

Chapter 2

Developments of the law on immunity of state officials in international law

2.1 Introduction

The purpose of this chapter is to trace and state the development of the law on the immunity of state officials in international law and then examine the question of immunity vis-à-vis international law *jus cogens* on the prohibition and punishment of international crimes. The main question is *whether immunity of state officials can prevail over international law jus cogens on the prohibition and punishment of international crimes*.

In the course of discussing the developments on immunity, the chapter traces the origin of immunity and its subsequent developments. Customary international law is discussed here as the origin of immunity of state officials. This is then followed by the discussion on provisions of the Charters of the International Military Tribunals at Nuremberg and Tokyo, statutes of international criminal tribunals and hybrid courts, the Rome Statute, codified international law treaties, the work of the International Law Commission and other non-binding instruments.

It is observed that all these documents contain clear provisions that immunity of state officials is not, or shall not be a bar to prosecution of international crimes nor a mitigating factor in the punishment.

2.2 Customary international law of immunity of state officials

Customary international law consists of the rules which become legally binding as a result of state practice over a period of time. A rule of customary international law is ‘created by widespread state practice (*usus*) coupled with *opinio juris sive necessitatis*, namely, a belief on the part of the state concerned that international law obliges it, or gives it a right, to act in a particular way.’¹ This position has been confirmed by the International Court of Justice in several cases.² State practice can be derived from official pronouncements of the governments to form rules of customary international law. *Opinio juris* is an opinion of an existence of law.³ It is a belief that the conduct is mandated by a legal obligation.

The rules regarding customary international law are codified in article 38(1) of the Statute of the International Court of Justice. According to article 38(1), customary international law is constituted through ‘evidence of a general practice accepted as law.’ Hence, two elements make up the existence of customary international law: general practice and *opinio juris*.⁴ The International Court of Justice (ICJ) has described the two elements forming customary international law as follows:

[F]or a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the

¹ UK Ministry of Defence (2004) *The manual of the law of armed conflict*, 5, (ss 1.12-1.12.2).

² *Asylum Case, (Colombia v Peru)*, Judgment, 20 November 1950, ICJ Reports (1950), 126; *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969), paras 70-78; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua, (Nicaragua v USA)*, Judgment, 27 June 1986, ICJ Reports (1986), paras 183-186. But see *Prosecutor v Kuperškić et al*, Case No. IT-95-16-T, Trial Chamber II, Judgment of 14 January 2000, para 540.

³ M du Plessis, (ed.), (2008) *African guide to international criminal justice*, vii.

⁴ JE Ackerman and E O’Sullivan (2000) *Practice and procedure of the International Criminal Tribunal for the Former Yugoslavia*, 2-3; E Kwakwa (1992) *The international law of armed conflict: Personal and material fields of application*, 30. However, see, T Maluwa (1999) *International law in post-colonial Africa*, 5.

existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.⁵

With regards to *opinio juris*, the ICJ has given guidance that:

Not only must acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, for example in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition and not by any sense of legal duty.⁶

In the *Asylum* case, the ICJ held that the party which relies on custom must prove that custom is established in such a manner that it has become binding on the other party, that the rule invoked is in accordance with a constant and uniform usage practiced by the states in question.⁷

Immunity of state officials has been characterised as emanating from customary international law.⁸ However, ‘identifying customary rules in the field of international criminal law is a truly daunting task, particularly as most instances of state practice will occur in juridical outer space and out of judicial sight.’⁹ Nevertheless, in the context of immunity of state officials, state practice indicates that state officials were historically not subject to criminal responsibility for their actions, because of a merger of the sovereign and the sovereignty of the state.¹⁰ Geoffrey Robertson states that ‘[s]overeign immunity

⁵ See, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*), (Merits), ICJ Reports (1986) 44, para 77.

⁶ See, *Case Concerning North Sea Continental Shelf (Denmark, Germany v The Netherlands)*, 1969 ICJ Reports 3, 44 (Judgment of 20 February 1969).

⁷ *Asylum case (Colombia v Peru)*, ICJ Reports (1950), 276-277.

⁸ See, B Stern, ‘Immunities for heads of state: Where do we stand?’ in M Lattimer and P Sands (eds.), (2003) *Justice for crimes against humanity*, 73-106, 73 (wherein Stern says: ‘Some of the tenets used in order to grant immunity to heads of state have their origin in customary international law...’).

⁹ G Mettraux (2005) *International crimes and the Ad Hoc tribunals*, 13 (‘identifying customary international law and the role of Judges in the customary process’).

¹⁰ MC Bassiouni (1999) *Crimes against humanity in international criminal law*, 505-508 (stating that this is particularly true with respect to Monarchies as evidenced by Louis XIV’s statement: ‘*L’etat c’est moi*’ (meaning that ‘the state is me’ - my own translation)).

followed in the first place from the divine right of kings: you could not put an infallible ruler on trial since, if you did, the verdict must always go in his favour'.¹¹ The concept of state officials is as old as the state itself. It is when the state existed that its heads also existed. The rule of immunity of state officials 'was derived from unlamented doctrine that the King can do no wrong.'¹² This could also emanate from the old maxim that the King cannot be sued in his own courts. According to Orakhelashvili, 'historically, the original concept of immunity of high level state officials, such as heads of state arose from the fact that they represent their states and to sue [them] was tantamount to suing an independent state.'¹³ This position finds further support from Peter Burns who writes that:

Heads of state and government policymakers, whether ruling as princes by divine right or as democratically elected representatives of the people, have with few exceptions been able to avoid responsibility for their conduct by wrapping themselves up in the blanket of state sovereignty, secure in the knowledge that no international mechanism existed to call them to account.¹⁴

However, reservations may be entered to the above stated position in that the state and its officials are two distinct entities which must not be confused. Arguably, the traditional doctrine of immunity from jurisdiction enjoyed by the state and the state officials is based on the principle of state dignity. This is a notion that a sovereign must not degrade the dignity of his nation by submitting to the jurisdiction of another state.¹⁵ Consequently, a state official is not to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation.¹⁶ Possibly, the moral comity of nations may be said to have contributed to the development of the head of state immunity. This is aptly put that 'do

¹¹ G Robertson (2002) *Crimes against humanity: The struggle for global justice*, 403.

¹² PA Gabin, 'Accountability of the president under the command responsibility doctrine', 9-10, available at <<http://www.supremecourt.gov.ph/publications/summit/Summit%20Papers/Agabin%20%20Accountability%20of%20the%20President.pdf>> (accessed on 28 August 2008).

¹³ A Orakhelashvili (2006) *Peremptory norms in international law*, 320; Y Simbeye (2004) *Immunity and international criminal law*, 105-109.

¹⁴ P Burns, 'An international criminal tribunal: The difficult union of principle and politics' (1994) 5(2-3) *Criminal Law Forum* 341-380, 342.

¹⁵ See generally, Dissenting Opinion of Judge Jean Yves De Cara in the *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, *Provisional Measures*, Order of 17 June 2003, ICJ Reports 2003, p. 123.

¹⁶ *The Schooner Exchange v McFadden* (1812), 11 US 137-138; *Mighell v The Sultan of Johore*, [1894] 1 QB 149.

unto others as you would have them do to you.’¹⁷ In this regard, each state upholds the immunity concept in the hope that its own head of state can be protected when out of his country.

Further, state officials are conferred the functional immunity as of right in order to allow them to perform their duties effectively under customary international law. It is perhaps not right to dispute that a state official benefits from absolute criminal immunity before the courts of a foreign state.¹⁸ Customary international law recognises certain ‘degrees of immunity from criminal prosecution for heads of state and other officials.’¹⁹ It is common that some states and national laws allow immunity to their own state officials or to officials from foreign countries.²⁰ According to Van Schaack and Ronald Slye,

Government officials under both domestic and international law may claim immunity from accountability for acts they commit while in office. Heads of state have enjoyed such immunity for centuries, due in large part to the conflation of the head of state with the state itself. Thus, head of state immunity was grounded in the more general notion of sovereign immunity. Sovereign and head of state immunity developed as doctrines rooted in the comity that one state owed another.²¹

There is a customary international law basis that ‘one state cannot exercise its jurisdiction over another’s sovereign, at least in ordinary crimes.’²² The absolute nature of the immunity precludes the application of any exception to that immunity, for example, based on the nature of the offence of which a state official is accused.²³ Nevertheless, it

¹⁷ D Aversano, ‘Can the pope be a defendant in American courts? The grant of head of state immunity and the judiciary’s role to answer this question’ (2006) 18 *Pace International Law Review* 495-529, 506.

¹⁸ DP Stewart, ‘Immunity and accountability: More continuity than change?’ (2005) 99 *American Society International Law Proceedings* 227-230, 229.

¹⁹ WA Schabas (2000) *Genocide in international law*, 316; *Attorney-General of Israel v Adolf Eichmann*, (1968) 36 ILR 18 (District Court of Jerusalem), para 28; *Attorney-General of Israel v Adolf Eichmann*, (1968) 36 ILR 227 (Supreme Court of Israel), para 14; *Prosecutor v Blaškić*, (Case No. IT-95-14-AR 108bis), *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, para 41.

²⁰ *R v Bow Street Stipendiary Magistrate and Others, ex parte Pinochet Ugarte*, [1998] 4 All ER 897; [1998] 3 WLR 1456 (HL). *Contra, United States v Noriega*, 808 F. Supp. 791 (SD Fla 1992) –whereby Noriega –was not accorded immunity protection simply because the Executives did not consider him entitled to such protection.

²¹ B Van Schaack and RC Slye, (2007) *International criminal law and its enforcement: Cases and materials*, 865-866.

²² Schabas (2000) 317.

²³ See, Dissenting Opinion of Judge Jean Yves De Cara in the *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, *Provisional Measures*, Order of 17 June 2003, ICJ Reports 2003, 122.

should be noted that in contemporary international law, sovereign equality of states does not prevent state officials from being prosecuted in an international court, provided that such court has jurisdiction over former or serving state officials.

It is widely accepted that the doctrine of immunity is largely a matter of custom.²⁴ There is no specific international convention or treaty on this doctrine, ‘even though some international conventions or treaties refer expressly to the situations of a serving or former head of state.’²⁵ Schabas argues that ‘[i]mmunity of the heads of state, other senior government officials, diplomatic personnel and functionaries and experts of international organizations, exists by virtue of customary international law.’²⁶ Schabas supports this position by saying that it is codified in various treaties, and has been applied by the International Court of Justice in an important ruling dealing with a prosecution for genocide.²⁷

The International Court of Justice (ICJ) concluded that customary international law provided for a general rule entitling a serving foreign minister to enjoy full immunity from criminal jurisdiction before a foreign national court.²⁸ The ICJ held further that although various international conventions on the prevention and punishment of certain serious crimes impose on states obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension in no way affects immunities under customary international law.²⁹

²⁴ See *Amicus Brief in the Matter of David Anyaele and Emmanuel Egbuna v Charles Ghankay Taylor and others*, A submission from the Open Society Justice Initiative to the Federal High Court of Nigeria, Abuja Division, November 2004, p.16, paras 41-44 (on immunities-stating that “while the immunity of diplomats has always been regulated by its own regime, the immunity of heads of state appears to have been subsumed within state immunities until relatively recently, owing to the identification of the state with its ruler.”); D Akande ‘International law immunities and the International Criminal Court’ (2004) 98 *American Journal of International Law* 407; A Watts ‘The legal position in international law of heads of states, heads of governments and Foreign Ministers’ (1994) III 247 *Hague Recueil des Cours*, 19-130; JL Mallory ‘Resolving the confusion over the head of state immunity: The defined right of Kings’ (1986) 86 *Columbia Law Review* 169, 177; SK Verma (1998) *An introduction to public international law*, 155 (who states that this concept is imbibed in the customary international law). However, of recent years, this position appears to be modified by adoption of treaties, for example, the Rome Statute outlawing immunity of state officials.

²⁵ Stern in Lattimer and Sands (2003) 83.

²⁶ W Schabas (2007) *An introduction to the International Criminal Court*, 231.

²⁷ Schabas (2007) 231.

²⁸ *Arrest Warrant* case, para 58.

²⁹ *Arrest Warrant* case, para 59.

