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1.0 Introduction

The existence of the power of immunity to certain state officials and the necessity to repress international crimes is a very important issue to handle. Whereas immunity has played an important role in the international legal order benefactors of this immunity have at times abused same resulting in some cases to the commission of heinous crimes and or international crimes. The kind of protection bestowed on state officials by virtue of immunity and how they use it is raising a lot of eye brows to society and the international community at large. This is because there have been series of abuses emanating unfortunately from state officials who benefit from immunity. Repression of international crimes becomes problematic especially when these crimes are committed by these privileged state officials who enjoy immunity from prosecution. Should these state officials continue to benefit from these privileges even after they have committed international crimes? The objectives of this work is to find out if the immunity of state officials is an obstacle to the repression of international crimes. Customary law allows immunity for heads of state and government and stipulates that a head of state has immunity, which includes personal inviolability, special protection for his or her dignity, immunity from criminal and civil jurisdiction, and from arrest and/or prosecution in a foreign state on charges concerning all crimes, including international crimes. With the occurrence of some types of crimes which international law has now accepted as international crimes, the defense of immunity instituted by national legislation is gradually becoming irrelevant? However, because of the immunity of states, their properties and to a certain extent those of their officials do exist in international law and may be relevant in the implementation of rules leading to the prosecution of state officials. Considering that states (moral persons) act through their officials, can this immunity be assigned to them and to what extent? Coming to international crimes as defined by international law, the same state officials may also be the perpetrators of international crimes with the risk of escaping prosecution because they are shielded by immunity.

1.1. Definition of key words and concepts

In a work that touches on the sensitive issues of immunity and repression of international crimes, it would be impossible to get abreast with the subject matter if certain relevant key words are not defined. Some of the said words/concepts are here below defined.

1.1.1 Immunity

Etymologically, it derives from the latin word *immunitas*, a variant of immunis, which means "the condition of someone being exempted from taxes, or from any charges or duties". In the field of criminal law the word has been found to be linked to the cause of impunity[1]. Historically, it is a heritage that dates back to the absolutist monarchical regimes, where the

[1] G. Cornu/ Association Henri Capitant, *Vocabulaire juridique*, 8th revised edition, Paris, PUF, 2007, p .467

king was the ultimate authority, and as such did not have to respond to anyone about his actions, because he was understood to be parallel to God.

Immunity is any exemption from a duty, liability or service of process, especially, such an exemption granted to a public official or governmental unit[2].Immunity which is an exception to the general rule of accountability can equally be viewed as:

1.1.2 An Official

"One who holds or is invested with a public office, a person elected or appointed to carry out some portion of government's sovereign powers. One authorized to act for a corporation or organization"[3]. Under the Rome Statute, though no definition is given of state official, one may deduce that state officials are those envisaged in its **article 27**captioned irrelevance of official capacity when it states:

"***This statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 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***"[4].

From the above, one can easily discern that an official under the context shall be a Head of state, Head of Government, member of Government or Parliament, an elected representative and a government official.

The International Court of Justice (ICJ) though not directly defining a state official has however given guidelines on who can fall within the state status. It has held that under Customary International Law, certain high ranking people, such as Heads of state[5], Heads of

[2] B. A Garner, Black's Law Dictionary,9th edition, Dallas,2009 p.817

[3]*Ibid* footnote 45

[4]Other relevant enactments include but are not limited to article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, Article 2(3) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 7(2) of the Statute of the International Tribunal for Former Yugoslavia and article 6(2) of the Statute of the International Tribunal for Rwanda.

[5] Doc/CN.4/650 on the 16th committee of ILC debate, cases in which such status has been recognized include: case of Ghaddafi of Libya, Decision No 1414,13 March 201, Cass. Crim.1;president Yudhoyeno of Indonesia, Rechtbanks Gravenhage, *Sector Civiel recht*,377038/KG ZA 10-1220,6 October 2010.

Government[6]and Ministers for Foreign Affairs enjoy immunity while in office. This list seems not exhaustive as the word certain infers.

1.1.3 INTERNATIONAL CRIME

International crime is a crime against international law. A crime against international law is said to occur when three conditions are satisfied namely:

- If there is a violation of criminal norm out of an international treaty and other international customary law which is binding on individuals
- The crime shows the characteristic of a crime that is punishable under the international law
- The treaty establishes a liability for the act done, and this must be binding on majority of countries[7]

Crimes which affect the peace or safety of more than one state or which are so reprehensible in nature as to justify the intervention of international agencies in the investigation and prosecution thereof[8]. It is often used interchangeably with crime against peace or crime against the law of nations each of which is defined below. Crime against peace is an international crime in which the offenders plan, prepare, initiate, or wage a war of aggression or a war in violation of international peace treaties, agreements, or assurances[9]. It is equally defined under crime against the Law of Nations as:

"***A crime punishable under internationally prescribed criminal law defined by an international convention and required to be made punishable under the criminal law of the member states. It is an act that is internationally agreed to be of a criminal nature, such as genocide, piracy, or engaging in the slave trade***[10].

In the context of this research one would consider other horrendous crimes that affect the international world as a whole but focus will be made on the international crimes enshrined in the Rome Statute of the International Criminal Court. Under the said statute the jurisdiction of

[6] Belgian Cour de Cassation, H.S.A et al V. S.A. al, 12 February 2003,ILM 43(2003), 596
[7] https//definitions.uslegal.com consulted on the 21 January 2022
[8]www.duhaime.org
[9]B. A Garner, Black's Law Dictionary,9th edition, Dallas,2009 p. 429
[10]*Ibid*

the International Criminal Court is limited to the most serious crimes of concern to the international community as a whole[11] which are:

The crime of genocide, Crimes against humanity, War crimes, The crime of aggression

1.2.Types of Immunity Enjoyed by those who benefit from it

There are typically two types of immunity one will benefit from as a state official. We have Immunity *ratione materiae* and Immunity *ratione personae*

1.2.1 Immunity Ratione Materiae

Immunity *ratione materiae* or functional immunity is generally conceived as protecting official acts that are carried out on behalf of the State and accordingly are cloaked by sovereign authority. Since State officials, including Heads of State, perform these acts in their official capacity, all these individuals are the beneficiaries of immunity *ratione materiae*.[12] In other words, the decisive element is the act, which has to be official in order to evade foreign scrutiny. To qualify as an official act, two components have to be met: the act must be exercised in pursuance of a certain State policy, in contrast to acts performed purely for the individual's personal benefit, and the act must be carried out using the apparatus of the State.[13]

The Appeals Chamber of the ICTY adopted this rationale in **Prosecutor v. Blaškić**. It stated:

'Such (State) officials (acting in their official capacity) are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity".[14]

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[11] Article 5 of the Rome Statute

[12] See Cassese, "Senior State Officials," 862–863; Kelsen, International Law, 358–359, inter alia, pointing out that the State depends on acts exercised by human beings in order to demonstrate "its legal existence"; Cryer et al., International Criminal Law, 534; Shaw, International Law, 738; Van Alebeek, Immunity, 132–133, who suggests to refer to acts, which were performed as a State official rather than to acts exercised in the capacity of a State official;

[13] Akande and Shah, "Immunities of State Officials," 832; Cassese, "Senior State Officials," 868; Wirth, "Core Crimes," 891; Watts, "Legal Position," 56–57; Gaeta, "Immunities and Genocide," 310–311; cf. International Law Commission [ilc], Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, u.n. Doc. a/cn.4/631 (June 10, 2010) (prepared by Roman Anatolevich Kolodkin) at § 23 and § 27.

