity of African States.⁶⁰⁹ The Assembly also stated that the indictments interfered with the political, social and economic development of African States and decided that the warrants issued against African leaders would not be executed by AU member states.⁶¹⁰

To resolve this issue the AU Assembly requested the Chairperson of AUC to table the matter before the UNSC and the UN General Assembly and also facilitate a meeting between AU and EU experts in order to discuss and resolve the situation. One scholar opines that the reason the AU Assembly approached both the UNSC and the UN General Assembly was that although the UNSC is the body mandated to deal with peace and security issues, the fact that some EU members are also UNSC permanent members, with veto powers, would reduce the chances of an outcome favorable to the AU.⁶¹¹ The General Assembly, this argument follows, would be more democratic and hence more likely to place the AU concerns on the “international agenda”.⁶¹²

Be that as it may, despite the AU’s plea that the arrest warrants be stopped until the issue has been dealt with, and the circulation of the above AU decision internationally, the European States continued with the exercise of universal jurisdiction. The arrest of Rose Kabuye, the then Rwandan Chief of Protocol in Germany, particularly sparked a lot of controversy.⁶¹³ Some have

⁶⁰⁸ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 30 June - 1 July 2008, Assembly/AU/Dec.199 (XI).

⁶⁰⁹ Ibid para 5.

⁶¹⁰ Ibid.

⁶¹¹ C Jalloh “Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction” (2010) 21*Criminal Law Forum* 1 at 12.

⁶¹² Ibid.

⁶¹³ “Top Rwandan aide chooses French terror trial” *The Guardian* 10 November 2008 <http://www.theguardian.com/world/2008/nov/10/rwanda-congo-kabuye> (accessed 18 August 2014) “Government of Rwanda Communiqué on the arrest of Mrs. Rose Kabuye” http://www.minaffet.gov.rw/index.php?id=886&tx_ttnews%5Btt_news%5D=55&cHash=a1600843ce217f5052270a5209cfdd24 (accessed 18 August 2014).

argued that her position as Chief of Protocol and the fact that she was on an official visit as a representative of Rwanda entitled her to functional immunity.⁶¹⁴

Following this arrest, the AU Assembly made the second decision on the issue of universal jurisdiction at its Twelfth Ordinary Session held in Addis Ababa, Ethiopia in February 2009.⁶¹⁵ In this decision, the AU Assembly took note of the work of the African Union-European Union Technical Ad-hoc Expert Group (hereinafter “the AU-EU Expert Group”) which had investigated the positions of the AU and EU on universal jurisdiction and made recommendations.⁶¹⁶ The Assembly expressed regret that despite the above decision calling for a moratorium on the arrests, an arrest warrant was, nevertheless, issued against Rose Kabuye. The AU reiterated its request that the issuance of warrant of arrests be stopped until the issues have been conclusively dealt with at the AU, EU and UN level. More importantly, for this discussion, the AU Assembly called for the AUC to examine the implications of expanding the jurisdiction of the ACJHR to deal with international crimes such as war crimes, crimes against humanity and genocide committed in Africa and report this to the Assembly in 2010.⁶¹⁷

Between the February 2009 decision and the next one, the AU-EU Expert Group released its report on principle of universal jurisdiction.⁶¹⁸ According to this report, both the AU and EU members regarded the principle of universal jurisdiction as an important tool to ending impunity which both organizations were committed to. However, the AU concerns were *inter alia* that in their exercise of universal jurisdiction, European States were singularly targeting African States’ sitting officials. That the indictments were politically motivated and in total disregard to international law on immunities. The AU also argued against the use of arrest warrants against African leaders, entitled to immunity, instead of other less compulsive measures such as summons to enter appearance. This, the AU said, “creates an international stigma against them

614 For an analysis of the immunity of Rose Kabuye at the time of the arrest see Jalloh 2010 *Criminal Law Forum* 30; D Akande “Prosecution of Senior Rwandan Government Official in France: More on Immunity” *AJIL Talks* 24 December 2008 <http://www.ejiltalk.org/prosecution-of-senior-rwandan-government-official-in-france-more-on-immunity/> (accessed 18 August 2014).

615 Decision On The Implementation Of The Assembly Decision On The Abuse Of The Principle Of Universal Jurisdiction, 1-3 February 2009, Assembly/AU/Dec.213(XII).

616 Ibid paras 1 and 2.

617 Ibid para 9.

618 AU-EU Technical Ad hoc Expert Group Report on the Principle of Universal Jurisdiction, 16 April 2009.

(African leaders), undermining their dignity and that of their states, and is in violation of certain of their fundamental rights, in particular the presumption of innocence.”⁶¹⁹

On the other hand, the EU’s concerns were that the proceedings against African leaders were just a fraction of proceedings instituted against persons from other nations all over the world.⁶²⁰ That, in any case, some of the proceedings instituted against African leaders had been stopped by European national courts due to the recognition of the immunity due to those leaders. As part of the solution to the problem, EU member states suggested that African States needed to institute proceedings against perpetrators of international crime; either based on the principle of universal jurisdiction or the other traditional basis of jurisdiction.⁶²¹

The third AU Assembly decision on this issue was adopted during the Assembly’s 13th ordinary session in Sirte, Libya in July 2009.⁶²² In this decision, the Assembly regretted that after all the AU’s efforts to discuss the issue with the EU representatives, some European States still continued with the indictments of African leaders.⁶²³ The AU called for the immediate termination of the pending proceedings and requested the European States concerned to respect the international law immunities due to African state officials.⁶²⁴

In all the above decisions, the AU while appreciating the principle of universal jurisdiction was of the view that the principle had been abused by European States. Various scholars have investigated the claim that European States unfairly target African leaders in the exercise of universal jurisdiction.⁶²⁵ This debate is, however, beyond the scope of this Chapter. Instead, the section focuses solely on the AU’s view that African leaders are immune from prosecution in national courts of Western States; a view which was supported by the ICJ in the cases below.

⁶¹⁹ Ibid paras 33-38.

⁶²⁰ Ibid paras 39-45.

⁶²¹ Ibid.

⁶²² Decision on the Abuse of the Principle of Universal Jurisdiction, 3 July 2009, Assembly/AU/Dec.243(XIII) Rev.1

⁶²³ Ibid para 4

⁶²⁴ Ibid para 5

⁶²⁵ See for example H van der Wilt “Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States” (2011) 9 *JICJ* 1043.

5.3.1.2 ICJ decisions on the immunity of African leaders

5.3.1.2.1 The *Arrest warrant case*

The *Arrest warrant case* involved the issuance of an international warrant of arrest by a Belgian magistrate against the then Congolese foreign affairs minister.⁶²⁶ He was accused of committing grave breaches of the Geneva Conventions of 1949 and the Additional Protocols as well as crimes against humanity. The Congo applied to the ICJ claiming that Belgium was in breach of the immunity held by the Congolese foreign minister and the sovereignty of the Congo. The Court stated that:

“...in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”⁶²⁷

On a vote of thirteen to three, the Court held that the issuance of an arrest warrant against the then incumbent Congolese Foreign minister, had not only infringed on the immunity of the minister; but also violated the sovereignty of the Congo.⁶²⁸ The ICJ added, however, that immunity could not be claimed for international crime before certain international tribunals with jurisdiction over the issue.⁶²⁹

This decision has been widely criticised by some commentators who hold the view that immunity should be non-existent for international crimes under all circumstances.⁶³⁰ However, some scholars agree with the ICJ decision. For example, Jalloh argues that the use of the term “such as” in the ICJ judgment, in the above excerpt, shows that the list of persons entitled to immunity in foreign jurisdictions listed by the ICJ, was not exhaustive.⁶³¹ He further argues that the ICJ decision can be interpreted to include other high ranking officials like Rose Kabuye, the then Rwandan Chief of Protocol who was arrested in Germany.⁶³²

⁶²⁶ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), 14 February 2002, 2002 ICJ 3.

⁶²⁷ Ibid para 47.

⁶²⁸ Ibid para 47-55.

⁶²⁹ Ibid.

⁶³⁰ See part 2.3.4 of this thesis.

⁶³¹ Jalloh 2010 *Criminal Law Forum* 29-42; D Akande “Prosecution of Senior Rwandan Government Official in France: More on Immunity” *AJIL Talks* 24 December 2008 <http://www.ejiltalk.org/prosecution-of-senior-rwandan-government-official-in-france-more-on-immunity/> (accessed 18 August 2014).

⁶³² Ibid.

5.3.1.2.2 *Djibouti v France case*

The *arrest warrant* decision was later affirmed by the ICJ in the *Djibouti v France case*.⁶³³ The issue in this case was that a French Judge had sent two witness summons to the President of Djibouti; asking him, on short notice, to appear before the judge as a witness in a case. Djibouti applied to the ICJ seeking a ruling that the issuance of the witness summons by the judge amounted to a forceful judicial act which violated the immunity of the President of Djibouti.