In an application for indication of provisional measures before the ICJ in the *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, the Government of Congo successfully pleaded customary international law of immunity of state officials in seeking an order of the court to stop France from investigating and prosecuting public officials of Congo for crimes against humanity and torture. These included H.E General Pierre Oba, Minister of the Interior, Public Security and Territorial Administration, and H.E Mr. Denis Sassou Nguesso, President of the Republic of the Congo. The Republic of Congo argued that such investigation, court processes and prosecution against its state officials amounted to ‘*violation of the criminal immunity of a Foreign Head of State –an international customary rule recognised by the jurisprudence of the Court.*’³⁰ Similarly, the Agent and Counsel of France admitted that:

There are no written rules deriving from any legislation relating to immunities of states and their representatives. It is the jurisprudence of the French courts which, referring to customary international law and applying it directly, have asserted clearly and forcefully the principles of these immunities.³¹

Much as the above position stated by the ICJ is respected, it should be known that immunity cannot be upheld for torture because immunity cannot apply to torture.

The principal source of international law regarding immunity of state officials from prosecution for international crimes in domestic and international courts is the international custom. However, rejection of the defence of immunity has also equally been characterised as having attained customary international law status. The ICTY has declared article 7(2) of the Statute of ICTY and article 6(2) of the Statute of ICTR to be ‘indisputably declaratory of customary international law.’³² These provisions provide a basis for non-recognition of immunity of state officials for international crimes.

³⁰ See, *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France), Provisional Measures*, Order of 17 June 2003, ICJ Reports 2003, 102, paras 1-39, but see particularly, paras 1 and 28 (where the ICJ agreed that France had to respect the right ‘for the immunities conferred by international law on, in particular, the Congolese Head of State.’).

³¹ *Congo v France*, ICJ Reports 2003, para 33.

³² *Prosecutor v Furundžija*, Judgment (ICTY Case No. IT-95-17/1), (10 December 1998), para 40.

Contemporary international law limits the enjoyment of such immunities. An unconditional defence of immunity of state officials can hardly be justified nowadays³³ especially in this era of human rights agenda and protection of humanity from heinous crimes. As far back as 1946, the immunity of state officials was neither a substantive defence nor an absolute doctrine at all. Even if the doctrine of immunity of state officials would be viewed as emanating from the divine right of Kings, history has it that even the King himself was ‘still under God and the Law.’³⁴ It can also be argued that immunities under international law do not possess the same characteristics as peremptory norms,³⁵ particularly those that prohibit the commission of international crimes. This position remains contentious though. On one hand, ‘there is an interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members, and on the other, there is the interest of the community of states to allow them to act freely on the interstate level without unwarranted interference.’³⁶ This debate is discussed at a later stage of this chapter.³⁷ Having set the customary international law nature of the immunity of state officials, it is important that the conventional international law on the doctrine be discussed.

2.3 Codification of immunity of state officials

In this part, the study presents various international law statutes, treaties, sources and efforts that have contributed to the development of the law on immunity of state officials through codification. In particular, international efforts to codify the law on immunity are presented in two dimensions: developments before the Nuremberg Charter and developments after the Nuremberg Charter. It is the understanding that major developments on the prosecution of international crimes ensued after World War I and World War II.

³³ Orakhelashvili (2006) 320.

³⁴ Lord Justice Coke proclaimed and declared to King James that ‘a King is still under God and the Law.’ This statement was considered by RH Jackson in his *Report to President Truman on the Basis for Trial of War Criminals* (1946) *Temple Law Quarterly* 19, 148, quoted in Stern in Lattimer and Sands(2003) 74.

³⁵ Orakhelashvili (2006) 354.

³⁶ *Arrest Warrant* case, para 75.

³⁷ See, part 3 of this chapter.

2.3.1 Developments of the law on immunity before the Nuremberg Charter

Before World War I, the international community had made very little efforts to prosecute leaders who were perpetrators of international crimes. Bassiouni observes that '[a]fter the First World War, the international community made some tentative attempts to deal with this problem, but no such effort were pursued vigorously and none was successful.'³⁸ Efforts to codify immunity of state officials started after *World War I*. The first efforts were evidenced by the signing of the *Treaty of Peace between the Allied and Associated Powers and Germany*, at Versailles, on 28 June 1919 (the Versailles Treaty). In its Part VII (on Penalties), the *Versailles Treaty* called for the trial of the former German Emperor under article 227 as follows:

The Allied and Associated Powers publicly arraign William II of Hohenzollen, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

Article 227 of the Versailles Treaty also addressed a request to the Government of the Netherlands for the surrender to them of the Ex-Emperor (William II) in order for him to be tried. Article 228 of the Versailles Treaty of 1919 provided that the German Government 'recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.'

The *Report Presented to the Preliminary Peace Conference by the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties* at Versailles of March 1919³⁹ provided in its Chapter III (Personal Responsibility):

In view of the grave charges which may be preferred against—to take one case—the ex-Kaiser—the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished...

³⁸ MC Bassiouni, 'The time has come for an International Criminal Court' (1991) 1 *Indiana International and Comparative Law Review* 1, 2-4.

³⁹ Conference of Paris 1919 Carnegie Endowment for International Peace, Division of International Law, Pamphlet No.32 (1919), Reprinted in (1920) 14 *American Journal of International Law* 95 (Supp.), quoted in MC Bassiouni (1992) *Crimes against humanity in international law*, 553-556, 555.

All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.⁴⁰

The above provisions emphasise that the former German Emperor was to be tried despite his official rank and status as a head of state. However, this effort was not carried beyond its inclusion in a treaty. The Allies did not set up an international tribunal or seek to secure jurisdiction over Kaiser Wilhelm.⁴¹ According to De Aragao, Germany did not extradite its own nationals and also that the Government of The Netherlands refused to extradite Kaiser Wilhelm on the ground that he was charged with a ‘political offence’ exempt from extradition.⁴²

2.3.2 Immunity in the Charter of the International Military Tribunal

The defence of official capacity has effectively been rejected at least since the Nuremberg Trials.⁴³ On 8 August 1945, at London, the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics signed an Agreement for the Prosecution and Punishment of

⁴⁰ Note that the United States of America had submitted its Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities, 4 April 1919 in which it stated clearly that ‘The conclusion which the Commission reached, and which is stated in the report, is to the effect that ‘all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.’ The American Representatives are unable to agree with this conclusion, in so far as it subjects to criminal, and, therefore, to legal prosecution, persons accused of offences against ‘the laws of humanity’, and in so far as it subjects Chiefs of States to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations...’ See Bassiouni (1992) 558, (emphasis in square brackets supplied).

⁴¹ Bassiouni (1992) 465.

⁴² EJG de Aragao, ‘Setting standards for domestic prosecutions of gross violations of human rights through the ICC: International jurisdiction for wilful killings in Brazil?’ in M Editori (2005) *The International Criminal Court: Challenges and prospects*, Proceedings of an International Conference organized by the European Inter-University Centre for Human Rights and Democratisation (EIUC), 13-38, 15; JF Willis (1982) *Prologue to Nuremberg – The politics and diplomacy of punishing war criminals of the First World War*, 98 (ff).

⁴³ K Kittichaisaree (2001) *International criminal law*, 259.

the Major War Criminals of the European Axis⁴⁴ purportedly acting in the interests of all the United Nations and by their representatives duly authorised thereto to conclude that agreement. Article 1 of the Agreement on the Prosecution and Punishment of Major War Criminals of the European Axis provides:

There shall be established after consultation with Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.

A Charter of the International Military Tribunal was annexed to the London Agreement signed on 8 August 1945. The Charter set down laws and procedures by which the *Nuremberg Trials* were to be conducted. Article 1 of the Charter states that: ‘in pursuance of the Agreement signed on 8 August 1945...there shall be established an International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis.’ Arguably, that this particular provision is inconsistent with international law principles relating to presumption of innocence of an accused in that instead of employing terms like the ‘accused’ or ‘suspect’, the Charter rather deliberately used the term ‘criminals’ –which is a prejudgment of the persons that were to be tried before the International Military Tribunal. In article 2, it is observed that the Tribunal was to consist of four members (basically drawn from those states that signed the London Agreement). Article 3 of the Nuremberg Charter provides that the Tribunal and its members could not be challenged by the prosecutor, the defendants or counsel. This provision was arguably contrary to international law principles governing prosecution and punishment of international crimes in that it shows how the Tribunal lacked impartiality.

⁴⁴ See, Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 United Nations Treaty Series 279. The Agreement was signed by Robert H. Jackson (for the United States of America), Robert Falco (for the Provisional Government of the French Republic), C Jowitt (for the United Kingdom) and I. Nikitchenko and A. Trainin (both for the Union of Soviet Socialist Republics); reprinted in Bassiouni as n. 221 above, 579-581; available also at the *Avalon Project at Yale Law School*, at <<http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm>> (accessed on 8 November 2008).

Article 6 of the Charter of the International Military Tribunal provided for the international crimes namely: Crimes against peace; War Crimes and Crimes against humanity. Article 14 of the Charter of the International Military Tribunal created the Committee for the Investigation and Prosecution of Major War Criminals whereby it states that each signatory shall appoint a Chief Prosecutor for the investigation of the charges against, and the prosecution of, major war criminals. Of particular importance to this study is article 7 (on Jurisdiction and General Principles) of the *Charter of the International Military Tribunal* which provides:

The official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 7 of the Charter of the International Military Tribunal provided a basis for the prosecution and punishment of the heads of state for international crimes. Following the above provision, trials were conducted at Nuremberg in Germany (The Nuremberg Trials) and a number of persons –some of whom were representatives of state or government departments –were tried and punished for international crimes committed during World War II. Michael Scharf writes that:

[A]lthough Hitler, Himmler and Goebbels escaped prosecution by committing suicide, many of the most notorious German leaders were tried before the Nuremberg Tribunals. The list of the Nuremberg defendants reads like a ‘Who’s Who’ in the Third Reich...⁴⁵

By 1946, when the International Military Tribunal was convened in Nuremberg, both Adolf Hitler and Benito Mussolini had died and thus no prosecutions for the heads of state took place in the International Military Tribunal.⁴⁶

2.3.3 Immunity under Control Council Law No. 10

The Charter of the International Military Tribunal was later to be followed by the *Allied Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes*

⁴⁵ MP Scharf (1997) *Balkan justice: The story behind the first international war crimes trial since Nuremberg*, 9-11.

⁴⁶ Bassiouni (1992) 465-466.

against Peace and Against Humanity.⁴⁷ The law was enacted to give effects to the terms of the London Agreement of 8 August 1945, and the Charter issued pursuant thereto. Article II (1) of the Control Council Law No.10 provided for crimes against peace, war crimes and crimes against humanity. Article II (4) and (5) of the Law prohibited the granting of immunity to persons who committed international crimes in the following terms:

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment...
5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.⁴⁸

After the efforts to prosecute state officials in Germany, there followed equal measures in the Far East after World War II. Below is a reflection on such initiatives.

2.3.4 Immunity in the Charter of the International Military Tribunal for the Far East

The Proclamation by the Supreme Commander for the Allied Powers issued on 19 January 1946 at Tokyo, in Japan declared that ‘there shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offences which include crimes against peace.’⁴⁹ The constitution, jurisdiction and functions of such a Tribunal were set forth in the *Charter of the International Military Tribunal for the Far East* (the Tokyo Charter) which was approved by Douglas MacArthur, the United States Army Supreme Commander for the Allied Powers on 19 January 1946 at Tokyo.

⁴⁷ *Official Gazette of the Control Council for Germany*, No.3, Berlin, 31 January 1946.

⁴⁸ See art II (4) (a) & (5) of the *Allied Control Council Law No.10 on the Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity*.

⁴⁹ See art 1 of the *Proclamation by the Supreme Commander for the Allied Powers*, Tokyo, 19 January 1946. The proclamation was ordered and signed by Douglas MacArthur (the Supreme Commander for the Allied Powers).

The *Charter of the International Military Tribunal for the Far East* provided that the tribunal was established for the just and prompt trial and punishment of the major war criminals in the Far East.⁵⁰ The first trial of the Tribunal was in Tokyo.⁵¹ Article 5 of the Charter provided jurisdiction over persons and offences. It stated that the Tribunal shall have power to try and punish Far Eastern war criminals who as individuals or as members of organisations, were charged with offences which included crimes against peace, conventional war crimes and crimes against humanity.

With regards to immunity from prosecution for international crimes, article 6 of the *Charter of the International Military Tribunal for the Far East* provided:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to 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.

It may be recalled that the provision of article 6 of the *Charter of the International Military Tribunal for the Far East* is different from article 7 of the Charter of the International Military Tribunal for war criminals in the European Axis that led to the *Nuremberg Trials*. Whereas the Tokyo Charter provided for, and recognised immunity of state officials as a circumstance for mitigation of punishment subject to the discretion of the Tribunal, the London Charter on the other hand, did not recognise official status as a mitigating factor in the punishment of individuals.

