Head of State Immunity under the Malabo Protocol: Triumph of Impunity over Accountability?

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By

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Declaration

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Abstract.

At the 23rd Ordinary Session of the African Union's Assembly of Heads of State and Government held in Malabo, Equatorial Guinea in June 2014, the Assembly adopted, amongst others, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). The Protocol would, amongst others, reform the proposed African Court of Justice and Human Rights (which was to be achieved by merger of the African Court of Justice and the African Court of Human Rights) by creating an International Criminal Section. The Protocol also confers on "serving AU Heads of State or Government, or anybody acting or entitled to act in such capacity" immunity from prosecution during incumbency.

Predictably, the immunity provision has spawned widespread and trenchant criticism from international criminal justice advocates who claim that the AU seeks thereby to create a culture of and perpetuate impunity. The AU on the other hand asserts not only that it is standing up for itself against neo-colonialist imperialist forces who have perverted international criminal justice and seek subjugation of African States through the International Criminal Court (ICC), but also that it is a champion for the very soul of customary international law on immunities.

What this dissertation sets out to do and has sought to achieve has been to undertake a doctrinal study to determine whether the immunity that Article 46A *bis* of the Malabo Protocol confers on "Heads of State or Government, or anybody acting or entitled to act in such capacity" coheres with international law – *lex lata* – or represents a retrogression in international law norms that seek to prevent impunity for international crimes. In assessing the oft-made claim about the AU seeking or cultivating impunity thereby, the study has endeavoured to go beyond the self-serving rhetoric of each party in the hero-villain contestation that has characterized AU-ICC engagement over the past several years. It has sought to determine the veracity on the one hand of the claim that the Malabo Protocol's immunity provision represents an illegal roll-back by the AU of normative gains in international criminal law to ensure accountability for egregious violations of human rights law. It has also sought to determine the legitimacy of the AU's claims, on the other hand, that Africa has been unfairly targeted by the ICC, that there is no substance to the accusation that it seeks impunity for the category of officials covered by the immunity provision and that its insistence on immunity is but a reflection of its fealty to current international law. Through a review of legal history, case law from national and international tribunals, state practice and academic expositions, this thesis examines the evolution and practice of Head of State immunity as well as recent trends in the practice of the doctrine in light of the countervailing push to establish exceptions to immunity in order to ensure accountability under international human rights and international criminal law.

In order to come to conclusions that answer the titular question, this thesis also interrogates the status-inspired dialectics and self-serving hero-villain polemics and consequent actions that fuel contestations of right between the AU and the ICC as well as the worldviews that respectively seek to preserve and overturn the asymmetry of the international legal order. The thesis finds that notwithstanding the lure of the values-laden-normative-hierarchy-inspired push against impunity, values do not international-law make. On the evidence, the immunity clause and undergirding rationale represent neither an illegal rollback by the AU of accountability standards for international crimes nor an altruistic bid by the AU to champion international criminal justice on the continent. The answer to the titular question of this dissertation therefore lies in shades of grey and somewhere in the middle of the respectively indignant and self-righteous stances of the AU and the ICC**.**

Dedication:

This thesis is dedicated to:

Family: Mine, our children's, and the friendships over several years that have yielded the bonds of family; May they, to all within them, always be an abiding source of succour, truth and warmth and a safe harbour in times of need.

So mote it be.

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Writing this dissertation has given me an opportunity to find a part of myself that I was not always sure existed, in spite of my aspirations. It has allowed me also, in my "dotage," to significantly expand my horizons, to be challenged on firmly held worldviews, to cultivate new interests and to go beyond the professional paths that our youthful choices inspired. For this, there are many to thank, if not all by name:

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- Professor Frans Viljoen, supervisor of my LLM dissertation some 18 years ago, who was always supportive of my long-held desire to pursue a doctorate and to whom I owe a debt of gratitude for declining my request to be my supervisor and for steering me to Professor Tladi, who he deemed more appropriate;

- Doctoral candidates – past and present – whose writings have been an inspiration and whose fears, tribulations, self-doubts and glimmers of hope especially when overwhelmed, were a frequent reminder that I did not walk alone and that it could be done;

- The purveyors of decoloniality and third world approaches to international law (TWAIL), through the prisms of whose work the status-inspired dialectics that have fuelled the contestations of right between the AU and the ICC are that much clearer. The endeavour to preserve the status quo on the one hand and the effort, on the other hand, to dismantle the foundations of the asymmetry in the international legal order – and the world view that sustains it – will undoubtedly continue apace;

- Colleagues, friends and managers in the World Bank Group who were accommodating of diminished responsiveness and whose frequent inquiries about the status of the undertaking, were meant as encouragement;

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Any deficiencies of this thesis are entirely mine.

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Table of Abbreviations

ACHPR	African Court on Human and Peoples' Rights
ACJ	African Court of Justice
AD	Anno Domino
AHSG	Assembly of Heads of State and Governments
ANC	African National Congress
ASP	Assembly of States Parties of the International Criminal Court
AU	African Union
CAR	Central African Republic
DRC	Democratic Republic of Congo
EAC	East African Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
EU	European Union
FSIA	Foreign Sovereign Immunities Act
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israeli Defence Forces
ILC	International Law Commission
IMTFE	International Military Tribunal for the Far East
NGHC	North Gauteng High Court
NGO	Non-Governmental Organizations
OAU	Organization of African Unity
OPT	Office of the Prosecutor
PALU	Pan African Lawyers Union
PRC	Permanent Representative Council
RDF	Rwanda Defence Force
REC	Regional Economic Communities
RPF	Rwanda Patriotic Front
SADC	Southern African Development Community
SALC	Southern African Litigation Centre
SCA	Supreme Court of Appeal (South Africa)
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States
USA	United States of America
USD	United States Dollar

Chapter 1

Flirtations with Impunity? Introduction to and Overview of the Study.

1. Introduction.

The adoption by the African Union (AU) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol),[1] which would bestow international criminal jurisdiction on an expanded African Court,[2] has generated considerable debate and consternation within academic circles and the international criminal justice community.[3] The Malabo Protocol would, amongst other things, reform the proposed African Court of Justice and Human Rights[4] (which was to be achieved by merger of the African Court of Justice and the African Court of Human Rights) by creating an International Criminal Justice Division and associated offices,[5] and expanding the jurisdiction of the Court considerably.[6]

There are a range of reasons, fuelled primarily by mistrust of African leaders' commitment to international criminal justice,[7] that have generated the dismay and alarm of various commentators. These include the "unseemly haste"[8] with which the drafting of the text of the Protocol was undertaken and the limited consultation with the

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1 The Malabo Protocol was adopted at the 23rd Session of the Assembly of Heads of State and Government of the AU, which was held in Malabo, Equatorial Guinea from 26 – 28 June 2014. See Assembly Decision on the Draft Legal Instruments, [Assembly/AU/Doc.529(XXIII)] at https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20529%20(XXIII)%20_E.pdf accessed 13 December 2018. See also AU Press Release Nº18/23rd AU SUMMIT, page 2 at http://summits.au.int/ar/sites/default/files/PR%2018%20-%2023rd%20AU%20Assembly%20ends%20in%20Malabo%20(3).pdf accessed 8 August 2015.

2 See Articles 2 and 14 of the Malabo Protocol. Text of the Protocol available at https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf, accessed 5 March 2016.

3 See Dire Tladi, "The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the Normative (Chaff)," (2015) 13 (1) *Journal of International Criminal Justice* 3, at 5 – 8. See also Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" (Nov 2014), *Institute for Security Studies,* Paper 278, generally.

4 See Protocol on the Statute of the African Court of Justice and Human Rights at https://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf accessed 8 August 2018.

5 See Articles 2 and 14 of the Malabo Protocol, Note 2 above.

6 See Article 28A of the Malabo Protocol, Note 2 above.

7 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," (2011) 9 *Journal of International Criminal Justice* 1067, at 1077. The effort it took to bring Hissène Habré to trial in Senegal is an example of the source of cynicism about African leaders' commitment to international criminal justice. The happy convergence of rulings from the UN Committee against Torture (Communication No. 181/2001: Senegal. 05/19/2006.) and the ICJ (Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*) Judgment of 20 July 2012); the continued prompting of Belgium and the AU; and, the election of Mackie Sall to replace the obstructionist Abdulai Wade created an environment for bringing the former Chadian leader who is alleged to have ordered the torture and disappearance of several to trial.

8 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 3 above, at 4.

human rights and international criminal justice academic and activist communities.[9] Above all however, it is the inclusion of an immunity clause which would insulate Heads of State and Government and arguably other State officials[10] from prosecution – even for international crimes – that seems to have most rankled activists.[11]

Seen in some quarters as the product of thin skinned pique,[12] and in others as a blatant attempt to subvert international criminal justice and permit impunity,[13] the immunity provision has elicited rather harsh commentary[14] – typical among them being a description as 'insidious' by Hernández, du Plessis, Ferstman and Wilmshurst.[15] An overwhelming concern has been what impact such provisions could have on the progressive development of international criminal law generally and on the scourge of impunity in Africa.[16]

The AU response has been to assert that the immunity provision is fully consistent with customary international law and the rights that accrue to States and their high-ranking officials thereunder.[17] The justification, presented through published views of African

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9 See Max du Plessis, "Implications of the AU Decision to give the African Court Jurisdiction over International Crimes," (June 2012) *Institute for Security Studies* Paper 235 at 1.

10 Article 46A *bis* of the Malabo Protocol states that *"No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office"*. The language employed potentially significantly opens up the range of officials who can plead immunity *ratione personae* beyond the *troika* of Heads of State, Prime Ministers and Foreign Ministers. For analysis on the foregoing see Dire Tladi, Note 3 above, at 5 – 8.

11 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders." Note 3 above. See also Human Rights Watch, "African Union: Reject Immunity for Leaders," (12 May 2014), available at https://www.hrw.org/news/2014/05/12/african-union-reject-immunity-leaders, accessed 10 November 2018. See also Op-ed by Desmond Tutu prior to an Extraordinary Summit of the AU Assembly of Heads of States and Government where it was alleged that the AU would be staging a walk out from membership of the International Criminal Court. Desmond Tutu, *In Africa, Seeking a License to Kill*, New York Times (10 October 2013) available at http://www.nytimes.com/2013/10/11/opinion/in-africa-seeking-a-license-to-kill.html accessed 8 August 2018.

12 See Fred Oluoch '*Mixed reactions to Kenya's push to establish African court' The East African* 7 February 2015 available at http://www.theeastafrican.co.ke/news/Mixed-reactions-to-Kenya-s-push-to-establish-African-court/-/2558/2616388/-/12dkljgz/-/index.html accessed 8 August 2018.

13 See Human Rights Watch, *Statement regarding immunity for sitting officials before the Expanded African Court of Justice and Human Rights* at https://www.hrw.org/sites/default/files/related_material/Immunity%20Statement%20-%20African%20Court%20of%20Justice%20and%20Human%20Rights.pdf accessed 8 August 2018. See also Opinion Editorial (Op-ed) by Kofi Annan, *Justice for Kenya,* New York Times (9 September 2013), available at http://www.nytimes.com/2013/09/09/opinion/justice-for-kenya.html accessed 8 August 2018.

14 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 3 above, at 10 - 11.

15 Hernández et al 'Heads of state immunities for international crimes: prospects for consensus and irreconcilable impasse?' (2015), available at https://www.chathamhouse.org/sites/files/chathamhouse/events/special/DG%20Heads%20of%20States%20Immunities%20-%20summary%202015.pdf accessed 8 August 2018.

16 See Garth Abraham, "Africa's Evolving Continental Court Structures: At the Crossroads?" (2015) *South African Institute of International Affairs* Occasional Paper 209 at 10 – 11, available at http://www.saiia.org.za/wp-content/uploads/2015/02/saia_sop_209_-abraham_20150202.pdf accessed 8 August 2018.

17 See Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa's Relationship with the International Criminal Court (ICC), from Extraordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia, 12 October 2013, available at http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf. See also Statement by H.E. Mr. Kelebone A. Maope Ambassador and Permanent Representative of Lesotho to the United Nations on Behalf of African State Parties to the Rome Statute at the Thirteenth Session of the Assembly of

leaders, sees the immunity provision of the Malabo Protocol as representing the continent's efforts to stand up for itself and to put an end to what has been described as the ICC's acquiescence to being used as a tool by imperialistic western powers seeking to perpetuate dominance over former colonies.[18]

In order to address the titular question of this dissertation, the present study endeavours to go beyond the self-serving rhetoric of each party in the hero-villain contestation that has characterized AU-ICC engagement over the past several years. It seeks to determine the veracity on the one hand of the claim that the Malabo Protocol's immunity provision represents an illegal roll-back of normative gains in international criminal law to ensure accountability for egregious violations of human rights law,[19] and on the other, the legitimacy of the AU's claims that it has been unfairly targeted by the ICC,[20] that there is no substance to the accusation that it seeks impunity for the category of officials covered by the immunity provision[21] and that its insistence on immunity is but a reflection of its fealty to current international law – *lex lata.*[22]

The study reviews the legal and practical implications of the Malabo Protocol's immunity provisions on the corpus of international criminal law and international criminal justice in Africa. Amongst others, it does this by examining the evolution and practice of Head of State immunity as well as recent trends in the practice of the doctrine in light of the

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States Parties to Rome Statute of the International Criminal Court in New York (December 8, 2014), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-Lesotho-AfricanStatesParties-ENG.pdf accessed 13 December 2018. See also Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Volume 10, International Criminal Justice Series (2017) Asser Press 203 – 219 at page 213. See also *AUC concerned over ICC decisions on Malawi and Chad,* available at https://europafrica.net/2012/01/17/8258/ accessed 13 December 2018.

[18] See Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholders* (2017), International Criminal Justice Series, Asser Press. See also speech of Kenyan President to Emergency Summit of Heads of States and Government, 13 October 2013. See http://allafrica.com/stories/201310130069.html, accessed 2 February 2016. See also Ugumanim Bassey Obo Dickson Ekpe, "Africa and the International Criminal Court: A Case of Imperialism by Another Name," *3 International Journal of Development and Sustainability* (2014) 2025 – 2036. See also Motsoko Pheko, The ICC is Now an Instrument of Imperialism, Pambazuka News (25 June 2015), available at https://www.pambazuka.org/governance/icc-now-instrument-imperialism accessed 13 December 2018.

[19] See Human Rights Watch, Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights (November 13, 2014), available at https://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and accessed 13 December 2018

[20] See Dapo Akande, "The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?", *EJILTalk* (February 8, 2012), available at http://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/ accessed 13 December 2018. See also Daisy Ngetich, *Mugabe accuses ICC of targeting Africans*, Citizen Digital (16 June, 2015), available at https://citizentv.co.ke/news/mugabe-accuses-icc-of-targeting-africans-89161/ accessed 13 December 2018. See also *Museveni calls for mass pull-out of African states from International Criminal Court*, Daily Nation (December 12 2014), available at http://www.nation.co.ke/news/politics/African-states-quit-ICC-Museveni/1064-2554310-5qe0l2/index.html accessed 13 December 2018. See also *African Union Condemns 'Unfair' ICC*, BBC (October 11, 2013), available at https://www.bbc.com/news/world-africa-24489059 accessed 13 December 2018.

[21] See International Justice Resource Centre: *African Union Expresses Opposition to International Criminal Court Prosecutions and Seeks Postponement of Kenyatta Trial* (October 16, 2013), available at https://ijrcenter.org/2013/10/16/african-union-expresses-opposition-to-international-criminal-court-prosecutions-and-seeks-postponement-of-kenyatta-trial/ accessed 13 December 2018.

[22] See *AUC concerned over ICC decisions on Malawi and Chad*, available at https://europafrica.net/2012/01/17/8258/ accessed 27 September 2018.

countervailing push to ensure accountability under international human rights and international criminal law.[23]

2. Background to the Study.

At the 23rd Ordinary Session of the Assembly of Heads of State and Government of the AU held in Malabo, Equatorial Guinea in June 2014, the AU Assembly adopted, amongst others, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,[24] otherwise known as the Malabo Protocol.[25]

While it is an open question whether the Malabo Protocol will ever come into effect (or indeed whether it should),[26] its adoption by the Assembly of Heads of State and Governments (AHSG) represented a further unravelling of what has been a fraught relationship between the AU and the International Criminal Court (ICC). The deterioration in the relationship[27] has been fuelled by a range of reasons, primary among which has been what has been described as selective prosecutions by the ICC focusing exclusively on Africa.[28]

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[23] See *Regina v. Bow Street Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (Amnesty International and others intervening) [1998] 4 All ER 897 at 946. Lord Steyn, in rejecting immunity for Augusto Pinochet held that he did not accept the proposition that "acts by police, intelligence officers and military personnel are paradigm official acts" and asserted that "qualitatively, what [Pinochet] is alleged to have done is no more to be categorized as acts undertaken in the exercise of the functions of a head of state than the examples … given of a head of state murdering his gardener or arranging the torture of his opponents for the sheer spectacle of it"

[24] See AU Assembly Decision on the Draft Legal Instruments, Note 1 above.

[25] Although all the Protocols adopted at the AU's 23rd Ordinary Session of the Assembly of Heads of State and Government may be properly referred to as Malabo Protocols, the Protocol creating an Expanded African Court has – largely because of its notoriety – been the exclusive subject of that expression.

[26] Per Article 11 of the Malabo Protocol, it only comes into force 30 days after the deposit of instruments of ratification by 15-member States. The outrage and hostility of human rights NGOs such as Amnesty International and Coalition for the ICC to the Head of State Immunity provisions may well play a role in the pace of member State ratifications. See also George Kegoro 'African Union might shelf plan for expanded continental court' *Daily Nation* 14 March 2015, http://mobile.nation.co.ke/blogs/African-Union-Court-Uhuru-Kenyatta-ICC/-/1949942/2653692/-/format/xhtml/item/0/-/inv1myz/-/index.html accessed 16 August 2018 which asserts that the dropping of the case by the ICC against Uhuru Kenyatta has robbed the Malabo Protocol of a stalwart champion.

[27] See AU Assembly, Decision on the Meeting of States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec.245(XIII), 3 July 2009, x 10; AU Decision on the Progress Report of the Commission on the Implementation of AU Decision on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, Assembly/AU/Dec.296(XV), 27 July 2010, x 5 and AU Assembly Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.397(XVIII). See also ICC Kampala Declaration, Declaration RC/Decl.1, 1 June 2010, x 7 and generally the Kampala Declaration on Cooperation, Declaration RC/Decl.2., 8 June 2010, available at https://au.int/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf, accessed 16 October 2018

[28] It has been suggested that because six of the ten situations currently (as of October 31, 2018) before the ICC concerning Africa were a result of self-referrals, and two were by Security Council referrals, the claim of bias is not altogether legitimate. The antipathy to the ICC can be seen as part of a broader challenge to the architecture of international law and the push by developing nations for reform of the UN Security Council, whose permanent members have veto powers and are therefore able to protect themselves from having cases sent to the ICC by the Security Council but are able to send cases to the ICC even though they are not parties to the ICC Statute themselves. See Kamari Clarke who notes for instance that *"the making of law is a political process and the negotiations that went into the creation of the* Rome Statute *eventually adopted by 120 states in 1998 were deeply shaped by international power relations. Yet, ignoring the highly political processes of selecting and vetting the crimes under the subject matter jurisdiction of the Rome Statute has led to a misrepresentation of the highly political fields in which the history of African violence is embedded. If we look at how the four crimes currently under the subject matter jurisdiction of the ICC came to occupy the basis upon which offenses were*

The narrative of the ICC being a tool to subjugate African countries has spawned anti-western rhetoric,[29] and contributed to the creation of a chasm that may prove difficult to bridge.[30] AU members' sensitivity can be traced back however to the perceived disrespectful exercise of universal jurisdiction by European courts even before the ICC came into existence.[31]

Given the role that African countries played in birthing the ICC, the fact that the AU has turned against the court is a surprising, if not unpredictable, development. Testament to African governments' early support for the ICC can be found not only in the participation of forty seven members of the Organization of African Unity (OAU, predecessor to the AU) in the 1998 Rome Conference which adopted the Rome Statute that created the ICC, but also in the fact that almost a third of the countries that first ratified the Rome Statute were African.[32] So is the fact that there are currently – as of October 31, 2018 – thirty-three African States that are party to the Rome Statute.[33] Indeed, the 2004-2007 Strategic Plan of the AU had urged member States to ratify the Rome Statute[34] and three of the first four situations over which the ICC exercised

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committed and cases were selected, we can see that these were politically motivated and chosen based on the various interests of the state parties involved in choosing them. But in many of the African post-war regions with decimated judiciaries and infrastructures, the political crimes of the Rome Statute are really not able to address the root causes of economic plunder that are key to the emergence of violence in the first place" http://iccforum.com/africa#Clarke accessed 13 March 2015. See also Dire Tladi, "The African Union and the International Criminal Court: The Battle for the Soul of International Law" (2009) 34 *South African Yearbook of International Law* 57; See also M. du Plessis, T. Maluwa and A. O'Reilly, "Africa and the International Criminal Court," *International Law 2013/01 (Chatham House, July 2013).*

29 In his speech at a Special AU Summit of Heads of State and Government in Addis Ababa in October 2013, Uhuru Kenyatta stated that *"[t]he ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers…"* See http://allafrica.com/stories/201310130069.html accessed 13 December 2018.

30 See Charles Jalloh, "The African Union and the International Criminal Court: The Summer of Our Discontent(s)" *JURIST – Forum* (August 6, 2010), http://jurist.org/forum/2010/08/the-african-union-and-the-international-criminal-court-the-summer-of-our-discontents.php accessed 18 August 2018.

31 See AU Assembly, Decision on Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.199(XI); See also Council of the European Union, Report of AU-EU Expert *Ad Hoc* Group on Principle of Universal Jurisdiction http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208672%202009%20REV%201 accessed 18 August 2018.

32 Seventeen of the first 60 ratifications of the Rome Statute (that permitted it to enter into force on July 2, 2002) were by African countries: Senegal (February 2, 1999); Ghana (December 20, 1999); Mali (August 16, 2000); Lesotho (September 6, 2000); Botswana (September 8, 2000); Sierra Leone (September 15, 2000); Gabon (September 20, 2000); South Africa (November 27, 2000); Nigeria (September 27, 2001); Central African Republic (October 3, 2001); Benin (January 22, 2002); Mauritius (March 5, 2002); Democratic Republic of Congo (April 11, 2002); Niger (April 11, 2002); Uganda (June 14, 2002); Namibia (June 25, 2002); Gambia (June 28, 2002)

33 As of October 31, 2018, the African membership of the ICC stands at 33, Burundi having served its notice of withdrawal on 27 October 2016 and effectively withdrawn as a State party on 27 October 2017. See *Burundi leaves International Criminal Court amid row* (27 October 2017) BBC News, available at http://www.bbc.com/news/world-africa-41775951 accessed 18 August 2018. For current list of African States parties, see

http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx accessed 18 August 2018.

34 Commission of the African Union, Strategic Plan 2004-2007, Volume 3: Plan of Action – Programmes to Speed up Integration of the Continent (May 2004) at 67, available at

https://www.issafrica.org/uploads/ACTPLAN.PDF accessed 18 August 2018.

jurisdiction were referred by Uganda,[35] the Democratic Republic of Congo[36] and the Central African Republic.[37]

By dint however of a remarkable lack of self-awareness and a series of missteps by the ICC's first Chief Prosecutor, conflict and tensions were created between the ICC and the AU where none would have been the case if greater attention had been paid to the AU's perceptions of negative bias.[38] The antipathy between the AU and the ICC spilled out into the public view when on July 3, 2009, the AU resolved to withhold cooperation from the ICC over its issue of an arrest warrant for President Omar al Bashir of Sudan.[39] This has been followed, in the years since, by a raft of AU Resolutions that have reiterated AU displeasure with the ICC and with the United Nations (UN) Security Council for various actions and perceived snubs.[40]

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[35] In December 2003, President Museveni referred the Lords' Resistance Army to the ICC. See The International Criminal Court, Situation in Uganda (ICC-02/04). Although the referral of this case by the Government of Uganda was in January 2004, with investigations beginning in July 2004, the first case on the ICC's official docket was the Situation in the DRC which was only referred 3 months later. See ICC website at https://www.icc-cpi.int/uganda for further detail, accessed 30 June 2016.