In its judgment, the Court started by recalling the ruling in the *Arrest Warrant case* that heads of state and high ranking officials were totally immune from both civil and criminal proceedings in national courts of foreign states.⁶³⁴ The Court, however, found for France on the issue of summons and stated that the issuance of witness summons was merely an invitation to the President of Djibouti to willingly participate in the proceedings; to which he could accept or refuse.⁶³⁵ Nevertheless, the Court found that the manner of transmission of the witness summons, through facsimile, lacked the “courtesies due to a foreign Head of State”.⁶³⁶ The Court held that this constituted a violation of the dignity of Djibouti and that France ought to have offered to Djibouti an official apology for the same.⁶³⁷

5.3.1.2.3 Rwanda’s application against France

Rwanda applied to the ICJ against France for the issuance of a warrant of arrest against three high ranking Rwandan officials: the Chief of General Staff of its Defence Forces, the Chief of Protocol attached to the Presidency and the Ambassador of Rwanda to India.⁶³⁸ The French judge, who issued the warrants, also recommended that the UN Secretary General ensure the trial of President Kagame of Rwanda before the ICTR. In the application to the ICJ, Rwanda alleged that by issuing these warrants of arrest, France had violated “international law with regard to international immunities generally; and diplomatic immunities particularly”.⁶³⁹ However, no

⁶³³ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, 4 June 2008, 2008 ICJ 136.

⁶³⁴ *Ibid* para 170.

⁶³⁵ *Ibid* para 171.

⁶³⁶ *Ibid* para 172.

⁶³⁷ *Ibid*.

⁶³⁸ Press Release, International Court of Justice, The Republic of Rwanda applies to the International Court of Justice in a dispute with France, 18 April 2007, <http://www.ici-cij.org/presscom/files/1/16921.pdf> (accessed 20 August 2014).

⁶³⁹ *Ibid*.

action could be taken in the proceedings as France refused to consent to the jurisdiction of the ICJ as is a prerequisite to such proceedings under article 38 (5) of the ICJ Rules of Procedure.⁶⁴⁰ Nevertheless, Jalloh argues that had the case proceeded, the ICJ would have held that at least one of the three Rwandan officials, the Chief of Protocol, was entitled to functional immunity during her official visit to Germany where she was arrested.⁶⁴¹

The ICJ decisions, especially the *Arrest Warrant* case, still holds in relation to the immunity of sitting state officials of high rank before national courts of foreign states. This was affirmed by most of the Law Lords in the *Pinochet case*; who held that if Pinochet had been a sitting president at the time of the proceedings, his immunity would have been a bar to the issuance of an order to extradite him.⁶⁴² From the foregoing, it is clear that the commencements of proceedings against incumbent heads of state and high ranking officials in the national courts of foreign states is in violation of international law on immunities.

5.3.1.3 Universal jurisdiction and the creation of the African Criminal Court

One of the recommendations contained in the AU-EU Expert Group Report was that:

“Those national criminal justice authorities considering exercising universal jurisdiction over persons suspected of serious crimes of international concern are legally bound to take into account all the immunities to which foreign state officials may be entitled under international law and are consequently obliged to refrain from prosecuting those officials entitled to such immunities.”⁶⁴³

In the same breath, the report stated that the exercise of universal jurisdiction by European States against African personalities occurred partly because of inadequate prosecution of international crimes on the continent.⁶⁴⁴ The Report recommended the expansion of the jurisdiction of the African human rights courts to deal with international crimes committed in Africa.

In the three AU decisions relating to universal jurisdiction, discussed above, the AU Assembly urges the AUC to follow up on the expansion of the jurisdiction of the human rights court to

⁶⁴⁰ Rules of Court, Adopted on 14 April 1978 and Entered Into Force on 1 July 1978.

⁶⁴¹ Jalloh 2011 *Criminal Law Forum* 29-42.

⁶⁴² *R v Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Ugarte Pinochet (Amnesty International & Others Intervening)* (No. 3) (1999) 2 All ER 97 at 112 (per Lord Wilkinson), at 119 (per Lord Goff), at 152 (per Lord Hope), at 168 (per Lord Saville), and at 171 (per Lord Millet).

⁶⁴³ AU-EU Expert Group Report, Recommendations, Para 8.

⁶⁴⁴ *ibid*

tackle international crimes. It is therefore clear that the creation of the African Criminal Chamber was part of the AU's plan to put an end to the exercise of universal jurisdiction by Western states which, as has been shown above, often infringed on the immunities of high ranking African officials including heads of state.

5.3.2 Prosecution of sitting African heads of state at the ICC

The major AU grievance against the ICC relates to the prosecution of sitting African heads of state. The ICC has commenced proceedings against President Bashir of Sudan, the late President Muammar Gadhafi of Libya, as well as President Uhuru Kenyatta and Deputy President William Ruto of Kenya.⁶⁴⁵ The AU issued numerous decisions decrying these prosecutions claiming that these leaders should be immune from prosecution and encouraging its member states not to cooperate with the ICC.⁶⁴⁶ In these decisions, the AU also requested the AUC to work towards the expansion of the jurisdiction of the ACJHR to try international crimes in Africa. The AU saw it as one of the ways “to ensure Africa’s interests can be fully defended and protected in the international judicial system”.⁶⁴⁷

From the foregoing it is clear that the AU's sour relationship with the ICC over the prosecution of African leaders contributed to the desire to have an African criminal court. The use of universal jurisdiction by Western States, discussed in the preceding section, contributed to the AU's weariness of foreign based justice; a sentiment which was aggravated by ICC prosecution of only African leaders since its formation.⁶⁴⁸ The AU's aversion to the prosecution of African leaders explains the introduction of article 46 A *bis* to the Amendment Protocol which safeguards the immunity of heads of state and government as well as senior state officials. The possible impacts of this provision are discussed below.

5.3.3 The challenge in finding a forum for the Habre trial

5.3.3.1 The Habre trial

⁶⁴⁵ See part 2.5 of this thesis.

⁶⁴⁶ See part 4.2 of this thesis

⁶⁴⁷ Decision on the Implementation of the Assembly Decisions on the International Criminal Court, 30 June -1 July 2011, Assembly/AU/Dec.366 (XVII) para 8.

⁶⁴⁸ Jalloh 2011 *Criminal Law Forum* 5.

Apart from the prosecution of African leaders by the ICC and Western States, another issue that influenced the creation of the African international crimes chamber related to the trial of Habre. As discussed in Chapter 2, Habre was the president of Chad from October 1982 to December 1990 when he was deposed and went to Senegal on exile. In May 1992, a National Truth Commission released a report which implicated Habre in acts of institutional and systematic torture, arbitrary arrests and detentions, summary executions and massacres that were alleged to have been committed as part of Habre's 8 year regime in Chad.⁶⁴⁹ Years later, in January 2000, seven victims of the crimes and the Chadian Association of Victims of Crimes and Political Repression (AVCPR) filed a complaint against Habre in a Senegalese Court. They claimed that he should be held accountable for the crimes he had allegedly committed during his tenure. As a result, Habre was indicted for the crimes of torture, crimes against humanity and acts of barbarity and placed under house arrest in Senegal.⁶⁵⁰

The Dakar Court of Appeal overturned this decision and held that the Senegalese courts had no jurisdiction to hear the case, as it involved acts committed by a foreigner, against foreigners and outside Senegalese territory.⁶⁵¹ The latter decision was upheld by the Cour de Cassation, the highest Court in Senegal, on March 2001 to the chagrin of civil society movements.⁶⁵² This Court held that there was no legislation in Senegal that accorded the Senegalese courts the jurisdiction to try a foreigner, for acts of torture committed abroad, as required by article 5 (2) of the Convention against Torture⁶⁵³ which Senegal is party to.⁶⁵⁴

On 8 May 2003, Chadian nationals and some Belgian nationals filed a complaint against Habre in the Brussels District Court under the universal jurisdiction laws of Belgium.⁶⁵⁵ In September

⁶⁴⁹ Report of the commission of inquiry into the crimes and misappropriations committed by ex-president Habre, his accomplices and/or accessories, 7 May 1992, <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Chad-Report.pdf> (accessed 30 July 2014).

⁶⁵⁰ Hissène Habré case, Dakar Court of Appeal, 4 July 2000 <http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/4872D1E231539097C125708A002AF709> (accessed 30 July 2014).

⁶⁵¹ Ibid.

⁶⁵² "Senegal Bars Charges Against Ex Chad Dictator: Habré's Victims Vow to Fight On" *HRW News* 21 March 2001 <http://www.hrw.org/news/2001/03/20/senegal-bars-charges-against-ex-chad-dictator> (Accessed 31 July 2014).

⁶⁵³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

⁶⁵⁴ Hissène Habré case, Court of Cassation, 20 March 2001 <http://www.icrc.org/applic/ihl/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/90e26efa1bb31189c1256b21005549b0?openDocument> (accessed 31 July 2014).