[14] Prosecutor v. Blaškić, Case No. it-95-14-ar108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber ii of 18 July 1997 (Oct. 29,1997) at § 38.

This judgement rightly points out that State officials do not personally incur responsibility for acts they have performed in their official capacity on behalf of or as an extended arm of the State since these acts are acts of the state rather than acts of the officials personally.[15] For official conduct contradicting the State's international obligations, these agents escape personal responsibility by hiding behind the veil of the State.[16]

The purpose is not primarily to benefit the State official but to shield an official act that is attributable to the State from foreign scrutiny.[17] However, as these acts are performed by individual officials as instruments of the State, these persons are also protected. The Institute of International Law (IIL) circumscribes the aim of immunity as "to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States".[18]

1.2.2 Immunity Ratione Personae

With regard to Heads of State in office, the pertinent mode of immunity is the immunity *ratione personae*, which is conceptually distinct from immunity *ratione materiae* discussed above. Immunity *ratione personae*, also referred to as personal immunity, forms a classic exemption from jurisdiction attributed to the status of the person. It is only conferred on a restricted circle of high-ranking State officials who are the current holders of the respective offices. Incumbent Heads of State, as the highest-ranking representatives of the State, belong clearly to this circle.[19] As immunity *ratione personae* attaches to the office holder him/herself, it ceases to have effect as soon as the term in office ends. Thereafter the former high ranking State official may only benefit from immunity *ratione materiae* with respect to official acts performed on behalf of the State.[20]

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[15] Van Alebeek, Immunity, 112. See also Lozano v. Italy, Court of Cassation of Italy, 24 July 2008, n. 31171, i.l.d.c. 1085 (it 2008) at 13, holding that once an individual has been conferred the quality of a State organ, his or her conduct is imputable to the State because the acts performed are the expression of official functions.

[16] Cassese, International Law, 112; Van Alebeek, Immunity, 107–112.

[17] Cryer et al., International Criminal Law, 534; Akande and Shah, "Immunities of State Officials," 825; Bantekas, International Criminal Law, 127–128. Contra International Law

[18] Institute of International Law [iil], Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes, Resolution of Napoli Session (2009) (prepared by Lady Fox) at art. ii(1) (emphasis added); see also Broomhall, International Justice, 129; Bantekas, International Criminal Law, 128; cf. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 u.n.t.s. 95, at § 5 of the preamble.

[19] Cassese, "Senior State Officials," 863–864; Akande and Shah, "Immunities of State Officials," 818–819;

[20] Gaeta, "Official Capacity," 977; Cassese, International Law, 119; Shaw, International Law, 738;

Immunity *ratione personae* is an absolute immunity since it covers official as well as private acts.[21] In this regard, Lord Browne-Wilkinson held in the Pinochet case that:

"***this immunity enjoyed by a head of state in power . . . is a complete immunity attaching to the person of the head of state . . . and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state***."[22]

In the Arrest Warrant case, the ICJ went even further by granting "full immunity from criminal jurisdiction and inviolability" to certain high-ranking office holders, which "protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."[23] It concluded that the issuance of an arrest warrant for an incumbent Minister of Foreign Affairs breaches by virtue of its nature and purpose, his or her immunity from jurisdiction and inviolability. The international circulation of the warrant of arrest likewise violates the respective prerogatives provided under international law.[24] In contrast, in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters, the ICJ ruled that the witness summonses addressed to the President of the Republic of Djibouti did not contravene his immunity under international law since they simply represented an invitation to testify without inflicting any measures of constraint. Although the Court found that the disclosure of confidential information concerning the investigation would violate the honour and dignity of a ruler, it did not observe any breach of the inviolability of the Djiboutian Head of State on the part of France due to lack of a verifiable causality.[25] The provision pertinent to the inviolability of Heads of State is mutatis mutandis **article 29 of the Vienna Convention on**

[21] Broomhall, International Justice, 130–131; Wickremasinghe, "Immunities," 381; Wirth, "Core Crimes," 883;
[22] R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3), [1999] ukhl 17, [2000] 1 a.c. 147 at 201–202. See also ibid. at 268–269, per Lord Millett.
[23] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 i.c.j. 3 (Feb. 14) at § 54; see also Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 2008 i.c.j. 177 (June 4) at § 170.
[24] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14) at § 70, § 71 and § 75. See also The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812) at 137, where it is held that the "person of the sovereign" is exempt "from arrest or detention within a foreign territory." Contra Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14), dissenting opinion of Judge Oda at § 13: "it bears stressing that the issuance of an arrest warrant by one State and the international circulation of the warrant through Interpol have no legal impact unless the arrest request is validated by the receiving State. The Congo appears to have failed to grasp that the mere issuance and international circulation of an arrest warrant have little significance. There is even some doubt whether the Court itself properly understood this, particularly as regards a warrant's legal effect. The crucial point in this regard is not the issuance or international circulation of an arrest warrant but the response of the State receiving it."
[25] Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 2008 I.C.J. 177 (June 4) at § 171 and § 173–175 regarding the first summons and § 179–180 concerning the second invitation.

Diplomatic Relations (VCDR),[26] which prescribes that the diplomatic agent in question "shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." According to Denza, inviolability comprises the duty of the host State to refrain from any imposition of sovereign imperatives, especially enforcement measures, on the person in question, to prevent any restriction upon his or her person, freedom or dignity and to treat him or her with due respect.[27] Consequently, the protection granted to Heads of State in office is far-reaching.[28]

In this respect, **article 3(2) of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property** emphasises that the immunity of States from foreign national jurisdiction "is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*." As seen above, immunity *ratione personae* protects its beneficiaries who are physical persons, from foreign jurisdiction with regard to official as well as private acts whereas State immunity only bars proceedings concerning *acta jure imperii* (act by right of dominion) directed against the abstract entity of the State.

1.3. Categories of Persons Benefiting from Immunity from Prosecution under International Criminal Law (ICL)

[26] Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 2008 I.C.J. 177 (June 4) at § 174.