Although the Tokyo Tribunal was empowered to try the Japanese state officials, General MacArthur agreed that the Japanese Emperor would not be brought to trial as a consideration for the Emperor to agree to end the war in the Far East.

⁵⁰ On the Tokyo War Crimes Tribunal, see, U Kei (2003) *Beyond the judgment of civilization: The intellectual legacy of the Japanese war crimes trials, 1946-1949*, 1-336; C Hosoya, N Ando, Y Onuma and RH Minear (eds.) (1986) *The Tokyo war crimes trial*, 1-226.

⁵¹ Arts 1 and 14 of the *Charter of the International Military Tribunal for the Far East*, Tokyo, 19 January 1946.

2.3.5 Immunity in the statutes of international criminal tribunals

The statutes of international criminal tribunals dealing with international crimes contain provisions outlawing immunity of state officials. These tribunals include the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). An attempt is made here to discuss relevant immunity provisions under the statutes of these international criminal tribunals.

The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Federal Republic of Yugoslavia since 1991 ('ICTY') was established by the United Nations Security Council acting under Chapter VII powers of the Charter of the United Nations.⁵² The ICTY deals with the prosecution and punishment of persons responsible for war crimes, genocide and crimes against humanity.⁵³ Regarding immunity of state officials, the Statute of the ICTY provides that:

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.⁵⁴

The history behind this provision is that during the discussions leading to the adoption of the statute, the Secretary-General of the United Nations had suggested that immunity should not be recognised for state officials. The relevant part of the Report of the Secretary-General to Resolution 808 of 1993⁵⁵ reads as follows:

Virtually all the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a

⁵² See, UNSC Res 808(1993), adopted by the Security Council at its 3175th meeting, on 22 February 1993, UN. Doc. S/RES/808(1993) and UNSC Res. 827 (1993), Adopted by the Security Council at its 3217th meeting on 25 May 1993, UN. Doc. S/RES/827(1993); Art 1 of the Statute of the ICTY.

⁵³ See generally the Statute of the ICTY, art 2 (Grave breaches of the Geneva Conventions of 1949 'war crimes'); art 3 (violations of the laws and customs of war 'war crimes'); art 4 (genocide) and art 5 (crimes against humanity).

⁵⁴ Art 7(2), Statute of the ICTY.

⁵⁵ (S/25704 and Add.1), 25 May 1993.

plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment...⁵⁶

As a result of the immunity provision in the Statute of the ICTY, former state officials who have been prosecuted before the tribunal, have not successfully pleaded immunity. This is observed in the cases involving Milošević,⁵⁷ Karadžić⁵⁸ and Kunarać.⁵⁹ Detailed discussions on the plea of immunity as raised by Milošević, Karadžić and Kunarać are presented in chapter 3 of this study.⁶⁰ Suffice here to indicate that immunity is not a recognised defence before the ICTY.

The International Criminal for Rwanda (ICTR) which was also established by the United Nations Security Council in 1994⁶¹ prosecutes and punishes persons responsible for genocide, war crimes and crimes against humanity. The tribunal was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. Also, the ICTR was to deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period. The ICTR is governed by its statute, which is annexed to the Security Council Resolution 955 of 1994.⁶² The Statute of ICTR provides for punishment of international crimes.⁶³ With regards to immunity of state officials, the Statute of ICTR provides in its article 6(2) that:

⁵⁶ See, Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), paras 55-56.

⁵⁷ *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on Preliminary Motions, Trial Chamber, Decision of 8 November 2001, paras 26-34.

⁵⁸ *Prosecutor v Karadžić*, Case No.IT-95-5/18-PT, *Decision on the Accused's Holbrooke Agreement Motion*, 8 July 2009, Trial Chamber of ICTY, para 5; *Prosecutor v Karadžić*, Case No.IT-95-5/18-PT, *Appeal of the Decision Concerning Holbrooke Agreement Disclosure*, 28 January 2009, ICTY Appeals Chamber, paras 8-12. See also, *Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure*, ICTY Appeals Chamber, 6 April 2009, para 17.

⁵⁹ *Prosecutor v Kunarać, Kovač and Vuković*, Case No. IT-96-23 –T and IT-96-23/1-T, Trial Chamber of ICTY, Judgment, 22 February 2001, para 494.

⁶⁰ See, Ch 3, part 3.2.

⁶¹ Resolution 955 of 8 November 1994, UN Doc. S/1994/955.

⁶² UNSC Res 955 of 1994 was adopted by the Security Council at its 3453rd meeting, on 8 November 1994.

⁶³ See generally the Statute of ICTR, arts 2 (genocide), 3 (crimes against humanity) and 4 (Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II).

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

It is observed that immunity is outlawed by the Statute of the ICTR in respect of international crimes. Due to the immunity provision (as will be observed in chapter 3),⁶⁴ the ICTR has been able to prosecute individuals, including former Rwandan state officials for genocide, crimes against humanity and war crimes. For example, Jean Kambanda was prosecuted by the tribunal and sentenced to life imprisonment.⁶⁵

After the establishment of the two international criminal tribunals for Rwanda and the former Yugoslavia, a permanent international criminal court for the prosecution of international crimes was established. The following part discusses the law of immunity in the statute establishing the ICC.

2.3.6 Immunity in the Rome Statute of the International Criminal Court

On 17 July 1998, at Rome, Italy, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court.⁶⁶ The Rome Statute of the ICC was adopted against the background of putting an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole on the ground that such crimes threaten the peace, security and well-being of the world. The Rome Statute provides for the independent and permanent International Criminal Court with jurisdiction over the most serious international crimes. The ICC is a contemporary and permanent forum for the prosecution and punishment of individuals who commit international crimes.⁶⁷ It is complementary to national criminal jurisdictions.⁶⁸ It has

⁶⁴ See Ch 3, part 3.2.

⁶⁵ See, *Prosecutor v Kambanda*, Case No. ICTR-97-23-S, Trial Chamber I, Judgment and Sentence, 4 September 1998.

⁶⁶ The Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, A/CONF. 183/9 (1998).

⁶⁷ For a drafting history of the Rome Statute and related jurisdiction, and other matters of the ICC, see generally, A Cassese, P Gaeta and JRWD Jones (eds.), (2002) *The Rome Statute of the International*

jurisdiction over persons responsible for the most serious crimes of international concern to international community.⁶⁹ Crimes within the jurisdiction of the ICC are genocide, crimes against humanity, war crimes and the crime of aggression.⁷⁰ The ICC has jurisdiction over such crimes only after 1 July 2002, the date the Rome Statute entered into force. However, the ICC has at present not yet been able to deal with the crime of aggression because, although states agreed on the definition of the crime of aggression at the Review Conference of the Rome Statute in Kampala in June 2010, the jurisdiction of the court over the crime of aggression has been suspended until after the next Review Conference to be held after seven years.

Regarding immunity, article 27 of the Rome Statute provides that:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in an of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁷¹

Thus, the above provision envisages that no one will ever escape from responsibility for international crimes within the jurisdiction of the ICC. From the experience in the former international criminal tribunals, no immunity may be claimed before an international

Criminal Court: A commentary, Vol. I, Sec. I 'The path to Rome and beyond', 3-145, but see also, Vol. II; J Crawford, 'The drafting of the Rome Statute' in P Sands (Ed), (2003) *From Nuremberg to the Hague: The future of international criminal justice*, 109-156; M Politi and F Gioia (eds.), (2008) *The International Criminal Court and national jurisdictions*, 1-171; BN Schiff (2008) *Building the International Criminal Court*, 1-257.

⁶⁸ See, Preamble to the Rome Statute, paras 10-11; arts 1 and 17, Rome Statute. On the principle of complementarity, see generally, JT Holmes, 'Complementarity: National courts versus the ICC' in Cassese *et al*, (2002) 667-685; WA Schabas, 'Complementarity in practice: Creative solutions or a trap for the court?' in Politi and Gioia (2008) 25-48; O Bekou, 'Complementarity and the ICC: A dangerous gamble?' in G Ulrich (ed.,) (2005) *The International Criminal Court: Challenges and prospects: Proceedings of an International Conference organised by the European Inter-University Centre for Human Rights and Democratisation*, 64.

⁶⁹ For details on the jurisdiction of the ICC, see generally, WA Schabas (2007) *An introduction to International Criminal Court*, 3rd edn, 58-140.

⁷⁰ Arts 5(1), 6, 7 & 8, Rome Statute.

⁷¹ Art 27(1) & (2), Rome Statute.

tribunal. The immunities under international law for state officials are ‘compounded by the immunities frequently available under national legislation or constitutional law to a nation’s own head of state, high officials, members of parliament, or officials generally.’⁷²

Article 27(1) of the Rome Statute guarantees that norms of international criminal responsibility apply without any distinction for officials based on official capacity. By specifically referring to national or international law, ‘Article 27(2) ensures that the consequences of the responsibility recognized by Article 27(1) are not frustrated by claims of immunity or other procedures.’⁷³ As will be observed in Chapter 3 of this study,⁷⁴ the ICC has held that the case against Omar Hassan Al Bashir⁷⁵ that, immunity of a serving state official does bar criminal prosecution of such individual before the ICC. In fact, according to the ICC in the case against Ahmad Harun,⁷⁶ the position of a state official may be considered an aggravating factor even when issuing a warrant of arrest.

2.3.6.1 Drafting history of Article 27 of the Rome Statute

For a proper understanding of article 27 of the Rome Statute, one must consider its drafting history. Early writers on article 27 of the Rome Statute suggest that article 27 did not raise any substantive problems at the drafting process. Schabas states that ‘the issue was uncontested during negotiations and there were no problems reaching agreement on an acceptable text’⁷⁷ of article 27. Per Saland of Sweden was the Chairman of the Working Group on the General Principles of Criminal Law throughout the process

⁷² O Triffterer, ‘Commentary on Article 27’ in O Triffterer, ed., (1999), *The Rome Statute of the International Criminal Court: Observer’s notes, article by article*, 501; H Duffy and J Huston, ‘Implementation of the ICC Statute: International obligations and constitutional considerations’ in C Kress and F Lattanzi, eds., (2000) *The Rome Statute and domestic legal orders: General aspects and constitutional issues*, Vol.1, 29.

⁷³ B Broomhall (2003) *International justice and the International Criminal Court: Between sovereignty and the rule of law*, 138.

⁷⁴ See Ch 3, part 3.2.

⁷⁵ *Prosecutor v Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir, Case No. ICC-02/05-01/09, Public Reducted Version, Pre-Trial Chamber I, 4 March 2009, 15, para 41.

⁷⁶ *Prosecutor v Harun and Muhammad Al-Adl-Al-Rahman*, Case No. ICC-02/05-01/07, ‘Decision on the Prosecution Application under Article 58(7) of the Statute’, paras 127 and 128.

⁷⁷ Schabas (2007) 231.

beginning with the UN Preparatory Committee of 1995 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. This Working group, among other things, was responsible for the drafting of article 27 of the Rome Statute. Thus, according to Per Saland:

The principle provided for in this article was uncontested throughout the discussions, and it was relatively easy to agree on its formulation. Mexico had some objections concerning the language in paragraph 2 but withdrew its reservations. Spain also had some problems. The Drafting Committee made some changes to the paragraph after its adoption in the working group.⁷⁸

However, before the present-day text of article 27 of the Rome Statute, several discussions on the text of the article had taken place since 1996. Most of these are presented and reprinted in a study by Cherif Bassiouni.⁷⁹ In 1996, the Preparatory Committee on the Establishment of an International Criminal Court had suggested the following:

193. Taking into account the precedents of the Nuremberg, Tokyo, Yugoslavia and Rwanda tribunals, there was support for the Statute to disallow any plea of official position as Head of State or Government or as a responsible government official; such official position should not relieve an accused of criminal responsibility. Some delegations thought that this issue could be included in relation to “defences”. The opinion was also expressed that further consideration would be useful on the question of diplomatic or other immunity from arrest and other procedural measures taken by or on behalf of the Court.⁸⁰

Again, the Preparatory Committee⁸¹ had proposed two different texts of the article on official capacity. The two texts read thus:

⁷⁸ P Saland, ‘International criminal law principles’ in RS Lee, ed.,(1999), *The International Criminal Court: The making of the Rome Statute, issues, negotiations, results*, 202.

⁷⁹ MC Bassiouni, (1998) *The Statute of the International Criminal Court: A documentary history*, 1-793. On this matter, this study relies on the documents reprinted in Bassiouni’s book.