[36] On March 3, 2004, President Kabila of the Democratic Republic of the Congo ("the DRC") invoked the jurisdiction of the ICC in a referral letter to the Prosecutor. See Press Release of April 19, 2004: *Prosecutor receives referral of the situation in the Democratic Republic of Congo* (ICC-OTP-20040419-50), available at https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor+receives+referral+of+the+situation+in+the+democratic+republic+of+congo accessed 13 December 2018.

[37] The Central African Republic (CAR) government referred itself to the International Criminal Court (ICC) on 22 December 2004. This was the third self-referral by an ICC State party, following Uganda and the Democratic Republic of Congo (DRC). See January 11, 2005 Press Release of the Coalition for the International Criminal Court: ICC State Referral from Central African Republic, available at http://www.scoop.co.nz/stories/WO0501/S00082/icc-state-referral-from-central-african-republic.htm accessed 13 December 2018.

[38] See Julie Flint and Alex de Waal 'Case Closed: A Prosecutor without Borders' (Spring 2009) *World Affairs* available at http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders accessed 18 August 2018. See also Luis Moreno Ocampo, *Let Sudan's President Come to New York. Then Arrest Him*, New York Times, 24 August 2015 available at http://www.nytimes.com/2015/08/24/opinion/let-sudans-president-come-to-new-york-then-arrest-him.html?emc=edit_th_20150824&nl=todaysheadlines&nlid=38974186 accessed 18 August 2018, where the ICC's first Chief Prosecutor says of possible attendance by Sudanese President Omar al Bashir at the 2015 UN Summit of world leaders[38] that "[*t]he United States should grant Mr. Bashir his visa, and then, upon his arrival, arrest and surrender him to the I.C.C., where he could present any legal arguments he wishes about innocence, immunity or alleged prosecutorial bias.* Such commentary would suggest that Mr. Moreno-Ocampo has acquired neither better judgment nor a deeper understanding of international law and international relations since his departure from the ICC. See also Mark Kersten 'A Brutally Honest Confrontation with the ICC's Past: Thoughts on 'The Prosecutor and the President'' 23 June 2016, *Justice in Conflict*, available at https://justiceinconflict.org/2016/06/23/a-brutally-honest-confrontation-with-the-iccs-past-thoughts-on-the-prosecutor-and-the-president/ accessed 5 July 2016.

[39] See AU Assembly, Decision on the Meeting of States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec.245(XIII), 3 July 2009, x 10. This Decision was influenced by the ICC's issue of an arrest warrant for President Omar al Bashir of Sudan. See *Prosecutor v. Omar Al Bashir* (Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir) Case ICC-02/05-01/09-3 (4 March 2009).

[40] See AU Assembly, Decision on the Progress Report of the Commission on the Implementation of AU Decision on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, Assembly/AU/Dec.296(XV), 27 July 2010, x 5; and AU Assembly, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.397(XVIII), 30 January 2012, xx 6 and 8. For ICC Assembly of State Parties (ASP) decisions on cooperation see e.g. ICC Resolution on Cooperation, ICC-ASP/10/Res.2, 20 December 2011 and ICC Resolution on the Strengthening of the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5, 21 December 2011, x 6. See also ICC Kampala Declaration, Declaration RC/Decl.1, 1 June 2010, x 7 and generally the Kampala Declaration on Cooperation, Declaration RC/Decl.2., 8 June 2010. On 2 July 2011, the AU declared that the indictment of President Muammar Gaddafi to stand trial in the ICC 'seriously complicates' the AU's efforts to broker a settlement in the Libyan civil war and decided that its 'member states

One of the more combative episodes in the disintegration of the relationship between the AU and the ICC was a Resolution on October 12, 2013 by an Extraordinary Summit of the AU Assembly.[41] After reiterating the "AU's concern on the politicization and misuse of indictments against African leaders and Deputy President of Kenya," the Decision re-affirmed the AU's commitment to withholding cooperation with the ICC for the prosecution of any Heads of State and Governments.[42] Deemed by observers to be a less drastic result than the termination *en masse* of AU member States' membership of the ICC that some parties, including Kenya, were advocating,[43] this position has nonetheless generated considerable disquiet about the AU's relationship with the ICC and the consequences of the breach.[44]

For historians, political scientists, human rights experts, and other commentators, the decision by the Kenyan legislature, in 2013, to withdraw Kenya's accession to the Rome Statute,[45] extensive lobbying of the AU by the Kenyan Government to withdraw *en masse* from the ICC (supported by a surprising number of previous champions of the ICC)[46] as well as representations to the UN Security Council[47] and the Assembly of States Parties of the ICC[48] have portended sinister machinations to dismantle the machinery for international criminal responsibility. Perhaps justifiably, they have invoked memories

would not co-operate in the execution of the arrest warrant'. See Paragraph 6 of Assembly/AU/Dec.366(XVII), Decision on the Implementation of the Assembly Decisions on the International Criminal Court (Doc. EX.CL/670(XIX)), available at https://au.int/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf, accessed 16 October 2018.

41 See Decisions and Declarations of the Extraordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia on 12 October 2013, available at https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf, accessed on October 19, 2018

42 See AU Assembly, Decision on Africa's Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1 (Oct.2013), available at http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf accessed 18 August 2018. The AU first decided to withhold cooperation with the ICC upon the application by the ICC's Chief Prosecutor of an arrest warrant for Omar al Bashir in 2008. See Charles Jalloh, Note 30 above.

43 See 'African Union: ICC non-cooperation drive thwarted, but African States should do more to uphold the rights of African victims' *No Peace without Justice*, 12 October 2013 available at http://www.npwj.org/ICC/AU-and-ICC-African-States-should-uphold-rights-African-victims.html-0 accessed 18 August 2018. See also Maru MT 'The Future of the ICC and Africa: the good, the bad, and the ugly' *Aljazeera, Opinion* 11 October 2013 available at https://www.aljazeera.com/indepth/opinion/2013/10/future-icc-africa-good-bad-ugly-201310111431308819 24.html accessed 18 August 2018.

44 See Ademola Abass, "Historical and Political Background to the Malabo Protocol" in G. Werle and M. Vormbaum (Eds), *The African Criminal Court*, International Criminal Justice Series 10 (2017, Asser Press)

45 See 'Kenya MPs vote to withdraw from ICC' *BBC News* 5 September 2013 available at https://www.bbc.co.uk/news/world-africa-23969316 accessed 18 August 2018. Notwithstanding the vote, President Kenyatta declined to assent to the bill and Kenya remains a State-Party to the Rome Statute of the ICC.

46 Reportedly, even countries such as South Africa and Ghana, who have in the past championed the cause of the ICC, were among the supporters of the proposal for the AU members to withdraw from the ICC. See Kimberly Brody '*What Next for the ICC in Africa?*' *Freedom House*, 22 November 2013, available at https://freedomhouse.org/blog/what-next-icc-africa#.VcB_Rof77cs accessed 18 August 2018.

47 See Wachira Maina 'ICC: Kenya's is a lose-lose strategy even if the African Union has its way' *Pambazuka News* 27 June 2013 available at https://www.pambazuka.org/governance/icc-kenya%E2%80%99s-lose-lose-strategy accessed 18 August 2018.

48 See 'Week of setbacks for Kenya at The Hague' *Daily Nation*, 23 November 2013 available at https://www.nation.co.ke/news/politics/Week-of-setbacks-for-Kenya-at-The-Hague-/-/1064/2086148/-/qr4bf4z/-/index.html accessed 18 August 2018.

of the Tribunal of the Southern African Development Community (SADC),[49] which was effectively neutered[50] and then disbanded[51] after finding that Zimbabwe's constitutional amendment (which authorized the eviction of white farmers from land) perpetrated unlawful discrimination.[52]

Of this, the North Gauteng High Court (NGHC) in South Africa has since found and declared that the decision to neuter the SADC Tribunal was illegal[53] and a cynical ploy by some SADC leaders to avoid accountability for breaches of human rights in their countries. The Government's appeal of the decision[54] and reasoning for same has yielded an even more scathing assessment from the Constitutional Court of South Africa. Per news reportage of the decision rendered on December 11, 2018, Chief Justice Mogoeng Mogoeng – writing for the majority – held that:

> The president's decision to render the tribunal dysfunctional is unconstitutional, unlawful and irrational. And so is his signature. The appropriate remedy is simply to declare his participation in arriving at that decision, his own decision and signing of the protocol, constitutionally invalid, unlawful and irrational[55]

Judicial findings on nefarious motives that inspired the forced collapse of the SADC Tribunal and commentary thereon exacerbates concerns in the international criminal justice community about the motives behind the Malabo Protocol.[56]

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49 The SADC Tribunal was a court of the Southern African Development Community (SADC) with a jurisdiction also over human rights. Although the legal foundation for its creation had existed since 1992, it only became operational after judges were appointed during the SADC Summit in 2005.

50 The SADC Tribunal held in *Mike Campbell (Pvt) Ltd et al. v. Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008), that the Government of Zimbabwe violated the SADC treaty by engaging in racial discrimination against white farmers and denying those whose lands had been confiscated under the land reform program in Zimbabwe access to the courts. Zimbabwe pulled out of the SADC Tribunal immediately after the ruling and challenged its legitimacy. The SADC summit then ordered in 2010, a review of the "functions and [...] terms of reference of the SADC Tribunal" rendering it non-operational for the period of the review.

51 In 2012 the SADC Summit Resolved to limit the jurisdiction of the Tribunal to "disputes between member states", barring individuals and companies. The farce was ended later that year when the SADC Tribunal was disbanded altogether. See Frederick Cowell, "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction," *Human Rights Law Review 13:1* (2013), 153 – 165, available at http://www.corteidh.or.cr/tablas/r30717.pdf accessed 13 December 2018. See also Laurie Nathan, "The Disbanding of the SADC Tribunal: A Cautionary Tale." *Human Rights Quarterly* 35, no. 4 (2013): 870 – 892, available at https://repository.up.ac.za/bitstream/handle/2263/42461/Nathan_Disbanding_2013.pdf?sequence=1 accessed on September 14, 2017.

52 See *Mike Campbell (Pvt) Ltd et al. v. Republic of Zimbabwe*, Note 50 above.

53 See *Law Society of South Africa and Others v. President of the Republic of South Africa and Others* (20382/2015) [2018] ZAGPPHC 4 (1 March 2018) available at http://www.saflii.org/za/cases/ZAGPPHC/2018/4.html accessed 18 August 2018. In a scathing judgment, Judge President Dunstan Mlambo found that "the first respondent's [Zuma] participation in suspending the SADC Tribunal and his subsequent signing of the 2014 Protocol on the SADC Tribunal is declared unlawful, irrational and thus, unconstitutional"

54 See Jade Weiner, *On the SADC Tribunal Case*, Politics Web (16 March 2018). Available at https://www.politicsweb.co.za/opinion/on-the-sadc-tribunal-case accessed 13 December 2018.

55 See Greg Nicolson, *ConCourt slams Zuma for signing unconstitutional SADC deal*, Daily Maverick (12 December 2018). Available at https://www.dailymaverick.co.za/article/2018-12-12-concourt-slams-zuma-for-signing-unconstitutional-sadc-deal/?utm_source=homepagify, accessed 12 December 2018.

56 See Ademola Abass, "Historical and Political Background to the Malabo Protocol." Note 44 above.

3. The Immunity versus Human Rights Debate.

What appears to be a clash of values between the preservation of sovereignty on the one hand and the protection of human rights on the other lies at the heart of the debate on the legitimacy of Head of State immunity[57], which derives from the doctrine of State or sovereign immunity in international law.[58] As Tladi describes:

> [The] debate on immunities, and particularly whether there are or should be exceptions to immunity is a reflection of a broader tussle for the soul of international law. In this debate, those seeking to build a brave new world in international law, argue for less recognition of immunities and more recognition of exceptions to immunity. This approach, it is imagined, will lead to a better, more humane world, in which those that commit atrocious acts against fellow human beings are held to account. In this world, imagined by those holding out for the brave new international law, leaders, knowing that immunity will not protect them, will think twice before committing crimes against their own populations. On the other side of the spectrum are those that recall the words of the International Court of Justice that immunity does not mean impunity because, even without creating exceptions to immunity, there are avenues for justice and accountability. For these commentators and actors, a better world depends on the stability of international relations and not on some nostalgic appeal to values.[59]

3.1 Previewing Immunities.

Immunity of State officials from foreign courts has been a topical subject in academic and judicial circles for a long time.[60] The plurality of divergent or otherwise inconsistent views on the subject has prompted many a passionate debate.[61] The United Nations General Assembly – albeit obliquely focused on

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57 See Dire Tladi, "The African Union and the International Criminal Court: The Battle for the Soul of International Law," Note 28 above, at 62 – 64. See also Dire Tladi, "The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the Normative (Chaff)," Note 3 above, at 3 where he characterizes the values clash as the "hero – villain" divide.

58 See Shobha Varughese George 'Head-of-State Immunity in the United States Courts: Still Confused After All These Years' (1995) 64 *Fordham Law Review* 1051, at 1051.

59 See Dire Tladi, "The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?" (2018) 32 *Leiden Journal of International Law*, 169 – 187 at page 170). See also Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," (2017) 60 *German Yearbook of International Law* 43 – 71.

60 See for instance different views of Law Lords in *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (1998) 3 WLR 1456. See also W. Schabas and N. Bernaz (Eds) *Routledge Handbook of International Criminal Law* (Routledge Press, 2011); Hazel Fox *The Law of State Immunity* (Oxford University Press, 2002); Hazel Fox, *Some Aspects of Immunity from Criminal Jurisdiction of the State and its Officials: The Blaškic Case"*, in LC Vohrah, F. Pocar F *et al* (Eds) *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, 2003).

61 See Larry Helfer and Tim Meyer, "Codifying Immunity or Fighting for Accountability? International Custom and the Battle Over Foreign Official Immunity in the United Nations" in Curtis Bradley & Ingrid Wuerth (Eds) *Custom in Crisis* (2015, Duke Law School) *(*Proceedings of Conference "Custom in Crisis: International Law in a Changing World," Duke Law School October 31, 2014).

universal jurisdiction[62] – and the International Law Commission (ILC)[63] have weighed in and one could reasonably argue that the sustained engagement by the ILC on the subject is confirmation of the difficulty of achieving consensus on the scope of application of the doctrine.[64]

Summarily stated, the principle of immunity precludes the exercise of jurisdiction by a State over Heads of State and senior officials of foreign States.[65] The rationale for immunity is grounded in the doctrine of sovereignty (independence) and sovereign equality which compel the courts of a State to decline to exercise jurisdiction over a foreign State or its officials.[66] To do otherwise would be for a State to assert superiority and dominion over, and thereby debase the dignity of another. This rationale, first introduced in the writings of Hobbes and Grotius,[67] is represented by the Latin maxim *par in parem non habet imperium.*[68]

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62 See *Sixth Committee Delegates Discuss Ways to Further Review Complex, Controversial Issues of Applying Universal Legal Jurisdiction* (13 October 2010), an overview of Sixth Committee debate on universal jurisdiction during 65th General Assembly of the United Nations, available at http://www.un.org/press/en/2010/gal3392.doc.htm accessed 20 August 2018. See agenda item 84 on *the scope and application of the principle of universal jurisdiction* at the 66th Session of the General Assembly of the United Nations, available at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml accessed 20 August 2018. See also fn 13 in Special Rapporteur Kolodkin's Second report on immunity of State officials from foreign criminal jurisdiction, Note 63 below. The South African delegation at the UN sought answers to the following questions: *do ministers for foreign affairs and other senior State officials possess full immunity under customary international law; is such immunity applicable in the case of genocide, war crimes and crimes against humanity; do temporal limits on such immunity exist and, if so, are they the same for all officials, what importance for immunity will the fact have that the aforementioned crimes may potentially fall within the category of crimes under the norms of jus cogens.*

63 See *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur, International Law Commission, U.N. Doc. A/CN.4/601 (May 29, 2008); *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, International Law Commission, U.N. Doc. A/CN.4/631 (June 10, 2010); and, *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, International Law Commission, U.N. Doc. A/CN.4/646 (24 May 2011). See also *Preliminary Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, by Concepcion Escobar Hernandez, Special Rapporteur, International Law Commission, U.N. Doc. A/CN.4/654 (31 May 2012), *Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, International Law Commission, U.N. Doc. A/CN.4/661(4 April 2013), *Third Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, International Law Commission, U.N. Doc A/CN.4/673 (2 June 2014) *Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction,* International Law Commission, U.N. Doc. A/CN.4/686 (29 May 2015), *Fifth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction,* International Law Commission, U.N. Doc. A/CN.4/701 (14 June 2016), and *Sixth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction,* International Law Commission, U.N. Doc. A/CN.4/722 (12 June 2018); all available at http://legal.un.org/ilc/guide/4_2.shtml accessed 10 December 2018.

64 The debate within the ILC of Special Rapporteur Kolodkin's preliminary and second reports was reportedly quite animated and reflected disagreement on what the law on immunities is (*lex lata*) as compared to what it should be (*lex ferenda*). See Larry Helfer and Tim Meyer, *Codifying Immunity or Fighting for Accountability? International Custom and the Battle Over Foreign Official Immunity in the United Nations*, Note 61 above.

65 Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21(4) *The European Journal of International Law* 815, at 819. See also Paola Gaeta "Does President Al Bashir Enjoy Immunity from Arrest" (2009) 7 *Journal of International Criminal Justice* 315, at 320.

66 See Hersch Lauterpacht "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 *British Yearbook of International Law* 220, at 221 – 223. See also Michael Tunks "Diplomats or Defendants? Defining the Future of Head of State Immunity" (2002) 52 *Duke Law Journal* 651, at 656.

67 While attribution of the doctrine to Grotius is a product of his characterization as the 'father of international law', Bankes argues that it would *be historically untenable to postulate that he was the father of the concept*. See Ernest Bankes *The State Immunity Controversy under International Law* (Germany, 2005), at 43.

68 The principle – forming basis of the act of State doctrine and sovereign immunity – in public international law, that no sovereign power may exercise jurisdiction over another sovereign power. See Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2002), at 30 – 31.

Writing in the seminal case of *The Schooner Exchange v. McFaddon*,[69] Chief Justice Marshall of the United States Supreme Court set out the doctrine as follows:

> [F]ull and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[70]

Deriving from sovereign immunity, the immunity of Heads of State and high-ranking Government officials from criminal and civil proceedings of other States is a right that accrues to the State and not the individual who thereby becomes a beneficiary of same. This rule is to permit sovereign States to conduct their international relations through their representatives, unimpeded and without interference by equal sovereign States.[71]

Absolute immunity, which was the original doctrine, arose from the absence of distinction between the monarch and the State[72] in the era before the Treaty of Westphalia.[73] It has over the centuries however evolved to take account of developments in international law. With increased participation of the State in commercial matters, courts began to make distinctions between public governmental acts of a State, *acta jure imperii,* and the commercial acts of a State, *acta jure gestionis*, with immunity being available only for the former.[74]

Of the immunities available to high ranking officials, there is also a distinction between personal immunity, immunity *ratione personae*,[75] and functional

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69 *The Schooner Exchange v. McFaddon* 11 U.S. 116 (1812).

70 See Chief Justice Marshall in *The Schooner Exchange v. McFaddon,* Note 69 above at paragraph 11.

71 See Hazel Fox, *The Law of State Immunity*. Note 68 above. See also *Le Parlement Belge* [1880] 5 Probate Division 197, at 212.

72 Treaty of Westphalia (Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies), 1648, introduced the modern concept of the State with mutual undertakings to respect the principle of territorial integrity, available at http://avalon.law.yale.edu/17th_century/westphal.asp accessed 20 August 2018.

73 Claiming to derive his authority from God, Louis XIV's (1638 – 1715) famously declared to Parliament that *L'État c'est moi*. This may however be apocryphal (See E. Fournier, *L'Esprit dans l'Histoire* (4th ed. 1884), Ch.XLVIII).

74 Although there has been some debate about the legitimacy of the distinction (because arguably, even commercial activities of a State are *acta jure imperii*), this distinction is well recognized in academic literature. See Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," Note 66 above, 220, 221 – 224. See also Hazel Fox in Note 68 above at 36 – 39.

75 See *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium*) Judgment of the International Court of Justice of February 14, 2002), ICJ Reports 2002 [*Arrest Warrant Case*]; See also Dapo Akande "International Law Immunities and the International Criminal Court" (2004) 98 *American Journal of International Law* 407, at 409 – 412.

immunity, immunity *ratione materiae*.[76] The former, which is said to be available to the *troika* of Head of State, Head of Government and Foreign Minister and arguably other high ranking officials,[77] accrues to the person of such officials by virtue of the office they occupy in their State. In the interests of maintaining peaceful coexistence and cooperation among States, immunity *ratione personae* renders officials entitled to invoke it, absolutely immune from legal proceedings in a foreign State both in their personal and official capacities for the duration of their terms of office.[78]

Immunity *ratione materiae* on the other hand avails State officials for acts performed in their official capacities as agents of the State and can be invoked by a significantly wider range of State officials. Such immunities which are, unlike immunity *ratione personae* not time bound, would amongst others also benefit, post-incumbency, former Heads of State and other high-ranking officials who were previously cloaked with immunity *ratione personae*, for official actions during their incumbency.[79]

3.2 Previewing the Case for *Jus Cogens* Human Rights Exceptions to Immunities.

Development of substantive norms of international human rights and international criminal law has led to a gradual erosion through the decades of the principles of sovereign and Head of State immunity.[80] The erosion has been propelled by the progressive extension of the parameters of international law beyond the Westphalian State-centric model to a regime in which non State actors (individuals) are subjects of (entitled to a number of fundamental rights and remedies for violations of those rights) as well as accountable under international law.[81]

As early as 1951, decades before the emergence of human rights law as a potent force for State and individual accountability, Lauterpacht had argued against the principle of State immunity, by asserting that:

> At a period in which in enlightened communities the securing of the rights of the individual, in all their aspects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which

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76 See Hazel Fox, *The Law of State Immunity,* Note 68 above.

77 See *Immunity of State Officials from Foreign Criminal Jurisdiction***,** Chapter X, Report on the 60th Session of the ILC, paras 275 – 277 available at http://legal.un.org/docs/?path=/ilc/reports/2008/english/chp10.pdf&lang=EFSRAC accessed 20 August 2018.

78 See *Arrest Warrant Case*, Note 75 above, at paragraphs 56 – 61.

79 See Dapo Akande, Note 75 above, at 412 – 415.

80 See *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* 3 WLR 1,456 (H.L. 1998). For commentary thereon, see Andrea Bianchi "Immunity versus Human Rights: The Pinochet Case" (1999) 10(2) *European Journal of International Law* 237, at 248 – 262. See also Ruth Wedgwood "Augusto Pinochet and International Law," (2000 – 2001) *46 McGill Law Journal* 241.

81 Sevrine Knuchel, "State Immunity and the Promise of Jus Cogens," (2011) 9(2) *Northwestern Journal of International Human Rights,* 149.

> may arise whenever the state – our own state or a foreign state – screens itself behind the shield of immunity in order to defeat a legitimate claim.[82]

Although this statement was a commentary on the injustice of the invocation of immunity by a State in order to evade the consequences of commercial transactions it enters into as well as tortious liabilities it incurs (from its actions or inactions), the sentiment is applicable to Head of State immunity and other procedural and substantive bars to accountability. This would be particularly the case for egregious crimes that have so shocked the conscience of mankind as to warrant international prosecution.