[27] Denza, Diplomatic Law, 258; see also Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 2008 I.C.J. 177 (June 4), separate opinion of Judge Koroma at § 13; J.A.M. v. Public Prosecutor, Hoge Raad der Nederlanden [hr] [Supreme Court of the Netherlands], 21 January 1969, 73 I.L.R. 387, where the appellant was found guilty for "insult of a reigning Sovereign or the Head of State of a friendly State" due to the display of a placard showing the slogan 'Johnson War Criminal'. But see Aziz v. Aziz, [2007] EWCA Civ 712, [2008] 2 All ER 501 at § 91, where Lord Justice Lawrence Collins concluded in a case concerning the Sultan of Brunei that there existed no "rule of customary international law which imposes an obligation on a State to take appropriate steps to prevent conduct by individuals which is simply offensive or insulting to a foreign head of state abroad." Cf. Watts, "Heads of State," § 13.

[28] Broomhall, International Justice, 130, who equates immunity with inviolability and maintains that inviolability is "the highest and most impervious form of immunity." Accord. Zappalà, "Heads of State in Office," 599; Wood, "Immunity of Official Visitors," 45; Frulli, "Immunities," 368, arguing that immunity ratione personae includes inviolability;
R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3), [1999] UKHL 17, [2000] 1 A.C. 147 at 269, per Lord Millett, who holds that an incumbent Head of State is inviolable for which reason he or she cannot be arrested or detained;

In international law, there are a number of persons who benefit from immunity and it is incumbent on them to use these privileges judiciously in order to continue to benefit from the protection of the law. Some of the state officials enjoying immunity are seen below.

1.3.1 Head of State

It is trite that once we are making reference to state officials, the first person who comes to mind is the Head of state. From time immemorial they enjoy absolute immunity from foreign jurisdiction[29] and certain criminal acts. Here, we have sitting head of state and former heads of State.

1.3.2 Siting or Acting Head of State

This form of immunity grants the official full immunity without exception, under customary international law, from any form of foreign jurisdiction. The main objective is to protect and maintain the international relations of the State leader which will be endangered if they were to be subjected to criminal jurisdiction[30].

The Head of state is the highest personality in a state. This position is usually elective in democratic states[31] or gotten through inheritance under monarchy[32].Given this important position held by this authority, he is seen as the embodiment of sovereignty and so cannot be easily be amenable before domestic or foreign courts. The case in most African countries is glaring as they are seen as untouchables, natural rulers and they head all sensitive and strategic services[33]. In England for example when King Charles was brought before the High Court of Justice to answer charges of war crimes inflicted on the civilian populations by his soldiers, it was a total embarrassment to him and he had this to say when he challenged the competence of those who were charged to judge him:

" I would like to know by what power I am called hither…by what authority, I mean, lawful…and when I know what lawful authority, I shall answer: Remember I am your king,

[29]R.V Alebeek,*the immunity of states and their officials in international criminal law and international human rights law*, Oxford (2008)

[30] F. Sweep, the extent of applicability of Head of State immunity ratione personae, Thesis submitted in the University of Tilburg (October 2013)

[31] The United States of America is an example of such a state wherein the Head of state is chosen through democratic elections.

[32] Morocco is an African state wherein monarchy is still practiced. The king is not chosen through democratic elections but inherits the predecessor.

[33] In Cameroon, the Head of State is the commander in chief of the armed forces, Head of the executive, President of the judicial council and guarantor of the independence of the judiciary power. Under the constitution the various arms of government are termed powers but it is paradoxical that it is the Head of state who guarantees the independence of another power.

your lawful King, and what sins you bring upon your heads, and the judgment of God upon this land, think well upon it…i shall not betray my trust. I have a trust committed to me by God, by old and lawful descent, I will not betray it to answer a new unlawful authority, therefore resolve me that, and you shall hear more of me…Let me see as a legal authority warranted by the word of God, the scriptures, or warranted by the constitutions of the Kingdom, and I will answer"[34]

The Prosecute or Extradite Case is an excellent example of how, in line with Lord Goff's opinion, international law regulated the immunities of former heads of state. The case started when a complaint was filed against the former head of state of Chad, Hissene Habré, with a Belgian investigating judge for inter alia crimes of torture. After assuring the Belgian courts had jurisdiction over the crimes complained of, the judge wrote to the Government of Chad, asking whether Mr Habré enjoyed any immunities as a former head of state. In response, the Minister of Justice of Chad stated that all immunities from legal process for Mr Habré had officially been lifted. Only after these assurances were received, was an international arrest warrant (in abstentia) issued by the Belgian judge[35]. This clearly shows that had the Chadian government answered in the negative, the Belgian Court would not have issued any warrant of arrest against the Chadian former President. Though the House of Lords decision ordering extradition of Pinochet received acclamation, with time this enthusiasm died out gradually and the dissenting judgment of Lord Goff began to make sense.

while relevant international immunity law norms generally prohibit criminal prosecutions by domestic jurisdictions against foreign sitting heads of state and other senior government officials, they allow such suits against former leaders and officials in certain circumstances. Moreover, these same norms permit prosecutions against both sitting and former heads of state and officials if these prosecutions are commenced by international criminal tribunals (e.g., the ongoing International Criminal Court proceeding against President Omar Al-Bashir of Sudan). Significantly, the recent US Supreme Court case United States v. Samantar significantly changed the related doctrine of foreign official immunity in the United States. Samantar essentially removed statutory analysis of foreign official immunity through the Foreign

[34] These are the words of King Charles I of England when he appeared for the first time before the Court in 1646 quoted in Laughland J, (2008*) A history of Political Trials: From Charles I to Saddam Hussein* Peter Lang Ltd:Oxford,22

[35] D.M Grutters, Lord Goff minority judgment in Pinochet No (3), 2015

Sovereign Immunity Act ("FSIA") and ostensibly replaced it with traditional common law analysis. In light of this radical shift in the foreign official immunity inquiry, this write up suggests an analytical approach that US courts may draw upon in the aftermath of Samantar. Such an approach, reflecting a "totality of circumstances" analysis, combines certain aspects of the existing common law analysis from the head-of-state context with particular approaches used by courts in the official immunity context under the FSIA[36].

The French Supreme Court held that international customary law prohibits the exercise of criminal jurisdiction over foreign Heads of states in office[37]

Heads of state differ from each other depending on the power they incarnate or the position and state they find themselves. Once elected and having not taken over office they enjoy commensurate immunity and while in office and thereafter this immunity dwindles as they move from one stage to the other. Where there is a vacancy at the helm of the state and elections are carried out but the winner of the elections has not yet taken the oath of office can such an individual enjoy same prerogatives of a sitting president?