⁸⁰ See, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, (Proceedings of the Preparatory Committee during March-April and August 1996)*, reprinted in Bassiouni(1998) 385-439, particularly, 415, para 193 “Irrelevance of Official position.”

⁸¹ See, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, (Compilation of Proposals)*, reprinted in Bassiouni (1998) 441-606, but see particularly, 484, Part 3bis. ‘General Principles of Criminal Law’, Section 1, Substantive Issues, Article B (e) ‘Irrelevance of Official Position.’

Proposal 1

[1. This Statute shall be applied to all persons without any discrimination whatsoever.] The official position of a person who commits a crime under this Statute, in particular whether the person acts as Head of State or of Government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment.

2. Immunity

In the course of investigations or procedures performed by, or at the request of the court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law.

Proposal 2

Official capacity of the accused

1. The official capacity of the accused, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as an agent of the State shall in no case exempt him from his criminal responsibility under this Statute, nor shall it constitute a ground for reduction of the sentence.
2. The special procedural rules, the immunities and the protection attached to the official capacity of the accused and established by internal law or by international conventions or treaties may not be used as a defence before the Court.

In 1997, the Working Group on the General Principles of Criminal Law had placed the provisions on irrelevance of official capacity under draft article 24 and suggested the following wording of the article:

Article 24 ‘Irrelevance of official position’

1. This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [*per se*] constitute a ground for reduction of the sentence.
2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.⁸²

⁸² See, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/AC.249/1998/DP.6. But note that in the *Draft Report of the Inter-sessional Meeting from 19 to 30*

The above were efforts toward the final agreement on the text of article 27 of the Rome Statute of the ICC in 1998. However, given the different provisions on immunities under the Rome Statute, it is necessary to consider the provisions of article 27 and 98(1) of the Rome Statute which seem to be opposing one another other, although this is not always the case.

2.3.6.2 Controversy between Articles 27 and 98(1) of the Rome Statute

According to Schabas, ‘a literal reading of article 27(2) suggests that immunity cannot be invoked under any circumstances.’⁸³ Nevertheless, Schabas notes further that ‘it does not make sense that the [c]ourt can ignore the claim to immunity of a head of state or senior official from a non-party State.’⁸⁴ In fact, this is premised on the basis of article 98(1) of the Rome Statute which seems to contradict article 27(2) of the Rome Statute. There is a contrary view as expressed by other scholars. Dapo Akande suggests that, the UN Security Council can imperatively withdraw immunity from any person, in exercising its power under Chapter VII of the Charter of the United Nations by for example, passing a resolution referring a situation to the ICC as it did in its resolution 1593 of 2005 on the situation in Darfur.⁸⁵ To justify this position, Akande argues that operative paragraph 2 of the UN Security Council resolution 1593 (2005) had imperatively ‘lifted immunity’ by requiring the Government of Sudan to cooperate with the ICC.⁸⁶ It would seem that this has already been the position in respect of the events that led to the establishment of the ICTY, ICTR and SCSL.⁸⁷ The contrary position is that the Security Council did not create an express obligation on Sudan or other states; it rather ‘requested’ them to

January 1997 in Zutphen, The Netherlands, reprinted in Bassiouni (1998) 221-311, the irrelevance of official capacity was placed under *Article 18*, but it had been suggested that para 2 of this Article be subject to further discussion in connection with judicial cooperation, see Bassiouni (1998) 246; See also, *Report of the Working Group on General Principles of Criminal Law and Penalties*, (A/AC.249/1997/WG.2/CRP.2/Add.1), reprinted in Bassiouni (1998) 380.

⁸³ Schabas (2007) 232.

⁸⁴ Schabas (2007) 232.

⁸⁵ D Akande, ‘The Bashir indictment: Are serving heads of states immune from ICC prosecution?’ *Oxford Transitional Justice Research Working Paper Series*, 30 July 2008, 3.

⁸⁶ Akande (2008) 3.

⁸⁷ *Prosecutor v Milošević*, (Case No. IT-02-54-PT), Decision on Preliminary Motions, 8 November 2001, paras 26-34; *Prosecutor v Taylor*, (SCSL-2003-01-I), Trial Chamber’s Decision on Immunity from Jurisdiction, 31 May 2004, para 41.

cooperate. As such, the language used in operative paragraph 2 of Resolution 1593(2005) is soft and not mandatory to create obligations even to non-parties to the Rome Statute.⁸⁸

Applying literal interpretation, one may assert that the provisions of article 27(2) and 98(1) of the Rome Statute appear to be at odds. They raise a contentious subject matter on immunity enjoyed by state officials from non-parties to the Rome Statute. The Chair of the Working Group responsible for the drafting of Article 27 at the Rome Diplomatic Conference, Per Saland, suggests that ‘there may be a contradiction between that article and article 98(1), owing to the fact that each was negotiated by a different Working Group at the Conference.’⁸⁹

However, if the purposive interpretation is applied, there must not be such necessary contradiction at all. But, the question is whether article 98(1) acts as a bar to the execution by a state party to the Rome Statute of a request from the court to arrest and surrender an official from another state, or whether immunities cannot simply apply. According to Broomhall,

Article 27(2) makes clear that immunity 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 to the exercise of jurisdiction by such states, rather than by the court. The Court may be free to act where states remained constrained by doctrines of immunity.⁹⁰

Broomhall adds that ‘[i]t should be noted that the paragraph [98(1)] refers to obligations under international law, meaning that national law pertaining to immunities will not be able to block cooperation with the Court except to the extent that it reflects the international law accounted for in this paragraph.’⁹¹ A close reading of article 98(1) of

⁸⁸ P Gaeta ‘Does President Al Bashir enjoy immunity from arrest?’ (2009) 7 *Journal of International Criminal Justice* 315.

⁸⁹ Saland in Lee (1999) 189.

⁹⁰ Broomhall (2003) 141.

⁹¹ Broomhall (2003)141-142.

the Rome Statute would suggest that only the court and not the requested state decides on the scope of the immunity in question.⁹²

Today, the preceding debate may lead to confusion on the understanding of the difference between articles 27 and 98 of the Rome Statute. There are conflicting positions regarding the interpretation of articles 27 and 98 above as demonstrated by Professor William Schabas and Professor Johan van der Vyver. Van der Vyver maintains that, ‘article 27 excludes immunity of state officials for crimes within the jurisdiction of the ICC. Article 98 simply upholds rules of international law which place obligations on states to surrender a suspect to the ICC.’⁹³ Hypothetically, if state A has custody of an accused person and is precluded by an international agreement to surrender a state official, state A cannot be compelled to violate that obligation. The accused may only be surrendered to the ICC when he is no longer serving as a state official as such. This interpretation is correct. But it is also important to note the views by Schabas as well. Schabas argues that article 27 denies the defence of official capacity and removes immunity of state officials from states parties to the Rome Statute. Article 98 deals with immunity attaching to diplomats and states. Hence, there is no incompatibility or inconsistency between articles 27 and 98 of the Rome Statute because article 27 governs the exercise of jurisdiction over individuals before the ICC while article 98 is applicable to the obligation of state cooperation with the ICC.⁹⁴ Further, article 27(1) of the Rome Statute denies the defence of official capacity to different categories of officials, thereby denying this defence to anyone who may try to invoke it. An interpretation is that the provision applies to all officials whether exercising *de jure* or *de facto* powers. With regards to the ICC, article 27(2) removes immunity from such officials of states parties to the Rome Statute. This is a clear literal interpretation of the provision.

⁹² See, a rule adopted by the Preparatory Committee for the ICC in the Finalised Draft Rules of Procedure and Evidence adopted on 30 June 2000, Chapter IV. Rule 195(1) grants States the right to provide information to the court relevant to any determination under Article 98.

⁹³ Comments by Prof Johan van der Vyver, 25 June 2010, at Pretoria.

⁹⁴ See, WA Schabas (2010) *The International Criminal Court: A commentary on the Rome Statute*, 446-453. Schabas argues that articles 27 and 98 are different and deal with distinct aspects relating to immunity and state cooperation.

A troubling question is whether article 27(2) applies to state officials from states that are not parties to the Rome Statute, for example, Sudan and Libya. This issue has generated debate amongst scholars. Two different positions are observed. Some suggest that article 27(2) cannot apply to individuals from states that are not parties to the Rome Statute. Yet, others hold a different view that if the Security Council can refer a situation to the ICC; the court is empowered to proceed against individuals, including state officials of non-parties to the Rome Statute. We examine these two positions here. Schabas argues that, ‘article 27(2) cannot apply to heads of state of non-party states, who retain their immunity under customary international law. Nor does it affect those who benefit from immunity as a result of the Charter of the United Nations, which is hierarchically superior to the Rome Statute.’⁹⁵ To this end, even when the ICC stated that the President of Sudan, Omar Al-Bashir does not benefit from immunity in respect of legal charges against him and before the ICC; it remains contentious whether the court was right to assert such view.

In the case of Omar Al Bashir, the Pre-Trial Chamber of the ICC should have applied article 34 of the Vienna Convention on the Law of Treaties, 1969, in determining whether article 27(2) of the Rome Statute applies to Sudan, and by extension, its state officials. It is obvious that the Rome Statute must be interpreted in line with article 34 of the Vienna Convention on the Law of Treaties, 1969 in respect of third states like Sudan which is not a state party to the Rome Statute. The effect of article 34 of the Vienna Convention on the Law of Treaties is that a treaty does not create either obligations or rights for a third state without its express consent. For example, Sudan is not a state party to the Rome Statute. So, how could article 27(2) of the Rome Statute apply to the Sudanese state official? Akande⁹⁶ argues that, resolution 1593 of 2005 which referred the situation in Darfur to the ICC conferred jurisdiction on the ICC over individuals responsible for the crimes committed in Darfur. Resolution 1593 required Sudan to cooperate with the ICC. Although there is no express paragraph in the resolution which allows the court to proceed against President Bashir of Sudan, an inference can be made that, despite being a

⁹⁵ Schabas (2010) 450.

⁹⁶ D Akande ‘The legal nature of Security Council referrals to the ICC and impact on Al Bashir’s immunities’ (2009) 7 *Journal of International Criminal Justice* 333, 340-341.

third state, Sudan is obliged under resolution 1593 to cooperate with the ICC in the prosecution of persons responsible for international crimes committed in Darfur. Hence, being a member of the United Nations, Sudan is obliged to accept and enforce the decisions of the Security Council.⁹⁷ One must recall that the referrals of the situations in Darfur and Libya followed the determinations by the Security Council that the situations constituted a threat to international peace and security. Thus, the referrals triggered the jurisdiction of the ICC over all individuals, including state officials responsible for the crimes in Darfur and Libya.

The preceding arguments do not provide any clear answer to the question whether the ICC can proceed against persons from states that are non-parties to the Rome Statute. It is illogical to suggest that by referring the Situation in Darfur to the Prosecutor of the ICC, the United Nations Security Council assumed that the ICC would apply article 27(2) of the Rome Statute and at the same time contend that article 34 of the Vienna Convention on the Law of Treaties, 1969, could apply in respect of the Rome Statute as a treaty as such. Even if there could be an implied waiver of immunity through the referrals by the Security Council, it remains contestable whether such is the clear position in international law.

If the Security Council refers a situation to the Prosecutor of the ICC, such referral does not alter an established rule under customary international law or the Vienna Convention on the Law of Treaties, 1969, particularly article 34 thereof. Arguably, the Security Council cannot contract on behalf of a state and therefore, it cannot under normal circumstances, cause an international treaty to be binding on a third state. In fact, the Security Council cannot change basic provisions in the Rome Statute even when it refers a situation to the Prosecutor of the ICC.⁹⁸ So, what would be the position regarding prosecution of perpetrators of international crimes, especially state officials in Sudan or Libya whereby the Security Council referred the situations in such states to the ICC? Should President Bashir or Col. Muammar Gaddafi benefit from immunity because

⁹⁷ Art 25, UN Charter, 1945.

⁹⁸ Schabas (2010) 451.

Sudan and Libya are not states parties to the Rome Statute? If this is to be maintained, there is a serious risk of tolerating or developing a culture of impunity in respect of international crimes.