The increasing focus of international organizations and the international legal system on safeguarding human rights and on ensuring accountability for the egregious human rights violations of the twentieth century has led inexorably to calls for States to consent to accept some limitations on their sovereignty.[83] The dearth of accountability measures, particularly for such violations have led also to the application by courts of innovative exceptions not only to the classical grounds for the exercise of jurisdiction, but also, in some cases, to the application of the doctrine of immunity.[84]

The arguments against immunity for international crimes in a modern world are articulately reflected in the dissent of Judge Cançado Trindade in the *Jurisdictional Immunities of the State Case,*[85] summary facts of which are as follows: Following its surrender to the Allied Powers in 1943, Italy, which had entered World War II in 1940 as an ally of the German Reich, declared war against Germany. In response, German forces occupied significant parts of Italy and committed monstrous crimes including massacres, deportations and forced labour against both soldiers and civilians. At the end of the war, although Germany enacted various laws to facilitate payment of compensation to victims, thousands of former Italian military internees did not fall within the ambit of such laws and were unable to secure compensation from Germany.

The said internees sued Germany in Italian Courts to claim compensation. Although Germany objected to the suits on grounds of jurisdictional immunity before foreign courts. Italian Courts held for the plaintiffs asserting that where crimes under international law had been committed, the jurisdictional immunity of States could be set aside.[86] Germany instituted an action before the International Court of Justice (ICJ) against Italy. Greece, whose

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82 See Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," Note 66 above, 220, 235.

83 Michael Tunks, "Diplomats or Defendants? Defining the Future of Head of State Immunity," Note 66 above at 656.

84 See Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case" Note 80 above, at 248 – 262.

85 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of the International Court of Justice, ICJ Reports 2012, p99 (hereafter *Jurisdictional Immunities of the State Case*).

86 See *Ferrini v. Federal Republic of Germany* (2006) 128 ILR 658; *Federal Republic of Germany v. Giovanni Mantelli and others*, Italian Court of Cassation, Order No 14201, 29 May 2008; *Federal Republic of Germany v. Liberato Maietta*, Italian Court of Cassation, Order No 14209, 29 May 2008. See also Daniel Scherr, "Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening): A Case Note," (2012) 10 *New Zealand Yearbook of International Law* 139.

courts had made similar rulings as Italy for atrocities committed by German forces during World War II intervened.

The ICJ held that Italy had violated its obligation to respect Germany's immunity under international law firstly by allowing civil claims to be brought against Germany based on violations of international humanitarian law committed by the German Reich between 1943 and 1945, secondly by declaring as enforceable in Italy, decisions of Greek courts, and thirdly by taking measures of constraint against German property in Italy.[87]

In a widely referenced dissenting opinion which has delighted legal moralists and probably alarmed legal positivists,[88] Cançado Trindade rejected Germany's invocation of immunity for Nazi atrocities in the suit instituted by the victims. He introduced his dissent by asserting that the tension between immunity of the State and the rights of individuals to access justice should be resolved in favour of the individual,[89] especially where the State claiming immunity recognizes its own wrongdoing.[90] He then went on to aver – a variation of the *nemo dat quod non habet* rule – that States cannot waive, *inter se,* rights that do not belong to them but to individuals who are subjects of international law;[91] invoked "universal juridical conscience" as an applicable source of law and asserted that such suits as the present seek to restore international order rather than to compromise such order.[92] He concluded by stating that permitting immunity for *delicta imperii* (particularly of *jus cogens* norms)[93] would be violative of the essence of 20th century international criminal and human rights law.[94]

The underlying reasoning for the planks of Cançado Trindade's dissent are not new and have received varying measures of approbation[95] and repudiation[96] before various tribunals. While case law largely reflects the majority view of the ICJ in the *Jurisdictional Immunities Case*, dissenting opinions in many cases – comprising greater numbers of judges in various courts have been described as progressively shifting the balance in order to resolve the tension in favour of upholding human rights over State and sovereign immunity and derivatives therefrom for individuals.[97] Indeed, the ILC in its consideration of the Draft Code of Crimes against the Peace and Security of Mankind had stated that:

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87 See *Prefecture of Voiotia* v. *Federal Republic of Germany*, Case No. 11/2000 *ILR*, Vol. 129, p. 513.

88 See Marko Milanovic, "Judging Judges: A Statistical Exercise" *EJILTalk*, (12 March 2012), available at http://www.ejiltalk.org/judging-judges-a-statistical-exercise/, accessed 20 August 2018.

89 See *Jurisdictional Immunities of the State Case*, Note 85 above at paragraphs 41 – 52.

90 See *Jurisdictional Immunities of the State Case*, Note 85 above at paragraphs 25, 26 and 28.

91 See *Jurisdictional Immunities of the State Case*, Note 85 above at paragraphs 69 – 72.

92 See *Jurisdictional Immunities of the State Case*, Note 85 above at paragraphs 121 – 129.

93 See *Jurisdictional Immunities of the State Case*, Note 851 above at paragraphs 53 – 62 and 117 – 120.

94 See *Jurisdictional Immunities of the State Case*, Note 851 above at paragraphs 154 – 160.

95 See Lord Steyn in *Pinochet*. Note 23 above. See also House of Lords in *Oppenheimer v. Cattermole*, 1976 AC, 249.

96 See majority opinions in *Arrest Warrant Case* (Note 75 above), *Al-Adsani v. United Kingdom*, (2002) 34 EHRR 273 and Jurisdictional Immunities of the State Case (See Note 85 above).

97 See Antonio Cassese, "When May Senior State Officials be Tried for International Crimes: Some Comments on the Congo v. Belgium Case," (2002) 13 *European Journal of International Law*, 853 – 875.

> It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code, to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions, particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security[98]

A 2016 decision of South Africa's Supreme Court of Appeal (SCA), albeit founded on domestic and not international law, appears to give further reason for the shift in the values debate.[99] On the question of whether or not the Government of South Africa was under an obligation to arrest President Omar al Bashir further to an international arrest warrant issued by the ICC, the SCA – while acknowledging that Sudan was not party to the Rome Statute and that Omar al Bashir would ordinarily be entitled to immunity *ratione personae* under customary international law[100] – found the existence of such an obligation by construing South Africa's Rome Statute Implementation Act[101] and the Constitution[102] to require adherence to norms of human rights law.[103] The SCA's decision has however been critiqued for effectively ignoring the fact that South Africa's obligations under the Rome Statute fell within the frame of Article 98 thereof which would arguably require recognition of obligations to accord immunity under customary international law.[104] On this, more later.

4. Significance and Objective of the Study.

In light of the adoption of the Malabo Protocol, subsequent calls for *en masse* termination of AU members' relationship with the ICC[105] and the continued antipathy between the AU and the ICC, the best hope for addressing impunity for egregious human rights

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98 Report of the International Law Commission on its 48th Session (6 May – 26 July 1996) on the Draft Code of Crimes against the Peace and Security of Mankind with commentaries. See paragraph 1 (on article 7), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf accessed 20 August 2018.

99 See *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

100 *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre,* Note 99 above at paragraphs 66 – 85.

101 See Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, available at http://www.saflii.org/za/legis/num_act/iotrsoticca2002699.pdf, accessed 31 October 2018.

102 See *The Constitution of the Republic of South Africa* as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly (1996), available at http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf, accessed 31 October 2018.

103 *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre,* Note 99 above at paragraphs 89 – 95.

104 See *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre,* Note 99 above at paragraphs 55 – 105. See also Dire Tladi, "The ICC Decisions in Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199. See also Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its impact on Al Bashir's Immunities" (2009) 7 *Journal of International Criminal Justice* 333, at 342.

105 While Kenya had led the charge, the National General Council of South Africa's ruling African National Congress resolved at its October 2015 meeting to "ask the ANC-led government to begin the process of withdrawal of its membership of the ICC." See Paragraph 2.9 of ANC NGC 2015 Resolutions on International Relations available at http://www.anc.org.za/show.php?id=11694 accessed 20 August 2018.

violations may very well lie with the Expanded African Court.[106] It is essential therefore to have a full understanding of the extent of its jurisdiction, any bars to exercise of jurisdiction and how such jurisdiction coheres with the jurisdiction of the ICC, departure from which has been said to motivate the quest for an African Court with similar jurisdiction as the ICC.[107]

The principal contribution therefore that this study proposes to make to the existing body of law and knowledge would be to undertake a doctrinal analysis of Head of State immunity in international law and to determine the legal effect of the immunity provision of the Malabo protocol and its likely influence on current norms of, and trends in international criminal law. The coherence or otherwise of the immunity provision with the stated objectives of the Malabo Protocol itself is also examined. For the primary reason of the Malabo Protocol being *nouveau*, such analysis – which would contribute to answering questions that are of significant interest to international criminal lawyers – does not currently exist in any substantial form.[108]

The question whether the Rome Statute permits the exercise of international criminal jurisdiction by another supra-national court founded on a treaty is easily answered in the affirmative.[109] The fact however that the Protocol confers immunity from prosecution on Heads of State and possibly a range of other Government officials[110] and makes no mention whatsoever of the ICC[111] raises a range of legal questions which must be

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106 What seemed like an initial stampede to ratification has been considerably tempered. Four years after its adoption, the Protocol has, as of October 31, 2018, received eleven signatures but no ratifications. The rather slow rate of accession by AU member States, in spite of active encouragement by the AU Commission and Assembly to do so, makes it unclear whether the Malabo Protocol will ever come into force. See Journalists for Justice, *Benin, Guinea Bissau, Kenya and Mauritania sign the International Crimes Protocol* (25 March 2015) available at http://www.jfjustice.net/benin-guinea-bissau-kenya-and-mauritania-sign-the-malabo-protocol-vesting-the-african-court-with-criminal-jurisdiction/ accessed 10 December 2018. See List of Countries which have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf accessed 10 December 2018. See also *AU Urges Member States to Ratify Malabo Convention*, Ethiopian News Agency (17 October 2018), available at https://www.ena.et/en/2018/10/17/au-urges-member-states-to-ratify-malabo-convention/ accessed 10 December 2018.

107 See Michelle Nel, *Can a Regional Court be a Viable Alternative to the ICC in Africa?* Eye Witness News (8 August 2018), available at https://ewn.co.za/2018/08/08/can-a-regional-court-be-a-viable-alternative-to-the-icc-in-africa, accessed 16 October 2018. See however Dire Tladi, Note 3 above, at 15 – 16. Tladi argues that

> [t]he effect of the extension of the African Court's jurisdiction is, potentially, to expand the reach of international criminal justice' because although 'the African Court will not have the competence to try the persons having immunity, but this will not prevent the ICC from exercising jurisdiction against such persons.

Given the rhetoric of the proponents of the immunity provisions, it is conceivable that a number of African countries will withdraw from the ICC, in which case a real question of potential impunity could arise.

108 Tladi and du Plessis appear to be the only persons who have discussed the immunity provision of the Malabo Protocol even if only in the depth permitted by 15 and 16-page articles respectively (see Note 3 above). This dissertation proposes to address the questions raised by the immunity and their likely effect on norms of international criminal justice more comprehensively.

109 Chacha Bhoke Murungu suggests otherwise in "Towards a Criminal Chamber in the African Court of Justice and Human Rights," (Note 7 above) but his views are inconsistent with the clear provisions of the Vienna Convention on the Law of Treaties (VCLT). See Articles 6 and 34 of the VCLT available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf accessed 20 August 2018.

110 See Article 46A *bis* of the Malabo Protocol.

111 See Max du Plessis, "Implications of the AU Decision to give the African Court Jurisdiction over International Crimes," Note 9 above. See also Max du Plessis, "African Efforts to Close the Impunity Gap – Lessons for

addressed in the interests of ensuring the development of a coherent international criminal justice regime. Other issues, such as inconsistent jurisprudence in international criminal law arising from a proliferation of judicial bodies exercising similar jurisdiction, while not unique to the Malabo Protocol's conferment of international criminal jurisdiction, also arise.

While the ICJ has declared immunity from the jurisdiction of foreign courts for Heads of States and such senior State officials as Foreign Ministers to be a rule of customary international law,[112] the Court also listed the circumstances in which such officials could be tried as follows:[113]

(i) before domestic courts in accordance with the relevant rules of domestic law.

(ii) before foreign courts in the event of the waiver by the State of the official of his immunity

(iii) before foreign courts after the official's period of incumbency, if such courts have jurisdiction, for acts committed prior to or after the period of incumbency or acts committed in a private capacity during incumbency

(iv) before certain international criminal courts, where such courts have jurisdiction

Although this formulation has received fair criticism from some scholars and commentators,[114] it has largely been accepted as an accurate representation of the current State of international law as far as Head of State Immunity or immunity *ratione personae* goes. The disquiet over the Malabo Protocol's immunity clause arises from its express exclusion of jurisdiction over sitting Heads of State and Government and arguably a range of other high-ranking officials before international courts. The disquiet is deepened by the concern that Article 46A *bis* appears to roll back the normative progression that the international criminal justice community thought had been achieved by the ICJ's acknowledgment that immunity may not apply before some international courts.[115] The increasingly common phenomenon of Heads of State seeking to perpetuate their stay in office by eliminating term limits exacerbates such disquiet.[116]

A primary objective of the study will therefore be to review the Malabo Protocol and, amongst others, determine how Head of State immunity coheres with international criminal law and such instruments as the Constitutive Statute of the African Union and

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Complementarity from National and Regional Actions" (November 2012) *Institute for Security Studies* Paper 241.

112 See *Arrest Warrant Case*, Note 75 above, at paragraphs 56 – 61.

113 See *Arrest Warrant Case*, Note 75 above, at paragraph 61.

114 See Antonio Cassese, "When May Senior State Officials be Tried for International Crimes: Some Comments on the Congo v. Belgium Case," Note 97 above.

115 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," Note 7 above, at 1077.

116 The three most recent examples of this phenomenon, occurring in 2015, have been the unsuccessful attempt of Blaise Compaore in Burkina Faso, the successful effort of Rwanda's Paul Kagame and the successful albeit destabilizing effort of Pierre Nkurunziza in Burundi. See Press Statement of US Government *Reaction to Rwandan President's Decision to Run for Third Term*, 2 January 2016, available at https://2009-2017.state.gov/r/pa/prs/ps/2016/01/250937.htm accessed 20 August 2018.

determine what the likely consequences are for the dispensation of international criminal justice in Africa.

5. Principal Research Questions.

The essence of the debate over the legitimacy of Head of State immunity, which has been reflected also in the deliberations of the ILC, is whether in light of international human rights and international criminal law norms, international law recognizes a curtailment or contraction of the doctrine of State immunity and by extension, immunity of State officials from the jurisdiction of foreign courts. Whilst a number of scholars have answered this question in the affirmative, others have asserted that such a response is wishful thinking – an effort to represent *lex ferenda* as *lex lata*.[117]

How the AU and the Expanded Court come down on this question will be key to determining whether the implementation of the Malabo Protocol can be expected to reflect the *"unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union."*[118]

The overarching questions that this dissertation seeks to answer therefore are:

(1) What is current international law on immunities?

(2) Does international law permit immunities in the face of violations of international criminal law?

(3) What is the legal effect, if any, of the Malabo Protocol's Immunity provision[119] on the normative framework for international criminal justice; and,

(4) To what extent could the Malabo Protocol undermine the fight for accountability and against impunity in Africa?

Key questions for research purposes that will help to answer the principal questions include the following:

- What are the foundations of the doctrine of Head of State immunity and how has it developed/evolved?

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[117] The distinction between *lex lata* and *lex ferenda* is not always conceded by human rights lawyers. See John Dugard "The Future of International Law: A Human Rights Perspective – With Some Comments on the Leiden School of International Law" (2007) 20 *Leiden Journal of International Law* 729, at 730 – 733. See also Sean D. Murphy, "Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is The State Practice in Support of Exceptions?" *American Journal of International Law Unbound, 112*, at 4 – 8.

[118] See AU Assembly, Decision on International Jurisdiction, Justice and the ICC 1 - Doc. Assembly/AU/13(XXI), Assembly/AU/Dec.482 (XXI) available at http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20482%20(XXI)%20_E.pdf accessed 20 August 2018. See also Article 4(h) of the AU Statute which provides an unprecedented right to member States to intervene militarily in other members States on humanitarian grounds.

[119] See Article 46A *bis* of the Malabo Protocol.

- To what extent have human rights law and international criminal law influenced the doctrine of immunity?

- What is the current scope of application of the doctrine of immunity in international law?[120]

- How did the Malabo Protocol come to be and what position would the proposed Expanded African Court occupy within the judicial landscape of the African Union?

- What is the rationale for and/or desirability of a Court with international criminal jurisdiction in Africa?

- What is the rationale for the Protocol's assertion of immunity for *serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions, during their tenure of office*?

- To what extent does the immunity provision of the Malabo Protocol influence the internal coherence of the Protocol and how should it be interpreted?

- To what extent does the Malabo Protocol's immunity provision undermine the dispensation of international criminal justice in Africa?

6. Summary Literature Review.

On the precise subject of this dissertation, there is not an extensive body of literature. There are however several academic articles by Jalloh, Tladi, Akande, du Plessis, and Clarke amongst others and compilations edited by Werle and Vormbaum that have chronicled the strain in the relationship between the ICC and the AU and followed the actions taken by the AU to create the Expanded African Court.[121] With the exception of

[120] See for instance *Southern African Litigation Centre v. Minister of Justice and Constitutional Development and Others,* Case Number: 27740/2015, 23 June 2015.

[121] See Charles Jalloh, *The African Union and the International Criminal Court: The Summer of Our Discontent(s)* (2010) JURIST – Forum, available at http://jurist.org/forum/2010/08/the-african-union-and-the-international-criminal-court-the-summer-of-our-discontents.php accessed 20 August 2018; Charles Jalloh "*Kenya vs. The ICC Prosecutor*" (August 2012) 53 *Harvard International Law Journal Online*; Charles Jalloh, "*Regionalizing International Criminal Law?"* (July 2009) 9 *International Criminal Law Review* 445-499. See also Timothy Murithi "*The African Union and the International Criminal Court: An Embattled Relationship*?" (March 2013) *IJR Policy Brief No. 8*; See also Dire Tladi "The African Union and the International Criminal Court: The Battle for the Soul of International Law" (2009) 34 *South African Yearbook of International Law* 57; Dire Tladi "*The ICC Decisions on Chad and Malawi – On Cooperation Immunities and Article 98*" (2013) 11(1) *Journal on International Criminal Justice* 199 – 221; The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: Attempting to Make a Collage from an Incoherent Framework" (2015) available at http://www.derebus.org.za/wp-content/uploads/2015/07/Dire-Tladi.pdf accessed 20 August 2018; Dire Tladi "Complementarity and cooperation in international criminal justice Assessing initiatives to fill the impunity gap" (November 2014), *Institute for Security Studies* Paper 277; Dire Tladi "The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the Normative (Chaff)" Note 3 above. See also Chacha Bhoke Murungu "Towards a Criminal Chamber in the African Court of Justice and Human Rights" (2011) 9 *Journal of International Criminal Justice* 1067, at 1077; See also Frans Viljoen "AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol" *AfricLaw Blog,* 23 May

Tladi and du Plessis however few scholars have written about the immunity provision of the Malabo Protocol and its effect.[122]

Opinion editorials on the subject have been avowedly simplistic commentaries that have proven unhelpful to advancing the agenda for cooperation between the AU and the ICC by caricaturing the AU, tarring AU members with the same feather and failing to appreciate the underlying nuances about recent global political history and the consequences of an asymmetrical global legal order.[123]

State immunity and Head of State immunity on the other hand have enjoyed extensive review and deliberation amongst academics and judicial authorities. Whilst there are some values-influenced variations on what the scope of immunity should be,[124] and in some cases, whether it should even exist,[125] the essence of the current customary international law position was presented in the judgment of the *Arrest Warrant Case*, which – for upholding immunities for Heads of State and high-ranking officials from foreign criminal jurisdiction – has not escaped a fair amount of criticism.[126]

Although there is general agreement that immunity may attach to the *troika* of Head of State, Head of Government and Foreign Minister for official acts,[127] the extension by the majority opinion of such immunity to private acts has been robustly countered by some scholars.[128] In a vigorous dissent, Judge *ad hoc* Van den Wyngaert[129] even denies the existence of immunity in customary international law for Foreign Ministers and beyond that, asserts that there can be no immunity for war crimes and crimes against humanity.[130]

2012. See also Gerhard Werle, Lovell Fernandez and Moritz Vormbaum, *Africa and the International Criminal Court* (2014 Asser Press).

122 It is important to note that while it is the case that the afore mentioned scholars have not yet written any substantive texts examining the normative framework of the Malabo Protocol, they have been involved in the African Court Research Initiative at Florida International University (FIU). The initiative, as its name would suggest, is likely to produce extensive literature on the Malabo Protocol in the near future.

123 See for instance Kenneth Roth, "Africa Attacks the International Criminal Court" *Human Rights Watch* (14 January 2014), available at http://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court accessed 20 August 2018. See also Kamari Clarke, Note 28 above. See also T. Mbeki and M. Mamdani, *Courts Can't End Civil Wars,* The New York Times (5 February 2014), available at http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html?_r=0 accessed 5 July 2016.

124 See Dapo Akande, "International Law Immunities and the International Criminal Court," Note 75 above.

125 See Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," Note 66 above, at 220, 221 – 223.

126 See Antonio Cassese, "When May Senior State Officials be Tried for International Crimes: Some Comments on the Congo v. Belgium Case," Note 97 above.

127 James Crawford *Brownlie's Principles of Public International Law (*8th Ed) (Brownlie, 2012) at 487-488. For a different view however see Sir Arthur Watts *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers* (Boston, 1994) at 109.

128 See Jan Wouters and Leen De Smet, "The ICJ's Judgment in the Case Concerning the Arrest Warrant of 11 April 2000: Some Critical Observations, (January 2003) *Institute for International Law* Working Paper 27, available at https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP27ed2e.pdf accessed 20 August 2018.

129 See dissenting Opinion of Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant Case*, Note 75 above, at paragraphs 20 – 21.

130 See Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, Note 129 above, at paragraphs 24 – 39.

Notwithstanding the views of scholars, like Orakhelashvili, who believe that immunity *ratione personae* can be overcome in the face of egregious violations of *jus cogens* norms,[131] there appears to be a consensus that immunity *ratione personae* before the courts of foreign States – at least where invoked by the troika – is impregnable during incumbency.[132]

With respect however to immunity *ratione materiae*, there are principally two schools of thought.[133] The one argues that there are no exceptions to such immunity and the other presents three possible exceptions. The first proffered exception is that because State immunity is available only for sovereign acts, States and their officials cannot enjoy immunity for international crimes because such crimes cannot be legitimate acts of States. The second argument, which hews closely to the first, is that immunity for official acts cannot avail a person who commits international crimes because such crimes cannot be official acts of State. The third argument is that of normative hierarchy which states that immunity cannot be invoked for international crimes which are *jus cogens* (principles of international law from which there can be no derogation). This argument appears to be reinforced by such provisions as the *aut dedere aut judicare* provisions of the Torture Convention.

Bianchi[134] and van Alebeek[135] represent the latter school while such authors as Wardle[136] and Gaeta[137] represent the former school, albeit in a more nuanced fashion. The Gaeta position that there are no human rights exceptions to sovereign immunity and derivatives therefrom is reinforced by the preliminary, second and third reports delivered by Roman Kolodkin to the ILC in his role as Special Rapporteur on the question of the immunity of Heads of State before foreign courts.[138] Beyond asserting definitively the absence of any exception to immunity *ratione personae* for Heads of States and high-ranking officials before the courts of foreign States, Kolodkin also argues that there is no exception to immunity *ratione materiae*. He argues in justification that:

> There can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act,

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131 See Alexander Orakhelashvili "State Immunity and International Public Order" (2002) 45 *German Year Book of International Law* 227. See also Alexander Orakhelashvili "State Immunity and International Public Order Revisited" (2006) 49 *German Year Book of International Law* 327. See also Alexander Orakhelashvili "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong" (2007) 18 *European Journal of International Law*, 955.

132 See Hazel Fox, *The Law of State Immunity*, Note 71 above.

133 For being restricted in time, and for serving a reasonably legitimate purpose in preserving international comity, immunity *ratione personae* has not been seen as much an enabler of impunity as immunity *ratione materiae* the cover of which could be perpetual. See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 65 above, at 820 – 825.

134 Andrea Bianchi "Immunity versus Human Rights: The Pinochet Case" Note 80 above.

135 Rosanne van Alebeek *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, 2008).

136 Philip Wardle "The Survival of Head of State Immunity at the International Criminal Court" (2011) 18 *Australian International Law Journal* 181.