1.3.3 Former Head of State

The case is somehow not very clear. While in some cases they are granted immunity in others they are not. This is undisputedly due to the fact that politics has a role to play in the decision making. The US court refused the former Panaman President, Manuel Noriega immunity as she did not consider him a president even when he was in office[38].This case was moreover aggravated by the fact that the former President was accused of being involved in the commercialization of drugs and narcotics which could not form part of official duties. There is no general consensus as even the United States of America still gives contradictory decisions on the issue of Head of states immunity. One is inclined to believing that most of the decisions emanating from the US on this issue are politically motivated. Contrasting the case of ***Lafontant V. Aristide*** with that of ***Noriega*** afore-cited, one would conclude that the US Courts have not found a common ground on decision making as far as this field is concerned. In the former case, the Eastern District of New York held that Jean Bertrand Aristide a former overthrown Haitian

[36] Christopher D. Totten, Head of State and Foreign Official immunity in the United States of America After Samantar: A suggested Approach, Fordham International Law Journal Vol; 34 (2011)

[37]Arret of the Cour de Cassation , 13 March 2001, No 1414 at 1, President Ghaddafi charged with acts of terrorism where it was held: la coutume international s'oppose a ce que les Chefs d'Etats en exercise puissant, en l'absence de dispositions internationals contraires s'imposant aux parties concernees, faire l'objet de poursuites devant les juridictions penales d'un etat etranger

[38]United States V. Noriega 1506 (S.D. Fla. 1990)

President was entitled to absolute immunity[39]. The US while advocating for immunity for the deposed President, based its pleadings on what it called 'United States' foreign policy interests'[40]

1.3.4 Other States Officials Benefiting from Immunity under the ICL

Customary law on head of State immunity regulates the interstate relations, therefore focusing only on the immunity before foreign courts, since it is always allowed for the home State to prosecute their own leader. Before these foreign courts, immunity ratione personae is rigidly upheld, as can be drawn from the DRC v Belgium case: there is only one circumstance that would allow for a foreign court to be allowed to prosecute an incumbent State leader of a different State, and that is when the home State of this leader waives the immunity of their leader. Under no other circumstances than these is a foreign court allowed to prosecute a sitting head of State. This includes issuing the warrant for its arrest.

In the case of the DRC v Belgium, this strict application of this form of immunity can be deducted. In addition, the ICJ goes as far as enlarging the scope of immunity to the extent where it includes the Minister of Foreign Affairs.

In the case of activities performed by a high-ranking state official on his or her territory, a right for foreign courts to exercise their criminal jurisdiction is highly unlikely. Even if jurisdiction were established, the forum state may not be able to hold in absentia trials though sentencing *par contumace* is very alive in French colonies. There may be other rules preventing the exercise of criminal jurisdiction, such as the act of state doctrine or forum *non convenient*. is not related to the existence of a customary rule on functional immunity of state officials from foreign jurisdiction[41].

[39] *Lafontant V. Aristide* 128(E.D.N.Y. 1994)

[40] *ibid*

[41] Micaela Frulli, *On the existence of a customary rule granting functional immunity to state officials and its exceptions: Back to square one.* Duke Journal of comparative and international law (2016), vol.26, p 487

1.3.5 State Officials on Diplomatic Missions

Consular officers are covered by immunity arising mostly from bilateral agreements[42] whose clauses are focused only on acts[43] performed in the exercise of consular functions.[44]It is submitted that the question as to who decides the official nature of acts has not been settled. The debate is ongoing because it looks at times very difficult to draw the line between acts that are done in an official capacity and those done in the private capacity. Be it as it may, more precise instruments have been enacted which are on the path of settling the issue.

The Vienna Convention on Consular Relations states:

'***Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions***[45]

Failing to act within the ambit of consular limits may therefore expose the official as was the case in Rissman[46]. The consular officer for Germany in Italy, Mr. Rissman issued a passport to a minor to leave Germany accompanied by a parent against whom custody was not granted. Commenting on this unwholesome conduct of the Consular officer, it was said[47]:

'the consul who assists a minor without respecting the laws of the receiving state acts outside the limits of his proper functions and his action cannot be covered by functional immunity.

There are other important state officials namely the parliamentarians and officials appointed in international Non-Governmental Organizations (NGO) whose scope falls outside the province of this thesis.

1.4 The position of the Rome Statute with regards to immunity

[42] Article 13 of the Anglo-Italian Convention of 1954 and the American Consular Convention of 1928

[43]The said article 13 is instructive: "A consular officer or employee shall not be liable, in proceedings in the courts of the receiving state, in respect of acts performed in his official capacity, falling within the functions of a consular officer under international law as recognised in the territory, unless the sending state requests or assents to the proceedings through its diplomatic representative."

[44]footnote18

[45]Article 43

[46]Cited by Micaela footnote 116, Re Rissman, Tribunal di Genova, 6 Maggio 1970

[47]Scholar known as Condorelli commenting on the judgment

For a state to be able to carry out its missions effectively it must give physical persons some attributes which go with protection. When some special status is accorded these persons, it is important a law be put in place to govern the status of such persons. If there aren't laws to regulate their activities, we might not know where to protect them and where not to. The Rome Statute is one of the fundamental international legal instrument that has addressed the issue of immunity. In arriving at the conclusion that al-Bashir's head of state immunity could not apply before the Court, the Pre-Trial Chamber considered and applied the explicit prohibition of immunities that appears in article 27(2) of the Rome Statute.[48] This provision states that international or domestic immunities or special procedural rules will not prevent the Court from exercising jurisdiction over any person. In one respect, article 27(2) effectively operates as a waiver of an official's immunity by the state party to the Rome Statute and satisfies the second exception to the absolute immunity normally enjoyed by serving heads of state as articulated by the International Court of Justice in the Arrest Warrant case. Such a waiver is precisely the manner in which Laurent Gbagbo's immunity has been effectively revoked before the ICC. Unlike the situations of Libya and Sudan, the ICC does not rely on the authority of the Security Council to exercise jurisdiction in relation to the conflict in Côte d'Ivoire. Although not a state party to the ICC, Côte d'Ivoire has explicitly accepted the jurisdiction of the ICC on two occasions,[49] a state of affairs that is contemplated by article 12(3) of the Rome Statute. The effect of this acceptance of the Court's jurisdiction is to render the provisions of article 27(2) applicable to Gbagbo and, therefore, waive the immunity he would normally enjoy under

[48] See above n 22. Rome Statute art 27 is distinguished from its correspondents in the Statutes of the ICTR, ICTY and Special Court for Sierra Leone in that it resolves to render both official capacity (art 27(1)) and immunities (art 27(2)) irrelevant before the Court. However, this provision must be read in accordance with article 98(1) of the Rome Statute. The appearance of this particular

[49] Declaration Accepting the Jurisdiction of the International Criminal Court (Republic of Côte d'Ivoire) Minister for Foreign Affairs, 18 April 2003 <http://www.icc-cpi.int/NR/rdonlyres/9CFE32D1-2FCB-4EB4-ACA0-81C2343C5ECA/
279844/ICDEENG7.pdf>. See aslo Confirmation de la Déclaration de Reconnaissance [Confirmation of the Declaration of Recognition] (Republic of Côte d'Ivoire) President of the Republic of Côte d'Ivoire, 14 December 2010 <http://icc-cpi.int/NR/rdonlyres/
498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>.21 January 2022

customary international law.[50] In fact it is this waiver that permitted the court to hear and determine the said case[51].