It is argued here that the Rome Statute did not create the crimes within the jurisdiction of the ICC. The crimes are recognised under customary international law and therefore, they create a binding obligation on all states and individuals generally. In principle, one must not confuse responsibility of an individual for crimes as envisaged under article 27(2), and state cooperation (reflected in article 98 of the Rome Statute). It must be noted that only state cooperation is subject to the Vienna Convention on the Law of Treaties, but not whether an individual should be held responsible for crimes. This means that, individuals like President Bashir of Sudan or Col. Muammar Gaddafi of Libya can be held responsible, but Sudan and Libya may not be compelled to surrender them to the ICC due to the provisions of article 98 of the Rome Statute.⁹⁹ Hence, President Bashir and Muammar Gaddafi can be held responsible for international crimes before the ICC. This is the direct implication of the referral of the situations in Darfur and Libya to the ICC. In fact, in the case of Libya, resolution 1970(2011)¹⁰⁰ authorised the Prosecutor of the ICC to investigate the situation in Libya with a view to prosecuting the responsible perpetrators of international crimes. This has an effect that immunity attaching to Libyan leaders cannot be upheld.

While the Security Council referrals cannot change the general principle or rules on immunities described under article 27(2) of the Rome Statute,¹⁰¹ it is not a new phenomenon that the Security Council can take measures which can affect rules of customary international law, such as immunity of state officials. It is argued that rules of customary international law can be modified by an action of the Security Council. This is based on the fact that the Security Council can establish international criminal tribunals

⁹⁹ However, some scholars argue that article 27 of the Rome Statute cannot be used on Sudan which is a non state party to the Rome Statute. One anonymous examiner of this thesis holds this view because the Rome Statute is a treaty which binds only on states parties and not non-parties thereto. This argument, if followed, may lead to impunity for individuals from non-states parties to the Rome Statute.

¹⁰⁰ UNSC Res 1970(2011), para 4.

¹⁰¹ Schabas (2010) 451-452.

with powers over international crimes, and thereby outlaw immunity for anyone responsible for such crimes. For instance, the ICTY and ICTR were established for this kind of purpose, and it is not surprising that many state officials in the former Yugoslavia and Rwanda were prosecuted by these tribunals.

2.3.7 Immunity in the statutes of hybrid courts

Like in the statutes of international criminal tribunals and the ICC, the statutes of hybrid courts also contain provisions outlawing immunity of state officials responsible for international crimes. In this part, the discussion is followed on two hybrid courts: the Special Court for Sierra Leone and the Extra-ordinary Chambers in the Courts of Cambodia.

The Special Court for Sierra Leone ('the SCSL') was established by an agreement between the United Nations and the Government of Sierra Leone,¹⁰² after adoption of the United Nations Security Council Resolution 1315 of 2000.¹⁰³ The President of Sierra Leone at the time, Ahmad Tejan Kabbah, alarmed by the continued breach of the ceasefire agreement between the Government of Sierra Leone and the major warring rebel faction, RUF, asked the United Nations to help Sierra Leone establish a Special Court to try those suspected of committing international crimes.

The purpose of the Special Court for Sierra Leone is to 'prosecute the persons who bear the greatest responsibility for serious violation of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.'¹⁰⁴ In Resolution 1315, the UN Security Council requested the Secretary-General, Kofi Annan, to negotiate an agreement with the Government of Sierra Leone with a view

¹⁰² Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (16 January 2002), UN SC Res. 246, UN Doc. S/2002/246.

¹⁰³ UN SC Res.1315 (2000) of 14 August 2000, UN. Doc.S/RES/1315.

¹⁰⁴ Art 1(1), Statute of the SCSL.

to establishing a Special Court. The agreement was later implemented into Sierra Leonean law by the *Special Court Agreement (Ratification) Act, 2002*.¹⁰⁵

The SCSL is a hybrid court. It is composed of international judges and judges appointed by the Government of Sierra Leone. It also applies both international and Sierra Leonean law, and has international and national lawyers. The Statute of the SCSL allows the court to prosecute and punish war crimes and crimes against humanity but not genocide. As to immunity of state officials, the Statute of the SCSL provides that: 'The official position of any accused persons, whether as Head of State or Government or a responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment.'¹⁰⁶ As will be observed in chapter 3 and in the case against Charles Taylor,¹⁰⁷ it is article 6(2) of the Statute of the SCSL which denied Charles Taylor a claim of immunity from prosecution before the SCSL.¹⁰⁸ The Appeals Chamber of the SCSL dismissed on 31 May 2004, a Motion by Charles Taylor to quash his indictment and to set aside the warrant for his arrest on the ground that he is immune from any exercise of jurisdiction by the court by virtue of the fact that he was, at the time of issuing of the indictment and warrant against him, a head of state.

In Cambodia, the Extra-ordinary Chambers in the Courts of Cambodia (ECCC) were established in 2004 to try senior leaders of the Democratic Kampuchea for international crimes committed by the Khmer Rouge regime in Cambodia from 17 April 1975 to 6 January 1979. On 6 June 2003 the United Nations and the Royal Government of Cambodia entered into an agreement concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea.¹⁰⁹ The purpose of this agreement was to regulate the cooperation between the United Nations and the Royal

¹⁰⁵ Act No. 9 (2002), *Act Supplement to Sierra Leone Gazette*, CXXXIII (22), 25 April 2002.

¹⁰⁶ Art 6(2), Statute of the SCSL.

¹⁰⁷ See Ch 3, part 3.2.

¹⁰⁸ *Prosecutor v Taylor*, (SCSL-2003-01-I), Appeals Chamber's Decision on Immunity from Jurisdiction, 31 May 2004, para 41.

¹⁰⁹ See, 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*, Done at Phnom Penh on 6 June 2003, available at <<http://www.eccc.gov.kh/english/default.aspx>> (accessed on 5 October 2008).

Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea. It was also to deal with leaders most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia committed between 17 April 1975 and 6 January 1979.¹¹⁰ The agreement recognised that the ECCC has jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in article 1 of the Agreement.¹¹¹

On 19 October 2004, the Royal Government of Cambodia promulgated a *Law Approving 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*¹¹² in which it agreed to carry out all procedures necessary to implement the Agreement. In August 2001, the Royal Government of Cambodia enacted a *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, which was amended in October 2004.¹¹³ The General Assembly of the United Nations welcomed the promulgation of this law on ECCC in its *Resolution 57/228* of 18 December 2002. The Law referred to senior leaders of Democratic Kampuchea as ‘suspects’ and stated that the Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the Supreme Court of Cambodia.¹¹⁴ Further, the Law empowered the ECCC to deal with the crimes of torture, genocide, crimes against

¹¹⁰ Art 1, *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*, 6 June 2003.

¹¹¹ Art 2, *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*, 6 June 2003. The Agreement further recognises that the ECCC has jurisdiction consistent with that set forth in the Law on the establishment of the ECCC.

¹¹² NS/RKM/1004/004, Published on 21 October 2004, No. 254 Ch. L.

¹¹³ See, *Preah Reach Kram* NS/RKM/0801/12 dated 10 August 2001; NS/RKM/1004/006, adopted by the National Assembly of the Kingdom of Cambodia on 5 October 2004 in the 1st Session of the 3rd Legislature, and approved in its entirety by the Senate on 8 October 2004, in the 9th Session of the 1st Legislature, and pronounced as being fully in accordance with the Constitution by the Constitutional Council in its Decision No. 065/007/2004 KBTh. Ch. of 22 October 2004. The Law may be read at <<http://www.eccc.gov.kh/english/default.aspx>> (accessed on 5 October 2008).

¹¹⁴ Art 2, *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, 2001.

humanity and war crimes.¹¹⁵ The Law on ECCC allowed the foreign judges to co-preside over cases before the ECCC.¹¹⁶

The Law establishing the ECCC provided for individual criminal responsibility in its Chapter VIII wherein article 29 relates to immunity of state officials from prosecution for international crimes. It provides expressly that:

Any suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in articles 3, 4, 5, 6, 7 and 8 [torture, genocide, crimes against humanity and war crimes] of this law shall be individually responsible for the crime. The position of or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.¹¹⁷

It should be noted here (as indicated in chapter 3)¹¹⁸ that the jurisprudence of the ECCC does not reveal any case where immunity was pleaded by the state officials, accused for international crimes in Cambodia.¹¹⁹

2.3.8 Immunity as covered under treaties

It is important to understand that there are many international treaties outlawing the defence of immunity of state officials from prosecution for international crimes. In this part, the study analyses how various international treaties have addressed immunity. Such treaties include the Convention on the Non-Applicability of Statutory Limitations to War

¹¹⁵ Arts 4, 5 and 6, *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, 2001.

¹¹⁶ For example, on 14 July 2008, His Majesty Norodom Sihamoni King of Cambodia, by a Royal Decree, NS/RKT/0708/857, appointed Mrs. Catherine Marchi Uhel (French national) as International Reserve Judge of the Supreme Court Chamber and Mr. Siegfried Blunk (German national) as International Reserve Investigating Judge vide article 1 of the Decree.

¹¹⁷ Art 29, *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, 2001.

¹¹⁸ See Ch 3, part 3.2.

¹¹⁹ See generally, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-2007-ECCC/OCIJ, (Khieu Samphan), *Provisional Detention Order*, 19 November 2007; Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, *Provisional Detention Order*, ECCC-OCIJ, 19 September 2007, 1-5, paras 1-6; Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, *Provisional Detention Order*, ECCC-OCIJ, 19 September 2007, paras 1 and 2; Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, ECCC-OCIJ, *Police Custody Decision*, 12 November 2007, p.1-2; Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, ECCC-OCIJ, *Provisional Detention Order*, 14 November 2007, p.1-5, paras 1-11.

Crimes and Crimes against humanity, the Genocide Convention, the Convention against Torture, and the Convention on the Suppression and Punishment of the Crime of Apartheid.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968¹²⁰ was adopted in the spirit that war crimes and crimes against humanity are among the gravest crimes in international law; and that none of the previously existing solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity had made provision for a period of limitation. The objective of the Convention was that effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms and the promotion of peace and security; and the desire to affirm in international law that ‘there is no period of limitation for war crimes and crimes against humanity.’¹²¹

The Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity outlaws limitations to such crimes, irrespective of the date of their commission.¹²² In relation to immunity of state officials, the convention provides,

If any of the crimes mentioned in article I [war crimes and Crimes against humanity] is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them,

¹²⁰ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Adopted by the General Assembly of the United Nations on 26 November 1968, General Assembly Resolution 2391 (XXIII) of 26 November 1968; United Nations, *Treaty Series*, Vol. 754, No. I-10823. The Convention entered into force on 11 November 1970. Subsequent to this Convention, the Council of Europe elaborated a similar Convention titled, *European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes*, European Treaty Series, No.82, 25 January 1974, reprinted in 13 ILM 540 (1974), see also *Reports of the Consultative Assembly of the Council of Europe on the applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity* (Doc. 1868 of 27 January 1965 and Doc. 2506 of 15 January 1969).

¹²¹ Preamble to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968, paras I-VII.

¹²² Art I (a)-(b), Convention on Non-Applicability of Statutory Limitations to War crimes and Crimes against Humanity, 1968.

irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.¹²³

By employing words such as ‘*representatives of the State authority*’ the Convention actually refers to public officials such as the heads of state. Thus, it does not recognise immunity of state officials as defence for prosecution and punishment of war crimes and crimes against humanity.

Another treaty which outlaws immunity of state officials in respect of genocide is the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).¹²⁴ The Genocide Convention provides that genocide, ‘whether committed in time of peace or in time of war, is a crime under international law which the contracting parties undertake to prevent and to punish.’¹²⁵ It recognises that persons committing genocide or any of the other acts prohibited under the convention shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.¹²⁶ Hence, by emphasising on the ‘*constitutionally responsible rulers*’ and ‘*public officials*’, the Genocide Convention envisages the state officials, and removes immunity of state officials as a defence for acts of genocide. Hence, state officials cannot invoke a defence of their status if charged with genocide.

Authoritative academic commentaries on article IV of the Genocide Convention reveal that the drafting history of article IV of the Genocide Convention ‘proved to be quite difficult, largely because it touched on related questions such as State responsibility.’¹²⁷ It must be recalled that the UN General Assembly Resolution 96(I) had specified in its language that persons responsible for genocide ‘whether private individuals, public

¹²³ Art II, Convention on Non-Applicability of Statutory Limitations to War crimes and Crimes against Humanity, 1968.

¹²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Approved by the General Assembly of the United Nations, on 9 December 1948. General Assembly Resolution 260 A (III) of 9 December 1948; United Nations, *Treaty Series*, Vol. 78, No. I-1021. The Convention entered into force on 12 January 1951.

¹²⁵ Art I, Genocide Convention.