137 Paola Gaeta "Does President Al Bashir Enjoy Immunity from Arrest?" Note 65 above.

138 *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction* by Roman Anatolevich Kolodkin, Special Rapporteur, Int'l Law Comm'n, U.N. Doc. A/CN.4/601 (May 29, 2008); *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, U.N. Doc. A/CN.4/631 (10 June 2010); and, *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, U.N. Doc. A/CN.4/646 (24 May 2011).

> and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official. The issue of determining the nature of the conduct of an official — official or personal — and, correspondingly, of attributing or not attributing this conduct to the State, must logically be considered before the issue of the immunity of the official in connection with this conduct is considered.[139]

Akande argues that the existence or otherwise of immunities before a tribunal is ultimately a factor of the constitutive instrument of the tribunal,[140] and, Akande and Shah, while dismissing the reasons proffered above for limiting the availability of immunity *ratione materiae* argue that immunity cannot lie for international crimes because immunity would be "in conflict with more recent rules of international law and it is the older rule of immunity which must yield".[141]

Tladi and du Plessis appear to be the principal authors who have analysed the immunity provision of the Malabo Protocol and addressed questions arising therefrom, but their reviews are only as deep as 15 and 16-page articles will permit. While du Plessis asserts, hyperbolically, that *"the AU has shown itself to be committed to a regional exceptionalism of the most egregious kind: immunity for African leaders who have committed international crimes",*[142] Tladi pursues a more pedagogical frame that concludes that although there is no rule under customary international law granting immunity to State officials before international criminal courts, there is not either a rule denying officials immunity before such courts.[143] Evocative of Akande and Shah,[144] Tladi argues that whether or not an international criminal court has jurisdiction over high ranking officials is ultimately a question that is resolved by the jurisdictional reach set out in the constitutive statute of the court.[145]

Chacha Bhoke Murungu also reviews the causes of and proximate factors for the AU's decision in 2009 to set up a Criminal Chamber in the African Court of Justice. He reviews the legal basis for such a court, identifies potential legal issues, such as immunity, that the court may be required to consider and presents arguments for and against the criminal jurisdiction of an expanded African Court. While this piece addresses some of the issues that this thesis shall examine, its principal limitation is that it was written before the text of what became the Malabo Protocol was drafted and adopted.[146]

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139 See *Second report on immunity of State officials from foreign criminal jurisdiction* by Roman Anatolevich Kolodkin, Special Rapporteur, Note 62 above at paragraph 94(b) and (c).

140 See Dapo Akande, "International Law Immunities and the International Criminal Court," Note 75 above, at 415 – 419.

141 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 65 above, at 840.

142 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 3 above at 3.

143 Dire Tladi, "The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the Normative (Chaff)," Note 3 above, at 15.

144 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 65 above, generally.

145 Dire Tladi, "The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the Normative (Chaff)," Note 3 above, at 15 – 16.

146 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," Note 7 above.

It is important to note in concluding this summary literature review that this thesis has had the distinct benefit of being supervised by an expert on its subject matter who has been actively engaged in the contemporaneous development of international law on the subject and has also had a front row seat to events that have contributed to the evolution of legal doctrine thereon.[147] The not infrequent reference to Professor Tladi's scholarship in this thesis is not just because of a dearth of writings on the subject of the Malabo Protocol by other scholars but because he is one of only two scholars, thus far, to have undertaken textual analysis of the immunity provision of the Malabo Protocol and what its import is.[148] The reliance on Professor Tladi's work can hardly however be called slavish as this thesis has drawn distinctions with or otherwise traversed some of Professor Tladi's conclusions in International Law Commission reports and academic articles.[149]

7. Overview of Chapters.

This dissertation unfolds into three parts, which collectively consist of seven Chapters. The first part – comprising the first two Chapters – sets the context, provides a brief history of the Malabo Protocol and its *raison d'être* and presents the analytical framework against which an assessment will be made of whether or not the Malabo Protocol undermines the fight against impunity. The second part comprising Chapters three, four and five deals with the law on Head of State immunity and its evolution from classical times until the present. It reviews what exceptions there are to immunity and examines whether or not there are *jus cogens* human rights exceptions to immunity before foreign domestic court and before international courts. Chapter Six addresses the titular and principal research questions through the prism of the analytical framework and Chapter Seven concludes the dissertation.

More specifically, as an introduction to the rest of the research that this thesis presents, this Chapter One provides the context for the study and sets out the relevance of the subject. It also undertakes a limited review of the literature on the subject, presents the key research questions and offers an overview of the rationale and content of the Chapters.

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147 In 2015, at its sixty-seventh session, the International Law Commission decided to include the topic "*Jus cogens*" in its programme of work, on the basis of the recommendation of the Working Group on the long-term programme of work and appointed Professor Tladi as Special Rapporteur for the topic. Reports available at http://legal.un.org/ilc/guide/1_14.shtml. Beyond his role as the ILC Special Rapporteur on the legal doctrine that has been presented to invalidate immunities, Professor Tladi has acted as the Chair of the Draftig Committee for articles presented by Concepcion Escobar-Hernandez, ILC Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction and an active member of the ILC in debating said legal questions. Professor Tladi has also acted as Counsel before the ICC on behalf of South Africa and the African Union on questions of immunity of Heads of State – Mr. Omar al Bashir in particular - from foreign criminal jurisdiction.

148 See for instance Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff" (2015) 13(1) *Journal of International Criminal Justice* 3, at 12 – 15; Dire Tladi, "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic," (2014) 7 *African Journal of Legal Studies* 381, at 393 – 398; Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Volume 10, International Criminal Justice Series (Asser Press, 2017) 203 – 219; D. Tladi, 'Immunity in the Era of "Criminalisation": The African Union, the ICC and International Law' (2015) 58 *Japanese Yearbook of International Law* 17

149 See, in particular, Chapter 4 of this thesis.

As background for the dissertation, Chapter Two examines how the Malabo Protocol came to be and the rationale for its assertion of immunity for Heads of State and other high-ranking officials. This requires a review of the sources of the AU's antipathy to the ICC and the legitimacy or otherwise of the claims of bias by the AU in the dispensation of international criminal justice.[150] Chapter Two also reviews the history of, and instances of what has been described by the AU as the improper exercise of universal jurisdiction by western States against African States as well as the efforts to address concerns raised by both the AU and the European Union.[151] It also traces the various steps in the progressive development of what has become the Malabo Protocol and reviews the contribution of some of the early jurisprudence of the ICC to the inclusion of the immunity provision.[152] Where possible, informal interviews have been conducted with key actors in the development of the Malabo Protocol as well as observers with ring side seats to the evolution of the Malabo Protocol. These include advisers to the African Union itself and senior persons within the Pan African Lawyers Union (PALU), which upon request of the AU Commission provided the first draft of the Protocol.[153]

While it would appear from public comments and pronouncements, including from within the ICC itself,[154] and several other parties that the AU seeks to encourage impunity,[155] the AU strenuously denies this. Chapter Two therefore sets out an analytical framework that will permit an assessment of the AU's assertion of *"unflinching commitment … to combating impunity ... in conformity with the Constitutive Act of the African Union."*[156]

Chapter Three traces the history and classical application of sovereign immunity and its progeny. Through a review of case law, State practice and academic expositions, it

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150 See Dire Tladi, "The African Union and the International Criminal Court: The Battle for the Soul of International Law," Note 28 above. See also Charles Jalloh, "The African Union and the International Criminal Court: The Summer of Our Discontent(s)," Note 30 above.

151 An advisory Technical *Ad hoc* Expert Group was constituted by both the AU and EU in January 2009 to inform AU-EU discussions on the principle of universal jurisdiction. See report of AU-EU Technical *Ad Hoc* Expert Group on the Principle of Universal Jurisdiction, Note 31 above.

152 See Dapo Akande. "ICC Issues Detailed Decision on Bashir's Immunity (…At long Last …) But Gets the Law Wrong," (15 December 2011) *EJIL Talk* available at http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 24 June 2016. See also Dire Tladi "The ICC Decisions on Chad and Malawi – On Cooperation Immunities and Article 98," (2013) 11 *Journal on International Criminal Justice* 199 – 221. See also André de Hoogh and Abel Knottnerus "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again" (18 April 2014) *EJIL Talk* available at http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/ accessed 24 June 2016.

153 See Donald Deya, "Is the African Court Worth the Wait?," (March 2012) *Open Society Initiative for Southern Africa,* available at http://www.osisa.org/openspace/regional/african-court-worth-wait accessed 31 August 2018

154 Although not said in as many words, the Prosecutor of the ICC has asserted that she finds the so-called "Africa bias" of the ICC offensive given that these are the words and 'propaganda' of a few powerful, influential individuals who seek impunity, and not the words of the millions of anonymous people that suffer from their crimes. See Fatou Bensouda 'Africa: Law As a Tool for World Peace and Security' Open Society Initiative for Southern Africa (4 June 2012), available at https://allafrica.com/stories/201206051220.html accessed 20 August 2018.

155 See Tejan-Cole A *Is the ICC's Exclusively African Case Docket a Legitimate and Appropriate Intervention or an Unfair Targeting of Africans?* ICC Forum (17 March 2013), available at http://iccforum.com/africa#Tejan-Cole_fn15 accessed 20 August 2018.

156 AU Resolution mandating the Commission to explore the creation of a continental international criminal justice tribunal. See Assembly/AU/Dec.482(XXI); Decision on International Jurisdiction, Justice and the ICC 1 - Doc. Assembly/AU/13(XXI) available at http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20474-489%20(XXI)%20_E.pdf accessed 20 August 2018.

examines the rationale for the doctrine of sovereign immunity and the evolution of its scope of application.

Chapter Four examines modern applications of the doctrines of State and Sovereign immunity and derivatives therefrom. Through the lens of developments in international human rights and humanitarian law as well as international criminal law, this Chapter investigates the scope of immunity *ratione personae* and immunity *ratione materiae* to determine whether they admit of any exceptions for *jus cogens* crimes. Case law on immunities in multiple national jurisdictions, the pronouncements of international courts such as the International Court of Justice (ICJ)[157] and the European Court of Human Rights (ECHR),[158] rulings on immunities in international criminal trials such as the Slobodan Milosevic[159] and Charles Taylor Cases[160] and the work of the ILC[161] are relied upon to this end.

Chapter Four also draws out, from the sources of law outlined above, trends that will inform analysis of the AU's inclusion of an immunity provision in the Malabo Protocol, the likely consequences thereof and a delineation of possible arguments for and against the application of the immunity provision. Of particular relevance in assessing current trends on immunities of high-ranking officials, is a review of the jurisprudence of the pre-Trial Chamber with respect to the failure by Rome Statute State parties to arrest Omar al Bashir – on grounds of Head of State immunity – when he visited Malawi,[162] Chad[163] the Democratic Republic of Congo[164] and, more recently South Africa.[165]

The effect of Article 46A *bis* of the Malabo Protocol being to permit invocation of immunity before an international criminal court, Chapter Five interrogates the question of immunity before international courts in order to determine whether under customary international law, immunity can be invoked before such courts. Chapter 5 also undertakes a textual analysis of the immunity provision of the Malabo Protocol in order

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157 See *Arrest Warrant Case*, Note 75 above, generally.

158 See *Al-Adsani v. United Kingdom*, Note 96 above.

159 See *Prosecutor v. Slobodan Milosevic* (Case No. IT-99-37-PT), Trial Chamber Decision on Preliminary Motions (8 November 2001) available at http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm accessed 24 June 2016.

160 See *Prosecutor v. Charles Ghankay Taylor* (SCSL – 2003 – 01 – I), Appeals Chamber Decision on Immunity from Jurisdiction available at http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf accessed 24 June 2016.

161 See Reports of Special Rapporteurs on Immunities from Foreign Criminal Jurisdiction, Note 63 above.

162 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011.

163 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09-140) Pre-Trial Chamber I, 12 December 2011.

164 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Regarding Omar Al-Bashir's Visit to the Democratic Republic of the Congo (ICC-02/05-01/09), Pre-Trial Chamber II, 26 February 2014.

165 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir ICC-02/05-01/09-302, 06 July 2017, available at https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF accessed 7 December 2018.

to determine the scope of the immunity that AU member States seek to confer on "any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions, during their tenure of office." It assesses the import of the immunity provisions for the dispensation of international criminal justice and determines what scope remains, if any, for prosecuting Heads of States and Government for international crimes. Among the questions arising from the Malabo Protocol's immunity provision would be the practical effect of the complementarity rule of the Expanded African Court[166] and how the crime of unconstitutional change of government may be prosecuted if a Head of State is immune from prosecution.[167]

Through the prism of the analytical framework, and against the backdrop of the previous Chapter's inquiry as to whether there is a *jus cogens* human rights exception to Head of State immunity before international courts, Chapter Six assesses whether the accusation that the AU seeks impunity for Heads of State and other members of the "ruling classes" is a legitimate one borne out by the actions and inactions of the AU itself. Chapter Six also undertakes a critique of the Malabo Protocol in order to determine whether it meets the burden that the AU places on itself to combat impunity.[168]

Chapter Seven concludes the dissertation by reprising the essence of the findings and analyses of the research and summarily reviewing the content of each Chapter as a backdrop to making conclusions on the titular question. In light of developments since the writing of this dissertation commenced in 2016, this final chapter takes a second look at the central issue of the perceived ICC bias against African States that set into motion, the actions and reactions that have yielded the present relationship between the AU and the ICC. It also summarily presents some recommendations for a sustainable basis for what each of the principal actors in this drama says it wants: *justice*.

166 See Article 46H of Malabo Protocol.

167 See Article 28E of Malabo Protocol.

168 See Assembly/AU/Dec.482(XXI), Note 118 above.

Chapter 2

A Retrospective on the Road Travelled Towards the African Court of Justice and Human and Peoples' Rights.

1. Introduction.

The burden of this Chapter is to provide the necessary context and background that this thesis is founded on. This requires an examination of the historical path to an African Court with international criminal jurisdiction (hereinafter the Expanded African Court) and how the Malabo Protocol came to be. To this end, this Chapter presents a review of critical background information such as the drivers of the fraught relationship between the AU and the ICC. It also recounts and provides a chronology of the steps leading up to the adoption in 2014 of the Protocol by the African Union (AU) and then assesses the place and status of the proposed Expanded African Court within the AU's judicial architecture.

This latter section presents a review of the structure and competence of the various courts that the AU has created, sets out the legal status of the Protocol (to add international criminal jurisdiction) amending the Protocol to merge the African Court of Justice and the African Court of Human Rights and assesses the rationale for the AU's assertion of immunity for Heads of State and other high-ranking officials. This Chapter also lays out the analytical framework which will be used to determine, in subsequent chapters, whether or not the immunity provision in the Malabo Protocol compromises the dispensation of international criminal justice in Africa and promotes impunity.

2. An Early Path to an African Court.

Although the effort to create a court with international criminal jurisdiction in Africa has been cast as a recent effort with the exclusive objective of subverting the International Criminal Court (ICC),[1] this view takes little account of the true origins of the path to an African Court.[2] Although little-mentioned, it is clear from multiple sources that the Organization of African Unity (OAU) had considered the possibility of an African court as early as 1980.

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[1] See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," (2011) 9 *Journal of International Criminal Justice* 1067. The author states in the abstract of the paper *that calls by the AU to establish the Criminal Chamber arise from a chain of events beginning with the indictment and prosecution of some African individuals, including State officials, by the Prosecutor of the International Criminal Court (ICC), and the authorities in domestic courts of European states.* See also Donald Deya, "Is the African Court Worth the Wait?," (March 2012) *Open Society Initiative for Southern Africa,* available at http://www.osisa.org/openspace/regional/african-court-worth-wait, accessed 31 August 2018. Deya notes inaccurately that the idea of an African court with international criminal jurisdiction *first arose back in 2007-08 when the Group of (African) Experts, which was commissioned by the AU to advise it on the 'merger' of the African Court on Human and Peoples' Rights with the African Court of Justice, recommended that due consideration should be given to expanding the jurisdiction of the African Court to cover international crimes.*

[2] See Ademola Abass "The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects" (2013) *Netherlands International Law Review* 27, at 28.

Indeed, records of the Ministerial meeting convened by the Secretary-General of the Organization of African Unity (OAU) in Banjul, the Gambia, from 9 to 15 June 1980 to deliberate upon the creation of a human rights accountability framework for Africa show clearly that the idea of "establishing an African court to judge crimes against mankind and violations of human rights" was discussed.[3] The principal reasons presented by the Chairman of the Committee of Experts for not pursuing the creation of the court through the African Charter on Human and Peoples' Rights (African Charter) were that there were plans within the United Nations (UN) to create an international court to prosecute crimes *erga omnes* and that the International Convention on the Suppression and Punishment of the Crime of Apartheid had also provided for an international penal court.[4] A third reason was that the African Charter should reflect African values of which compromise, non-inquisitorial and non-adversarial resolution of conflict were key aspects.[5]

More recently, further and more extensive consideration was given to the prospect of creating a continental court with international criminal jurisdiction because of pressure mounted by Belgium,[6] and at the instance of Belgium and other parties, by the Human Rights Committee of the United Nations,[7] the European Union[8] and the International Court of Justice (ICJ)[9] for Hissène Habré to be tried for egregious violations of human rights during his rule as President of Chad from 1982 until 1990.

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3 See Keba M'baye, Introduction to M'Baye Proposal, Draft African Charter on Human and Peoples' Rights of 1979, OAU Doc. CAB/LEG/67/1, paragraph 4, reprinted in, Christof Heyns (ed) *Human Rights Law in Africa* (Brill/ Nijhoff, 1999), at 65. See also Ademola Abass, "*Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges"* (2013) 24(3) *European Journal of International Law* 933, at 936. See also Frans Viljoen, "A Human Rights Court for Africa, and Africans" (2004) 30(1) *Brooklyn Journal of International Law* 1, at 4-5.

4 See Keba M'baye, Note 3 above. See also Frans Viljoen, "A Human Rights Court for Africa, and Africans," Note 3 above, at 5. See also *Report on the Draft African Charter presented by the Secretary-General at the Thirty-Seventh Ordinary Session of the OAU Council of Ministers, held in Nairobi, Kenya 15-21 June 1981. CM/1149 (XXXVII). See therein Rapporteur's Report on the Second Session of OAU Ministerial Conference on the Draft African Charter on Human and Peoples' Rights, Banjul, the Gambia, 7 - 19 January 1981 (Annex 2) CAB/LEG/67/Draft Rapt. Rpt (II) Rev.4 at paragraphs 13 and 117*. Notwithstanding the explanation proffered by the Committee of Experts, a delegation that was not identified proposed amendments to the draft Charter that would create a Court but participants, while taking note of the proposed amendment, decided not to consider it at that time.

5 See Chidi Odinkalu "The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System," (2001) 2 *African Human Rights Law Journal*, 225. Odinkalu offers an unvarnished view of the rationale for a weak human rights enforcement system in Africa. See Nsongurua Udombana "Toward the African Court on Human and Peoples' Rights: Better Late Than Never" (2000) 3 (1) *Yale Human Rights and Development Journal* 45, available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1015&context=yhrdlj accessed 31 August 2018.

6 After a four-year investigation by Belgian Judge Daniel Franzen from the District Court of Brussels, he issued an international arrest warrant for Habré for crimes against humanity, war crimes and torture and requested his extradition from Senegal. The investigation was initiated in 2000 upon request of 3 Chadian victims who had subsequently gained Belgian nationality. See Human Rights Watch, "Chronology of the Habré Case" (27 April 2015), available at https://www.hrw.org/news/2015/04/27/chronology-habre-case, accessed 2 September 2018

7 See CAT/C/36/D/181/2001, *Decision of the Committee Against Torture under Article 22, Paragraph 7, of the Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment* (19 May 2006),

8 See for instance RC-B6-0171/2006, *European Parliament resolution on impunity in Africa and in particular the case of Hissène Habré* (15 March 2006), available at http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P6-RC-2006-0171&language=EN, accessed 2 September 2018

9 The ICJ found that Senegal had "violated and continues to violate its conventional and customary international obligations, namely, on the one hand, Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1,

In January 2000, Souleymane Guengueng and six other Chadian victims of Habré's rule had filed a criminal complaint against Habré in Senegal, where he had been given asylum following his overthrow in 1990.[10] The complainants grounded their claim on breaches of the Torture Convention to which Senegal is party[11] and the *aut dedere aut judicare* (obligation to extradite or prosecute) provision thereof.[12] In the following month a Senegalese Court charged Habré with crimes against humanity and placed him under house arrest. Upon appeal by Habré, the charges were dismissed, and the *Cour de Cassation* subsequently declined to permit the exercise of universal jurisdiction because the Torture Convention had not been incorporated into Senegal's criminal procedure rules.[13]

In November 2000, a Belgian national of Chadian origin filed a private criminal complaint against Habré in Belgium where after a four-year investigation, a Belgian judge in September 2005 issued an international arrest warrant charging Habré with crimes against humanity, war crimes, and torture.[14] Belgium issued a request for the extradition of Habré which a Senegalese court declined to rule on. In the face of extensive pressure from Belgium, Senegal made a request to the AU to recommend an appropriate jurisdiction for a trial of Habré.[15]

The AU duly convened a Committee of Eminent African Jurists, upon whose recommendation the AU called on Senegal to prosecute Habré.[16] The seven-member Committee whose terms of reference had been to consider "the specific case of Hissène

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of the Convention against Torture and, on the other hand, the customary rules requiring States to combat impunity." See Case Concerning Questions relating to the Obligation to Prosecute or Extradite, (*Belgium v. Senegal*), Judgment, ICJ GL No 144, ICGJ 437 at paragraph 5.20.

10 See Paragraph 14 of Senegal's Counter Memorial in *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of the International Court of Justice of 23 August 2011, *ICJ Reports 2012,* available at http://www.icj-cij.org/files/case-related/144/16931.pdf accessed 2 September 2018.

11 Senegal signed the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted on 10 December 1984 and entered into force on 26 June 1987) on 4 February 1985 and ratified it 21 August 1986. For further detail see https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en accessed 2 December 2018.

12 See Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force 26 June 1987, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx accessed 2 September 2018. Senegal ratified the Torture Convention on August 21, 1986. For further detail see Ratification Table: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at http://www.achpr.org/instruments/uncat/ratification/ accessed 2 September 2018.

13 See *Senegal: Guengueng and Others v. Habré* (2002) AHRLR 183 (SeCC 2001), available at http://www.chr.up.ac.za/index.php/browse-by-subject/431-senegal-guengueng-and-others-v-Habré-2002-ahrlr-183-secc-2001.html, accessed March 13, 2016 accessed 2 December 2018.

14 For background on the Hissène Habré case, see Judgment of the ICJ in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, p 422 at paragraphs 15 – 41.

15 See detailed chronology of events leading up to the AU's recommendation for Senegal to try Habré in *The Trial of Hissène Habré* (January 2007) Human Rights Watch, available at

https://www.hrw.org/legacy/backgrounder/africa/Habré0107/Habré0107web.pdf accessed 2 September 2018.

16 See AU Assembly, Decision on the Hissène Habré Case and the African Union, Assembly/AU/Dec.103 (VI) (Doc.Assembly/AU/8 (VI)) Add.9, available at https://au.int/sites/default/files/decisions/9554-assembly_en_23_24_january_2006_auc_sixth_ordinary_session_decisions_declarations.pdf accessed 2 September 2018.

Habré and to help design a mechanism for dealing with impunity specifically in the African context,"[17] expressed preference for an African solution to extradition of Habré to Belgium. They noted that appropriate forums where Habré could be tried included Senegal, where Habré already was resident, Chad, where the atrocities had occurred, any African State party to the Torture Convention, or an *ad hoc* tribunal set up for this purpose.[18]

With respect to the future avoidance of impunity, the Committee proposed that:

> … this new body [the merged African Court of Human Rights and the African Court of Justice] be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention Against Torture … there is room in the Rome Statute for such a development and that it would not be a duplication of the work of the International Criminal Court.[19]

Less than a decade later, the AU appears to have heeded the call of the eminent African jurists.

3. The Drivers of the Relationship between the International Criminal Court, the African Union (AU) and AU Member States.