It has been argued that article 27(2) merely restates the already existing principle of customary international law, that no official immunities may be enforced before an international criminal court.[52] Accordingly, Gbagbo's head of state immunity has been abrogated by operation of articles 12(3) and 27(2) of the Rome Statute. However, this provision must be read in accordance with article 98(1) of the Rome Statute. The appearance of this particular article sheds light on the apparently wholesale prohibition of official immunities before the ICC. It reads:

'***The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international* law with respect to the State or diplomatic immunity of a person or property of a third State'**.[53]

There is a clear problem with the reconciliation of these two seemingly contradictory provisions.[54]

If official immunities are intended to be inapplicable before the Court, then why should such immunities be considered and respected in the course of requests for surrender of defendants? If all states parties to whom requests for surrender are directed were permitted to avoid compliance with such requests because of official immunities accruing to the accused

[50] Note that according to the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 35, a treaty can create legal obligations for a state not party to a treaty if that state accepts that obligations in writing. For further commentary on the effect of the waiver of immunities embodied in Rome Statute art 27(2), see Sarah Williams et al, '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, 77–8.

[51] The charges preferred against the accused could not be sustained by the prosecution wherefore he gained his freedom and is now enjoying his civic and political rights in his home country.

[52] Paola. G., (2009) 'Does President Al Bashir Enjoy Immunity from Arrest?' 7 Journal of International Criminal Justice p.315.

[53] Art 98(1) of the Rome Statute

[54] It is important to note that some of the ambiguity in applying these provisions in tandem may have resulted from the drafting history of article 98, which was proposed and negotiated in the final stages of the Rome Conference by a completely different working group to article 27. See Per Saland, 'International Criminal Law Principles' in Roy Lee (ed), The International Criminal Court: The Making of the Rome Statute (Kluwer Law International, 1999) 202; Otto Triffiter (ed), Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article (Beck/Hart, 1999) 501–14; William Schabas, An Introduction to the International Criminal Court (Cambridge University Press, 3rd ed, 2007), 231.

individual, then any defendant who enjoys such immunity would never be able to appear before the Court. Such a bizarre result would render the inclusion of article 27(2) meaningless.[55]

It has been suggested by a number of commentators that to operate effectively in coordination with article 27(2), article 98(1) must only apply to requests for surrender of suspects from non-states parties to the Rome Statute.[56]

This proposal is confirmed by the reference in article 98(1) to a 'third state'. The use of this term suggests that the drafters must have contemplated a State outside the framework of the Rome Statute,[57] as the law of treaties dictates that the expression 'third party' is usually used to refer to States not party to the relevant treaty.[58] Such an interpretation would allow both articles 27 and 98 to operate by effectively disregarding immunities that accrue to officials from states parties, but allowing states to respect the immunities enjoyed by individuals from non-states parties.[59]

This formulation raises the question of official immunities and their potential application before the ICC. It may be argued that immunities in this case would not be applicable before the Court as they would only be relevant in relation to the surrender of individuals and not to their prosecution per se. However, in this instance the immunity under consideration would not be of the domestically applicable variety, such as that which would prevent a court from exercising domestic jurisdiction. In effect, when an ICC state party is requested to deliver a suspect from a non-state party to the Court, it would be required under customary international law and

[55] It is important to recall that the ICC does not have the power to try defendants in absentia, as per Rome Statute art 63, and as such the delivery of suspects to the Court is essential for the effective exercise of jurisdiction. Moreover, as the Rome Statute is a treaty, the rules of treaty interpretation and, in particular, the maxim of effectiveness (ut ret magis valeat quam pereat) would apply to demand both articles are interpreted in such a way as to render them operative.

[56] Bruce. B., (2003) International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford University Press, 145; Steffen Wirth, 'Immunities, Related Problems and Article 98 of the Rome Statute' (2001) 12 Criminal Law Forum 429, 452–4.

[57] On the application of Article 98(1) to officials of non-states parties, see Broomhall, above n 39, 145; Akande, above n 16, 64, in which the author also refers to the domestic legislation of a variety of ICC states parties that confirms the immunity of officials from non-states parties unless that immunity is waived by the state concerned.

[58] See Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 34–38.

[59] Considering the position of Sudan as a non-state party to the Rome Statute, the application of article 98(1) is central to the ability of states to legitimately avoid surrendering al-Bashir to the Court and will be analysed in greater detail in Part III C of this article.

permitted under article 98(1) of the Rome Statute to give domestic effect to an official immunity that may be enjoyed before an international criminal court.[60]

It is, therefore, suggested that according to the dual operation of articles 27 and 98 of the Rome Statute in respect of requests for surrender of individuals from non-states parties, official (and, thus, head of state) immunities in relation to the international jurisdiction of the ICC will be the subject of consideration. Although it occurs in a somewhat disjointed manner, this argument proposes that official immunities can operate in relation to prosecutions before the ICC as they are implicitly preserved in relation to non-states parties such as Sudan and Libya by the appearance of article 98(1) in the Rome Statute

1.5 Examples of Immunities before International Courts and Tribunals

The argument that official immunities cannot be raised before any international court has also been discussed in the jurisprudence of various hybrid and other international tribunals. This issue came before the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of *Prosecutor v Slobodan Milosevic*. In the course of proceedings, amici curiae (friend of the court) argued that the Tribunal lacked the competence to try Milosevic by reason of his status as President and that that Court's Statute article 7 of which prevents the defendant's official position from relieving such person of criminal responsibility[61] could not overrule governing principles of customary international law according him head of state immunity.[62] The Trial Chamber dismissed this argument, suggesting that article 7 of the Statute reflected a rule of customary international law.[63] As evidence of this proposition, the Chamber cited the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind and its corollary, the Rome Statute of the ICC, both of which preclude the application of official immunities.[64] The analysis of the ICTY Trial Chamber in this respect is not

[60] Dapo Akande has argued that the removal of immunity in the Rome Statute art 27 will also be applicable at the domestic level, with particular reference to the national implementing legislation of states parties to the Rome Statute, which in a number of cases removes official immunities in relation to a request for surrender issued by the
ICC. See Akande, above n 1, 338–9.

[61] SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) ('ICTY Statute') art 7(2); SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annex ('ICTR Statute') art 6(2).

[62] Prosecutor v Slobodan Milosevic (Decision on Preliminary Motions) (ICTY, Trial Chamber, Case No ICTY-IT-02-54, 8 November 2001) [27].

[63] Ibid [28].

[64] See 'Draft Code of Crimes against the Peace and Security of Mankind' (1996) 2 Yearbook of the International Law Commission Pt 2 ('ILC Draft Code 1996'); Rome Statute art 27.

particularly convincing. The recent examples of the International Law Commission (ILC) Draft Code and the Rome Statute certainly constitute important advancements in international criminal law. However, it does not necessarily follow that these instruments offer evidence of state practice to the extent that a customary rule removing official immunities before international courts has been established.