⁶⁵⁵ *Requête des parties civiles au Ministre de la Justice concernant l'application de la loi de compétence universelle au*

2005, following a four year investigation by a magistrate of the Brussels District Court, an international warrant of arrest was issued against Habre.⁶⁵⁶ He was accused of torture, war crimes, crimes against humanity, and serious violations of international humanitarian law and a request for his extradition to Belgium was sent to Senegal.⁶⁵⁷ However, this extradition request was not acted upon; instead, on 25 November 2005, a Senegalese Court decided that it had no jurisdiction over the case.⁶⁵⁸ Consequently, the Senegalese Minister of the Interior, Ousmane Ngom, issued a statement placing Habre in the hands of the president of the AU.⁶⁵⁹

5.3.3.2 Involvement of the AU in the Habre case

In January 2006, the AU made the decision to establish a Committee of Eminent African Jurists to assess the possible ways of bringing Habre to trial and to recommend the possible ways of dealing with a similar situation in future.⁶⁶⁰ In its report, the Committee agreed that rejection of impunity was a universally accepted concept and that Habre should not be shielded from prosecution by his immunity as a former head of state.⁶⁶¹ The Committee recommended that an African solution should be adopted. In this regards, the Committee stated that Senegal was the most ideal forum for Habre's prosecution, because Senegal had ratified the Convention against Torture and is the country where Habre lives in exile.⁶⁶² It was then recommended that Senegal should empower its courts with the jurisdiction to try Habre; as well as to go to Chad, and any other countries as necessary, in order to collect evidence required for the trial.⁶⁶³

As an alternative, the Committee also stated that Chad had jurisdiction over the crimes. This is because the alleged offences were committed in Chad and it is the country of nationality for most

casHabre http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Belgium/Habr%C3%A9_Requete_Competence_U_8-5-2003.pdf (accessed 31 July 2014).

⁶⁵⁶ "Chronology of the Hissène Habré Case" FIDH, 13 July 2013, <http://www.fidh.org/en/africa/Chad/Hissene-Habre-Case/chronology-of-the-hissene-habre-case-9776> (accessed 31 July 2014).

⁶⁵⁷ *Ibid.*

⁶⁵⁸ "Senegal Places Crimes of Ex-Chad Dictator in Hands of African Union" *HRW* 25 November 2005 <http://www.hrw.org/news/2005/11/27/senegal-places-crimes-ex-chad-dictator-hands-african-union> (accessed 25 August 2014).

⁶⁵⁹ *Ibid.*

⁶⁶⁰ Decision on the Hissene Habre Case and the African Union, 23-14 January 2006, Assembly/AU/Dec.103 (VI).

⁶⁶¹ Report of the Committee of Eminent African Jurists on the Case of Hissene Habre http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Report0506.pdf (accessed 31 July 2014).

⁶⁶² *Ibid* para 17-19.

⁶⁶³ *Ibid* Para 19.

of the victims.⁶⁶⁴ Therefore, Chad ought to request for Habre's extradition from Senegal. If this did not happen, Chad was obligated to provide all the assistance required by Senegal in terms of access to evidence and witnesses. The third option proposed by the Committee was that all African countries, which had at that time ratified the Convention against Torture, were possible fora for the trial of Habre. Fourthly, the committee advised on the establishment of an ad hoc tribunal for this purpose.⁶⁶⁵ The Committee stated that the power to establish an ad hoc tribunal could be derived from Article 3 (h) 4(h) and (o) 9(1) (d) and Article 5(1)(d) of the Constitutive Act of the African Union. The Committee, however, noted that the establishment of such a tribunal would be costly and would also be likely to further delay the trial of Habre.⁶⁶⁶

Lastly, and most importantly for this discussion, the Committee also recommended the empowerment of one of the regional courts in Africa with international criminal jurisdiction. The Committee recommended that the chosen regional court should be expanded to have the jurisdiction to try international crimes in order to deal with similar issues in future. In particular, the Committee recommended "that this new body be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention against Torture."⁶⁶⁷

The AU Assembly followed up on the Committee's recommendations, above, at the Seventh Ordinary Session of the AU Assembly held in Banjul, the Gambia, on 2 July 2006.⁶⁶⁸ In this decision, the AU took note of the Committee's report and stated that the crimes which Habre was being accused of fell under the competence of the AU by virtue of articles 3 (h), 4 (h) and 4 (o) of the AU Constitutive Act.⁶⁶⁹ The AU then took up the issue and mandated Senegal to prosecute Habre, by a competent court, on behalf of Africa.⁶⁷⁰ The Assembly further requested the AUC President and AU member states as well as the international community to cooperate with, and support Senegal in this endeavour.⁶⁷¹

On 31 July 2007, the Senegalese parliament passed a law allowing the prosecution of war crimes, genocide, crimes against humanity and torture even when they are committed outside

⁶⁶⁴ Ibid Para 20.

⁶⁶⁵ Ibid para 22-25

⁶⁶⁶ Ibid para 20.

⁶⁶⁷ Ibid para 26 & 34-35.

⁶⁶⁸ Decision of the process of Hissene Habre and the African Union, 2 July 2006, Assembly/AU/Dec.127 (VII).

⁶⁶⁹ Ibid para 3

⁶⁷⁰ Ibid para 5

⁶⁷¹ Ibid.

Senegalese territory.⁶⁷² Subsequently, in 2008 Senegal amended its Constitution to allow retrospective prosecution of crimes against humanity.⁶⁷³ However, despite the commitment to try Habre, Senegal made no effort to do so leading to a petition made to the ECOWAS Court in 2010. The Court held that Senegal should try Habre by a special ad hoc tribunal and adhere to the strict rules and procedures of international law.⁶⁷⁴

The AU Assembly in a decision made during its sixteenth Ordinary Session in Addis Ababa, Ethiopia, requested the AUC to consult with Senegal in order to “finalise the modalities” of the trial of Habre in accordance with the ECOWAS Court decision.⁶⁷⁵ In this decision, the Assembly reaffirmed the mandate it had given Senegal to try Habre on behalf of Africa; and endorsed a recommendation for the AU financial contribution to the trial of Habre in Senegal, to the tune of One Million USD.⁶⁷⁶ In a further AU decision made in July 2011, the AU urged Senegal to try Habre according to its obligation under the Convention Against Torture or extradite him to another country willing to try him.⁶⁷⁷ The Assembly further called upon other AU member states, who were also parties to the Convention against Torture, and who were willing to try Habre; to register their interest with the AUC and to take the necessary measures to bring him to trial.⁶⁷⁸

Due to Senegal’s reluctance to prosecute Habre, an application was made to the ICJ by Belgium asking the Court to order Senegal to prosecute or otherwise extradite Habre to Belgium.⁶⁷⁹ In this application, Belgium alleged that Senegal was in breach of its obligations under the Convention against Torture, by failing to pass legislation to enable it to prosecute the crimes prescribed therein, and also by failing to prosecute Habre. The ICJ held that neither Senegal’s referral of the issue to the AU, nor its financial difficulties, could justify its delay in the compliance with the

⁶⁷² “Habre will face trial in domestic criminal court: Senegal justice minister” *Jurist* 12 July 2007 <http://jurist.law.pitt.edu/paperchase/2007/07/habre-will-face-trial-in-domestic.php> (accessed 04 August 2014).

⁶⁷³ “Senegal constitutional change paves way for Habré trial” *United Nations Human Rights* 11 April 2008 [http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8552&LangID=Ehttp://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8552&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8552&LangID=Ehttp://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8552&LangID=Ehttp://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8552&LangID=E) (accessed 04 August 2014).

⁶⁷⁴ In the Case Hissene Habré case versus Republic of Senegal, General Role No: ECW/CCJ/APP/07/08 Judgement NO: ECW/CCJ/JUD/06/10 http://iurisafrica.org/html/pdf_ecowa.pdf (accessed 04 August 2014).

⁶⁷⁵ Decision on the Hissene Habre Case, 30-31 January 2011, Assembly/AU/ Dec.340 (XVI).

⁶⁷⁶ Ibid para 5.

⁶⁷⁷ Decision on the Hissene Habre Case, 30 June -1 July, Assembly/AU/Dec.371(XVII), Malabo, Equatorial Guinea.

⁶⁷⁸ Ibid para 4.

⁶⁷⁹ Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 20 July 2012, No. 2012/24.

obligations under the Convention.⁶⁸⁰ The Court then proceeded to order “unanimously, that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him”.⁶⁸¹

Eventually, the AU and Senegal entered an agreement which led to the passing of the Statute of the Extraordinary African Chambers (EAC) on 2 September 2013.⁶⁸² The Statute provides for the prosecution of international crimes that occurred in Chad, between 7 June 1982 and 1 December 1990, which is the period during which Habre was the president of Chad. Habre is currently on trial before the EAC. The AU also followed the recommendation of the Eminent Jurists on the case of Habre to expand the jurisdiction of the ACJHR to deal with international crimes that happen in Africa. This, according to the AU decisions discussed above, was done partly to avoid the reoccurrence of the above challenges in dealing with a situation like Habre’s in future.