¹²⁶ Art IV, Genocide Convention.

¹²⁷ Schabas (2000) 317.

officials or statesmen’, were to be punished for their acts.¹²⁸ It appears that the drafting history of article IV of the Genocide Convention had brought in different positions and debates by states, such as France, Norway, Sweden, Philippines, Finland, United Kingdom, India, Pakistan, United States of America, Syria, Lebanon, The Netherlands, and China.¹²⁹ States found it difficult to agree on the use of the proper terms, ‘*persons liable*’ or ‘*who is responsible*’ under acts envisaged in article IV of the Convention. This was mostly based on the public officials and their responsibility for genocide. While France considered that only rulers could be responsible, Norway believed that rulers could be judged only by an international court.¹³⁰ The Netherlands had preferred the use of the term ‘responsible rulers’ in the text of article IV of the Convention. Philippines had suggested that ‘constitutional monarchs who acquiesced in genocide shared responsibility.’¹³¹ The United Kingdom agreed that it was in favour of article IV of the Genocide Convention, but only, in its view, that the provision ‘applied to genocide committed by individuals and not governments.’¹³²

Finally, the *Ad Hoc* Committee responsible for the preparation of the Convention agreed that ‘[t]hose committing genocide or any of the other acts enumerated in article IV shall be punished whether they are constitutionally responsible rulers, public officials or individuals.’¹³³ It was later felt necessary that clarifications are made on whether article IV of the Genocide Convention applied to *de facto* and *de jure* rulers.¹³⁴ It would be meaningful to assert that both *de facto* and *de jure* rulers have the same responsibility, and therefore that, the defence of immunity does not apply to both cases.

¹²⁸ See, UNGA Res. 96(I).

¹²⁹ For a detailed discussion on the heated debate between such states, see, Schabas (2000) 317-320 (on the ‘drafting history’). This study adopts the position stated by Schabas in his authoritative book on genocide.

¹³⁰ Schabas (2000) 319 (referring to UN Doc.A/401 and UN.Doc.E/623/Add.2).

¹³¹ Schabas (2000) 318.

¹³² Schabas (2000) 319, citing UN.Doc. A/C.6/SR.93.

¹³³ This found way into the final text of the Convention, albeit with some modifications. It should be noted that the final provision was agreed as it reads in the present day article IV of the Genocide Convention. It appears that thirty-one members had voted in favour of the provision; one voted against it; and eleven members abstained. The US was one of those that abstained, arguing that the word ‘rulers’ as used in article IV of the Genocide Convention, could not be applied to heads of state, especially the President of the United States. See, Schabas (2000) 319.

¹³⁴ See, Benjamin Whittaker, ‘*Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*’, UN Doc.E/CN.4/Sub.2/1985/6, 23, para 50.

The Genocide Convention calls for prosecution of persons charged with genocide by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to the contracting parties which shall have accepted its jurisdiction,¹³⁵ and further requires states to provide effective penalties for persons guilty of genocide.¹³⁶ In that sense, and given the contemporary settings, the Genocide Convention appears to refer to the United Nations specialised international tribunals or including domestic courts of states. It is not clear from the language of article VI of the *Genocide Convention* whether the drafters of the Convention had really intended for the ‘principle of complementarity’ as nowadays recognised under the Rome Statute.

Apart from the preceding treaties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),¹³⁷ is another treaty outlawing immunity. The Convention against Torture imposes obligations on states to take effective legislative, administrative and judicial measures to prevent acts of torture and that no exceptional circumstances whatsoever may be invoked as a justification of torture. Of importance, is the provision that ‘an order from a superior officer or a public authority may not be invoked as a justification of torture.’¹³⁸ From this, it is apparent that ‘*a public authority*’ would mean and include the state officials. Thus, no immunity is available for state officials who commit or order commission of torture as an international crime.

Further, the International Convention on the Suppression and Punishment of the Crime of Apartheid¹³⁹ does not recognise immunity for the crime of apartheid. The convention declares that ‘apartheid is a crime against humanity’¹⁴⁰ which violates the principles of

¹³⁵ Art VI, Genocide Convention.

¹³⁶ Art V, Genocide Convention.

¹³⁷ Adopted by the General Assembly of the United Nations on 10 December 1984, General Assembly Resolution 39/46 of 10 December 1984; United Nations, *Treaty Series*, Vol. 1465, No. I-24841. The Convention entered into force on 26 June 1987.

¹³⁸ Art 2(1)-(3), Convention against Torture.

¹³⁹ Adopted and opened for Signature, ratification by the General Assembly Resolution 3068(XXVIII) of 30 November 1973. The Convention entered into force on 18 July 1976, in accordance with article XV.

¹⁴⁰ Art I (1).

international law and urges states parties to the convention to declare criminal those individuals, organisations and institutions committing the crime of apartheid.¹⁴¹ The Convention defines the crime of apartheid in its article II. Regarding immunity, the convention provides that '[i]nternational criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organisations and institutions and *representatives of the state*, whenever they: commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the Convention; or directly abet, encourage or co-operate in the commission of the crime of apartheid.'¹⁴² The obligation is further imposed on states to adopt legislative measures to prosecute, bring to trial and punish persons responsible for or accused of the crime of apartheid.¹⁴³ Basically, '*representatives of the state*' include the state officials in its wider scope and thus, they are not exempted from bearing responsibility for the crime of apartheid as an international crime.

Hence, from the above international treaties, it must be noted that the defence of immunity has been outlawed for such crimes as genocide, crimes against humanity, war crimes, torture and apartheid. In the international treaties discussed above, state officials are referred to as representatives of governments or the state.

Having discussed international treaties above, it is also important to examine how the International Law Commission has made contribution to the development of the law on immunity of state officials.

2.3.9 International Law Commission and the question of immunity

The International Law Commission (ILC), which is a body established by the United Nations General Assembly, has made important contributions to the developments in the codification of immunity of state officials. The United Nations General Assembly Resolution on Affirmation of the Principles of International Law Recognised by the

¹⁴¹ Art I (2).

¹⁴² Art III.

¹⁴³ Art IV.

Charter of the Nuremberg Tribunal¹⁴⁴ recognised the groundbreaking work of the ILC in respect of immunity. In this resolution, the General Assembly affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal. The General Assembly had directed the ILC to treat as a matter of primary importance, plans for the formulation, in the context of a general codification of offences against the peace and security of mankind and principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. Hence, on 29 July 1950, the ILC submitted to the General Assembly a Report on the Principles of the Nuremberg Tribunal (the Nuremberg Principles).¹⁴⁵ That report contained a development on immunity of state officials from prosecution for international crimes. In its Principle III, it provided that:

The fact that a person who committed an act which constitute a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

The ILC has addressed the immunity of state officials in various forms.¹⁴⁶ In this regard, various works of the ILC deserve attention.¹⁴⁷ The Draft Code of Offences against the

¹⁴⁴ UN Res. 95, 1 UN. GAOR (Part II) at 188, UN. Doc. A/64/Add.1 (1946).

¹⁴⁵ 5 UNGAOR Supp. (No.12) 11, UN Doc. A/1316 (1950).

¹⁴⁶ RA Kolodkin (2006), 'Immunity of state officials from foreign criminal jurisdiction' *Annex A* to the *Report of the International Law Commission*, 436-454, 441.

¹⁴⁷ See, *The Draft Declaration on the Rights and Duties of States*, art 2 and its commentary, *Yearbook of the International Law Commission*, 1949, 287; *The Draft Principles of International Law Recognised in the Charter of the Nuremberg Tribunal*, draft principle III and its commentary, *Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950*, Document A/1316, 11-14; *Yearbook of the International Law Commission*, 1950, Vol. II, 192, 374-378; *The Draft Code of Offences against the Peace and Security of Mankind (1954)*, *International Law Commission Draft Code of Offences Against the Peace and Security of Mankind*, 28 July 1954, 9 UN. GAOR Supp. (No. 9), 11, UN. Doc. A/2693(1954), draft art 3 and its commentary, *Yearbook of the International Law Commission*, 1954, Vol. II, 119-120, especially art 3; *The Draft Code of Crimes Against the Peace and Security of Mankind (July 1991)*, *International Law Commission Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, 19 July 1991, (UN.GAOR. Supp. No.10, UN. Doc. (A/46/10) 238, particularly draft art 13; *Draft Articles on Diplomatic and Consular Relations*, *Yearbook of the International Law Commission*, 1958, Vol. II, 89-105; *Yearbook of the International Law Commission*, 1961, Vol. II, 89-128; *Draft Articles on Special Missions*, draft art 21 and its commentary, *Yearbook of the International Law Commission*, 1967, Vol. II, 359; *Draft Articles on the Representation of States in their Relations with International Organisations*, *Yearbook of the International Law Commission*, 1971, Vol. I, 287; *Yearbook of the International Law Commission*, 1971, Vol. II, 101-110; *Draft Articles on the Prevention and Punishment of Crimes against Diplomatic Agents and other Internationally Protected Persons*, *Yearbook of the International Law Commission*, 1972, Vol. II, 309-323; and *Draft Articles on Jurisdictional Immunities of States and Their Property*, *Work of the International Law Commission*, 2004, Vol. I, United Nations, New York, 262.

Peace and Security of Mankind, (1996)¹⁴⁸ is more emphatic. It excludes the defence of immunity of state officials in the following terms: ‘the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.’¹⁴⁹ The accompanying text of the commentary noted that the official position of an individual has been consistently excluded as a possible defence to crimes under international law.¹⁵⁰

As at 2011, the ILC is still considering a study on the immunity of state officials from foreign criminal jurisdiction. At its fifty-eighth session in 2006, the ILC considered the topic of immunity of state officials in its long-term programme of work. The General Assembly of the United Nations noted the decision of the ILC during its fifty-eighth session of 2006 in its resolution 62/66 of 6 December 2007. At its fifty-ninth session in 2007, the ILC decided to include the topic ‘*Immunity of state officials from foreign criminal jurisdiction*’ in its programme of work and appointed Mr Roman Kolodkin as Special Rapporteur on the question of immunity.¹⁵¹ The Special Rapporteur submitted his preliminary report on immunity in the sixtieth session of the ILC in 2008 whereby the ILC considered the preliminary report. At its sixty-third session, The General Assembly of the United Nations adopted a resolution on the report of the ILC on the work of its sixtieth session on 15 January 2009.¹⁵² During the ILC’s sixth-first session, the topic of immunity of state officials from foreign criminal jurisdiction was included in the provisional agenda for the sixty-first session convened at Geneva on 4 May 2009.

¹⁴⁸ Draft art 7 and its commentary, *Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, 26-27.

¹⁴⁹ *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May – 26 July 1996, UN Doc. A/51/10, 39.

¹⁵⁰ *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May – 26 July 1996, UN Doc. A/51/10, 40. See also, *Report of the International Law Commission to the General Assembly on the Work of its Thirty-Eighth Session*, *Yearbook of the International Law Commission*, 1986, Vol. II (Part 2), para 170, 52; *Fifth Report on the Draft Code of Offences Against the Peace and Security of Mankind*, by Mr. Doudou Thiam, Special Rapporteur, UN. Doc.A/CN.4/404, *Yearbook of the International Law Commission*, 1987, Vol.II (Part 1), UN. Doc. A/CN.4/SER.A/1987/Add.1 (Part 1), 9-10.

¹⁵¹ At its 2940th meeting on 27 July 2007, Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10), para 376.

¹⁵² Official Records of the General Assembly, Sixty-third Session, Supplement No.10 (A/63/10), (UN Doc.A/RES/63/123), Agenda item No.75.

However, at this session, the ILC did not consider the topic of immunity.¹⁵³ It is expected that the ILC will continue to discuss and consider this topic in its subsequent sessions.

2.3.10 The law on immunity as developed in non-binding instruments

In addition to the work of the ILC and the codification of the law on immunity in international treaties, one must note that other instruments which are not binding on states, have also called for rejection of immunity of state officials in respect of international crimes. These instruments include the Princeton Principles on Universal Jurisdiction and resolutions of the Institute of International Law.

The Princeton Principles deals with universal jurisdiction. Under the Princeton Principles, national courts may have the power to prosecute any person within their jurisdiction, who has committed an international crime contrary to international law.¹⁵⁴ The Principles are guidelines to national courts when prosecuting international crimes. Principle 2(1) outlines seven international crimes: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture. Regarding international crimes under international law as specified in Principle 2(1) above, the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.¹⁵⁵

Apart from the Princeton Principles, one notes that the Institute of International Law has discussed the question of immunity of state officials in its various resolutions. Although such resolutions are non-binding, they constitute important doctrinal sources for the establishment of the content of international law in the field of immunity. However, the

¹⁵³ International Law Commission, 'Provisional Agenda for the Sixty-first Session', Geneva, 4 May- 5 June, and 6 July -7 August 2009, UN General Assembly, UN. Doc. A/CN.4/605, Agenda item No.8 'Immunity of State officials from foreign criminal jurisdiction.'