In its analysis, the Chamber also referred to the Charters of the International Military Tribunal (IMT) for Nuremberg and the Far East (IMT Charters), which explicitly disallowed the argument of official immunities, as evidence of this rule of customary international law. Moreover, the omissions of the IMT Tokyo Charter are particularly relevant for prosecutions of heads of state. Although that Tribunal exempted accused individuals from arguing state immunity, it curiously preserved the head of state immunity enjoyed by the Emperor of Japan.[65]

Although, in this author's opinion, the status of the IMTs as international courts seems doubtful, if their practice can be utilized as evidence of a removal of official immunities before international courts and tribunals, it is argued that such practice, coupled with the relatively modest and very recent State adherence to the Rome Statute, does not suffice to establish a rule of customary international law that precludes the application of head of state immunity in all international prosecutions. However important the Rome Statute has proven for the development of international criminal prosecutions and for the ascription of responsibility to high-ranking officials for international crimes, the ICTY Trial Chamber was misguided in trying to assert a customary rule to that effect.[66]

There are other examples in the jurisprudence of the ICTY that contradict the notion that international law immunities cannot survive before international courts. In *Prosecutor v Blaškić* the ICTY considered the application of official immunities *ratione materiae* in relation to the production of documents before the Tribunal. In this instance, the Chamber acknowledged that although the rule assigning immunity to state officials was intended to apply to relations

[65] On the absence of head of state immunity in the jurisprudence of the Tokyo Tribunal and its relevance for the ICC, see Kerry Creque O'Neill, 'A New Customary Law of Head of State Immunity?: Hirohito and Pinochet' (2002) 38 Stanford Journal of International Law 289; Michael Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position' (2001) 64 Law and Contemporary Problems 67, 103–6; Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 Journal of International Criminal Justice 618, 627–8; Akande, above n 27, 417.

[66] For further criticism of the ICTY's attempts to establish such a rule of customary international law, see Nouwen, above n 24, 645, 664–66.

between States inter se, it must also be taken into account, and indeed it has always been respected, by international organizations as well as international courts.[67]

The case of *Prosecutor v Charles Taylor* before the Special Court for Sierra Leone (SCSL or 'Special Court') provides some more guidance on the issue of personal immunities before international courts. Unlike the ad hoc tribunals, the Special Court's founding statute does not reside in an explicit resolution of the Security Council. While there was certainly considerable Security Council activity surrounding the conflict in Sierra Leone,[68] which included the endorsement of some form of judicial body,[69] the Security Council did not establish the Court itself.[70] This came about through an agreement between the UN and the Government of Sierra Leone,[71] and is why the Special Court is often referred to as a 'hybrid' tribunal.[72] These peculiarities are most relevant when determining whether customary immunities can survive before the Special Court, considering that, like the ad hoc tribunals and the ICC, they are explicitly prevented from applying under its Statute.[73] This matter came before the Special Court when it was asked to consider Liberian President Charles Taylor's head of state immunity for crimes allegedly committed during the conflict.[74]

First, the Court determined that because the Security Council authorised the conclusion of the agreement between the UN and the Government of Sierra Leone, the agreement (and, therefore,

[67] Ibid [41]. For a commentary on the Blaškić decision and on the issue of whether international tribunals are empowered to issue binding orders to state officials, see Micaela Friulli, 'Jurisdiction Ratione Personae' in Antonio Cassese et al (eds), The Rome Statute of the International Criminal Court: A Commentary (Oxford University Press, vol I, 2002), 537–8.

[68] See, eg, Resolution on the Situation in Sierra Leone, SC Res 1315, UN SCOR, 55th sess, 4186th Meeting, UN Doc S/Res/1315 (14 August 2000) ('Resolution 1315'), referring to Sierra Leone as a threat to international peace and security.

[69] Resolution on the Situation in Sierra Leone, SC Res 1400, UN SCOR, 57th sess, 4500th Meeting, UN Doc S/Res/1400 (28 March 2002), noting that the Council 'welcomed the establishment' of the SCSL.

[70] Note, however, that the Security Council did authorise the UN Secretary-General to negotiate the agreement that resulted in the establishment of the Special Court: Resolution 1315. See also Deen-Racsmány, above n 17, 307.

[71] See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed 16 January 2002, 2178 UTS 137 (entered into force 12 April 2002) annex ('Statute of the Special Court for Sierra Leone').

[72] Other prominent examples of such hybrid tribunals include the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and East Timor Special Panels. On the development of these bodies generally, see Daphna Shraga, 'Politics and Justice: The Role of the Security Council' in Cassese, above n 13, 168–74.

[73] Statute of the Special Court for Sierra Leone art 6(2), which states: 'The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[74] Prosecutor v Charles Taylor (Case No SCSL-2003-01-I, 31 May 2004).

the Statute) was thus an agreement between all members of the UN and Sierra Leone. According to the Chamber, this inference of a multilateral consensus effectively elevated the Court to international status, therefore complying with the exception to personal immunities in the Arrest Warrant case.[75]

Second, in adopting a similar line of reasoning to the Trial Chamber of the ICTY, the Court recognised a customary principle that heads of state can never be immune from prosecution before international tribunals.[76] Clearly, the foundations of the Special Court for Sierra Leone question the definition of an 'international court' and are instructive of the legitimacy of judicial apparatus formulated by the Security Council. In many respects, the Special Court's analysis oversimplified this process.

For tribunals that are explicitly created by resolutions of the Security Council (such as the ad hoc tribunals), the authoritative removal of official immunities is clearly made out due to the near universal membership of the UN and the binding nature of chapter VII resolutions of the Council.

1.6 Cases Suggesting a Strong Reluctance to Prosecute Foreign State Officials

In **Ferrini v Germany**, a civil case concerned with the immunity of the state itself, the Italian Court of Cassation stated that, in its view, it was 'undisputed' that state officials do not enjoy functional immunity in respect of crimes under international law. As noted above, the case is currently the subject of an application to the ICJ by Germany alleging that Italy has violated its entitlement to state immunity,[77] and it is possible that the court will consider this aspect of functional immunity in its judgment and provide some further clarification. However, matters may be complicated by the fact that the international crimes alleged in Ferrini occurred, at least in part, in the territory of the forum state and many years ago.

A recent development in the United Kingdom is the reliance by courts and the government on the view that immunity for persons engaged on a 'special mission' has become a part of customary international law. On 6 October 2011 the Director of Public Prosecutions (DPP) refused to agree to the issue of an arrest warrant for alleged war crimes against Tzipi Livni, the Israeli opposition leader, who was visiting London. The DPP relied on a certificate issued under

[75] Ibid [38].
[76] Ibid [46]–[53].
[77] See Germany v Italy, pending before the ICJ.

the authority of the foreign secretary stating that the Foreign and Commonwealth Office had consented to her visit to the United Kingdom as a 'special mission'. Special mission immunity constitutes full personal immunity and, as discussed above, it accordingly does not allow any exception for prosecutions for international crimes.