5.4 Shielding sitting African presidents from accountability?

In all the AU Assembly decisions, discussed above, concerning abuse of universal jurisdiction, the AU relationship with the ICC and the trial of Habre; the AU reiterates its commitment to fighting impunity on the African continent in accordance with article 4 (o) of the AU Constitutive Act. It is therefore clear that the AU supports the idea of ending impunity in Africa. However, it is also clear that the AU is greatly dissatisfied with the manner in which international criminal justice has been meted out against African leaders by the ICC and the European Courts.⁶⁸³ Therefore, the jurisdiction of the ACJHR was expanded to deal with international crimes committed on “African soil”, in a manner that ensures “Africa’s interests can be fully defended and protected in the international judicial system”.⁶⁸⁴

⁶⁸⁰ Ibid paras 111-117.

⁶⁸¹ Ibid paras 119-121.

⁶⁸² Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (Unofficial translation by Human Rights Watch) <http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> (accessed 5 August 2014).

⁶⁸³ See Murungu 2011 *JICJ* 1067-1079. Murungu seems to be making a similar argument in the first half of his article.

⁶⁸⁴ Decision on the Implementation of the Assembly Decisions on the International Criminal Court, 30 June -1 July 2011, Assembly/AU/Dec.366 (XVII) para 8.

The question therefore relates to what the AU considers to be “Africa’s interests”. At first, it seemed that the format of the exercise of international criminal justice in the new African court was going to be similar to that of the ICC. For example, the crimes of genocide, war crimes and crimes against humanity, have the same definition they have in the Rome Statute. Similarly, the earlier drafts of the Amendment Protocol, up to May 2012, contained article 46 B which, just as article 27 of the Rome Statute, ruled out the application of immunity. This draft was provisionally adopted by the government experts and ministers of justice/Attorneys General on legal matters from AU member states.⁶⁸⁵ The inclusion of article 46 A *bis*, which provides for immunity, between May 2012 and June 2014 when the Amendment Protocol was adopted, changes the initial intention fundamentally.

Although it may be a long time before the Amendment Protocol enters into force, if at all, article 46 A *bis* is worthy of discussion because of its possible impact on the exercise of international criminal justice in Africa.

5.4.1 The definition of “other senior state officials”

Article 46 A *bis* provides for immunity from prosecution, not just for heads of state or government but also “other senior state officials based on their functions”. However, the Amendment Protocol does not define what categories of state officials fall under the title of “other senior state officials”. This is a very wide definition that could include every state official of high rank.⁶⁸⁶ This would be a very problematic outcome since most categories of international crimes, by way of definition, are required to be “committed as part of a plan or policy” or “as part of a large-scale commission of such”.⁶⁸⁷ Such definitions connote the requirement of planning and organization, which is often done by persons who are in positions of power, which most likely include senior state officials. This view is shared by the Director of International Bar Association (IBA) who says “it (the Amendment Protocol) ignores the obvious reality that these

⁶⁸⁵ Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7-11 and 14-15 May 2012 Exp/Min/IV/Rev.7.

⁶⁸⁶ S Allison “Think Again: At the new African Court, will power mean impunity?” *ISS Today*, 24 June 2014 <http://www.issafrika.org/iss-today/think-again-at-the-new-african-court-will-power-mean-impunity> (accessed 25 August 2014). Says “‘other senior state officials based on their functions,’ is a deliberately ambiguous category that could conceivably include the entire top echelon of government.”

⁶⁸⁷ See for example, the definition of war crimes and crimes against humanity in articles 7 and 8 of the Rome Statute, which are also adopted in the Amendment Protocol.

types of massive, systematic crimes are generally perpetrated by those who wield greatest power.”⁶⁸⁸

If all senior state officials are to be shielded from prosecution, the Court would only be able to prosecute former officials and non-state actors. With regard to former officials, this would still be challenging since, as is well known, one of Africa’s major problems is with leaders who tend to hold on to power for many years making it difficult to have smooth transition of power. And if the Court is to only prosecute non-state actors, then this may increase chances of “rebel justice”, where states use the Court to prosecute rebels in their territories; or the party that rises to power may call upon the Court to prosecute the losing party. If this happens, the Court will face the same criticism the ICC is currently facing concerning similar allegations.⁶⁸⁹

5.4.2 Article 46 and International criminal law

The discussions in Chapter 2 show that the recent trend in international criminal law has been to exclude immunity for international crimes before in international criminal tribunals. Article 46 A *bis* of the Amendment Protocol does not, however, follow this trend. On the contrary, it safeguards the immunity of heads of state and government as well as senior state officials based on their functions. This explains why it has been termed as retrogressive by the civil society movements in Africa.⁶⁹⁰

This author argues that article 46 A *bis* is in line with international law on immunities. This is based on the conclusion, arrived at in Chapter 2, that rejects the view that immunity is not applicable to all international tribunals.⁶⁹¹ It is argued, instead, that the applicability of immunity before a particular tribunal is determined by its manner of establishment and the provisions of its Constitutive Statute.⁶⁹² Following this argument, therefore, it is within international law on immunities for a tribunal to safeguard immunity based on official capacity. Considering the

⁶⁸⁸ See “IBA and SALC express alarm at AU’s endorsement of immunity for heads of state” *International Bar Association* 9 July 2014 <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f0c41e45-693d-4712-98c8-3da28c2b949d> (accessed 26 August 2014).

⁶⁸⁹ M Kersten “What Gives? African Union Head of State Immunity” *Justice in Conflict* 7 July 2014 <http://justiceinconflict.org/2014/07/07/what-gives-african-union-head-of-state-immunity/> (accessed 26 August 2014).

⁶⁹⁰ “African States: Reject Immunity for Leaders / 141 Groups in 40 Countries Speak Out” 25 August 2014 <http://en.starafrica.com/news/african-states-reject-immunity-for-leaders-141-groups-in-40-countries-speak-out.html> (accessed 25 August 2014).

⁶⁹¹ See part 2.6 of this thesis.

⁶⁹² See part 2.4 of the thesis.

difficulties the ICC has experienced in the prosecution of sitting heads of state,⁶⁹³ it is questionable whether it would be a worthy enterprise for the new international crimes chamber. It is however argued, for the reasons stated above, that immunity for the undefined category of senior state officials would have a negative impact on international criminal justice on the Africa continent.

5.4.3 Article 46 and Impunity

Article 4 (o) of the AU constitutive Act provides that in its operations, the AU shall be guided by the “respect for the sanctity of human life, condemnation and *rejection of impunity* and political assassination, acts of terrorism and subversive activities” (emphasis added). By including the immunity clause in the Amendment Protocol the AU has been accused by many of going against its Constitutive Act and encouraging impunity for international crimes on the continent.⁶⁹⁴

One possible argument in support of allowing immunity for sitting heads of state and senior officials, would be that this would merely delay prosecutions, to allow them to uninterruptedly perform their official functions till the end of their tenure of office, after which proceedings against them may be instituted. However, many have expressed concern that this move may encourage leaders who are accused of committing international crimes, to hold on to power in order to avoid prosecution.⁶⁹⁵ Moreover, with particular regard to the crime of unconstitutional change of government provided for in the Amendment Protocol, once a person rises to power, in an unconstitutional manner, the person would become a sitting head of state or government and the new court would have to wait until such person leaves office before s/he can be prosecuted. This is unless the term “sitting head of state or government” is defined to exclude persons who rise to power unconstitutionally.

Although it is argued that article 46 A *bis* is not contrary to international law on immunities, for reasons explained above; its practical implications may lead to the impunity where power is

⁶⁹³ See part 2.5.1.1.2 of the thesis.

⁶⁹⁴ See for example a letter endorsed by 42 civil societies with a presence in Africa “Immunity for government leaders will harm the African court” 13 May 2014 <http://www.issafrica.org/about-us/press-releases/immunity-for-government-leaders-will-harm-the-african-court> (accessed 25 August 2014).

⁶⁹⁵ “Joint Letter to the AU Member States on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights” FIDH, 12 May 2014, <http://www.fidh.org/en/africa/african-union/15305-joint-letter-to-the-au-member-states-on-the-draft-protocol-on-amendments> (accessed 12 August 2014).

greatest. For this reason, the thesis recommends that the article be either repealed in its entirety or interpreted narrowly.⁶⁹⁶

5.5 Conclusion

While protesting against prosecution of African leaders by courts of Western states under the principle of universal jurisdiction, the AU appeared to be committed to the fight against impunity but opposed to the manner in which international criminal justice was being exercised by the ICC and western courts. This, as shown above, catalyzed the process of passing and adopting of the Amendment Protocol. The AU's displeasure with the prosecution of heads of state led to the inclusion of article 46 A *bis* which did not exist in the earlier versions of the Protocol. Although this thesis argues that article 46 A is within the international law on immunities it nevertheless concludes that this clause is likely to have the undesirable outcome. This is because the immune officials will most likely end up getting away with international crimes after the end of their tenure of office.