¹⁵⁴ DW Nabudere and BL Mukasa, *Comprehensive Research Report on Restorative Systems of Justice and International Humanitarian Law*, resulting from the *Proceedings of the International Conference on Restorative Justice and International Humanitarian Law*, held at Intercontinental Hotel from 17-20 August, 2008, Nairobi, Kenya. The report was published by Marcus Garvey Pan-Afrikan Institute, Mbale, Uganda, 7 September 2008, 31-36.

¹⁵⁵ Princeton Project on Universal Jurisdiction, Principle 5.

focus of the Institute of International Law appears to be in respect of immunity of state officials from jurisdiction of foreign states. The Institute of International Law is arguably favouring the serving state officials by guaranteeing them with a range of immunities, but not former state officials as such. The first of its work on the subject is its *Draft International Rules on the Jurisdiction of Courts in proceedings against foreign states, sovereigns and Heads of State*, which it adopted at its 11th session at Hamburg, Germany in 1891. The second is its resolutions on ‘*Immunity of Foreign States from Jurisdiction and Measure of Execution*’, and on the ‘*Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement*’, adopted respectively at its 46th (Aix-en-Provence, 1954) and 65th (Basel, 1991) sessions. Then followed its resolution on ‘*Public Claims Instituted by a Foreign Authority or a Foreign Public Body*’ adopted at the Oslo session in 1977.

On 26 August 2001, the Institute of International Law adopted a resolution on ‘*Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*’ at its session of Vancouver. This study examines this latter resolution extensively. In this resolution, the Institute of International law affirmed that special treatment is to be accorded to a head of state or a head of government, as a representative of that state and not in his or her personal capacity, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner. It is apparent that this reasoning is based on the well-conceived interest of both the state and the government of which the person is head and the international community as a whole.¹⁵⁶ The resolution contains 16 articles and provides for inviolability of a state official in a foreign state in the following terms:

When in the territory of a foreign state, the person of a Head of State is inviolable. While there, he or she may not be placed under any form of arrest or detention. The Head of State shall be treated by the authorities with due respect and all reasonable steps shall be taken to prevent any infringement of his or her person, liberty, or dignity.¹⁵⁷

¹⁵⁶ Preamble to the Resolution on *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Adopted on 26 August 2001, Session of Vancouver, Institute of International Law (hereafter “the Institute of International Law 2001 Resolution on Immunities”).

¹⁵⁷ Art 1, Institute of International Law 2001 Resolution on immunities. See also, art 15 which guarantees the same rights in respect of the head of government. *But see*, art 13 (1)-(3) which states that: “[a] former

The resolution goes on to provide that in criminal matters the state official shall enjoy immunity from jurisdiction before the courts of a foreign state for any crime he or she may have committed, regardless of its gravity.¹⁵⁸ This seems to be contrary to the obligation imposed on states under the universality of the punishment of persons who commit international crimes. In article 3, the resolution states that in civil matters ‘the head of state does not enjoy immunity from jurisdiction before the courts of a foreign state, unless the suit relates to acts performed in the exercise of his or her official functions.’ Even in such cases, the state official shall enjoy no immunity in respect of a counterclaim. Nonetheless, nothing shall be done by way of court proceedings with regard to the head of state while he or she is in the territory of that state, in the exercise of official functions.¹⁵⁹ It is also an obligation that the authorities of the state ‘shall afford to a foreign head of state the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them.’¹⁶⁰

However, the resolution provides further that the state official may no longer benefit from inviolability, immunity from jurisdiction, or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her state. Such waiver may be made when the state official is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum state may be called upon to take.¹⁶¹ The resolution further provides that:

Nothing in this Resolution may be understood to detract from the obligations of the Charter of the United Nations, and the obligations under the statutes of international criminal tribunals as well as the obligations,

head of state enjoys no inviolability in the territory of a foreign state, nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the alleged acts constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the state’s assets and resources. Neither does he or she enjoy immunity from execution.”

¹⁵⁸ Art 2, Institute of International Law 2001 Resolution on immunities.

¹⁵⁹ Art 3.

¹⁶⁰ Art 6.

¹⁶¹ Art 7.

for those states that have become parties thereto, under the Rome Statute of the International Criminal Court.¹⁶²

It is in article 11(1) above where the resolution does not recognise the immunity from international crimes. The resolution is without prejudice to the rules which determine the jurisdiction of a tribunal before which immunity may be raised, the rules which relate to the definition of crimes under international law, and the obligations of cooperation incumbent upon states in these matters.¹⁶³ Importantly, and of relevance to this study, the resolution provides expressly that ‘nothing in this resolution implies nor can be taken to mean that a head of state enjoys an immunity before an international tribunal with universal or regional jurisdiction.’¹⁶⁴ Thus, it is clear that no state official may enjoy immunity before properly constituted international criminal tribunals established to deal with international crimes.

All the preceding international treaties, instruments and statutes of international courts constitute a body of customary international law in the area of prosecution and punishment of international crimes and rejection of immunity. Having established and indicated various international law sources which reject immunity of state officials for international crimes, it is now important to address a vital question regarding the existence of immunity and international law *jus cogens* on the prohibition and punishment of international crimes.

2.4 Does immunity prevail over international law *jus cogens* on the punishment of international crimes?

Rules of *jus cogens*¹⁶⁵ are norms which have attained a binding peremptory character. As such, *jus cogens* are non-derogable rules of international public order, except that they can be modified by a subsequent norm of a *jus cogens* nature.¹⁶⁶ *Jus cogens* rules are

¹⁶² Art 11(1) (a)-(b).

¹⁶³ Art 11(2).

¹⁶⁴ Art 11(3).

¹⁶⁵ The rules of *jus cogens* are recognised under article 53 of the Vienna Convention on the Law of Treaties, 1969.

¹⁶⁶ Art 53, Vienna Convention on the Law of Treaties, 1969.

meant to protect the interest of international community.¹⁶⁷ They create obligation *erga omnes* to all states not to breach such rules. *Erga omnes* obligations are ‘obligations of a state towards the international community as a whole.’¹⁶⁸ *Jus cogens* operate as a concept superior to both customary international law and treaty.¹⁶⁹ It is accepted in international law that prohibition and punishment of international crimes is an obligation *erga omnes* arising from *jus cogens* nature of crimes. Such *jus cogens* international crimes include the crime of aggression, genocide, crimes against humanity, war crimes, slavery, torture, piracy, apartheid and terrorism.¹⁷⁰ The ICTY held in *Furundžija* that prohibition of torture has attained *jus cogens*¹⁷¹ and so did the ICJ in respect of genocide.¹⁷² The ICJ has further held that prohibition of genocide has attained a peremptory norm in international law (*jus cogens*).¹⁷³ Such prohibition is assuredly an *erga omnes* obligation, protecting essential humanitarian values.¹⁷⁴

Since it is apparent that immunity of state officials is a matter of customary international law,¹⁷⁵ can immunity prevail over international law *jus cogens* on the prohibition and

¹⁶⁷ For more on *jus cogens*, see, ME Villiger (2009) *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 661-678.

¹⁶⁸ Case Concerning the Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*), Second Phase, Judgment of 5 February 1970, ICJ Reports 1970, 33, paras 33-34; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, 23.

¹⁶⁹ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia*), Preliminary Objections, Judgment of 11 July 1996, ICJ Reports 1996, para 101.

¹⁷⁰ MC Bassiouni, ‘International criminal justice in historical perspective: The tension between states’ interests and the pursuit of international justice’ in A Cassese (ed), (2009) *The Oxford companion to international criminal justice*, 131-142, 131.

¹⁷¹ *Prosecutor v Furundžija*, Case No. IT-95-17/I-T, Judgment, Trial Chamber, 10 December 1998, paras 137-139, 144, 153 and 156.

¹⁷² Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia*), Preliminary Objections, Judgment of 11 July 1996, ICJ Reports 1996, para 101.

¹⁷³ Armed Activities on the Territory of the Congo (New Application 2002) (*Democratic Republic of the Congo v Rwanda*), Judgment of 3 February 2006, para 64; Case Concerning the Application of the Convention on the Prevention and Prohibition of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Reports 2007, para 161.

¹⁷⁴ Case Concerning the Application of the Convention on the Prevention and Prohibition of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Reports 2007, para 147.

¹⁷⁵ See part 2.2 of this chapter (on customary international law of immunity). But see also, *Gaddafi*, Court of Appeal of Paris, 20 October 2000, 119 ILR 490-508, 500 (submission by the Advocate General that ‘the principle of the immunity of Heads of State is traditionally regarded as a rule of international custom necessary for the preservation of friendly relations between states’).

punishment of international crimes? This requires an investigation of the tension, conflict or competition between the duty to prosecute and punish perpetrators of international crimes and the apparent customary international law norm of immunity of state officials. The two must be balanced carefully. On one hand, both customary international law and conventional international law have long recognised the *jus cogens* status of the prohibition of international crimes thereby calling for the punishment of individuals responsible for such crimes. On the other hand, there is another argument that since customary international law has recognised and protected immunity of state officials from prosecution – including for international crimes before foreign national courts, as evidenced in the judgment of the ICJ in the *Arrest Warrant*¹⁷⁶ and the French Court in *Gaddafi*¹⁷⁷ case, national courts should uphold immunity of foreign state officials, doing so under the state sovereignty, dignity of the state and its officials, comity and convenience.

By closely following the jurisprudence of courts and academic commentaries, it is apparent that in principle, immunity of state officials has been lifted at least on six grounds. Yasmin Naqvi summarises the six grounds, which this study adopts as follows: ‘(1) that treaty obligations to prosecute state officials accused of international crimes are incompatible with immunity; (2) that states have impliedly waived the immunity of their officials by signing treaties criminalising certain international offences; (3) that there is a rule of customary international law lifting functional immunity in case of international crimes; (4) that the *jus cogens* nature of international crimes trumps immunity; (5) that international crimes fall outside the notion of “acts performed in a sovereign capacity”; and (6) that the fundamental rights of victims are incompatible with immunities.’¹⁷⁸

It is argued that immunity of state officials cannot override the human rights and international law *jus cogens* that impose obligations on states to prosecute and punish persons responsible for international crimes. By ratifying international treaties prohibiting international crimes states normally signify their consent to be bound by the terms of

¹⁷⁶ *Arrest Warrant case*, para 58.

¹⁷⁷ *Gaddafi*, 125 ILR 490-510.

¹⁷⁸ YQ Naqvi (2010) *Impediments to exercising jurisdiction over international crimes*, 254.

such treaties. Considering that such treaties impose international obligations to prosecute and punish persons responsible for international crimes, it follows that any domestic or customary rules conflicting with such treaty obligations cannot and should not prevail. In the case against Augusto Pinochet, the court was convinced that since the crime of torture constituted an international crime, immunity was incompatible to the duty imposed on states to prosecute and punish perpetrators of torture. As such, torture could not be regarded as forming part of the functions of a head of state under international law. Accordingly, Pinochet would not be entitled to immunity.¹⁷⁹ Immunity cannot override the duty to prosecute and punish the crime of torture as reflected under articles 5(1),(2) and 7(2) of the Convention against Torture, 1984. The same is also observed in article IV of the Genocide Convention, 1948. Article 7(2) of the Statute of the ICTY, article 6(2) of the Statute of ICTR, 6(2) of the Statute of SCSL and article 27 of the Rome Statute also bolster the duty to prosecute international crimes as prevailing over immunity of state officials.

Immunity has not yet attained the *jus cogens* nature to override the duty to prosecute and punish international crimes.¹⁸⁰ It must be noted that the duty to prosecute and punish international crimes has acquired a customary international law status of *jus cogens* higher than that of the rule on immunity of state officials. In terms of hierarchy, international law *jus cogens* on the prohibition and punishment of international crimes enjoy a higher status than the rules on immunity which, are arguably, lower norms. Hence, the '*jus cogens* nature of international crimes overrides immunity.'¹⁸¹ In *Al-Adsani v United Kingdom*, it was posited that,

[T]he basic characteristic of a *jus cogens* norm is that, as a source of law in the now vertical international legal system, it overrides any other rule

¹⁷⁹ *R v Bow Street Magistrate, ex parte Pinochet (No. 1), Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.1)*, House of Lords 25 November 1998, 119 ILR51-248(Lords Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann), 97-99, 104-107. See further, Lord Millet at 221-233.