There is no denying that the referral of the Darfur Situation to the ICC by the UN Security Council[20] and the subsequent issue by the ICC of an arrest warrant for Omar al Bashir[21] was a defining moment for the AU's engagement with the ICC.[22] The unravelling of the relationship between the ICC and the AU and some AU member States' progressive disenchantment with the ICC can be traced however to four principal factors which had their roots in events in the previous several years. These may be summarily presented as: (i) the perception among some AU member States of the abuse by Western States of the principle of Universal Jurisdiction; (ii) the perceived targeting by the ICC of African countries and the double standards of Western States; (iii) the perceived disrespect

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17 See Paragraphs 8 and 9 of the *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré* [to the AU], available at https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf accessed 3 September 2018.

18 See Paragraphs 16 – 33 of the *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré* [to the AU], Note 17 above.

19 See Paragraph 35 of the *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, Note 17 above.

20 See Paragraph 1 of UN *Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*, 31 March 2005, S/RES/1593 (2005) 1593 (2005). See also *Security Council Refers Situation in Darfur, Sudan, to Prosecutor Of International Criminal Court*, Security Council Press Release SC/8351 of 31 March 2005, available at http://www.un.org/press/en/2005/sc8351.doc.htm accessed 4 October 2016.

21 See *Prosecutor v. Omar Al Bashir* (Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir) Case ICC-02/05-01/09-3 (4 March 2009). See also Dire Tladi "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic" (2014) 7 *African Journal of Legal Studies* 381, at 390 – 396.

22 The AU decided to withhold cooperation with the ICC in reaction to the issue of the arrest warrant. See AU Assembly, Decision on the Meeting of States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec.245(XIII), 3 July 2009, x 10, available at https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf accessed 3 September 2018.

shown to African States and the AU by the UN Security Council; and, (iv) the overreach of various actors, including of the ICC itself, in its interactions with the AU and its member States.

3.1 The Perceived Abuse of the Principle of Universal Jurisdiction by Western States.

Broadly defined as the exercise of jurisdiction by the domestic courts of a State over crimes committed in another State against citizens of that or another State, universal jurisdiction is an extraordinary exercise of jurisdiction where there is no link between the commission of the crime and the exercise of jurisdiction in its prosecution.[23] It has been justified by the notion that crimes against humanity itself or crimes *erga omnes* require action to appease the conscience of mankind.[24] And this even where the customary justification for exercise of jurisdiction – on grounds of nationality, territoriality, passive personality and protection – are absent.[25]

For African States however, the principle of universal jurisdiction increasingly began to look, in the first decade of the twenty first century, like a cudgel wielded by Western powers, to embarrass African leaders and keep them in check.[26] The fact that the Western courts seeking to assert universal jurisdiction have in some instances been the courts of former colonial powers has served to exacerbate already fraught relationships.[27]

While the proximate cause for the forceful objection by the AU to the "abuse" of universal jurisdiction was the indictment of forty members of the Rwanda Defence Force (RDF) in a Spanish Court in 2008,[28] the sense of disrespect towards African States that the indictment engendered had its roots in a long history of similar actions by European investigative judges.[29]

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23 See Frans Viljoen *International Human Rights Law in Africa* (Oxford University Press, 2007), at 31 and 32.

24 See Frans Viljoen, *International Human Rights Law in Africa,* Note 23 above.

25 Frans Viljoen, *International Human Rights Law in Africa,* Note 23 above, at 31.

26 See Ex.Cl/411(XIII) Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General, available at http://archive.au.int/collect/oaucounc/import/English/EX%20CL%20411%20(XIII)%20_E.PDF accessed 3 September 2018. See also Charles Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (2010) 21 *Criminal Law Forum* 1, at 25.

27 See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 ICJ 3 (*Arrest Warrant Case*). See separate Opinion of Judge *ad-hoc* Bula Bula at 100 – 137 but particularly from 102 – 112. See also Harmen van der Wilt "Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered..." (2011) 9 *Journal of International Criminal Justice* 1043, at 1064 where he says: "the criticism of the AU leaders on the exercise of universal jurisdiction by Western courts is far too harsh, if not a token of bad faith." This view is not sustained by the author's own later reference in the same article to the role of colonial powers in stoking the tensions that have erupted into crimes against humanity in African countries. See also Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholders* (2017), International Criminal Justice Series, Asser Press

28 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," Note 1 above, at 1070.

29 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," Note 1 above, at 1069 – 1073. See also Council of the European Union, Report of African Union-European Union Technical *Ad hoc* Expert Group on the Principle of Universal Jurisdiction, Brussels, 16 April 2009, 8672/1/09, REV 1.

In the preceding decade alone, indictments, arrest warrants and/or corruption charges had been sought against no less than ten sitting or previous African Heads of State and a whole slew of senior African government officials in various European Courts.[30] Included in the roster of the said Heads of State were Muammar Gaddafi of Libya in France in 2001;[31] Robert Mugabe of Zimbabwe in England in 2002;[32] Teodoro Obiang Nguema of Equatorial Guinea, Denis Sassou Ngueso of Congo, Omar Bongo of Gabon, Blaise Compaore of Burkina Faso and Eduardo dos Santos of Angola in France in 2009,[33] Laurent Gbagbo of Ivory Coast; Denis Sassou Nguesso; Paul Kagame of Rwanda and President Ange-Felix Patasse of the Central African Republic in Belgium in the 2000s.[34] This of course excludes the countless other civil actions that had been instituted against a fair number of the listed persons.[35]

It is true that the afore-listed indictments preceded the crystallization of the conflict between the AU and the ICC that flared over the ICC's indictment of then Sudanese President Omar al Bashir and the antipathy that has since been generated towards the ICC by the AU.[36] Indeed, some of the listed parties that were prosecuted had left office when al Bashir was indicted but the history of perceived persecution did serve to cultivate a strong sense of opposition against perceived levers of post-colonial subjugation – a notion that Judge Bula Bula raised in the *Arrest Warrant Case*.[37] The fact also that most of these indictments and/or arrest warrants had been sought after the ICJ's ruling in the *Arrest Warrant Case* – which upheld the doctrine of immunity and its application to senior government officials[38] – only deepened the perception of unlawful persecution.[39]

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30 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," Note 1 above. See also Chacha Bhoke Murungu, "Prosecution of African State Officials – National and International Perspectives" (2012) *Bonner Rechts Journal*, 170.

31 See *Court Removes Bar to Gaddafi Trial*, BBC News (20 October 2000), available at http://news.bbc.co.uk/2/hi/europe/981080.stm accessed 24 June 2018. See *SOS Attentats et Beatrice Castelnau d'Esnault c. Gaddafi*, 125 ILR 490-510, 13 March 2001. The *Cours de Cassasion* in this case overturned a Court of Appeal ruling of October 2000 which had said that Gaddafi could stand trial for his role in the downing of a French airliner over West Africa in 1989 because Head of State immunities did not apply in cases of terrorism.

32 See Peter Tatchell, *How Mugabe resisted arrest*, New Statesman (4 March 2002), available at http://www.newstatesman.com/node/194364 accessed 27 June 2018.

33 See *Five African leaders sued for corruption,* Radio France International (11 July 2008), available at http://www1.rfi.fr/actuen/articles/103/article_960.asp accessed 9 July 2016. For full chronology of cases initiated by Transparency International and other NGOs and the rulings of the French courts see on respect of Gabon's Omar Bongo, Congo's Denis Sassou Nguesso and Equatorial Guinea's Teodoro Obiang Nguema Transparency International Press Release of November 9, 2010, "Biens Mal Acquis" Case: French Supreme Court Overrules Court of Appeal's Decision", available at

http://www.transparency.org/news/pressrelease/20101109_biens_mal_acquis_case_french_supreme_court_overrules_court_of_appe accessed 10 July 2016.

34 See Human Rights Watch, *"Belgium: Questions and Answers on the "Anti-Atrocity" Law*," at 2 and 3, available at https://www.hrw.org/legacy/campaigns/icc/belgium-qna.pdf, accessed 10 July 2016.

35 See for instance *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001); *Habyarimana v. Kagame*, 821 F. Supp. 2d 1244 (W.D. Okla. 2011).

36 See *Arrest Warrant Case*. See separate Opinion of Judge ad-hoc Bula Bula at 100 – 137 but particularly from 102 – 112

37 See *Arrest Warrant Case,* Note 27 above.

38 See *Arrest Warrant Case*, Note 27 above. See Paragraphs 58 and 59 of Main Judgment.

39 See Dapo Akande, "The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?", *EJILTalk* (8 February 2012), available at http://www.ejiltalk.org/the-african-unions-

At a meeting of AU Ministers of Justice and Attorneys General in Addis Ababa on April 18, 2008, shortly after the indictment of the RDF and former Rwanda Patriotic Front (RPF) officers, the indictments were forcefully denounced and a request made to the AU Commission to commission a study to determine the lawfulness of universal jurisdiction.[40] Similar denunciations of the indictments were recorded in the weeks shortly thereafter by the Pan African Parliament[41] and by the inter-Ministerial Committee of the International Conference of the Great Lakes Region.[42]

Upon adoption of the report commissioned by the AU Commission on the Abuse of Universal Jurisdiction on July 1, 2008 at a summit in Sharm el Sheikh, Egypt, the Assembly urged the Commission's chair "to urgently arrange a meeting between the African Union and the European Union (EU) to discuss the issue of the exercise of universal jurisdiction by European States, with a view to finding a lasting solution to concerns expressed by the African side."[43]

Arguably, the sense of persecution from the perceived abuse of universal jurisdiction exacerbated the dissatisfaction of the AU and its members with the architecture of international law and engendered resentment against the power dynamics that perpetuate the international legal order.[44]

3.2 The Perceived Targeting of African Countries by the ICC and the Double Standards of Western Powers.

The question of whether or not the ICC has unfairly targeted African countries has been the subject of extensive political and academic discourse.[45] The sentiment that the ICC has been biased has been fuelled primarily by political actors, who have relied on the predominantly African case load of the ICC as

response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/ accessed 3 September 2018.

40 See AU Assembly, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/ Dec.199(XI) (Doc. Assembly/Au/14 (Xi)), available at https://au.int/sites/default/files/decisions/9558-assembly_en_30_june_1_july_2008_auc_eleventh_ordinary_session_decisions_declarations_tribute_resolution.pdf accessed 4 September 2018.

41 See Pan-African Parliament's Johannesburg Declaration of 15 May 2008. See also Paragraph 2 of AU Assembly Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Note 40 above.

42 See Brazzaville Statement of 22 May 2008. See also Paragraph 4 of AU Assembly, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Note 40 above.

43 AU Assembly, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Note 40 above. The 10th and 11th meetings of the AU-EU Ministerial Troika addressed the issue of universal jurisdiction and the relationship between the AU and EU.

44 See Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters (3 – 4 November 2008), Kigali, Rwanda, MinJustice/ /Rpt. (II). See also Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholders*, Note 27 above. See also Tendayi Achiume, "The African Union, the International Criminal Court, and the United Nations Security Council," *Background Paper, University of California, Irvine School of Law ICC-UNSC Workshop,* November 2012.

45 See for instance *Is the International Criminal Court (ICC) targeting Africa inappropriately?* Discussion of invited experts – Bassiouni, Clarke, de Guzman and Tejan-Cole amongst others on Africa question, available at http://iccforum.com/africa accessed 4 September 2018. See also Res Schuerch *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholders*" in Gerhard Werle and Moritz Vormbaum (Eds) *International Criminal Justice Series* 13 ed (2017, Asser Press).

testament to its bias.[46] Indeed until October 2015, when the ICC Prosecutor sought authorization from the Pre-Trial Chamber for a *proprio motu* investigation into alleged war crimes in South Ossetia, Georgia, from July 1 until October 10, 2008,[47] the situations under investigation and the case load of the ICC were exclusively African. As of April 30, 2019, the only addition to situations under actual investigation since then – as opposed to preliminary investigation – has also been of an African State, Burundi.[48]

The sentiment has been exacerbated by the apparent double standards of members of the UN Security Council who – not party themselves to the ICC – have referred situations in African countries to the ICC while ignoring atrocities within countries where they wield influence.[49]

At the Twelfth Ordinary Session of the AU Assembly of Heads of States and Governments in Addis Ababa, Ethiopia, the Assembly, after declaring its 'deep concern'[50] with the ICC's indictment of Omar al Bashir went on to request

> the Commission to convene as early as possible, a meeting of the African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, *in particular in the light of the processes initiated against African personalities*,

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[46] See for instance Daisy Ngetich, *Mugabe accuses ICC of targeting Africans*, Citizen Digital (16 June 2015), available at https://citizentv.co.ke/news/mugabe-accuses-icc-of-targeting-africans-89161/ accessed 4 September 2018. See also *Museveni calls for mass pull-out of African states from International Criminal Court*, Daily Nation (December 12 2014), available at http://www.nation.co.ke/news/politics/African-states-quit-ICC-Museveni/1064-2554310-5qe0l2/index.html accessed 4 September 2018.

[47] See Request for authorisation of an investigation pursuant to article 15, ICC-01/15-4 (13 October 2015), available at https://www.icc-cpi.int/CourtRecords/CR2015_19375.PDF accessed 4 September 2018. The request was duly approved by the Pre-Trial Chamber on January 27, 2016. See Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15-12 (27 January 2016), available at https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF accessed 5 September 2018.

[48] The Pre-Trial Chamber authorized an investigation into alleged atrocities in Burundi on October 25, 2017, a day before Burundi's withdrawal from the Rome Statute of the ICC became effective. See Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, ICC-01/17-X-9-US-Exp (25 October 2017), available at https://www.icc-cpi.int/CourtRecords/CR2017_06720.PDF accessed 5 September 2018.

[49] See David Bosco '*Why is the International Criminal Court picking only on Africa?' The Washington Post*, 29 March 2013 available at https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html?noredirect=on&utm_term=.9f10d6851591 accessed 5 September 2018. As David Bosco explains:

> …great-power politics are the key here. China has a veto over Security Council action and wants the court to stay well away from North Korea, for instance. Russia will not permit an ICC investigation in Syria. And when violence in Iraq was at its most intense, the United States would have blocked any move to give the court jurisdiction there. A stray comment by an Iraqi minister in 2005 suggesting that the country might join the ICC produced nervous phone calls from U.S. diplomats. They got the assurances they wanted: Baghdad would not become a member.

See also Kamari Clarke at http://iccforum.com/africa#Clarke accessed 5 September 2018. See also Mark Kersten 'Calls for prosecuting war crimes in Syria are growing. Is international justice possible?' *The Washington Post* 14 October 2016, available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/?utm_term=.777b85235523 accessed 5 September 2018.

[50] See Paragraph 1 of AU Assembly, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan, Assembly/AU/Dec.221(XII), available at https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf accessed 5 September 2018.

> and to submit recommendations thereon taking into account all relevant elements.[51] (My Emphasis).

Commentary on the perceived Africa bias of the ICC and the even more inflammatory suggestion that the ICC was created by Western powers as a tool for continued dominance over African States received significant attention in the aftermath of the referral by the UN Security Council of the Darfur situation, prompting du Plessis to warn perhaps presciently in 2008 that:

> The danger with each of these arguments [that delegitimize the ICC] is that they will find traction – not surprisingly – with dictators and their henchmen who seek reasons to delay or resist being held responsible under universally applicable standards of justice. But compounding matters is the fact that each of the arguments is not substantiated by the true facts, or, perhaps worse (even if unwittingly so), is a distortion of the true facts. As one commentator has pointed out, the danger is that 'the rhetoric of condemnation – that the ICC is an agent of neocolonialism or neo-imperialism, that it is anti-African – may so damage the institution that … it is simply abandoned.[52]

Several scholars have sought to counter the perceptions of bias, and the cynical worldview of the purpose of the ICC being to keep Africans in check, by pointing to the critical role played by African countries at the Rome Conference which birthed the Rome Statute of the ICC and the role played by African countries in the post conference drive for ratification to bring the ICC to life.[53] Such scholars have sought to introduce nuance to the accusation of bias by most importantly pointing to the fact that the first three situations before the ICC – the situations in the Democratic Republic of Congo (DRC),[54] Uganda[55] and the Central African Republic (CAR),[56] were the product of referrals by the countries in which the

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51 See Paragraph 5 of AU Assembly, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan, Note 50 above. See also Ayele Derso, "The AU's Extraordinary Summit decisions on Africa-ICC Relationship" *EJIL Talk* (October 28, 2013), available at http://www.ejiltalk.org/category/international-organisations/the-african-union/ accessed 2 October 2016.

52 See Max du Plessis, "The International Criminal Court and its work in Africa: Confronting the Myths" (November 2008) *Institute for Security Studies, Paper 173,* 1 – 23 at p 2. Available at https://issafrica.s3.amazonaws.com/site/uploads/Paper173.pdf accessed 27 September 2018.

53 See Max du Plessis, "The International Criminal Court and its work in Africa: Confronting the Myths," Note 52 above. See also Sanji Mmasenono Monageng "Africa and the International Criminal Court: Then and Now" in G. Werle et al (Eds), *Africa and the International Criminal Court* (2014, Asser Press).

54 See Press Statement of the Office of the Prosecutor on the Situation in the DRC (ICC-OTP-20040419-50). In April 2004, the Government of the DRC referred the situation in the DRC to the ICC, which commenced investigations in June 2004. Find Press Statement at https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo and further particulars on the referral available at https://www.icc-cpi.int/drc accessed 1 July 2016.

55 See the International Criminal Court, Situation in Uganda (ICC-02/04). Although the referral of this case by the Government of Uganda was in January 2004, with investigations beginning in July 2004, the first case on the ICC's official docket was the Situation in the DRC which was only referred 3 months later. See ICC website at https://www.icc-cpi.int/uganda for further detail, accessed 30 June 2016.

56 See Press Statement of the Office of the Prosecutor on the Situation in the Central African Republic (CAR) (ICC-OTP-20050107-86). In this case the referral of the situation by the Government of the CAR to the ICC was made in December 2004. Investigation however only commenced in May 2007. See press statement at https://www.icc-cpi.int/Pages/item.aspx?name=otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic and more particular details on the Situation at https://www.icc-cpi.int/car accessed 30 June 2016.

situations occurred, themselves.[57] The fact however that such self-referrals were the product of active solicitation and considerable encouragement by the ICC's first Prosecutor, Moreno-Ocampo, does little to counter the perceptions of and accusations against the ICC of bias.[58]

While the accusation about a negative Africa bias by the ICC may, notwithstanding the solicitation for self-referrals, not have been completely legitimate in the first decade of the 21st Century, it certainly acquired legitimacy by December 2012 when, a full ten years after the ICC came into being,[59] all of the eight situations before the ICC were from Africa.[60] The fact that as of April 30, 2019, a full seventeen years after the ICC heard its first case, not just the active case load of the Court but also all eleven situations under active (rather than preliminary) investigation remain exclusively African[61] in spite of consistent complaints by African States makes the accusation all the more legitimate.[62] Although the Office of the Prosecutor (OTP) of the ICC has since launched preliminary investigations into situations beyond Africa – in Afghanistan,[63]

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57 See Jalloh, Akande and du Plessis, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court" (2011) 4 *African Journal of Legal Studies* 5, at 13 – 15.

58 Sarah Nouwen *Complementarity in the Line of Fire, The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013, Cambridge University Press) at 350.

59 The Rome Statute of the ICC was adopted on 17 July 1998 and entered into force on 1 July 2002 upon deposit of the 60th instrument of ratification. For further detail on the status of ratifications see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=fr&clang=_fr accessed 5 September 2018.

60 The eight situations in reference were of the Democratic Republic of Congo (DRC), Uganda, Central African Republic (CAR), Sudan, Kenya, Libya, Cote d'Ivoire and Mali. For further particulars see ICC website at https://www.icc-cpi.int/pages/situations.aspx, accessed 30 June 2016.

61 As of 30 April 2019, all 27 cases that have come before the ICC have been from African situations. See Situations and Cases tab at https://www.icc-cpi.int/Pages/main.aspx#, accessed 30 April 2019.

62 See Tor Krever, "Africa in the Dock: On ICC Bias," *Critical Legal Thinking* (30 October 26), available at http://criticallegalthinking.com/2016/10/30/africa-in-the-dock-icc-bias/, accessed 2 September 2018. See also Kwamchetsi Makokha, *Africa: Claims of ICC Bias and Double Standards at ASP Annual Meeting*, The East African (28 November 2016), available at https://allafrica.com/stories/201611290215.html, accessed 2 September 2018.

63 On 20 November 2017, the Prosecutor of the International Criminal Court ("ICC"), Fatou Bensouda, requested authorisation from Pre-Trial Chamber III to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in the Islamic Republic of Afghanistan since 1 May 2003. This was some ten years after the preliminary examination of the situation in Afghanistan was made public in 2007. For further detail see https://www.icc-cpi.int/afghanistan accessed 10 December 2018.

Colombia,[64] Iraq,[65] Palestine,[66] Philippines,[67] Ukraine[68] and Venezuela,[69] all twenty seven cases that have come before the ICC as of April 30, 2019, are from African situations.[70] The point of contention has been why, in spite of atrocities across the world which should have warranted deeper scrutiny from the ICC[71] –

[64] The situation in Colombia has been under preliminary examination since June 2004. The preliminary examination focusses on alleged crimes against humanity and war crimes committed in the context of the armed conflict between and among government forces, paramilitary armed groups and rebel armed groups, including the crimes against humanity of murder; forcible transfer of population; imprisonment or other severe deprivation of physical liberty; torture; and rape and other forms of sexual violence; and the war crimes of murder; intentional attacks against civilians; torture; other cruel treatment; outrages on personal dignity; taking of hostages; rape and other forms of sexual violence; and using children to participate actively in hostilities. For further detail see https://www.icc-cpi.int/colombia accessed 10 December 2018.

[65] The preliminary examination of the situation in Iraq, initially terminated on 9 February 2006 was re-opened on 13 May 2014 upon receipt of new information. The preliminary examination focuses on alleged crimes committed by United Kingdom nationals in the context of the Iraq conflict and occupation from 2003 to 2008, including murder, torture, and other forms of ill-treatment. For further detail see https://www.icc-cpi.int/iraq accessed 10 December 2018. See also Statement terminating preliminary examination by Ocampo in 2006. Available at https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf accessed 10 December 2018.

[66] On 16 January 2015, the Prosecutor announced the opening of a preliminary examination into the situation in Palestine in order to establish whether the Rome Statute criteria for opening an investigation are met. Specifically, under article 53(1) of the Rome Statute, the Prosecutor shall consider issues of jurisdiction, admissibility and the interests of justice in making this determination. For further detail see https://www.icc-cpi.int/palestine. See also Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine (22 May 2018), available at https://www.icc-cpi.int//Pages/item.aspx?name=180522-otp-stat accessed 10 December 2018.

[67] On 8 February 2018, the Prosecutor announced the opening of a preliminary examination into the situation in the Philippines since at least 1 July 2016, where the "war on drugs" campaign launched by the Government of the Philippines has been alleged to have resulted in thousands of extra-judicial killings. For further detail see https://www.icc-cpi.int/philippines accessed 10 December 2018. Philippines has since withdrawn from the Rome Statute. See ICC-CPI-20180320-PR1371, ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law (Press Release of 20 March 2018). Available at https://www.icc-cpi.int/Pages/item.aspx?name=pr1371 accessed 10 December 2018.

[68] On 25 April 2014, the Prosecutor announced the opening of a preliminary examination into the situation in the Ukraine. Although Ukraine is not a party to the Rome Statute, it has accepted the ICC's jurisdiction over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014 and beyond. The preliminary examination initially focussed on alleged crimes against humanity committed in the context of the "Maidan" protests which took place in Kyiv and other regions of Ukraine between 21 November 2013 and 22 February 2014, including murder; torture and/or other inhumane acts. For further detail see https://www.icc-cpi.int/ukraine accessed 10 December 2018.