The Amendment Protocol is yet to come into force and it may take several years before it does, if ever. However, if the new international crimes chamber becomes operational, it is clear, from the discussion above, that article 46 A *bis* will increase the chances of perpetrators of international crimes going unpunished. The initial provision in the draft Amendment Protocol, article 46 B, that excluded immunity based on official capacity would have been preferable if the AU's mission of dealing with impunity on the continent is to be realised. The next chapter deals with the thesis conclusion and recommendations.

⁶⁹⁶ See part 6.2.5 of the thesis.

CHAPTER SIX

Conclusions and Recommendations

“The root of the problem is not an obsession with Africa but rather a slow but perceptive shift of the Court away from the apparent independence shown in its early years towards a rather compliant relationship with the Security Council and the great powers”⁶⁹⁷

6.1 Introduction

The main issue under discussion in this thesis was head of state immunity before international criminal tribunals and its impact on the AU-ICC relationship. The prosecution of heads of state at the ICC has been the greatest source of friction between the AU and the ICC. The fact that all the cases currently being prosecuted at the ICC are from Africa and, therefore, only African heads of state have been subjected to the ICC jurisdiction has not helped the situation. As a result, the AU has made decisions accusing the ICC of bias and urging its member states not to cooperate with the ICC. Some African States Parties to the Rome Statute followed the AU decisions and refused to arrest and surrender President Bashir contrary to their treaty obligation. Apart from the decisions not to cooperate, the AU has since adopted the Amendment Protocol which seeks to deal with crimes committed on the African soil and which safeguards immunity based on official capacity.

The thesis began by examining the general principles of immunity under international law and the emerging exception to this rule under international criminal law. In this regard, it focused majorly on immunity under the Rome Statute and the cases against heads of state at the ICC. Thereafter, it dealt with the cooperation duty under the Rome Statute and the exceptions thereto, with particular regard to article 98, and the controversial relationship it has with article 27 of the Rome Statute. In chapter 4, the thesis canvassed the AU decisions urging member states not to cooperate with the ICC and the response of African States to these decisions. In Chapter 5 the circumstances surrounding the inclusion of article 46 A *bis* in the Amendment Protocol, and the manner in which this article is likely to influence the practice of international criminal justice on the African continent, was conclusively dealt with.

⁶⁹⁷ W Schabas “Africa, Fatou Bensouda and the International Criminal Court” *PHD Studies in Human Rights* 13 December 2011 <http://humanrightsdoctorate.blogspot.com/2011/12/africa-fatou-bensouda-and-international.html> (Accessed 20 May 2014).

This chapter, therefore, presents the findings and recommendations that arise from the research. It sets out, briefly, a summary of the previous chapter discussions, outlines the major conclusions to be drawn from these discussions, and then makes recommendations on the main research questions raised at the beginning.

6.2 Conclusions

6.2.1 Immunity before international criminal tribunals

Chapter 2 demonstrated that the previously robust protection offered by head of state immunity has shrunk considerably over the years. International criminal tribunals established over the last century provided for individual criminal responsibility, where a person's official capacity, at the time of commission, does not exclude the jurisdiction of the tribunal. Article 27 of the Rome Statute, however, excludes both international law and national law immunities from application before the ICC. Based on the above, some commentators and the ICC have argued that article 27 reflects a new rule of customary international law where immunities cannot be pleaded before all international tribunals.⁶⁹⁸

This thesis argues against this assertion and instead concludes that the applicability of immunity before a particular tribunal depends on the manner of its establishment and the provisions in its constitutive statute.⁶⁹⁹ To begin with, an international tribunal established by way of a treaty, which provides for the irrelevance of immunity based on official capacity, like the ICC, has jurisdiction to try heads of states parties.⁷⁰⁰ Therefore, article 27 of the Rome Statute effectively excludes immunities of heads of states parties due to these states' acceptance to be bound by the provisions of the treaty. As a result, despite AU assertions to the contrary, the ICC has rightfully exercised its jurisdiction over President Kenyatta and Deputy President Ruto, who are leaders of a state party to the Rome Statute.

Furthermore, heads of non-party states to the Rome Statute may be subjected to the jurisdiction of the ICC by virtue of the UNSC referral of a particular situation to the ICC, under Chapter VII of the UN Charter. This is because article 13 of the Rome Statute empowers the UNSC to refer situations to the ICC acting under Chapter VII of the UN Charter and decisions made under

⁶⁹⁸ See part 2.4 of the thesis.

⁶⁹⁹ See also Akande 2004 *AJIL* 417.

⁷⁰⁰ See Part 2.5 of the thesis.

Chapter VII are binding on all the UN members.⁷⁰¹ Therefore, the ICC rightfully exercised its jurisdiction over President Bashir and the late President Muammar Gaddafi, despite statements to the contrary from the AU and some commentators. However, without the UNSC referral under Chapter VII, the ICC would have no jurisdiction to try a sitting head of a non-party state.

On the other hand, the SCSL having been established by a treaty between the UN and Sierra Leone did not have the jurisdiction over Charles Taylor while he was still a sitting head of state. This is because the SCSL, contrary to its decision indicating otherwise, lacked the backing of Chapter VII powers of the UNSC.⁷⁰² Without Chapter VII backing, and without Liberia's consent to be bound by the SCSL Statute, the SCSL had no jurisdiction over the sitting president of Liberia. As explained in Chapter 2, immunity borne by a head of state belongs to that state and not the bearer and may only be waived by the state. Liberia did not waive the immunity of its president; in fact, it contested his prosecution on the basis of immunity.⁷⁰³ Neither was Liberia bound by the Statute of SCSL since it was not party to the establishing treaty. For this reason, Charles Taylor, being the sitting president of Liberia at the time of indictment, still had immunity therefore his indictment was contrary to international law on immunities.

For the above reasons the thesis concludes, contrary to the view of some commentators,⁷⁰⁴ that the mere description of a tribunal as international does not automatically give it jurisdiction over sitting heads of state.⁷⁰⁵ The jurisdiction of a particular international tribunal over sitting heads of state is determined: first, by the manner of its establishment which determines whether the decisions of the tribunal are binding on a particular state or otherwise.⁷⁰⁶ A tribunal established under Chapter VII powers binds all UN member states while that established by treaty binds only the states parties to that treaty except in cases of UNSC referral under Chapter VII. The second determining factor is the provisions of the establishing statute of a particular tribunal which could exclude immunity, like article 27 of the Rome Statute; or safeguard it like article 46 A *bis* of the Amendment Protocol. This would then determine whether the particular tribunal would

⁷⁰¹ See part 2.4.2 of the thesis.

⁷⁰² See also Frulli 2004 *JICJ* 1124; Deen-Racsmány 2005 *Leiden Journal of International Law* 307; Cryer 2001 *ICLQ* 436.

⁷⁰³ *Prosecutor v Charles Ghankay Taylor*, Applicant's Motion made under Protest and without waiving of Immunity requesting that the Trial Chamber do quash the approved indictment against the person of President Charles Ghankay Taylor (SCSL-03-01-I-015) 23 July 2003.

⁷⁰⁴ See for example P Gaeta 2009 *JICJ* 321.

⁷⁰⁵ See also Akande 2004 *AJIL* 417.

⁷⁰⁶ *ibid.*

have jurisdiction over heads of state, like the ICC, or not like the African international crimes chamber. Both situations are well within international law on immunities.

6.2.2 Article 98 (1) as a bar to the arrest and surrender of President Bashir

As stated above, article 27 operates to remove the immunities before the ICC of the heads of both states parties and non-party states through UNSC referral. States parties to the Rome Statute are considered to have waived the immunities that accrue to their officials in relation to the ICC by virtue of article 27. While non-party states to the Rome Statute, who are UN member states, are bound by a UNSC referral under Chapter VII. The question that follows, therefore, is whether a UNSC referral of a situation in a non-party state, automatically extinguishes the immunities of the officials of that state, in relation to a requested state. Otherwise stated, does the referral of the Darfur situation to the ICC by the UNSC, mean that states parties to the Rome Statute may arrest and surrender President Bashir to the ICC without breaching his immunities as the head of a non-party state?

Chapter 3 discussed the various views espoused by scholars on the relationship between article 27, which bars immunity from application at the ICC; and article 98, which preserves immunity during states parties' cooperation with the ICC.⁷⁰⁷ Categorized loosely, there are two conflicting views on the issue. The view held by the ICC, as well as some scholars, is that the referral of the Darfur Situation to the ICC made the Rome Statute applicable to Sudan in its entirety despite being a non-party state. Therefore, according to this argument, article 27 removes the immunities of President Bashir and states parties to the Rome Statute cannot rely on article 98 (1) to avoid arresting and surrendering President Bashir to the ICC. The Court justifies this stance by arguing that since the ICC has jurisdiction over President Bashir, the states parties requested to cooperate would be acting as agents of the Court, and not on their own behalf, and therefore they cannot breach the immunities of President Bashir.⁷⁰⁸ The Court, however, did not elaborate on the circumstances under which article 98 (1) can be relied on to deny cooperation.