¹⁸⁰ Pinochet case (No.3), [2000] 1 AC 147; Orakhelashvili (2006)354, but see the position regarding state immunity, *Al-Adsani v United Kingdom*, (2001) 34 *European Human Rights Reports* 273, 298-299; para 61; H Fox (2002) *The law of state immunity* 525; Committee Against Torture, 34th Session, Summary of Record of 646th Meeting, 6 May 2005, (CAT/C/SR.646/Add.1); *Bouzari v Islamic Republic of Iran* 124 ILR 427, para 73; *Greek Citizens v Federal Republic of Germany (The Distomo Massacre case)*, (2003) 42 ILM 1030.

¹⁸¹ Naqvi (2010) 268-276.

which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or in any event, does not produce any legal effects which are in contradiction with the content of the peremptory rule.¹⁸²

From the above, it seems that when two hierarchical norms compete or conflict, the solution is to resolve them by hierarchy, which means, only the superior norms must prevail. This ‘normative hierarchy’ tends to suggest that immunity rules must not override the *jus cogens* effects of international crimes.¹⁸³ But, this could lead to confusion as the two rules are inherently competing and conflicting.¹⁸⁴ Naqvi observes that ‘although personal immunity is not considered as peremptory in customary international law, the rule should always be respected because in such circumstances, “the need to avoid conflicts in international relations may be held to override the demands of justice.”’¹⁸⁵

Nevertheless, one must take the position that immunity should not be upheld in respect of prosecution and punishment of international crimes because customary international law, and largely conventional international law, has outlawed immunity of state officials. As I have already argued, ‘it would be important to know that as long as punishment of international crimes is concerned, there is no point in regarding heads of state as a special class that deserves protection different from any other private individual who commit the same international crimes.’¹⁸⁶

¹⁸² *Al-Adsani v United Kingdom*, ECHR, European Court of Human Rights 2001-IX 79, 21 November 2001, para 1 (Dissenting Opinion of Judges Rozaskis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vijić).

¹⁸³ For a contrary position, see LM Caplan, ‘State immunity, Human rights and *jus cogens*: A critique of the normative hierarchy theory’ (2003) 97 *American Journal of International Law* 741-781, 771; D Akande and S Shah (2011) 21 *European Journal of International Law* 815, 833-838 (arguing that the argument that *jus cogens* prevail over immunity is not persuasive. They contend that not all rules prohibiting international crimes have attained the status of *jus cogens*).

¹⁸⁴ Joint Separate Opinion in the *Arrest Warrant* case, para 75.

¹⁸⁵ Naqvi (2010) 271 (citation omitted).

¹⁸⁶ CB Murungu ‘Judgment in the first case before the African Court of Justice and Human and Peoples’ Rights: A missed opportunity or a mockery of international law in Africa? (2010) 3(1) *Journal of African and International Law* 187-229.

In light of the above, it should be noted that a state official cannot commit international crimes and hide behind the cover of functional and private immunity even before his or her own national courts because international crimes are punishable by any state under universal jurisdiction. The point to be emphasised is that functional or private immunities are not acceptable as defences for prosecution of state officials who commit international crimes. It must be understood that ‘international law has long outlawed the defence of immunity of state officials for international crimes.’¹⁸⁷

According to the ICJ, functional immunity is not a defence from prosecution for international crimes.¹⁸⁸ As Judge Christine van den Wyngaert has observed, ‘international law does not prohibit, but instead encourages States to investigate allegations of war crimes and crimes against humanity, even if the alleged perpetrator holds an official position in another State.’¹⁸⁹ In the case against President Bashir, the ICC made it clear that immunity of a state official is not a defence for international crimes.¹⁹⁰ Equally, the

¹⁸⁷ See treaties discussed in this Chapter 2, especially art 7 of The London Charter of the International Military Tribunal (the “London Charter” or “Nuremberg Charter”), 8 August 1945, U.N.T.S, vol. 82; art 6 of the Charter of the International Military Tribunal for the Far East, Tokyo (The Tokyo Charter), 19 January 1946; Principle III, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, (Principles of the Nuremberg Tribunal), 1950, No.82; *Yearbook of the International Law Commission*, 1950, Vol. II, 374-378; *Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950*, Document A/1316, pp. 11-14; art 227 of the Versailles Treaty, 1919; art II (4) and (5) of the Control Council Law No.10 *on the Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity*, *Official Gazette of the Control Council for Germany*, No.3, Berlin, 31 January 1946; art 7 of the 1996 *Draft Code of Offences Against the Peace and Security of Mankind*, (1996) *Yearbook of the International Law Commission*, Part 2, p. ii; art 6 of the Statute of ICTR, 1994; art 7 of the Statute of ICTY, 1993; art 27 of the Rome Statute of the ICC, 1998; art 6 of the Statute of the SCSL; art 29 of the *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, 2001; art 15(3) of the *Statute of the Supreme Iraqi Criminal Tribunal*, 2005; Principles 5 and 14 of the *Princeton Project on Universal Jurisdiction*, developed by Jurists at Princeton University, USA; art 11(1) (a)-(b), *Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Adopted on 26 August 2001, Session of Vancouver, Institute of International Law; Art II of the *Convention on Non-Applicability of Statutory Limitations to War crimes and Crimes against Humanity*, 1968; art IV of the *Genocide Convention*; art 2(1)-(3) of the *Convention against Torture*, 1984; art 2, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1973; art 12 of the *Protocol for the Prevention and Punishment of Genocide, Crimes against Humanity, War Crimes and All forms of Discrimination*, International Conference of the Great Lakes, 2006.

¹⁸⁸ See, *Arrest Warrant Case*, para 61 of the judgment.

¹⁸⁹ See, Dissenting Opinion of Judge Christine Van Den Wyngaert, *Arrest Warrant Case*, 143-144, para 10.

¹⁹⁰ *Prosecutor v Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir, Case No. ICC-02/05-01/09, Public Reducted Version, Pre-Trial Chamber I, 4 March 2009, 15, para 43.

same is found in the decisions of the ICTY, ICTR and SCSL.¹⁹¹ Elsewhere, the Iraqi Supreme Criminal Tribunal has decided that Saddam Hussein could not be entitled to immunity as president of Iraq.¹⁹² Hence, if there is a persistent invocation of immunity of state officials, it will lead to a culture of impunity whereby state officials would commit more crimes knowing that they are absolutely protected by law. Immunity of state officials must not apply to the prosecution and punishment of persons responsible for international crimes.

Further, it is argued that by being states parties to international treaties such as the Convention against Torture, the Rome Statute and the Genocide Convention, states have impliedly waived immunity attaching to their officials. By waiver of immunity here, it should be considered that states have imperatively renounced or disclaimed immunity attaching to their officials. The concern here is whether by ratifying international treaties rejecting immunity of state officials, state officials may be prosecuted for such crimes. Regarding torture, Lord Hutton rendered a very useful authority by stating that there is no question of waiver of immunity because immunity to which *Pinochet* could be entitled does not arise in relation to torture which is an international crime.¹⁹³

Customary international law does not recognise functional immunity of state officials responsible for international crimes.¹⁹⁴ It is trite that provisions of international treaties and statutes outlawing immunity have attained the status of customary international law.¹⁹⁵ The ICTY held in *Milošević*¹⁹⁶ that article 7(2) which outlaws immunity of state officials has attained the status of customary international law. If this is now an accepted

¹⁹¹ *Prosecutor v Milošević*, Decision on Preliminary Motions, Trial Chamber, Decision of 8 November 2001, paras 26-34; *Prosecutor v Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998; *Prosecutor v Taylor*, Case No.SCSL-2003-01-I, *Decision on Immunity from Jurisdiction*, Appeals Chamber of the SCSL, (31 May 2004), para 58.

¹⁹² See, *Judgment in the First Case, No.1/9 of 2005 (the Al-Dujail Case)*. The court held that since World War II, immunities that protected former higher ranking officials from prosecution do not apply. Article 15(3) of the Statute of IST denied Saddam Hussein of immunity he had claimed. So, conclusively, the defence of immunity of state officials was not recognized by the Iraqi Special Tribunal.

¹⁹³ *Pinochet*, House of Lords, 119 ILR 202-221.

¹⁹⁴ Naqvi (2010) 262-268.

¹⁹⁵ See provisions cited in note 186 above.

¹⁹⁶ *Prosecutor v Milošević*, Case No. IT-02-54-PT, Decision on Preliminary Motions, Trial Chamber, 8 November 2001, paras 26-34.

position in contemporary international law, it is somehow difficult to reconcile this position with the one that immunity also arises from customary international law. It would seem that there is a conflict of two customary international law rules here. But, it is submitted that the rules found in treaty law which have attained customary international law should prevail of the rules on immunity arising from customary international law. Besides, it seems that immunity as a matter of custom only relates to foreign national courts and not international courts as such.

In international law, it is not acceptable that commission of international crimes can qualify as acts performed in official capacity. It was the position in *Pinochet* case that, torture is an international crime, which, if committed by a state official cannot form part of official functions of such official.¹⁹⁷

Finally, fundamental human rights of victims of international crimes are such high that they negate the rule of immunity of state officials.¹⁹⁸ Put simply, human rights demands that perpetrators of international crimes, however high they may be, be put on trial for their crimes. Hence to suggest that immunity of state officials may prevail over the demand for justice where human rights have been violated would be to ignore the rights of victims of human rights violations, particularly the right to an effective remedy and judicial protection. The Committee against Torture (CAT) has echoed this position in respect of the victims of torture in Canada, and pointed out that a state is under obligation to put in place effective measures to provide civil compensation to the victims of torture.¹⁹⁹

¹⁹⁷ *R v Bow Street Magistrate, ex parte Pinochet* (No.3), House of Lords 119 ILR 137, 139-157.

¹⁹⁸ Naqvi (2010) 281-286.

¹⁹⁹ Committee Against Torture, Summary Record of the Second Part (Public) of the 646th Meeting, 6 May 2005, CAT/C/SR.646/Add.1, paras C (4) (g) and D (5) (F), and 67 (apparently rejecting immunity from claim for liability for torture); see also, *Jones v Minister of Interior Al-Mamlaka Al-Arabiya AS Saudia (The Kingdom of Saudi Arabia) and others*, United Kingdom, EWCA Civ 1394 (2004).

2.5 Conclusion

In this chapter, the focus has been to try and trace the developments of the law on immunity of state officials. The analysis is from customary international law and codified international law. It has been revealed that apart from customary international law, immunity of state officials developed before and after the Nuremberg trials. It has been shown that international criminal tribunals (the ICTY and ICTR), the International Criminal Court, hybrid courts (the SCSL and ECCC) and international law treaties and non-binding instruments have played roles in the codification of the law on immunity of state officials.

Additionally, the International Law Commission has also contributed to the development of international law on immunity of state officials. In all the sources, it is evident that state officials are not immune from prosecution for international crimes. Conclusively, immunity of state officials from prosecution is well documented in both customary international law and treaty law.

The chapter has also examined the conflicting norms of international law *jus cogens* and immunity of state officials in order to determine which rule should prevail over the other. It is concluded that there is ample authority that *jus cogens* prevail over immunity which is founded in customary international law.²⁰⁰ Consequently, prohibition of international crimes (genocide, war crimes, crimes against humanity, torture, apartheid, piracy and the crime of aggression) has attained *jus cogens* status. As such, any perpetrator of these crimes cannot be entitled to immunity. In principle, immunity cannot override *jus cogens* in relation to international crimes. One cannot be allowed to commit international crimes and then claim functional immunity of state official because international crimes cannot be regarded as forming part of the functions of state officials. It is observed in *Pinochet* that the majority of the House of Lords supported the view that *jus cogens* enjoy supremacy over immunity, as such; immunity rules are lower norms even though they arise from customary international law. Hence, even if immunity of state officials were to

²⁰⁰ Orakhelashvili (2006) 355.

persist, it cannot operate if state officials have violated international *jus cogens*. Such violations would arise from committing international crimes such as the crime of aggression, genocide, war crimes, and crimes against humanity, torture, apartheid, slavery and terrorism.

Since this chapter has traced the law governing immunity in international law and has provided a general background to the rejection of immunity of state officials in respect of international crimes, the next chapter examines the jurisprudence of international courts in order to indicate how such courts have dealt with the issue of immunity.