1.7 Crimes committed in the country of the foreign court (the forum state)

The increasing focus on state practice in the area of criminal prosecution of foreign state officials has highlighted another possible exception to functional immunity.[78] This recalls the circumstances referred to by Lord Millet in the Pinochet case, when he dealt with the charge of conspiracy to murder allegedly committed in the territory of the requesting state, Spain, and commented, 'The plea of immunity *ratione materiae* is not available in respect of an offence committed in the forum state.' He did not elaborate further and it is clear that the majority were of the view that Pinochet was entitled to immunity for 'ordinary' crimes carried out in his official capacity, even if committed on Spanish territory. However, a study of state practice has revealed that, in the few cases recorded involving such crimes,[79] states have usually been prepared to arrest and/or prosecute the foreign state officials concerned even where such offences have been committed in an official capacity. Conversely, the home states of the officials concerned tend to refrain from claiming any immunity on their behalf.[80]

In 2009, an Italian court convicted 23 CIA agents on charges of kidnapping for their participation in the extraordinary rendition of a suspected terrorist, Abu Omar, who was abducted in Milan and flown to Cairo where he was allegedly tortured. Among the defendants, who were all tried in absentia, was a former head of the CIA station in Milan who had been a US consul. The precise rationale of the decision is unclear, although in the earlier Blaskic case,

[78] Although the ILC's Special Rapporteur has characterized it as more of an 'absence of immunity' rather than an exception, stating, 'A situation where criminal jurisdiction is exercised by a state in whose territory an alleged crime has taken place, and this state has not given its consent to the exercise in its territory of the activity which led to the crime, and to the presence in its territory of the foreign official who committed this alleged crime stands alone in this regard.' See Roman Kolodkin, Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc A/CN.4/646, 24 May 2011.

[79] State practice on this point appears to be scant. See ILC, Immunity of State Officials from Foreign Criminal Jurisdiction, para 162.

[80] See the Rainbow Warrior incident where a New Zealand court convicted two French agents of manslaughter and wilful damage for their part in sinking a Greenpeace vessel in New Zealand. The judge noted that the defendants had acted under orders but stated that this was not a matter on which he would place any great weight (R v Mafart and Prieur 74 ILR 241). France did not raise any issue of immunity at the trial stage but later argued that the defendants' detention in a New Zealand prison was inappropriate 'taking into account in particular the fact that they acted under military orders and that France [was] ready to give an apology and to pay compensation to New Zealand for the damage suffered'. See Ruling of UN Secretary General of 6 July 1986 in UN Reports of International Arbitration Awards Vol. XIX, p. 213.

the Appeals Chamber of the ICTY had alluded briefly to its view that spies, although acting as organs of a state, could be held personally accountable for their wrongdoing. In the oral pleadings before the ICJ in Djibouti v France, counsel for Djibouti also made the point (which was not directly relevant to the case) that exceptions to the principle of functional immunity existed in the event of war crimes and acts of espionage and sabotage carried out in the territory of a foreign state.

More recently, Khurts Bat, the secretary of the executive office of the Mongolian National Security Office, was arrested in London pursuant to a European arrest warrant issued by a German federal court. He faced charges relating to the kidnapping of a Mongolian national in France who was then forcibly transported to Berlin, seriously ill-treated, drugged and flown abroad using a diplomatic passport. The acts were alleged to be part of a plan by the Mongolian secret service, and at the time the defendant was working at the Mongolian Embassy in Budapest.[81] His claims of personal immunity as a member of a special mission and as a high-ranking state official were rejected by the district judge, and he then appealed on both points to the divisional court, adding at a late stage a further claim for functional immunity based upon the fact that the acts alleged were official acts of Mongolia. The divisional court affirmed the judgment of the lower court on the first two points and also rejected the additional claim for functional immunity, holding that customary international law does not afford such immunity in relation to official acts performed in the territory of the forum state in circumstances where that state has not given its consent to the presence of the foreign official and his presence is unknown.[82]

The precise parameters of the exception for crimes committed in the territory of the forum state are not entirely clear. There may be an argument, for example, that the exception applies only in the case of spies.[83] The Special Rapporteur's Second Report on the 'Immunity of state Officials from Foreign Criminal Jurisdiction' notes the fact that a crucial consideration is 'whether or not the territorial state has consented to the discharge in its territory of official functions by a foreign state organ' and that consent to the presence of the foreign official may

[81] Foakes, J., (2011) Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts available at www.chathamhouse.org, accessed on 17/1/2022 at 7:05 am

[82] See Khurts Bat v Investigating Judge of the German Federal Court and others. The official was returned to Germany, freed, and apparently re-employed in Mongolia.

[83] See for example McElhinney v Williams and Her Majesty's Secretary of State for Northern Ireland [1995] 104 ILR 691, although this was a civil case.

also be important. The Special Rapporteur concludes: 'If a state did not give its consent to the presence of a foreign official and his activity, which led to the commission of a criminally punishable act, in its territory, there would appear to be sufficient grounds for assuming that the official does not enjoy immunity *ratione materiae* from the jurisdiction of that state.' The classic examples given are espionage, acts of sabotage and kidnapping, but presumably international crimes such as torture or war crimes could also fall within the exception.

1.7 The rigour of Immunity watered down by the Security Council

Notwithstanding the international recognition of the ICC, the power of referral of certain cases[84] by the Security Council to it has aroused so much debate. The removal of official immunities that appears in article 27 of the Rome Statute is, in certain respects, frustrating as the Statute has not yet received universal acceptance among States.

In relation to other international tribunals such as the ICTY, whose governing Statute is found in a resolution of the Security Council, the absence of a customary rule precluding the application of official immunities in international proceedings does not defeat the Tribunal's ability to establish jurisdiction over senior officials and heads of state. As the ICTY Statute forms part of a Security Council Resolution, it creates obligations for all members of the UN. Moreover, because in their creation of the ICTY the Security Council was acting under chapter VII of the UN Charter — responding to a 'threat to international peace and security'[85] — the effect of this Resolution (and of the ICTY Statute) is such that it becomes binding on all members of the UN and will therefore prevail over States' obligations under customary international law.[86] Thus, as the ICTY Statute stipulates that official capacity cannot apply to excuse criminal conduct; this, of itself, would appear to override customary head of state immunity before the Tribunal.[87] This is not the case, however, with the ICC, which is created by treaty.

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[84] The referral of the situations in Darfur and Libya by the Security Council is looked upon as meant to operate against the enjoyment of immunity enjoyed by their Heads of state. (Al-Bashir and Gaddafi)

[85] See SC Res 827, UN SCOR, sess 48th, 3217th mtg, UN Doc S/RES/827 (25 May 1993) preambular paragraphs.

[86] Charter of the United Nations art 25 ('UN Charter'). For commentary on the binding character of chapter VII Resolutions, see Bruno Simma (ed), The Charter of the United Nations: A Commentary (Oxford University Press, 1994) 605–36. See also Akande, above n 27, 417.