The second view, which this author agrees with, is that although article 27 removes President Bashir's immunities in relation to trial at the ICC, article 98 (1) preserves them in relation to his

⁷⁰⁷ See part 3.5.1 of the thesis.

⁷⁰⁸ Decision Pursuant to Article 87(7) of the Rome Statute (Malawi) para 44 & 45.

arrest by a state party.⁷⁰⁹ According to this view, therefore, while the ICC has jurisdiction over President Bashir, it acted *ultra vires* by asking states parties to arrest and surrender him.⁷¹⁰

Article 98 (1) provides that the ICC may not request a state party to cooperate, if such act 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....” As discussed in Chapter 2, state immunity is based on the equality and sovereignty of states and cannot be breached except by the consent of a state.⁷¹¹ The trial of sitting heads of states before certain international tribunals is therefore an exception to this well-established rule of customary international law. For that reason, the fact that the immunity of a head of state does not apply before a particular international tribunal, does not mean that immunity of that head of state is not applicable in relation to other states.

From the foregoing, the thesis concludes that the fact that the ICC has jurisdiction to try President Bashir arising from the UNSC referral, does not automatically mean that his immunities are not applicable in relation to states parties to the Rome Statute. This is because in order to arrest and surrender President Bashir to the ICC, a state party would have to subject him to the jurisdiction of its national courts. While the scope of immunity has reduced in relation to international tribunals, immunity of sitting heads of state before national courts of foreign states is still inviolable even on charges of international crime.⁷¹² Immunity before international tribunals and that before national courts are separate concepts and should remain as such. Therefore, states parties to the Rome Statute cannot arrest and surrender President Bashir without being in breach of article 98 (1) of the Rome Statute by acting inconsistently to their obligation under international law to respect the immunities of the Sudanese President.

⁷⁰⁹ VM Blommestein and C Ryngaert 2010 *ZIS* 428-430; Gaeta 2009 *JICJ* 329.

⁷¹⁰ Gaeta 2009 *JICJ* 329.

⁷¹¹ See part 2.2 of the thesis.

⁷¹² See *Arrest Warrant case* para 51; *Gaddafi* France Court of Cassation 2001 (125) ILR 456; *Habre* Senegal Court of Cassation 2001 (125) ILR 528; *Tatchell v. Mugabe* England Bow Street Magistrates' Court 2004 (136) ILR 572. See also *Pinochet* (No. 3) at 112 (per Lord Wilkinson), at 119 (per Lord Goff), at 152 (per Lord Hope), at 168 (per Lord Saville), and at 171 (per Lord Millet) where the Law Lords held that had Pinochet been a sitting head of state, his immunity would have subsisted. See also R Cryer *An Introduction to International Criminal Law* 531-534; C Murungu *Prosecuting International Crimes in Africa* 42.

6.2.3 Impact of AU decisions on cooperation of African States Parties to the Rome Statute with the ICC

The thesis found that AU decisions do not have a direct impact on African States Parties to the Rome Statute's response to their cooperation obligation. Instead, it was found that other political factors which have no relationship with these state's commitment to their Rome Statute obligations, directly affect these states' decision to cooperate or not to cooperate with the ICC in the arrest and surrender President Bashir. This finding was made upon looking at how Chad, Malawi and Kenya have responded to their Rome Statute obligations under the Statute vis-a-vis the AU position. Of particular relevance were the AU decisions urging its members not to cooperate with the ICC under article 98 (1) of the Rome Statute canvassed in chapter four. These AU decisions have created conflicting obligations for African States Parties to the Rome Statute. On the one hand, these states have a treaty obligation to cooperate with the ICC under article 96 of the Rome Statute; and on the other hand, they have the obligation to comply with the AU decisions under the AU Constitutive Act.

Chapter 4 showed that the responses of African States Parties to the Rome Statute were varied and inconsistent. Some states parties, such as Kenya, took measures to arrest and surrender President Bashir in spite of the AU decisions urging them otherwise. However, some African States Parties to the Rome Statute, such as Chad and Malawi, relied on the AU decisions to refuse to arrest and surrender President Bashir. It is noteworthy that all the three countries, Chad, Malawi and Kenya changed their views at least once concerning their willingness to arrest and surrender President Bashir to the ICC. However, these changes were neither reflective of the AU's position at the time nor did they seem to be affected by the AU decisions.

To begin with, in 2009, Chad entered a reservation to an AU decision urging member states not to cooperate with the ICC and showed its willingness to arrest and surrender President Bashir.⁷¹³ Interestingly, at that time there was political unrest between Chad and Sudan with the Chadian President accusing his Sudanese counterpart of sponsoring rebels in Chad and vice versa.⁷¹⁴ After the resolution of this conflict, Chad changed its stance concerning the arrest and surrender

⁷¹³ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) of 1-3 July 2009, Doc. Assembly/AU/13(XIII) para 8.

⁷¹⁴ See part 4.3.2.2 of the thesis.

of President Bashir and has allowed him into its territory five times at the time of writing.⁷¹⁵ This is in spite of the ICC decisions against Chad discussed in Chapter 4. Chad stated that it had decided to “align itself fully” with AU decisions urging member states not to cooperate but this does not seem likely because of the reservation entered in 2009. In 2009, when there was political unrest between the two countries, Chad was willing to arrest and surrender President Bashir to the ICC, however, after resolution of the conflict Chad decided to align itself with the AU decisions. From the foregoing, it is clear that Chad’s response was influenced by the political unrest between itself and Sudan and not by the AU decisions or Chad’s commitment to its Rome Statute obligation.

Moreover, Malawi allowed President Bashir to visit its territory in 2011 in spite of the ICC request for his arrest and surrender. During the ICC decisions against Malawi, Malawi said it had complied with the AU decisions under AU Constitutive Act.⁷¹⁶ However, in June 2012, despite the fact that the AU position remained the same, Malawi refused to host an event that President Bashir was scheduled to attend saying it would arrest him in compliance with its Rome Statute obligations. Interestingly, this change occurred following a change of leadership in Malawi. It therefore seems that the change in Malawi’s attitude was influenced by the change in leadership, rather than by the AU position which had remained the same.⁷¹⁷

Like Malawi, Kenya allowed President Bashir into its territory in 2010 but later a warrant of arrest was issued against him by the High Court of Kenya.⁷¹⁸ The case was presented to the Kenyan High Court by a civil Society organization, the Kenyan Chapter of the International Commission of Jurists. The Government of Kenya, named as respondents in the case, opposed the application arguing *inter alia* that the High Court lacked jurisdiction to hear the case. The High Court of Kenya issued the warrant of arrest but the IGAD meeting that President Bashir was to attend in Kenya was moved to Addis Ababa; therefore, the warrant was unexecuted. Interestingly, the Government of Kenya did not mention the AU decisions during the proceedings in its opposition to the issuance of a warrant of arrest. The AU decisions were only

⁷¹⁵ Ibid.

⁷¹⁶ Decision Pursuant to Article 87(7) of the Rome Statute (Malawi) para 5.

⁷¹⁷ See also O A Maunganidze “Malawi’s Stance on al-Bashir is in Line with its International Obligations” Institute for Security Studies <http://www.polity.org.za/article/malawis-stance-on-al-bashir-is-in-line-with-its-international-obligations-2012-06-14> (accessed 19 October 2013).

⁷¹⁸ *Kenya Section of the International Commission of Jurists v Attorney General & another* [2011] eKLR 2-3.

mentioned by the 3rd respondent, a civil society organization, but the Court did not take this into consideration in its decision to issue a warrant of arrest.

The response of these three states reflects the response of most African States Parties to the Rome Statute to their treaty obligations.⁷¹⁹ As has been shown, the AU decisions did not affect these states' decision to cooperate or not to cooperate with the ICC. The decision of a particular state to take measures towards arresting and surrendering President Bashir was found to be very subjective, and influenced by the politics in the country, rather than the AU's position on the matter.

6.2.4 The law and politics of AU grievances

The AU is a political body which makes political decisions, however, three of the grievances in the AU decisions were found to have justification in law. Chapter 4 discussed these recurring themes in the AU decisions: the reliance on article 98 (1) to refuse cooperation; request for UNSC deferral of cases against President Bashir under article 16 of the Rome Statute; and the claim that the indictment and issuance of warrants against President Bashir impaired the delicate peace process in Darfur region and in Sudan generally. On the issue of article 98 (1), for the reasons espoused above, the author agrees with the AU position, that article 98 (1) should be interpreted to protect the head of a non-party state, like President Bashir, from being subjected to the jurisdiction of a requested state by way of arrest and surrender.