[69] The preliminary examination of the situation in Venezuela, which will examine crimes allegedly committed in Venezuela during political unrest since April 2017, was announced on 8 February 2017. State security forces are alleged to have frequently used excessive force to disperse and put down demonstrations, and arrested and detained thousands of actual or perceived members of the opposition, a number of whom would have been allegedly subjected to serious abuse and ill-treatment in detention. The actions pf some protesters are alleged also to have led to the deaths and injury of some members of security forces. For further detail see https://www.icc-cpi.int/venezuela accessed 10 December 2018.

[70] For further detail on active cases see ICC website at https://www.icc-cpi.int/cases accessed 10 December 2018.

[71] The December 2008 – January 2009 operation of the Israeli Defense Force in Gaza as well as the extreme civil strife in Syria which commenced in 2011 are the events most often cited as deserving of ICC investigation. See for example Yael Ronen "ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities" (2010) 8 *Journal of International Criminal Justice* 3.

such as in Afghanistan since 2002,[72] in Iraq since 2003,[73] in Palestine[74] and in Syria since 2011[75] – all the active cases before the ICC are from Africa.[76]

In a stinging critique of the ICC, John Dugard has stated that:

> In pronouncing on this matter [the matter of an ICC bias against Africa] I must rely on the available evidence, which shows that both Prosecutors have preferred to target African situations and to avoid non-African situations. Arguments that the killings in Iraq failed to meet the threshold of gravity required cannot be raised in respect of Palestine. This is particularly evident when one compares the case of Kenya, in which the Prosecutor initiated an investigation proprio motu, with that of Palestine. The violence in Kenya in 2007 – 2008 was not the result of action taken by a disciplined military force using sophisticated modern weaponry, but the result of undisciplined, loosely co-ordinated civil violence. Some 1,200 persons were killed and many wounded, raped and displaced. In the Pre-Trial Chamber, judges were divided as to whether civil violence of this kind could constitute a crime against humanity. Operation Cast Lead, in contrast, was the result of a disciplined military operation, employing sophisticated modern weaponry (including white phosphorus), which failed to distinguish between civilian and military targets in its indiscriminate attacks on densely populated neighbourhoods, hospitals, schools and mosques. More persons were killed, wounded and rendered homeless than in Kenya. Several reports compiled by legal experts have analysed the evidence and concluded that both war crimes and crimes against humanity were committed. The failure and refusal, since 29 November 2012 of the Prosecutor to investigate crimes committed in Palestine and the determination to proceed with the cases from Kenya and Mali speaks volumes. It speaks of bias. In these circumstances, one must conclude that on the available evidence the complaints of the African Union are fully justified.

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[72] See Investigation Report of US Senate Armed Services Committee, "Inquiry into the Treatment of Detainees in U.S. Custody," available at https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf accessed 30 September 2018. See also James Schlesinger (Chair), Final Report of the Independent Panel to Review Department of Defence Detention Operations (August 2004), available at http://www.dtic.mil/dtic/tr/fulltext/u2/a428743.pdf accessed 30 September 2018. See also Katherine Gallagher, "Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture" (2009) 7 *Journal of International Criminal Justice* 1087.

[73] See Human Rights Watch, "Getting Away with Torture: The Bush Administration and Mistreatment of Detainees" (12 July 2011) available at https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees accessed 27 September 2018.

[74] Human Rights Watch, *Rain of Fire: Israel's Unlawful Use of White Phosphorous in Gaza* (March 2009), available at https://www.hrw.org/sites/default/files/reports/iopt0309web.pdf accessed 27 September 2018. See also Human Rights Watch, *"I Lost Everything": Israel's Unlawful Destruction of Property during Operation Cast Lead* (May 2009), available at https://www.hrw.org/report/2010/05/13/i-lost-everything/israels-unlawful-destruction-property-during-operation-cast-lead, accessed 27 September 2018. See also Human Rights Watch, Under Cover of War Hamas Political Violence in Gaza (April 2009), available at https://www.hrw.org/sites/default/files/reports/iopt0409webwcover.pdf accessed 27 September 2018. See also Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles* (June 2009), available at https://www.hrw.org/sites/default/files/reports/iopt0609webwcover_0.pdf accessed 27 September 2018. See also Human Rights Watch, *White Death Flags: Killings of Palestinian Civilians during Operation Cast Lead* (August 2009), available at https://www.hrw.org/report/2009/08/13/white-flag-deaths/killings-palestinian-civilians-during-operation-cast-lead accessed 27 September 2018.

[75] See Human Rights Watch, "Syria: Events of 2017" *Human Rights Watch World Report 2018*, available at https://www.hrw.org/world-report/2018/country-chapters/syria, accessed 2 September 2018

[76] See William A. Schabas, "The Banality of International Justice," (2013) 11 *Journal of International Criminal Justice* 545 – 551; See also David Hoile, "Is the ICC a Tool to Re-colonise Africa?" *New African* (31 March 2017), available at https://newafricanmagazine.com/current-affairs/icc-tool-recolonise-africa/ accessed 10 December 2018.

> The relationship between the African Union and the ICC has been soured by the targeting of African situations to the exclusion of non-African situations. The decision of the African Union to confer criminal jurisdiction on the African Court of Justice and Human Rights, although unwise, is a response to this.[77]

Echoing Dugard, du Plessis – one of the ICC's biggest champions[78] – who had previously been dismissive of the allegations of bias against the ICC,[79] has noted in a substantial departure from his earlier views that:

> no matter what justifications the Prosecutor of the ICC may provide, and no matter how the mantra that the bulk of the ICC's cases have arisen from self-referrals by African states is repeated, that does not explain away the burning issue of why other deserving cases (and there are other deserving cases) have escaped the Court's attention. At least two factors appear to be doing that evasive work as regards the Court's docket. Neither is edifying.[80]

Although the accusation of an Africa bias may have been borne out by the ICC's subsequent actions, or more accurately, inactions, the fact that this accusation gained currency at the time it did is especially curious given that the situations in the DRC, Uganda and the CAR, were, notwithstanding Ocampo's solicitations, on the docket of the ICC only because they were referred to the ICC by the countries themselves.[81]

In spite of strident denials by the ICC's principal actors that considerations of global politics have any influence in its decisions,[82] it is clear that there are such political considerations in its decisions on which situations are placed under formal investigation.[83] As Dugard,[84] du Plessis[85] and Tladi[86] have illustrated, it is no accident therefore that investigations into Iraq, Libya or Palestine have endured (or enjoyed) such delay. Such political considerations, manifest in the actions of the Office of the Prosecutor and the Court itself,[87] fuels the larger

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77 John Dugard, 'Palestine and the International Criminal Court: Institutional Failure or Bias?' (2013) 11(3) *Journal of International Criminal Justice* 563.

78 See Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" (Nov 2014) *Institute for Security Studies, Paper 278*.

79 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" Note 78 above.

80 See Max du Plessis "Universalising International Criminal Law: The ICC, Africa and the Problem of Political Perceptions" (December 2013) *Institute for Security Studies, Paper* 249, at 2.

81 To suggest otherwise would mean that African countries did not have agency in deciding to make self-referrals. Charles Jalloh, "Regionalizing International Criminal Law," (2009) 9 *International Criminal Law Review* 445, at 462 – 479.

82 See Luis Moreno-Ocampo "The International Criminal Court: Seeking Global Justice" (2008) 40 *Case Western Reserve Journal of International Law* 215. See also Interview with Philippe Kirsch, first president of the International Criminal Court, International Review of the Red Cross Volume 88 Number 861 (March 2006), available at https://www.icrc.org/eng/assets/files/other/irrc_861_kirsh.pdf, accessed 8 July 2016.

83 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," (2017) 60 *German Yearbook of International Law* 43 – 71.

84 See John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?" Note 77 above.

85 See Max du Plessis "Universalising International Criminal Law: The ICC, Africa and the Problem of Political Perceptions," Note 80 above.

86 See also Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 83 above.

87 See Sarah Nouwen and Wouter Werner "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2010) 21(4) *The European Journal of International Law* 941. See also Mahmood Mamdani *'Saviors and Survivors: Darfur, Politics and the War on Terror'* (Cape Town HSRC Press, 2009). The fact that the Office

dissatisfaction of the African Union with the architecture of the international legal order.[88] As Keppler notes,

> This reaction is perhaps unsurprising, as it draws from genuine historical geopolitical power imbalances and the legacy of injustices committed during the colonial period for which there was no accountability[89]

Considerations of withdrawal from the Rome Stature of the ICC by AU member States are a direct consequence of such sentiments and the product of continued missteps of the ICC and related parties that fuel rather than salve the not unjustifiable discontent.

3.3 The Perceived Disrespect Shown to African States and the AU by the UN Security Council.

Another proximate cause for AU resolutions and subsequent actions that have precipitated the quest for an African court with international criminal jurisdiction in the last few years has been the AU's belief that the UN Security Council did not have any respect for the continental body. The instances that have most fuelled the narrative of disrespect appear to have originated from requests from the AU to the UN Security for Article 16 deferrals of ICC prosecutions.

Meant as a tool to ensure that international peace and security is not sacrificed at the altar of retributive justice Article 16 of the Rome Statute of the ICC provides as follows:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.[90]

Akande, du Plessis and Jalloh have appropriately noted of Article 16 that it "represents one way in which the tension between the search for peace and the demands for justice may be mediated."[91]

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of the Prosecutor was particularly hesitant and extremely careful and deliberative (clearly reticent) in its consideration of the Situation in Iraq for instance, while exhibiting almost reckless conduct in respect of African countries strengthened the sense of double standards. See John Dugard, 'Palestine and the International Criminal Court: Institutional Failure or Bias?' Note 77 above. See also Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" Note 78 above.

88 See Kamari Clarke "The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise" (2014) 7 *African Journal of Legal Studies* 297. See also B. S. Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 *International Community Law Review* 3. See *Kagame takes aim at the ICC* (16 October 2013) available at http://www.iol.co.za/news/africa/kagame-takes-aim-at-the-icc-1592709, accessed 27 September 2018, where Kagame is quoted as saying "*[t]his world is divided into categories, there are people who have the power to use international justice or international law to judge others and it does not apply to them".*

89 Elise Keppler "Managing Setbacks for the International Criminal Court in Africa" (2001) *Journal of African Law* 1, at 7.

90 See Article 16 of Rome Statute of the ICC, available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf accessed 27 September 2018.

91 See Akande, Du Plessis and Jalloh, "Position Paper: An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC," (2010) *Institute of Security Studies*, available at https://oldsite.issafrica.org/uploads/PositionPaper_ICC.pdf accessed 27 September 2018.

In July 2008, even before an indictment was issued against Omar al Bashir, the Peace and Security Council of the African Union had asked the Security Council to defer the anticipated indictment of the Sudanese President by a year in order *to* "ensure that the ongoing peace efforts are not jeopardized."[92] The fact that the Security Council did not directly address the request nor even respond to it[93] fed a storyline of disrespect towards African leaders by Western powers[94] that had festered over the course of the previous decade partly on account of the exercise by the courts of Western countries of universal jurisdiction in multiple instances.[95] Exacerbating the sentiment was the fact that the United States, a veto wielding member of the Security Council, had had no qualms about deploying Article 16 to its benefit, inappropriately, in the past.[96] The result was the AU decision to withhold cooperation with the ICC which has been echoed in several subsequent AU Decisions.[97]

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92 See AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) 21 July 2008. In the same Communique, the Peace and Security Council also called upon *the Commission to take all necessary steps for the establishment, within a period of 30 days following the adoption of the present decision, of an independent High-Level Panel made up of distinguished Africans of high integrity, to examine the situation in depth and submit recommendations to Council on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed*. See also "Special Research Report No. 2: Working Together for Peace and Security in Africa: The Security Council and the AU Peace and Security Council", *Security Council Report,* available at http://www.securitycouncilreport.org/special-research-report/lookup-c-glKWLeMTIsG-b-6769467.php?print=true accessed 27 September 2018.

93 See Dire Tladi, "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic" Note 21 above at 396 and fn. 54. See also Elise Keppler, "Managing Setbacks for the International Criminal Court in Africa," Note 89 above at 9 - 10. As Keppler notes, the UN Security Council acknowledged the AU request in Resolution 1828 (S/RES/1828 (2008)) and discussed it in an open meeting on July 31. She endeavours also, reasonably if not entirely convincingly, to explain the failure of the Security Council to issue a formal response to the AU's missive that:

> The members are usually unwilling to table a resolution that is likely to be vetoed, or that cannot garner enough support to be adopted. Meanwhile, other paths for council action, such as presidential or press statements, require consensus. Council members also tend to avoid drawing attention to issues where consensus is lacking as it highlights Security Council impotence to act.

94 See Kamari Clarke, "The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise," Note 88 above. See also Ovo Imoedheme, "Unpacking the Tension between the African Union and the International Criminal Court: The Way Forward," (2015) 23(1) *African Journal of International and Comparative Law* 74, at 90 – 91.

95 See Report of the AU Executive Council at its Thirteenth Ordinary Session, (Sharm el Sheikh, June 24 – 28, 2008) EX.CL/411(XIII) Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General available at http://archive.au.int/collect/oaucounc/import/English/EX%20CL%20411%20(XIII)%20_E.PDF accessed 24 June 2016. See also Report of the AU Executive Council at its Fifteenth Ordinary Session (Sirte, Libya, June 24 – 30, 2009) AU Assembly, Progress Report of the Commission on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, available at

http://archive.au.int/collect/oaucounc/import/English/EX%20CL%20522%20(XV)%20_E.PDF accessed 24 June 2016.

96 The US had invoked Article 16 in 2002, upon threat of veto of Security Council Resolution 1422 (and a year later of Resolution 1487) in order to allow renewal of the mandate of the UN mission in Bosnia and Herzegovina and all future peacekeeping operations. For further detail on the abuse of Article 16 and the accusations of double standards it engendered see Akande, Du Plessis and Jalloh, "Position Paper: An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC," Note 83 above. See also Jalloh, Akande and Max du Plessis, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court" (2011) 4 *African Journal of Legal Studies* 5.

97 The AU's decision not to cooperate with the ICC is repeated in multiple Decisions and Declarations issuing from the Summits of the Assembly of Heads of States and Governments. See https://au.int/en/decisions/assembly accessed 10 December 2018. See for instance Paragraph 10 of Assembly/AU/Dec.245(XIII) Rev.1. Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc.

The second request for an Article 16 deferral was in the case of Kenya. At the Sixteenth Ordinary Session of the Assembly of Heads of States in Addis Ababa on January 30 and 31, 2011, the Assembly "supported and endorsed Kenya's request for a deferral of the ICC investigations and prosecutions … under Article 16 of the Rome Statute… in order to prevent the resumption of conflict and violence and requested the UN Security Council to accede to this request in support of the ongoing peace building and national reconciliation."[98]

The Security Council response to the request in respect of Kenya was considerably different from the response in respect of al Bashir and resulted in a vote in the Security Council which failed to pass.[99] From reports on discussions in the Security Council, it appears that members did not believe that the Security Council was a competent forum to determine whether there should be a deferral (on grounds of complementarity) in order to permit Kenya to undertake its own investigations and prosecutions.[100]

The eminently reasonable position of the Security Council in this case notwithstanding, it appears the damage from the Security Council's earlier snub of the request for deferral for al Bashir had already been done, thus allowing the

Assembly/AU/13(XIII). Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009, available at https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf accessed 10 December 2018; Paragraph 5 Assembly/AU/Dec.296(XV). Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/Au/Dec.270(Xiv) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV) Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda, available at https://au.int/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf accessed 10 December 2018; Assembly/AU/ Dec.334(XVI) Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII). Adopted by the Sixteenth Ordinary Session of the Assembly of the Union on 31 January 2011 in Addis Ababa, Ethiopia, available at https://au.int/sites/default/files/decisions/9645-assembly_en_30_31_january_2011_auc_assembly_africa.pdf accessed 10 December 2018; Assembly/AU/Dec.366(XVII) Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc. EX.CL/670(XIX). Adopted by the Seventeenth Ordinary Session of the Assembly of the Union on 1 July 2011 in Malabo, Equatorial Guinea, available at https://au.int/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf accessed 10 December 2018; Paragraph 8 of Assembly/AU/Dec.397(XVIII) Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. EX.CL/710(XX), Adopted by the Eighteenth Ordinary Session of the Assembly of the Union on 30 January 2012 in Addis Ababa, Ethiopia, available at https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-_415_xviii_e.pdf accessed 10 December 2018.

98 See Paragraph 6 of AU Assembly, Decision on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/ Dec.334(XVI) (Doc. EX.CL/639(XVIII)), available at https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20334%20(XVI)%20_E.pdf accessed 5 September 2018.

99 See SC/11176: Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining (15 November 2013). Available at https://www.un.org/press/en/2013/sc11176.doc.htm, accessed 10 December 2018.

100 From Tladi's telling (from his vantage point in representing South Africa on the Security Council at the time), members believed that the ICC itself was a better forum to hear the case for deferral (on grounds of complementarity) because of Kenya's willingness to investigate and prosecute. See Dire Tladi "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic," Note 21 above, at 396 – 397.

narrative of the Security Council's unreasonableness and/or disrespect for the AU and its member States to persist.[101]

The failure of a second Security Council vote on November 15, 2013, held upon the instance of Rwanda (which was a Security Council member at the time) with the support of Togo and Morocco, to defer the cases of Kenyatta and Ruto under Article 16 of the Rome Statute, did nothing to dispel the sentiment.[102] That the UN Security Council, in what was described as a humiliation for Africa, saw no reason to accommodate the request, following a horrific terrorist attack in Kenya[103] that would reasonably require the full attention of both the duly elected President and Deputy President could therefore hardly have been well received.[104]

3.4 Overreach by the ICC and Other Actors.

Another key driver of the disintegration of the relationship between the ICC and the AU has been the overreach of the ICC itself and related actors. Instances of such overreach have occurred at both a prosecutorial and judicial level as well as at the level of the NGOs that inhabit the realm of international criminal justice. Such overreach has been exemplified: (i) in the charges brought against Omar al Bashir by the ICC; (ii) in overzealous interpretations of key provisions of the Rome Statute; and (iii) in a strategy – of uncertain wisdom – to secure the arrest of al Bashir, at the risk of further deterioration of the ICC-AU relationship.

3.4.1 Prosecutorial Overreach.

The deficits in the temperament, comportment, competence, judgment and overall performance[105] of the first Chief Prosecutor of the ICC, Luis

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101 In a *Note Verbale*, dated 16 October 2015, to the President of the UN Security Council, the Permanent Mission of Kenya to the United Nations advised that *"Kenya regrets to inform the Council that the concerns of Kenya and indeed of the African Union, on this matter with the International Criminal Court in light of the situations in the Republic of Kenya and the Republic of the Sudan. As the requests made to the council pursuant to these discussions have not been met with due consideration, the African Union remains actively seized of this matter"* available at http://www.jfjustice.net/userfiles/201015-Kenya-note-verbale-of-16-October.pdf accessed 5 September 2018.

102 See UN Security Council Press Release on 7060th meeting, *Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining*, SC/11176 (15 November 2013). Members voting in favour were Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo. Members abstaining were Argentina, Australia, France, Guatemala, Luxembourg, the Republic of Korea, the United Kingdom, and the United States, available at https://www.un.org/press/en/2013/sc11176.doc.htm accessed 5 September 2018.

103 By Jeffrey Gettleman and Nicholas Kulish, *Gunmen Kill Dozens in Terror Attack at Kenyan Mall* (September 21, 2013) New York Times, available at https://www.nytimes.com/2013/09/22/world/africa/nairobi-mall-shooting.html accessed 30 September 2018

104 See Michelle Nichols, *Africa fails to get Kenya ICC trials deferred at United Nations*, Reuters (15 November 2013), available at https://www.reuters.com/article/us-kenya-icc-un-idUSBRE9AE0S420131115, accessed 29 October 2018.

105 See Antonio Cassese "Is the ICC Still Having Teething Problems?" (2006) 4 (3) *Journal of International Criminal Justice* 434; William Schabas "The International Criminal Court: Struggling to Find its Way", in Antonio Cassese (Ed) *Realizing Utopia: The Future of International Law* (Oxford University Press, Oxford 2012); Julie Flint and Alex de Waal 'Case Closed: A Prosecutor Without Borders' (2009) *World Affairs,* available at http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders accessed 5 September 2018; David Hoile *"Justice Denied: The Reality of the International Criminal Court"* (The Africa Research Centre,

Moreno Ocampo,[106] have received more than ample attention from scholars, NGOs, commentators and other watchers of the ICC and require no further elaboration here.[107]

The Prosecutor's typically poor judgment was however particularly evident early on in his decision to charge Omar al Bashir with genocide. Both the charge and the ICC pre-trial chamber's curious confirmation thereof through the issue of an arrest warrant for the crime of genocide[108] were surprising because an international commission of inquiry, set up pursuant to Security Council Resolution 1564[109] – and led by no less an international criminal justice scholar and expert than Antonio Cassese – had concluded that "the Government of the Sudan ha[d] *not* pursued a policy of genocide."[110]

In a particularly disturbing opinion editorial which evoked parallels to Nazi atrocities and showed an understanding by the Prosecutor, neither of the concept of the presumption of innocence nor of the role of the Pre-Trial chamber that had issued the warrant of arrest for Omar al Bashir, Ocampo claimed that:

> The genocide is not over. Bashir's forces continue to use different weapons to commit genocide: bullets, rape and hunger. For example, the court found that Bashir's forces have raped on a mass scale in Darfur. They raped thousands of women and used these rapes to degrade family and community members. Parents were forced to watch as their daughters were raped.
>
> The court also found that Bashir is deliberately inflicting on the Fur, Masalit and Zaghawa ethnic groups living conditions calculated to bring about their physical destruction. Millions of Darfuris are living in camps

2014); Mark Kersten "A Brutally Honest Confrontation with the ICC's Past: Thoughts on 'The Prosecutor and the President" *Justice in Conflict* 23 June 2016, available at https://justiceinconflict.org/2016/06/23/a-brutally-honest-confrontation-with-the-iccs-past-thoughts-on-the-prosecutor-and-the-president/ accessed 5 July 2016.

106 The Assembly of States Parties to the Rome Statute of the International Criminal Court unanimously elected Luis Moreno Ocampo as the first Prosecutor of the Court on 21 April 2003; see ICC Press Release of 24 April 2003 (ICC-OTP-20030424-9), available at https://www.icc-cpi.int/Pages/item.aspx?name=electionoftheprosecutor, accessed 6 September 2015. See also 'Election of the Prosecutor - Statement by the President of the Assembly of States Parties Prince Zeid Ra'ad Zeid Al Hussein' (ICC-20030411-5) available at https://asp.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202003/Pages/election%20of%20the%20prosecutor%20_%20statement%20by%20the%20president%20of%20the%20assembly%20of%20state.aspx accessed 6 September 2018.

107 See for instance Flint and De Waal: "Case Closed: A Prosecutor without Borders" *World Affairs* (Spring 2009) available at http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders accessed 6 September 2018. See also Mark Kersten, "A Brutally Honest Confrontation with the ICC's Past: Thoughts on 'The Prosecutor and the President" Justice in Conflict 23 June 2016, available at https://justiceinconflict.org/2016/06/23/a-brutally-honest-confrontation-with-the-iccs-past-thoughts-on-the-prosecutor-and-the-president/ accessed 5 July 2016.

108 See ICC Press Release of 12 July 2010: *Pre-Trial Chamber I issues a second warrant of arrest against Omar Al Bashir for counts of genocide* (ICC-CPI-20100712-PR557). Available at https://www.icc-cpi.int/pages/item.aspx?name=pr557.

109 See Paragraph 12 of UN Security Council Resolution 1564 [S/RES/1564 (2004)] available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1564(2004) accessed 6 September 2018. See also Ewan Macaskill, *Sudan's Darfur crimes not genocide, says UN report*, The Guardian (February 1, 2005). Available at https://www.theguardian.com/world/2005/feb/01/sudan.unitednations.