[87] For further analysis on the Security Council's withdrawal of immunity in the case of the ICTY, see Schabas, above n 37, 232.

According to the Vienna Convention on the Law of Treaties, treaty provisions cannot create obligations for third States without their consent.[88] Therefore, as Sudan and Libya are not parties to the Rome Statute and have not, thus far, consented to the jurisdiction of the ICC, the Court would rely on the Security Council Referrals to exercise jurisdiction over Syrian or Libyan defendants. Accordingly, the decision of the Pre-Trial Chamber in Prosecutor V. Al-Bashir made the necessary connection between the referral and the establishment of jurisdiction, inferring that the Security Council intended to enforce the terms of the Rome Statute against Sudan.[89] The Chamber did not, however, offer a detailed inspection of the wording of the Security Council Resolution and the nature and extent of the obligations it creates for both Sudan and Sudanese nationals. It is argued that, upon proper inspection, Resolutions 1593 and 1970 do not properly establish personal jurisdiction over Al-Bashir and Gaddafi, as to do so they would need to explicitly remove their head of state immunity.

1.8 The repression of international crimes

The Creation of the International Criminal Court is underpinned by the 'Rule of Law and meant to ensure that perpetrators of serious crimes are held accountable within the framework of a global jurisdiction, if they were beyond the reach of justice in their own country. The legal framework of the ICC created a permanent jurisdiction, to focus investigation and prosecution on the most serious crimes of international concern, the ambit of the Court to dispense not only legal justice but also transitional justice is enshrined in the Statute. As John Rawls has observed that justice is the bond of society without which any association of human beings would struggle to subsist[90].

However immunity of state officials[91] offers those in power the shield not to be tried for any act and or omission that resulted to some injury or prejudice to a person, people or a people. While in office and performing official duties state, officials ought to be protected so they function without fear of any repercussions. In fact international law confers on certain state

[88] Vienna Convention on the Law of Treaties art 34. On the application of this provision relative to international organisations, see Dan Sarooshi, International Organizations and their Exercise of Sovereign Powers (Oxford University Press, 2005), 20–1. On the application of this provision to non-states parties to the Rome Statute, see Schabas, above n 37, 200–202.

[89] Prosecutor v Al-Bashir (Case No ICC-02/05-01/09, 4 March 2009)

[90]John Rawls, A Theory of Justice (Harvard University Press, Reissued edition, , US (2005)3; 'Justice is the first virtue of social institutions .

[91] State officials include the Head of state, Head of government ,Foreign ministers and the diplomatic corps or people serving in that capacity

officials immunities that attach to the office or status of the official. These immunities, which are conferred only as long as the official remains in office, are usually described as 'personal immunity' or 'immunity *ratione personae'*. It has long been clear that under customary international law the Head of State and diplomats accredited to a foreign state possess such immunities from the jurisdiction of foreign states.

1.9 Conclusion

The original position of absolute bar to prosecute state officials because they enjoy immunity is fading out with evolution in international criminal law. Even though immunity still has a place in international politics and comity, how it is enjoyed is subject to time and place. As a result, many a state official including the Heads of State are now held accountable for crimes they commit despite their positions especially when the alleged crimes are of international character.

1.10 Recommendations

Representing a state is a very delicate exercise that the officials who are deemed to be dignified people need to be highly protected because of the functions they execute. In the course of performing their duty, such persons are exposed to certain acts that may even put their personal life in jeopardy or under the scourge of a plethora of court cases. In this light, the national and international communities have covered them from being subjected to these prosecutions. But that notwithstanding, a good number of state officials abuse this special privilege and commit international crimes. with all the literature adumbrated on how to manage this powers, there are a number of recommendations made that if they heed to, the powers of immunity will be well managed.

1.10.1 Recommendation to Immunity wielders.

Holders of immunity have been made a series of recommendations that if they heed to, much positive results will be arrived at. Some of the recommendations made are that the head of state should properly use the privilege of immunity, leaders should endeavor to come to power democratically and the leaders should create an advisory Council to always advise them on legal issues surrounding their powers. These are seen below.

1.10.2 The Head of State should properly use the privilege of immunity

The head of states should use the immunity meant to protect them to execute their duty well in order to continue to have strong laws and institutions put in place to protect them. They should avoid using these powers abusively for fear of being subjected to ridicule both at the domestic

and international jurisdictions. This protection is meant for them to carry out their function well so they should endeavor not to abuse it at anyone moment. Immunity should be used as a shield and not a sword.

1.10.3 Leaders should endeavor to come to power democratically

Accession to the helm of the nation should be done through periodical and democratically carried out procedures to the satisfaction of the people or at worst the majority of the people. Once in that position they should be available and accountable to its citizens. This accountability spans to the way the country is managed economically, socially and politically and the equitable sharing of natural resources of income generated from same.

This is because most of the crises given rise to the commission of international crimes have been sparked by fraud and rigging of elections. This will prevent the commission of international crimes and limit the abuse of the privilege of immunity.

1.10.4 The leaders should create an advisory Council to always advise them on legal issues and encourage the domestication of the Rome Statute.

Leaders come from diverse background of which knowledge of law is very imperative for their proper functioning. When they lack legal orientations, they find themselves committing serious crimes that may have far reaching consequences. In this direction, the leaders of the various sub regions should create a Council of Advisers to always brief them on international legal issues and members should be appointed on merits.

Given the dwindling nature of immunity as far as trials for international crimes are concerned, it is strongly advocated that the fundament instruments that encourage prosecution for international crimes oblivious of immunity should be domesticated.

1.10.5 Recommendation to the International Community

The international community too has a lot to say concerning the proper use of the privilege of immunity. The intervention of the UNSC in the Affairs of the ICC should be limited since most of the permanent members are not members to the Rome Statute whereas Africa which counts a good number of members is not a permanent member. The International Community should create a balance in the composition of the Security Council and equally set up a stand by appropriate personnel that will help them execute their orders. These points are adumbrated underneath.

1.10.6 Limit the Intervention of the UNSC in the Affairs of the ICC

Most of the members of the United Nations Security Council are not signatories to the Rome Statute putting in place the International Criminal Court. By so doing, most countries who are signatory are reticent at accepting the decisions of the UNSC on the bases that they can't be controlled by people who are not members of a treaty. This makes the implementation of the provision of the treaty difficult especially when it concerns sanctioning members who have committed crimes under international law. Thus motions referring actions before the ICC by Head of States and officials who have committed crimes under International Criminal Law should be limited by the UNSC especially concerning non-members.

1.10.7 The International Community should prevent the occurrence of conflicts

The members of the international community should avoid protecting head of states and those with such powers on the bases of friendship and comity.

On the contrary **Early warning commissions** should be formed which are able to detect signals of imminent conflicts which could result in the commission of international crimes. If such exited, the genocide in Rwanda could have been avoided.

Monitoring Organs dispatched to the target zones where there exist signs of conflict building to a certain threshold should be set up in order to nip escalation at the bud

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