Similarly, the author argues that the request for UNSC deferral of the case against President Bashir in the interest of peace, warranted investigation by the UNSC to establish its validity. This is due to the complex nature of the peace process in Darfur and the events that followed the issuance of the arrest warrant against President Bashir.⁷²⁰ Despite the gravity of the situation, and the numerous AU requests, the UNSC never put the matter to vote. This points to the double standard and the politics involved in the deferral process. This is confirmed by the UNSC's previous controversial use of article 16 in 2002⁷²¹ and the fact that the Kenyan requests which

⁷¹⁹ See the criteria used in choosing these three states as case studies in the research methodology part 1.5 of the thesis.

⁷²⁰ See part 4.2.2 of the thesis

⁷²¹ See part 4.2.1 of the thesis.

were submitted much later have been put to a vote. In this way the UNSC, a political body, influences the judicial process of the ICC and interferes with the Court's independence.

The very involvement of the UNSC, a political body, in the ICC's referral and deferral process shows that the Court is influenced by politics. Also, the ICC operates in highly political situations therefore the AU grievances, even if judged to be completely political, should be taken into consideration in the Court's decision on whether to proceed with a particular case. The discussion in Chapter 4 revealed that the tone in the AU decisions is getting more agitated and radical as the AU decisions continue to be dismissed. Although the AU decisions do not directly affect the decisions of individual African States on the President Bashir issue, as shown above, the Assembly is a meeting of African heads of state and therefore a good AU-ICC relationship is likely to increase the cooperation of African States with the ICC. The author opines that the relationship between the ICC and Africa in general would be improved if the AU decisions were to be taken under advisement by the ICC.

6.2.5 Article 46 A *bis* of the Amendment Protocol and international law on immunities

Chapter 5 showed how the AU's disagreement with the indictment of sitting African officials both at the ICC and by European States contributed to the adoption of the Amendment Protocol. In most of the AU decisions relating to these two issues the AU Assembly encouraged the AUC to hasten the process regarding the expansion of the jurisdiction of the ACJHR to deal with international crimes.⁷²² This culminated in the passing of the Amendment Protocol, which under article 46 A *bis* safeguards immunities based on official capacity, in the newly established African international crimes chamber. Chapter 2 showed that in the last century the statutes of international criminal tribunals have continuously provided for the irrelevance of immunity based on official capacity which is an exception to otherwise firmly established doctrine of immunity. Article 46 A *bis* is, therefore, worthy of consideration because it brings back the issue of immunity before international tribunals.

For reasons explained in part 6.2.1 above, this research disagrees with the assertion that immunity does not apply before all international criminal tribunals. Instead, the author argues that the applicability of immunity before a particular tribunal depends on the manner of its

⁷²² See part 5.3 of the thesis.

establishment and the provisions of the tribunal's establishing statute. According to this argument, the irrelevance of immunity before international criminal tribunals has not risen to a position of customary international law. It is therefore legal for a treaty establishing an international tribunal, like the Amendment Protocol, to safeguard the immunity of heads of state and government as well as senior state officials based on their functions. For this reason article 46 A *bis* is within international laws on immunities.

The result of this provision, if the Amendment Protocol comes into force, is that the new court will not have jurisdiction over heads of state and government as well as senior state officials. The author concludes that this will have a negative impact on international criminal justice on the African continent. This is first because, the term "senior state officials" is not defined and, left as it is, it may include persons at all levels of management. Second, international crimes by its very definition is more likely to be committed by people who have control over government policy.⁷²³ For these reasons, the exclusion of heads of state and government as well as senior state officials from the jurisdiction of the new court would mean that the Court would mainly prosecute non-state actors and therefore fall prey to the "rebel justice" that the ICC has been accused of.⁷²⁴ In the recommendations sections, the thesis argues for a narrow interpretation or otherwise repeal of the article.

6.3 Recommendations

6.3.1 ICC flexibility in dealing with heads of state's prosecution

Chapter 2 showed that proceedings against sitting heads of state are highly complex, politically charged and controversial processes. Apart from the challenges relating to the cooperation of the states involved,⁷²⁵ there are also "many questions of national dignity and national sovereignty and Pan-African solidarity" that arise.⁷²⁶ Be that as it may, in the last century there has been a move towards the prosecution of persons regardless of their official positions which is reflected in article 27 of the Rome Statute. More recently, support for article 27 was shown during the ASP discussion of the Kenyan Proposal seeking to amend it in order to excuse sitting heads of

⁷²³ See part 5.4.1 of the thesis.

⁷²⁴ *Ibid.*

⁷²⁵ See part 2.5.1.1.2 of the thesis.

⁷²⁶ C Jalloh "Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa" (2014) 7 *African Journal of Legal Studies* 43.

government from prosecution during their tenure of office.⁷²⁷ Therefore, the ICC will most likely continue to prosecute sitting heads of state in the near future.

Thus the author recommends that the ICC use its discretionary powers to afford the highest possible protection to the sovereignty and proper functioning of the states whose heads are on trial. An example of how this could be carried out relates to the interpretation of the controversial article 63 of the Rome Statute which relates to the presence of the accused person at trial. The Trial Chamber had previously ruled that President Kenyatta and Deputy President Ruto could conditionally be excused from trial except under particular circumstances.⁷²⁸ However, this ruling was reversed in the *Ruto case* by the Appeals Chamber⁷²⁹ leading to reconsideration by the Trial Chamber of a decision earlier made in the *Kenyatta case*. As one commentator notes, “the likely unhappy result has been to set the stage for a showdown between the Court and a member state that is crucial to its work and legitimacy.”⁷³⁰

This author recommends that, in line with the ASP amendments to the Rules of Procedure and Evidence, article 63 and the Rome Statute generally, should be interpreted in a way that allows for the pursuit of justice for the victims without jeopardizing the proper functioning of the nations headed by the accused persons.⁷³¹ Despite the controversy surrounding these ASP amendments,⁷³² the author argues for a wide interpretation that appreciates the difficulties surrounding the prosecution of heads of state; and ensures the cooperation of the concerned states in the interest of international criminal justice.

⁷²⁷ “Coalition For The International Criminal Court Report On The 12th Session Of The Assembly Of States Parties To The Rome Statute” 20-28 November 2013 http://www.iccnw.org/documents/asp12_report.pdf (accessed 21 October 2014).

⁷²⁸ *The Prosecutor V. William Samoei Ruto and Joshua Arap Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777 and *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defense Request for Conditional Excusal from Continuous Presence at Trial, 18 October 2013, ICC-01/09-02/11.

⁷²⁹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 25 October 2013, ICC-01/09-01/11 OA 5.

⁷³⁰ Jalloh 2014 *African Journal of Legal Studies* 52.

⁷³¹ See “Chair’s Compilation of draft Rules 134 bis to 134 quarter” 15 November 2013 <http://columlynch.tumblr.com/post/67491885867/from-the-chair-of-the-icc-assembly-of-state-parties> (accessed 21 October 2014)

⁷³² K Jon Heller “The ASP’s Respect for the Rome Statute” *Opinio Juris* <http://opiniojuris.org/2013/11/27/asps-respect-rome-statute/> (accessed 21 October 2014).

6.3.2 Strengthening the capacity to deal with international crimes in Africa

From the discussions in the thesis, it is clear that both the ICC and the AU are committed to the international criminal justice project on the African continent but disagree on the strategy and priorities. One way in which this tension may be resolved is by strengthening the capacity of individual states, as well as Africa as a region, to deal with international crimes. In relation to individual state's capacity, one of the AU decisions regulating its relationship with the ICC encouraged:

“Member States to initiate programs of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and safety of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies”⁷³³

This followed recommendations given by the AU-EU Expert Report on the Principle of Universal Jurisdiction. This report suggested a similar solution in an attempt to resolve the conflict between the AU and the EU over the alleged abuse of the principle of universal jurisdiction by European States against African personalities.⁷³⁴

The AU, in cooperation with the international community, should follow up on the above decision to ensure that its member states invest resources into drafting the necessary legislations and training law enforcers or otherwise enabling their municipal systems to deal more competently with international crimes. Already some Africa states, for example Kenya, are taking steps such as reforming the judiciary and enacting legislation to ensure prosecution of international crimes and other serious crimes.⁷³⁵ Nevertheless, there are still obstacles faced by such countries for example; lack of political will and judicial independence.⁷³⁶ A concerted effort by the concerned African States, the AU, the civil society as well as other stake holders would help develop the necessary institutional framework to deal with international crimes. This can

⁷³³ Decision On The Meeting Of African States Parties To The Rome Statute Of The International Criminal Court (ICC), 1 – 3 July 2009, Doc. Assembly/AU/13(XIII).

⁷³⁴ AU-EU Expert Report on the Principle of Universal Jurisdiction” 16 April 2009, http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf (accessed 15 October 2014)

⁷³⁵ See “Prosecuting International and Other Serious Crimes in Kenya” *ICTJ Briefing* April 2013 <http://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf> (accessed 21 October 2014)

⁷³⁶ Ibid.

then ensure that African States take advantage of the complementarity principle under the Rome Statute, by showing their willingness and ability to deal with international crimes that occur within their territories.