110 See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf accessed 6 September 2018.

> for displaced persons and, at the disposal of Bashir's forces, experiencing an ongoing genocide.[111]

Even paying due regard – charitably – to the fact that Ocampo is a non-native English speaker, the claims presented in the opinion editorial may justifiably be described as particularly outrageous. In an immediate rebuttal, William Schabas noted that:

> The Court did not *find* 'that Bashir's forces have raped on a mass scale in Darfur'. The Court did not *find* 'that Bashir is deliberately inflicting on the Fur, Masalit and Zaghawa ethnic groups living conditions calculated to bring about their physical destruction'. The Court did not – and would not – do anything to suggest the issue of whether or not genocidal acts had taken place was actually decided. It merely issued an arrest warrant.[112]

In a similar but even more scathing rebuttal, Dapo Akande stated that:

> … what is shocking is the Prosecutor's claim that the PTC *found that* Bashir's forces have committed the acts listed by the Prosecutor. This is just simply not true. No such finding was made. The decision by the Court was a decision to issue an arrest warrant. The standard applied under Art. 58 of the ICC Statute for such a decision is that there are "reasonable grounds to believe" that the crime has been committed. This is a low standard. It is lower than the "substantial grounds to believe" that the crime has been committed which is required for a confirmation of charges and lower than the standard of "beyond reasonable doubt" which is required for a conviction.[113]

There is little doubt that the pursuit of sensationalized charges that were unsustained by the evidence; the peddling of outright falsehoods about the state of affairs in the Sudan and the open discussion of using clearly illegal means to gain the custody of persons for whom arrest warrants had been issued,[114] served to exacerbate the profound antipathy of the AU and its member States towards Ocampo.[115] Indeed, the fact that an AU Resolution made specific mention of the Prosecutor "making

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111 Luis Moreno Ocampo, *Now end this Darfur denial,* The Guardian (15 July 2010), available at https://www.theguardian.com/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur accessed 6 September 2018.

112 William Schabas "Inappropriate Comments from the Prosecutor of the International Criminal Court," *PhD Studies in Human Rights* (16 July 2010), available at http://humanrightsdoctorate.blogspot.co.za/2010/07/inappropriate-comments-from-prosecutor.html accessed 6 September 2018.

113 Dapo Akande, "ICC Prosecutor's Inaccurate Statements about the Bashir Arrest Warrant Decision," *EJILTalk* (19 July 2010), available at http://www.ejiltalk.org/icc-prosecutors-inaccurate-statements-about-the-bashir-arrest-warrant-decision/ accessed 6 September 2018.

114 See ICC Bid to Arrest Sudan Suspect Failed (June 07, 2008). Per the news item attributed to Reuters, ICC spokeswoman Florence Olara said that Office of the Prosecutor had sought to divert a plane meant to carry Ahmad Harun, Sudan's minister for humanitarian affairs, to the annual Muslim haj pilgrimage in Mecca. Apparently however Harun had been tipped off and did not make the flight. See http://darfurdaily.blogspot.co.za/2008/06/icc-bid-to-arrest-sudan-suspect-failed.html, accessed 6 September 2018.

115 See generally Charles Jalloh, *The African Union and the International Criminal Court: The Summer of Our Discontent(s)*, JURIST - Forum (6 August 2010), available at http://jurist.org/forum/2010/08/the-african-union-and-the-international-criminal-court-the-summer-of-our-discontents.php accessed 2 July 2016.

egregiously unacceptable, rude and condescending statements" provides a window into the depth of the antipathy.[116]

3.4.2 Judicial Overreach.

Possessing of no police force or other capacity to physically render accused persons to the Court, the ICC can only rely on States to bring accused or indicted persons before it. In its overzealousness however – in seeking the arrest of al Bashir – the ICC has created problems for itself.[117]

The ICC's interpretation (or in Tladi's words – the lack thereof)[118] of Section 98 of the Rome Statute has been seen by scholars as an overreach that – for being poorly reasoned – has served to crack somewhat, the veneer of judiciousness that the Court had been cloaked with.[119] The difficulties that the Court created for itself have been exacerbated by its own inconsistencies.[120]

Summarily stated, the Article 98 issue revolves around how to read Article 27 of the Rome Statute with the said Article 98. Article 27, which renders irrelevant the official capacity of a prospective defendant or accused, states in subsection 2 thereof that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." Article 98 (titled "Cooperation with respect to waiver of immunity and consent to surrender") however recognizes immunities available under customary international law and states as follows:

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116 See Paragraph 9 of the Decision on the Progress Report of the Commission on the Implementation of AU Assembly, Decision on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Assembly/Au/Dec.270(Xiv) (Assembly/AU/Dec.296(XV)) in the Report of the Fifteenth Ordinary Session of the Assembly of the African Union held in Kampala, Uganda from 25 – 27 July 2010, available at https://au.int/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf, accessed 2 July 2016. Interestingly the depth of such antipathy was not unknown to the ICC's Prosecutor. See Luis Moreno Ocampo "Working with Africa: the view from the ICC Prosecutor's Office" a paper presented at a symposium titled *The ICC Africa Wants* organized by the Institute for Security Studies, Cape Town, 9 November 2009, available at https://www.issafrica.org/uploads/9NOV09OCAMPO.PDF, accessed 5 July 2016.

117 See Dire Tladi, Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap, (Nov 2014) *Institute for Security Studies, Paper 277.*

118 See Dire Tladi "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199, at 205.

119 See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98", Note 118 above; Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But Gets the Law Wrong" *EJILTalk* (15 December 2011), available at http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 6 September 2018.

120 See *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* (April 9 2014), available at https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF accessed 6 September 2018. Although the Court changed its reasoning it still fails to provide a convincing interpretation of the relevant provisions. See also André de Hoogh and Abel Knottnerus "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again" EJILTalk (18 April 2014), available at http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/ accessed 27 September 2018.

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[121]

While State parties to the Rome Statute bind themselves to the obligations thereunder and would therefore be subject to the provisions of Article 27(1), same cannot be said of non-State parties for which the *raison d'être* of Article 98(1) becomes apparent.[122]

In a series of inadequately reasoned Article 87(7) rulings chastising the governments of Malawi[123] and Chad[124] for their failure to arrest Omar al Bashir when he visited their countries, the Court failed to apply itself to an appropriate analysis of the tension between Article 27 and 98. In this first set of rulings delivered a day apart, while the Court legitimately rules on its ability to exercise jurisdiction over a Head of State it fails to address the import of Article 98(1) to the issue of whether or not State parties have an obligation to arrest and surrender indictees from non-State parties who may legitimately invoke immunity from foreign criminal jurisdictions.[125]

Particularly alarming to the AU and to various scholars was what was seen as a deliberate misreading, in the *Malawi* Decision, of the *ratio* of the *Arrest Warrant Case*. Reproducing the relevant text from the ICJ judgment in its ruling the ICC's Pre-Trial Chamber went on to misrepresent it as saying that:

> The International Court of Justice ("ICJ") held, in the "Arrest Warrant Case", that although customary international law provided for immunity with regard to national courts, for certain officials such as the incumbent Minister of Foreign Affairs, and a fortiori for Heads of State and Government, even in the case of a suspected commission of war crimes

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121 See Article 98(1) of the Rome Statute of the International Criminal Court, available at https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf accessed 27 September 2018.

122 See Dapo Akande, "Who is Obliged to Arrest Bashir?", *EJILTalk* (13 March 2009), available at http://www.ejiltalk.org/who-is-obliged-to-arrest-bashir/ accessed 27 September 2018; See also Should the ICC Appeals Chamber have a made a decision on Bashir's Immunity? *EJILTalk* (13 February 2010) available at http://www.ejiltalk.org/should-the-icc-appeals-chamber-have-a-made-a-decision-on-bashirs-immunity/ accessed 27 September 2018.

123 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09-139), available at https://www.icc-cpi.int/pages/record.aspx?uri=1287184 accessed 10 December 2018.

124 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to the Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09-140-tENG), Pre-Trial Chamber I, 13 December 2011, available at https://www.icc-cpi.int/pages/record.aspx?uri=1384955 accessed 10 December 2018.

125 See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98", Note 118 above, at 206.

> or crimes against humanity, *such immunities could not be opposed by a criminal prosecution of an international court* (emphasis added).[126]

For the record, the ICJ has never held as the Pre-Trial Chamber claimed.[127]

In its prompt and incredulous reaction to the rulings, the African Union Commission expressed:

> … its deep regret that the [Pre-Trial Chamber] decision has the effect of:
>
> i. Purporting to change customary international law in relation to immunity ratione personae;
> ii. Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless;
> iii. Failing to address the critical issue of removal or non-removal of immunities by the UN Security Council vide resolution 1593(2005), which referred the situation in Darfur to the ICC, and,
> iv. Making a decision *per incuriam* by referring to decisions of the African Union while grossly ignoring the provisions of Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States "to comply with the decisions and policies of the Union".[128]

The AU Commission went on to assert forcefully that it would:

> … oppose any ill-considered, self-serving decisions of the ICC, as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa.[129]

With the clear benefit of scholars and international criminal justice experts' reactions to the *Malawi* and *Chad* rulings, and the academic articles that spelt out their manifest errors,[130] the Pre-Trial Chamber tried a different tack.[131] In a *volte face* to its *Chad* and *Malawi* rulings, a differently constituted Pre-Trial Chamber acknowledged that:

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126 See Paragraph 33 of the Pre-Trial Chamber Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 12 December 2011.

127 See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98", Note 118 above

128 See *AUC concerned over ICC decisions on Malawi and Chad*, available at https://europafrica.net/2012/01/17/8258/ accessed 27 September 2018.

129 See *AUC concerned over ICC decisions on Malawi and Chad,* Note 128 above.

130 See Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong" (15 December 2011), Note 119 above. See also André de Hoogh and Abel Knottnerus**,** "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again" Note 120 above. See also Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98", Note 118 above

131 See ICC-02/05-01/09-290, Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute at paragraph 68, available at https://www.icc-cpi.int/CourtRecords/CR2017_01350.PDF, accessed 2 September 2018.

> Given that the Statute is a multilateral treaty governed by the rules set out in the Vienna Convention on the Law of Treaties, the Statute cannot impose obligations on third States without their consent …
>
> It follows that *when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise*.[132] (Emphasis mine).

The Pre-Trial Chamber went on to rule however that the referral of the Darfur Situation to the ICC by the UN Security Council (under its Chapter 7 powers, which Sudan was compelled to abide by) served to strip Omar al Bashir of his immunities even though Sudan is not party to the Rome Statute.[133]

While it is fair to say that a UN Security Council Chapter 7 referral may effectively render a non-State party subject to the jurisdiction of the ICC and indeed, such a position had been urged on the ICC by scholars such as Akande,[134] little attention was paid to the question of whether the Security Council Resolution, SC Resolution 1593 of 2005, obliges States to arrest Omar al Bashir given the fact that the said Resolution calls only for the cooperation of the "*Government of Sudan and all other parties to the conflict in Darfur* with the ICC."[135]

Per the Resolution, the Government of Sudan and all other parties to the conflict in Darfur, *shall cooperate fully,* while States and concerned regional and other international organizations are only *urged* to cooperate fully.[136] Indeed the fact that the Security Council has remained sanguine in the face of the many instances of non-cooperation – details of which are presented in annual reports from the ICC to the UN[137] – confirm that the limited scope of application of Resolution 1593 was purposeful, and even beyond that, quite possibly – even likely – a cynical move by some Security Council members to avoid creating obligations for themselves.[138]

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132 See Paragraphs 26 and 27 of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (9 April 2014), available at https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF, accessed 27 September 2018.

133 See Paragraphs 29 and 30 of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (9 April 2014), Note 132 above.

134 Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong" *EJILTalk* (15 December 2011), Note 119 above.

135 See Paragraph 2 of Security Council Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, on 31 March 2005, available at https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf accessed 27 September 2018.

136 See Paragraph 2 of UN Security Council Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, on 31 March 2005, Note 135 above.

137 Annual Reports to the UN by the ICC may be accessed from the ICC website at https://www.icc-cpi.int/resource-library/pages/reports.aspx accessed 27 September 2018.

138 See Dire Tladi, "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic," Note 21 above, at 393 – 398.

The missed opportunity to tackle critical legal questions, the absence of depth and the manifestly erroneous reasoning in the Court's rulings have generated considerable criticism from scholars, some of whom have suggested that the rulings have had the effect of denuding the Court of legitimacy.[139] That the Court has found itself issuing another rebuke to the government of Chad,[140] and admonishments to the governments of Nigeria,[141] the DRC,[142] Uganda,[143] Djibouti[144] South Africa[145] and more recently the Hashemite Kingdom of Jordan[146] – all for refusing to arrest Omar al Bashir while he visited their countries is a testament to the little value AU member States and other States[147] place on the court's reasoning on the proper interpretation of Article 98 of the Rome Statute.

3.4.3 NGO Overreach.

Frequently employing hyperbole to cultivate a sense of outrage that furthers their cause, NGOs are not unknown to engage in sensationalism. The utility and the wisdom of such overreach in the face of AU antipathy to the ICC has not however always been obvious.

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139 See Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong", Note 119 above. See also André de Hoogh and Abel Knottnerus**,** "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again" Note 120 above. See also Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98", Note 118 above

140 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (26 March 2013), available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-151 accessed 28 September 2018.

141 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court (5 September 2013), available at https://www.icc-cpi.int/CourtRecords/CR2013_05860.PDF accessed 28 September 2018.

142 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (9 April 2014), Note 132 above.

143 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute (11 July 2016) available at https://www.icc-cpi.int/CourtRecords/CR2016_04947.PDF accessed 28 September 2018.

144 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute (11 July 2016) available at https://www.icc-cpi.int/CourtRecords/CR2016_04993.PDF accessed 28 September 2018.

145 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (6 July 2017) available at https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF accessed 28 September 2018.

146 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: *Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir*, available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-309 accessed 28 September 2018.

147 As of April 2017, Omar al Bashir had undertaken 89 foreign trips without jeopardy to his liberty. For more detail, see website of Bashir Watch at http://bashirwatch.org/. See also https://s3.amazonaws.com/uploads.knightlab.com/storymapjs/bec643e888c2d80434574655a1e32c37/bashir/draft.html

On October 19, 2016, the South African Government submitted to the UN, a notice of withdrawal from the ICC in accordance with Article 127(1) of the Rome Statute.[148] Exactly a week before on October 12, 2016, Burundi's Parliament voted in support of a plan to withdraw from the Rome Statute and on October 18, 2016, President Pierre Nkurunziza of Burundi signed legislation withdrawing the country from the ICC.[149] Six days after South Africa's notice of withdrawal, the Gambia also announced that it would be withdrawing from the Rome Statute.[150]

A change in government in the Gambia in 2017 eliminated the threat of withdrawal[151] while intervention by Courts in South Africa have put a temporary,[152] if not permanent, brake on the ICC withdrawal efforts.[153]

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148 See S. Chan and M. Simons, *South Africa to Withdraw from International Criminal Court*, New York Times (21 October 2016), available at http://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html accessed 28 September 2018.

149 See Burundi walks away from the ICC - President signs law to begin withdrawal from the international court, IRIN (19 October 2016) available at http://www.irinnews.org/news/2016/10/19/burundi-walks-away-icc accessed 28 September 2018.

150 See *Gambia Announces Withdrawal from International Criminal Court*, Reuters World News (26 October 2016) available at http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335?il=0 accessed 28 September 2018.

151 Pap Saine and Lamin Jahateh, *Gambia announces plans to stay in International Criminal Court* Reuters World News (13 February 2017) available at https://www.reuters.com/article/us-gambia-justice-icc/gambia-announces-plans-to-stay-in-international-criminal-court-idUSKBN15S2HF accessed 28 September 2018.

152 See *Democratic Alliance v. Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017), available also at http://saflii.org/za/cases/ZAGPPHC/2017/53.pdf accessed 28 September 2018. See also James Macharia, *South African court blocks government's ICC withdrawal bid* Reuters World News (22 February 2017) available at https://www.reuters.com/article/us-safrica-icc/south-african-court-blocks-governments-icc-withdrawal-bid-idUSKBN1610RS accessed 28 September 2018. See also Gerhard Kemp, "South Africa's (Possible) Withdrawal from the ICC and the Future of the Criminalization and Prosecution of Crimes Against Humanity, War Crimes and Genocide Under Domestic Law: A Submission Informed by Historical, Normative and Policy Considerations, (2017) *16 Washington University Global Studies Law Review*, 411

153 South Africa's Justice and Correctional Service Minister Michael Masutha informed a meeting of the ICC's Assembly of States Parties (ASP) in New York on December 6, 2017 that the Government would seek Parliamentary approval to withdrawal from the Rome Statute. He also announced that an International Crimes Bill would be laid before Parliament to repeal the Rome Statute Implementation Act (which renders the Rome Statute domestic law) and replace it with new legislation that would grant extra-territorial jurisdiction to South African courts for crimes similar to those in the Rome Statute. See *Opening Statement by Advocate Michael Masutha, MP, Minister of Justice and Correctional Services, Republic of South Africa*, General Debate: Sixteenth Session of the Assembly of States Parties of the International Criminal Court, New York, 4-14 December 2017, available at http://www.justice.gov.za/m_speeches/2017/20171206-ICC.html accessed 28 September 2018. See however conflicting signals from multiple actors in South Africa. While South Africa's Minister for Foreign Affairs, Lindiwe Sisulu, has stated that South Africa is revisiting its position on leaving the ICC [See Jean Jacques Cornish, *SA Revisiting Decision to Quit ICC*, Eye Witness News (4 July 2018). Available at https://ewn.co.za/2018/07/04/sa-revisiting-decision-to-quit-icc], the Minister for Justice has insisted that the Government will withdraw from the Rome Statute (See Elise Keppler, *South Africa and the ICC: It's Not Too Late to Change Course*, Mail and Guardian (10 September 2018), available at https://mg.co.za/article/2018-09-10-south-africa-and-the-icc-its-not-too-late-to-change-course] accessed 10 December 2018. Given the degree of opposition by many respected ANC and former ANC stalwarts, it is unclear how this will end. [See Navi Pillay, Richard Goldstone, and Mark Kersten, *A Plan for South Africa to Stay in the ICC*, Mail and Guardian (10 September 2018), available at https://mg.co.za/article/2018-09-10-a-plan-for-south-africa-to-stay-in-the-icc] accessed 10 December 2018.

Not similarly fettered, Burundi's withdrawal from the ICC became effective on October 27, 2017.[154]

The move by South Africa in particular has been a source of considerable alarm to commentators who legitimately fear that the departure of a former champion of the ICC could inspire a deluge of withdrawals by African countries from the Rome Statute.[155]

In explaining the decision for the withdrawal initiated in 2016, Michael Masutha, South Africa's Minister for Justice and Correctional Services specifically identified as the principal reason for the withdrawal, the litigation initiated by the Southern African Litigation Centre (SALC – an NGO focused on promoting human rights and rule of law through litigation).[156] The application by SALC in the North Gauteng High Court to compel the government of South Africa to arrest Omar Al Bashir during his attendance at an AU meeting in South Africa in June 2015 and the subsequent judgment of the Supreme Court of Appeal was seen as constraining the government's pursuit of statecraft. In a press briefing, the Minister stated that:

> In exercising its international relations with foreign countries, particularly with countries in which serious conflicts occur or have occurred, South Africa is hindered by the Implementation of the Rome Statute of the International Criminal Court Act, 2 (Act No 27 of 2002). This Act and the Rome Statute of the International Criminal Court compel South Africa to arrest persons who may enjoy diplomatic immunity under customary international law but who are wanted by the International Criminal Court for genocide, crimes against humanity and war crimes and to surrender such persons to the International Criminal Court. South Africa has to do so, even under circumstances where we are actively involved in promoting peace, stability and dialogue in those countries…
>
> In the matter of the *Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016), the Supreme Court of Appeal confirmed that in terms of customary international law, heads of state enjoy immunity against arrest. However, the Supreme Court of Appeal found that in enacting the Implementation of the Rome Statute of the International Criminal Court Act, 2002, South Africa had expressly waived the immunity of such heads of state and that South Africa was obliged to arrest persons wanted for crimes committed against humanity. In essence, the

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154 Burundi served its notice of withdrawal on 27 October 2016 and effectively withdrew as a State party on 27 October 2017. See *Burundi leaves International Criminal Court amid row,* BBC News (27 October 2017), available at http://www.bbc.com/news/world-africa-41775951 accessed 28 September 2018.

155 See Press Release of the Assembly of State Parties of the ICC, "President of the Assembly regrets withdrawal of any State Party from the Rome Statute and reaffirms the Court's fight against impunity" (22 October 2016), available at https://www.icc-cpi.int//Pages/item.aspx?name=pr1248 accessed 28 September 2018. Mr. Sidiki Kaba expresses concern that

> … this disturbing signal would open the way to other African States withdrawing from the Rome Statute, thus weakening the only permanent international criminal court in charge of prosecuting the most serious crimes that shock the conscience of humanity, namely genocide, war crimes, crimes against humanity and crimes of aggression.

156 *Minister of Justice and Constitutional Development and Others v. Southern African Litigation Centre and Others* [2016] 2 All SA 365 (SCA).

> Supreme Court of Appeal identified the problem which needs to be addressed. The effect of withdrawal from the Rome Statute as well as the repeal of the Implementation Act thus completes the removal of all legal impediments inhibiting South Africa's ability to honour its obligations relating to the granting of diplomatic immunity under international law as provided for under our domestic legislation. This therefore removes the necessity at least in so far as this aspect is concerned of continuing with the appeal.[157]

In reaction to accusations of overreach that have been levelled against SALC and other similarly oriented NGOs for pursuing an aggressive strategy to secure the arrest of al Bashir without due consideration of the context and circumstances,[158] SALC has emphatically repudiated any blame. At a two-day conference on "International Justice, the International Criminal Court (ICC), the Malabo Protocol and the Implications for Justice in Africa," Angela Mudukuti, an International Criminal Justice Lawyer at SALC opined, in words to that effect, that the South African government should blame itself and not SALC for its shameful conduct in defying its own laws and refusing to arrest al Bashir. SALC, she said, which was trying only to get the South African government to abide by its own publicly stated values – as enshrined in its Constitution.[159]

And yet, given that the genesis of the open conflict between the AU and the ICC was the issue of an arrest warrant by the ICC for Omar al Bashir;[160] that the AU has long and forcefully asserted the recognition of Head of State immunity for member States;[161] that the purpose of Omar al Bashir's travel to South Africa was not a State visit to South Africa but attendance at a meeting of the AU Assembly of Heads of States and Governments;[162] and that the Chair of the AU at the time –

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157 See *Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir* on 21 October 2016, available at http://www.dirco.gov.za/docs/speeches/2016/masu1021.htm accessed 28 September 2018.

158 Comments by Professor Chris Landsberg of the University of Johannesburg and John Jeffery, MP and Deputy Minister of Justice and Constitutional Development at conference themed *Understanding the Malabo Protocol: The Potential, The Pitfalls, And Way Forward for International Justice In Africa*, Pretoria, 7 – 8 November 2016, on file with author.

159 Notes of conference on file with author. The author's request to Ms. Mudukuti for confirmation elicited a response which requested some modifications to the description of the exchange presented in this paper. Specifically, that the "*South African government was at fault for failing to abide by its international and domestic law obligations. As a human rights organisation mandated to protect the interest of the public and uphold the rule of law,* SALC was trying only to get the South African government to abide by its own publicly stated values – as enshrined in its Constitution." This author believes however that the exchange described in the body of the Chapter – as opposed to this footnote – is a more accurate description of what transpired.

160 See Assembly/AU/Dec.243(XIII) Rev.1, Decision on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/11(XIII), Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009. See also Assembly/AU/Dec.245(XIII) Rev.1, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII), Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009, available at http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20243-267%20(XIII)%20_E.PDF accessed 28 September 2018.

161 See Paragraph 6 of Assembly/AU/Dec.243(XIII) Rev.1 Decision on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/11(XIII), Note 160 above.

162 See AU Media Announcement on the 25th AU Summit, available at http://agenda2063.au.int/en/news/25th-au-summit-south-africa-7-15-june-2015, accessed 18 June 2016.

Robert Mugabe of Zimbabwe[163] – had been one of the most ardent critics of the ICC and even more fundamentally of the architecture of the international legal order, it is difficult to understand exactly what outcomes SALC expected from pressing for and actively pursuing the arrest of al Bashir at an AU meeting in South Africa.