In relation to strengthening the regional capacity, there should be mobilization of African States to sign and ratify the Amendment Protocol which expands the jurisdiction of ACJHR to deal with international crimes committed in Africa. The implementation of this Protocol will most likely be faced by a myriad of challenges particularly with regard to funding and personnel.⁷³⁷ Nonetheless, it is argued that it is a venture worth investing time and resources in especially because it provides for crimes that are of particular interest to Africa; for example, illicit exploitation of natural resources, piracy and corruption, which are at the moment not dealt with by the ICC.

In this regard, the Amendment Protocol needs to be amended in order to establish a relationship between the new African international crimes chamber and the ICC; should the Amendment Protocol come into force in its present state, there would be an overlap in the jurisdiction of the two Courts, especially with regards to African States Parties to the Rome Statute which may ratify the Amendment Protocol.

One way in which the Amendment Protocol may establish a relationship with the Rome Statute is by excluding African States that are already states parties to the Rome Statute from ratifying the new protocol. This way the African international crimes chamber can provide an avenue to deal with situations that occur in the territories of states that have not submitted themselves to the jurisdiction of the ICC. This could possibly remedy the controversial UNSC referrals where some permanent members, who are not party to the Rome Statute, participate in forcefully subjecting African non-party states to the jurisdiction of the ICC. However, there is no structure in place at the moment that guarantees that dealing with a situation by the African international crimes chamber, would bar the UNSC from referring the same situation to the ICC. This points to the need to have regional courts included in the ICC complementarity regime so that the investigation and/or prosecution of a situation by the African international crimes chamber would render a case inadmissible at the ICC.

⁷³⁷ See M du Plessis “Implications of the AU decision to give the African Court jurisdiction over international crimes” *ISS Paper 235*.

The second possible way would be to let the ICC deal with war crimes, crimes against humanity and genocide so that the African international crimes chamber would dedicate itself to the other eleven (11) crimes it has jurisdiction over.⁷³⁸ This would still leave the new chamber with more than enough situations to prosecute in Africa without the possibility of an overlap between its jurisdiction and that of the ICC. The third possible way would be to refer to the ICC cases concerning persons who ordinarily bear immunity from prosecution, since the new court would have no jurisdiction over such persons by virtue of article 46 A *bis* of the Amendment Protocol. In this way, heads of state and senior leaders who are alleged to have committed international crimes would be prosecuted at the ICC; while other persons who bear responsibility for the crimes and who are not indicted by the ICC may be prosecuted by the African international crimes chamber. However, this is unlikely to be the case since as shown in chapter 5 one of the motivations behind the expansion of the jurisdiction of the ACJHR was the AU's dissatisfaction with the indictment of African heads of state at the ICC.

Whichever the method of cooperation with the ICC is agreed on, it is important that the two courts work together, since ICC is already established and operational and its contribution to international criminal justice in Africa, though very controversial, is vital. The ASP could also participate in this by amending the Rome Statute to explicitly incorporate regional mechanisms, on the Preamble and under article 17 of the Rome Statute, as one of the triggers of the principle of complementarity.⁷³⁹ There is a lot of international crime occurring in Africa and the new international crimes chamber, which offers another avenue for redress, should be encouraged. It is also necessary that the new court collaborates with the ICC especially since more than half of African States are already states parties to the Rome Statute and that both Courts are involved in the international criminal justice project.

6.3.3 Cooperation between the AU and the UNSC in ICC related matters

A comparison of the language used by the AU Peace and Security Council in the 2008 Communiqué⁷⁴⁰ and that used by the Assembly in the October 2013 Decision⁷⁴¹, reveals that the

⁷³⁸ Article 28 A Of The Draft Protocol On Amendments To The Protocol On The Statute Of The African Court Of Justice And Human Rights, Revisions Up To Tuesday 15th May 2012, Exp/Min/Iv/Rev.7

⁷³⁹ C Jalloh "Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa" (2014) 7 *African Journal of Legal Studies* 43.

⁷⁴⁰ Communiqué of the 142nd Meeting of the Peace and Security Council of 21 July 2008 Psc/Min/Comm(CXLII).

AU's discontentment with the ICC is becoming deeper as years go by. For example, on the one hand, the language in the 2008 communiqué was largely diplomatic, and the suggestions therein included the proposal to establish a committee of "distinguished Africans of high integrity" to make recommendations on means of combating impunity and promoting justice and reconciliation in the Sudan.⁷⁴² On the other hand, the subsequent AU decisions in 2009, 2010 and 2013 urged members to refuse cooperation with the ICC; referred to the ICC Prosecutor's comments towards AU concerns as "egregiously unacceptable, rude and condescending",⁷⁴³ and urged President Kenyatta not to attend trial at the ICC until the issues raised by the AU had been dealt with.⁷⁴⁴ In fact, there were claims around the time of the Extraordinary AU Assembly Session held in October 2013, in Addis, Ethiopia that certain African States urged a mass withdrawal from the Rome Statute - which never materialized.⁷⁴⁵

This deterioration in the AU-ICC can be attributed to the perception of the AU that the UNSC and the ICC do not pay attention to its concerns regarding the situations in Africa. One good example is the AU's request for deferral of the *Bashir case* under article 16 of the Rome Statute. The AU has been making this call for more than five years now but the UNSC has not taken any form of action on it. This is despite the fact that the request to defer the cases against the two Kenyan leaders, which came later, has already been acted upon. A decision made by the AU in January 2014 stressed:

"The need for the UN Security Council to reserve a timely and appropriate response to requests made by the AU on deferral in accordance with Article 16 of the Rome Statute under Chapter VII of the UN Charter so as to avoid the sense of lack of consideration of a whole continent."⁷⁴⁶

A statement by the AU that a particular case jeopardizes the peace process in the Darfur region is worthy of consideration particularly because of the role played by the AU in the much

⁷⁴¹ Decision On Africa's Relationship With The International Criminal Court (ICC), 12 October 2013, Ext/Assembly/AU/Dec.1.

⁷⁴² Communiqué of the 142nd Meeting of the Peace and Security Council of 21 July 2008 Psc/Min/Comm (CXLII) para 11.

⁷⁴³ Decision On The Progress Report Of The Commission On The Implementation Of Decision Assembly/AU/Dec.270(XIV) On The Second Ministerial Meeting On The Rome Statute Of The International Criminal Court, 25-27 July 2010, Doc. Assembly/AU/10(XV).

⁷⁴⁴ Decision On Africa's Relationship With The International Criminal Court (ICC), 12 October 2013, Ext/Assembly/AU/Dec.1 para 10.

⁷⁴⁵ See "The Continent Versus the Court: African Union Deliberates Withdrawal from the ICC" *International Business Times* 11 October 2013 <http://www.ibtimes.com/continent-versus-court-african-union-deliberates-withdrawal-icc-1422434> (16 April 2014).

⁷⁴⁶ Decision On The Progress Report Of The Commission On The Implementation Of The Decisions On The International Criminal Court, 30-31 January 2014, Doc. Assembly/AU/13(XXII).

complicated peace process over the years.⁷⁴⁷ The UNSC ought to have taken time to investigate the validity of the claims so as to avoid perceptions of bias which are reinforced by the previous use of article 16 under very controversial circumstances.⁷⁴⁸

However, the AU also has the responsibility to furnish the UNSC with persuasive evidence to demonstrate how deferral as opposed to prosecution would be in the interest of peace in Darfur. This is because the situation in Darfur was referred to the ICC following a recommendation by a Commission on Darfur that stated *inter alia* that “the prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region.”⁷⁴⁹ Following this recommendation, the UNSC referred the Darfur Situation to the ICC. For the UNSC to defer a case arising from such a referral; there is need for the AU to provide evidence of a change of circumstances. It appears that both the UNSC and the AU want justice, peace and reconciliation in Darfur but have different roadmaps to achieving it. Forging a deeper cooperation between these two political organizations would be beneficial to the ICC; especially since they both have important roles to play in relation to prosecution of crimes committed in Africa.

6.4 Conclusion

The thesis set out to examine the position of head of state immunity before international criminal tribunals and its impact on the AU-ICC relationship and international criminal justice in Africa. Despite the recent practice of international criminal tribunals to exclude immunities, prosecution of heads of state at the ICC is at the heart of the deteriorating AU-ICC relationship. The discussion in this thesis revealed the perceptions of double standard as well as the politics that surround the prosecution of heads of state which dilute the quality of justice meted out by the ICC. Tackling these challenges, in the manner that this thesis has suggested may greatly assist in repairing the AU-ICC relationship and at the same time improve international criminal justice on the African continent.

⁷⁴⁷ A Sarjoh Bah “The African Union In Darfur: Understanding The Afro-Arab Response To The Crisis” http://fride.org/download/OP_Responses_arab_world_ENG_feb10.pdf (accessed 17 October 2014).

⁷⁴⁸ See part 4.2.1 of the thesis.

⁷⁴⁹ “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General” 25 January 2005 http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (accessed 20 October 2014)

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