Given South Africa's stated reason for its withdrawal,[164] and the fact that South Africa received commendation – for declining to arrest Omar al Bashir – from the AU Assembly of Heads of States at its meeting in January 2016 in Addis Ababa the stakes could not have been starker.[165] There is little reason to doubt that successful execution of an arrest warrant against al Bashir in South Africa would have very severely embarrassed the South African Government and the AU, potentially irreparably damaged South Africa's standing in the AU community and sparked whole scale withdrawal from the ICC of AU member States. The critique that SALC had, in its litigation, missed the big picture and was looking at trees rather than the forest is therefore not without merit.[166]

4. *Habemus Curiam* – The Making of a Court.

The chronology of events, immediate precursors to the adoption by the Assembly of African Heads of States and Governments of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol), started in Sirte in July 2009, where the AU Assembly of Heads of States and Governments were meeting for the first time following the issue of an arrest warrant for Omar al Bashir in March 2009.[167]

In a clear display of what had been a focus of the meeting, the first of the Assembly's decisions decried the "blatant abuse of the Principle of Universal Jurisdiction" particularly by some non-African States, expressed "deep concern that indictments have continued

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163 See AU Press Release No. 31 of 24th AU Summit: *Newly Elected Chair of the African Union, President Robert Mugabe interacts with officials and staff of the AU Commission* (3 February 2015) available at https://www.au.int/en/newsevents/29303/newly-elected-chair-african-union-president-robert-mugabe-interacts-officials-and accessed 28 September 2018.

164 Although South Africa's notice of withdrawal in October 2016 from the Rome Statute of the ICC generated considerable surprise, it is clear in retrospect that South Africa had been considering the inequities of the international legal order and rethinking its relationship with the Court for a while. See for instance Opening Statement by South Africa's Minister of International Relations and Cooperation, Maite Nkoana-Mashabane at the Fourteenth Meeting of the Assembly of States Parties of the International Criminal Court in The Hague from 18 – 26 November 2015, available at http://www.dirco.gov.za/docs/speeches/2015/mash1118.htm accessed 10 December 2018.

165 See Paragraph 3 of Assembly/AU/Dec.590(XXVI): Decision on the International Criminal Court, Doc. EX.CL/952(XXVIII) where the Assembly of Heads of States and Government "*COMMENDS the Republic of South Africa for complying with the Decisions of the Assembly on non-cooperation with the arrest and surrender of President Omar Al Bashir of The Sudan and DECIDES that by receiving President Bashir, the Republic of South Africa was implementing various AU Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir and that South Africa was consistent with its obligations under international law*," available at https://au.int/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf accessed 28 September 2018.

166 See Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, available at https://treaties.un.org/doc/publication/cn/2016/cn.786.2016-eng.pdf accessed 28 September 2018.

167 See Decisions and Declarations of the Thirteenth Ordinary Session of the Assembly of the African Union, 1 – 3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya, Note 160 above.

to be issued in some European States against African leaders and personalities"[168] and called upon all concerned States "to respect International Law and particularly the immunity of State officials when applying the Principle of Universal Jurisdiction."[169]

The third of the Assembly's decisions, while "reiterating unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent"[170] requested the Commission to:

> ensure the early implementation of Decision Assembly/Dec.213(XII), adopted in February 2009 mandating the Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity.[171]

The next Summit of the Assembly of Heads of States and Governments in Addis Ababa, Ethiopia in February 2010, gave approval to the Commission to proceed with developing a more concrete proposal on how to create a continental court with international criminal jurisdiction.[172] To this end the Pan African Lawyers Union (PALU) was retained by the AU Commission and tasked to undertake a thorough study, present detailed recommendations and draft an instrument to amend the Protocol on the Statute of the African Court of Justice and Human Rights.[173]

PALU presented a draft report as well as a draft amendatory Protocol to the Statute of the African Court of Justice and Human Rights to the AU's Legal Counsel in June 2010. Two months later a second draft – with revisions proposed by the Office of the Legal Counsel – was presented to the AU's Legal Counsel.[174]

The report and draft Amendatory Protocol approved by the Office of the AU's Legal Counsel were then subjected to validation workshops hosted by the Pan-African Parliament in South Africa in August and October 2010. Attendees were drawn primarily from the AU Commission, such organs and agencies as the Economic, Social and Cultural Council of the African Union and key persons (mainly lawyers) from regional economic

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168 See Paragraph 4 of the AU Assembly of Head of States and Governments' Decision on the Abuse of the Principle of Universal Jurisdiction, Note 160 above.

169 See Paragraph 6 of the AU Assembly of Head of States and Governments' Decision on the Abuse of the Principle of Universal Jurisdiction, Note 160 above.

170 See Paragraph 4 of the Assembly of Head of States and Governments Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Note 160 above**.**

171 See Paragraph 4 of the AU Assembly of Head of States and Governments Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Note 160 above.

172 See Paragraph 3 of Assembly/AU/Dec.271(XIV), Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/540(XVI) where the Assembly **"**REITERATES its previous positions articulated in decisions Assembly/Dec.199(XI), Assembly/Dec.213(XII) and Assembly/Dec.243 (XIII) adopted in Sharm el Sheikh, Addis Ababa and Sirte in July 2008, February 2009 and July 2009" respectively, available at https://au.int/sites/default/files/decisions/9561-assembly_en_31_january_2_feburuary_2010_bcp_assembly_of_the_african_union_fourteenth_ordinary_session.pdf accessed 28 September 2018.

173 In *Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes*, Donald Deya, President of PALU provides a chronology of the drafting and consultation processes supported by the AU from 2009 – 2011, available at http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deya.pdf accessed October 16, 2016

174 See Donald Deya *Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes*, Note 173 above.

communities. Human rights advocacy institutions such as the Centre for Human Rights of the University of Pretoria were also invited.[175] The report and draft Amendatory Protocol that emerged from the workshops reflected various revisions and suggestions presented by the attendees.

A series of meetings were then convened by the AU's Legal Counsel in Addis Ababa of member governments' representatives and experts where the report and the draft Amendatory Protocol were formally tabled. Both documents were subjected to further revision and in November 2011, government delegations provisionally adopted the draft report and the Protocol.[176]

The Protocol was then presented, in May 2012, to a meeting of Government Experts, Ministers of Justice and Attorneys General that appears to have been convened in order to consider matters relating to the AU's position on the ICC as well as the draft Amendatory Protocol.[177] The draft Amendatory Protocol and a recommendation to table it to the Assembly of Heads of States and Governments at its next meeting were duly adopted by the meeting.[178]

At the meeting of the Assembly of Heads of States and Governments in Addis Ababa, Ethiopia in July 2012, the change of venue prompted by Malawi's announcement that it would arrest Omar al Bashir if he attended the summit,[179] the Assembly surprised commentators and other observers by seeming to put brakes on the glide path to the Expanded African Court.[180] The Assembly requested the Commission, in collaboration with the African Court on Human and Peoples' Rights, to "undertake a study on the financial and structural implications resulting from the expansion of the jurisdiction of the African Court and submit the study along with the Draft Protocol on Amendments to the Protocol to the Statute of the African Court of Justice and Human Rights for consideration by the policy organs at the next summit slated for January 2013." The Assembly also stressed the need for the AU to agree on a definition of the 'crime of unconstitutional change of government' and "requested the Commission in collaboration with the AU Commission on International Law and the African Court on Human and

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175 See Donald Deya *Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes*, Note 173 above.

176 See Max du Plessis, "Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes," *Institute for Security Studies Paper 235*, June 2012, available at https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf accessed 29 September 2018.

177 See Press Release No. 037/2012 of the Meeting of Government Experts and Ministers of Justice/Attorneys General available at http://www.au.int/en/newsevents/13140/meeting-government-experts-and-ministers-justiceattorneys-general accessed 16 July 2016. See also Statement by H.E. Mr. Erastus Mwencha, Deputy Chairperson of the African Union Commission on Behalf of the Chairperson of the African Union Commission to the Meeting of Ministers of Justice/Attorneys General on Legal Matters, 14 May 2012, available at https://au.int/en/speeches/20120514 accessed 29 September 2018.

178 See Paragraph 1 of Assembly/AU/Dec.427(XIX): Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Doc. Assembly/AU/13(XIX)a, available at http://www.au.int/en/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf accessed 10 July 2016.

179 See AU Press Release of June 12, 2012: Announcement to all Media - Change of Venue for 19th AU Summit, available at http://www.au.int/en/pressreleases/24931/19th-african-union-au-summit-be-held-addis-ababa-ethiopia accessed 12 July 2016.

180 Vincent O. Nmehielle, "'Saddling' the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?" (2014) *7 African Journal of Legal Studies*, 35.

Peoples' Rights to submit this definition for consideration by the policy organs at the next Summit to be held in January 2013."[181]

Any suggestion that the AU had, in the face of extensive criticism for its decision to endow the African Court with international criminal jurisdiction, acquired cold feet should however have been dispelled by other decisions of the Assembly taken during the summit. Among these were the Assembly's decision urging member States to continue to eschew cooperation with the ICC and endorsing a recommendation of the Meeting of Ministers of Justice/Attorneys General to approach the International Court of Justice (ICJ), through the United Nations General Assembly (UNGA), to seek an advisory opinion on the question of immunities, under international law, of Heads of State and senior State officials from States that are not Parties to the Rome Statute of the ICC.[182] The Assembly also reiterated its Decision on the Abuse of the principle of Universal Jurisdiction which requested that the warrants of arrest issued on the basis of the abuse of the Principle of Universal Jurisdiction shall not be executed in any Member State.[183]

With the Commission due to respond to the Assembly's request by presenting a report at a meeting of AU policy organs at the next summit, in January 2013, the Commission convened a two-day meeting of experts in Arusha, Tanzania in December 2012. Upon consideration of their remit, the experts concluded that Article 28E – which defines and sets out the elements of the *Crime of Unconstitutional Change of Government* required no further revision.[184] The experts also reported anticipating only modest financial and structural impact from the expansion of the jurisdiction of the African Court.[185]

Seemingly unconvinced, the AU's Executive Council, at its Twenty-Second Ordinary Session held in Addis Ababa from January 21 – 25, 2013, requested "the Commission to conduct a more thorough reflection, in collaboration with the Peace and Security Council, on the question of the effect of popular uprising in all its dimensions on the crime of unconstitutional change of government, and on the appropriate mechanism for deciding the legitimacy of such an uprising." The Executive Council also requested the Commission to submit, a report on the structural and financial implications of "the expansion of the jurisdiction of the African Court of Justice and Human Rights to try international crimes, to the PRC [Permanent Representative Council] through its relevant sub-committees."[186]

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181 See Assembly/AU/Dec.427(XIX): Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Doc. Assembly/AU/13(XIX)a, available at http://www.au.int/en/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf accessed 10 July 2016.

182 See Paragraph 3 of Assembly/AU/Dec.419(XIX), Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/731(XXI), available at https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20419%20(XIX)%20_E.pdf accessed 29 September 2018.

183 See Paragraph 6 of Assembly/AU/Dec.420(XIX) Decision on the Abuse of the Principle of Universal Jurisdiction (Doc. EX.CL/731(XXI)) available at https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20420%20(XIX)%20_E.pdf accessed 29 September 2018.

184 See Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," Note 3 above, at 934.

185 See Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," Note 3 above, at 934.

186 See Paragraphs 2 and 3 of EX.CL/Dec.766(XXII), Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Doc. PRC/Rpt(XXV), available at https://au.int/sites/default/files/decisions/9657-ex_cl_dec_726-766_xxii_e.pdf accessed 29 September 2018.

The proposed Expanded African Court did not appear explicitly on the agenda of the AU Assembly at its Twenty First Ordinary Session in Addis Ababa, Ethiopia from May 26 – 27, 2013[187] or at the Twenty Third Ordinary Session of the Executive Council which preceded it from May 19 – 23, 2013 at the same location.[188] Curiously however, and likely attributable to Uhuru Kenyatta's election as Kenya's President in March 2013,[189] the Assembly in a "Decision on International Jurisdiction, Justice and the International Criminal Court", raised anew the failure of the UN Security Council to defer cases before the ICC upon the AU's request, affirmed **"**the need for international justice to be conducted in a transparent and fair manner" and decried the Decisions of the Pre-trial Chamber II and the appeals Chamber of the ICC on the admissibility of the cases dated 30 May and 30 August 2011 respectively, "which denied the right of Kenya to prosecute and try alleged perpetrators of crimes committed on its territory in relation to the 2007 post-election violence."[190]

At an Extraordinary Summit of the Assembly, convened upon request of Kenya in October 2013, the AU Assembly in its Decision on Africa's Relationship with the International Criminal Court[191] underscored the unprecedented nature of a sitting Head of State and his deputy being subjected to an international trial during their incumbency and noted the grave implications of same for peace, sovereignty, stability and reconciliation.[192] The AU accordingly decided, amongst others, that:

> no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.[193]

The Assembly decided also to fast track the expansion of the African Court of Human and Peoples' Rights[194] and encouraged AU Member State that wished to refer a case to

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187 See Assembly/AU/Dec.474-489(XXI), Assembly/AU/Decl.1-3(XXI) and Assembly/AU/Res.1(XXI): Decisions, Declarations And Resolution of the Twenty-First Ordinary Session of the Assembly of the Union, 26 - 27 May 2013, Addis Ababa, Ethiopia, available at http://www.au.int/en/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf accessed 16 July 2016.

188 See EX.CL/Dec.767- 782(XXIII): Decisions of the Twenty-Third Ordinary Session of the Executive Council, 19 – 23 May 2013, Addis Ababa, Ethiopia, available at http://www.au.int/en/sites/default/files/decisions/9658-ex_cl_dec_767-782_xxiii_e_1.pdf accessed 16 July 2016.

189 See *Uhuru Kenyatta's Election Victory is Upheld by Kenya's Supreme Court*, The Guardian (March 30, 2013) available at https://www.theguardian.com/world/2013/mar/31/kenya-court-upholds-kenyatta-victory accessed 16 March 2016.

190 See Paragraphs 1 – 7 of Assembly/AU/Dec.482(XXI): Decision on International Jurisdiction, Justice and the International Criminal Court (ICC). Available at https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20482%20(XXI)%20_E.pdf . Although the presentation to the AU Assembly which elicited this Decision was made by Uganda, it is not a stretch to believe that the newly elected President and Vice President of Kenya, both of whom were on trial at the ICC, encouraged Uganda's representations before the Assembly.

191 See Ext/Assembly/AU/Dec.1(Oct.2013), available at http://www.au.int/en/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf accessed 16 July 2016.

192 See Paragraph 10(i) of Ext/Assembly/AU/Dec.1(Oct.2013), available at http://www.au.int/en/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf accessed 16 July 2016.

193 This language is almost identical to the immunity provision in the Malabo Protocol and appears to have been drawn from the Kenyan Constitution. See Article 143 of the 2010 Constitution of Kenya, available at http://www.icla.up.ac.za/images/constitutions/kenya_constitution.pdf accessed 29 September 2018.

194 See Paragraphs 10(iv) and (v) of Ext/Assembly/AU/Dec.1(Oct.2013), available at http://www.au.int/en/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf accessed 16 July 2016.

the ICC to inform and "*seek the advice* of the African Union."[195] This text was adopted after the text of an earlier draft, which required AU permission for self-referrals was less than enthusiastically received.[196]

The stage appeared to be set then for the adoption by the AU Assembly of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which it did at the Twenty-Third Ordinary Session of the AU Assembly, held in Malabo, Equatorial Guinea from June 26 – 27, 2014.[197] The portentous undertaking to endow the African Court of Human and Peoples' Rights with international criminal jurisdiction was committed to, bereft of fanfare, in the modestly titled Decision on the Draft Legal Instruments.[198]

Four years after the Malabo Protocol's adoption by the AU Assembly, the Protocol had received eleven signatures but no ratifications.[199] As of 31 October 2018, this remains unchanged.[200]

5. Rationale for an African Criminal Court.

In the months since the adoption of the Malabo Protocol, some activists and academics have suggested that the quest for an African Court with international criminal jurisdiction is nothing but an act in self-preservation influenced by the unexpected effectiveness of the International Criminal Court.[201] The implicit reasoning undergirding that view is that

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195 See Paragraph 8 of Ext/Assembly/AU/Dec.1(Oct.2013), available at http://www.au.int/en/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf accessed 16 July 2016.

196 See Dire Tladi "The African Union and the International Criminal Court: The battle for the soul of international law" *(2009) 34 South African Yearbook of International Law* 57.

197 See Assembly/AU/ /Dec.517-545(XXIII); Assembly/AU/ /Decl.1-4(XXIII) and Assembly/AU/ /Res.1(XXIII): Decisions, Declarations and Resolution of the Twenty-Third Ordinary Session of the Assembly of the Union held in Malabo, Equatorial Guinea, June 26-27, 2014, available at http://www.au.int/en/sites/default/files/decisions/9661-assembly_au_dec_517_-_545_xxiii_e.pdf accessed 16 July 2016.

198 See Assembly/AU/Dec.529 (XXIII), Decision on the Draft Legal Instruments – Doc. Assembly/AU/8(XXIII), available at http://www.au.int/en/sites/default/files/decisions/9661-assembly_au_dec_517_-_545_xxiii_e.pdf accessed 16 July 2016. This Decision of the AU Assembly also served to adopt a Protocol relating to the Establishment of the African Monetary Fund; the African Convention on Cross-Border Cooperation (Niamey Convention); the African Union Convention on Cyberspace Security and Protection of Personal Data; the African Charter on the Values and Principles of Decentralization, Local Governance and Local Development; and, the Protocol to the Constitutive Act of the African Union on the Pan-African Parliament.

199 Kenya was the first signatory to the Malabo Protocol, which it signed on January 27, 2015. The 10 other signatories to the Malabo Protocol as of 31 October 2018 are Benin (January 28, 2015), Guinea Bissau (31 January 2015), Mauritania (26 February 2015), Congo (12 June 2015), Ghana (28 January 2016), Sierra Leone (29 January 2016), Sao Tome and Principe (29 January 2016), Chad (24 February 2016), Uganda (3 July 2017) and Comoros (29 January 2018). Status of signatures, ratifications and accessions available at http://www.au.int/en/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_19.pdf accessed 16 July 2016.

200 See Status of Signatures, Ratifications and Accessions to the Malabo Protocol, Note 199 above.

201 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 78 above. See also Opinion Editorial by Desmond Tutu, *In Africa, Seeking a License to Kill*, New York Times (10 October 2013) available at http://www.nytimes.com/2013/10/11/opinion/in-africa-seeking-a-license-to-kill.html accessed 2 January 2016.

an African Court with criminal jurisdiction is unnecessary and a product only of African leaders' discomfort in the face of the ICC's focus on Africa.[202]

Whatever the motivation for the Expanded African Court, the suggestion by some scholars and commentators that an African Court with international criminal jurisdiction is lacking in legal basis,[203] is not sustained by any rational assessment of international law.[204] The non-doctrinal views that such a Court is neither necessary nor desirable[205] are also neither reflective of the self-sufficiency that the African Union project aspires to[206] nor of the articulated objective of international criminal justice activists to deploy all possible measures to prevent impunity for international and transnational crimes.[207]

Indeed, there are at least two clear reasons – both sides of the same coin – why such a court is not only necessary but also desirable. The first would be a legal obligation under international treaties and protocols[208] and the second would be the undeniable fact that there are a range of international and trans-national crimes that are of little interest to the international community generally but of critical importance to Africa.[209]

As Abass notes with respect to the first reason:

> Without conferring on its court jurisdiction to prosecute international crimes, the AU will permanently face a rather absurd situation in which its member states recognize the existence of a crime in their region – a crime that they regard as very serious, as their practice dating back at least two decades shows – but one that the Union's court cannot prosecute.[210]

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202 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," Note 1 above. See also Max du Plessis, "Implications of the AU decision to give the African Court jurisdiction over international crimes" (June 2012) *Institute for Security Studies Paper 235.*

203 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the Africa n Court of Justice and Human Rights," Note 1 above, at 1080 – 1082.

204 See Ademola Abass, "The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects" Note 2 above, generally.

205 See Desmond Tutu: *In Africa, Seeking a License to Kill*, New York Times Opinion Editorial (Note 201 above). See also Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 78 above, at 3 where the author states rather alarmingly that *the AU has shown itself to be committed to a regional exceptionalism of the most egregious kind: immunity for African leaders who have committed international crimes.*

206 See Objectives of African Union set out in "AU in a Nutshell" available at https://au.int/en/history/oau-and-au accessed 29 September 2018.

207 See Ademola Abass, "The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects," Note 2 above.

208 See for instance the OAU Convention for the Elimination of Mercenarism in Africa Adopted on 3 July 1977 in Libreville, Gabon, and entered into force on 22 April 1985, available at https://www.au.int/en/treaties/convention-elimination-mercenarism-africa accessed 29 September 2018. As of 1 April 2016, the Convention had been signed by 36 countries and ratified by 32. See also the Article 4h obligations in the Constitutive Act of the African Union, available at https://www.au.int/en/treaties/constitutive-act-african-union accessed 29 September 2018.

209 The crime of unconstitutional change of Government would be one such crime.

210 Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," Note 3 above at 940.

The second reason would be that, law making – as is trite – is ultimately political and the making of international law is a function of the architecture of the international order and the power dynamics within it. What is clear is that failure by the AU to create the mechanisms to prosecute crimes that afflict the African continent in particular will result in such crimes going unpunished. The point is made by Kamari Clarke in a contribution to a discussion by a panel of experts on whether or not African countries are targeted inappropriately by the ICC. She stresses that international law making reflects global power dynamics and generates rules in a form that matters to the countries that wield power. In illustrating her point, she goes beyond:

> … the assumption that the ICC is "targeting Africa" and instead examine[s] the structural inequalities that have made it so that Africa and not the United States, Joseph Kony and not George Bush, crimes against humanity and not pre-emptive intervention form the [jurisdictional] basis for the court's action.[211]

The dynamics of international rule making are further illustrated by Tladi, who expresses some alarm about fairly blatant efforts by the United States to influence the definition of the crime of aggression in a treaty to which it is not even party. In a detailed paper, he sheds light on the geopolitical machinations that sought to influence the Kampala Review Conference of the Rome Statute – a principal task for which was to define the crime of aggression which had been deferred from the Rome Conference of 1998.[212]

6. The Place of the Expanded African Court within the AU's Judicial Architecture.

Displaying what can only be described as the AU's penchant for indecisiveness or rashness, the current judicial landscape of the AU comprises three regional/continental courts – the current stature and continued existence of which are, at best, uncertain.[213] This number excludes the sub-regional courts established under such treaties as the ECOWAS Treaty,[214] the SADC Treaty[215] and the EAC Treaty.[216]

The origin, jurisdiction and competence of the three continental courts, only one of which is active, may be summarily presented as follows:

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211 See Kamari Clarke, Note 49 above.

212 See Dire Tladi, "Kampala, the International Criminal Court and the Adoption of a Definition of the Crime of Aggression: A Dream Deferred" (2010) 35 *South African Yearbook of International Law* 80, at 96.

213 See Ademola Abass, "The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects" Note 2 above at 27 - 50.

214 See Articles 6(1)(e) and 15 of the ECOWAS Treaty. The Economic Community of West African States (ECOWAS) is a sub-regional bloc comprising 15 States that came into existence on May 28, 1975 with the signing of the Treaty of Lagos. Treaty available at http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf accessed 15 July 2016.

215 See Article 9(1)(g) of the SADC Treaty. The Tribunal established thereunder in 2005 has since been suspended primarily because of a ruling against Zimbabwe. The Southern African Development Community (SADC) is the progeny of the Southern African Development Coordination Conference which comprised 9 majority-ruled Southern African States and came into existence in April 1980. The current 15-member SADC emerged with the SADC Treaty on August 17, 1992. The Treaty has since been amended in 2001, 2007, 2008 and twice in 2009. Treaty available at http://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf accessed 14 July 2016.

216 See Chapter 8 (Articles 23 through 47) of the Treaty for the Establishment of the East African Community, which was signed on 30th November 1999, entered into force on 7th July 2000 and has since been amended in December 2006 and August 2007. Treaty available at http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf accessed 16 July 2016.

6.1 The African Court on Human and Peoples' Rights.

Following extensive lobbying of the Organization of African Unity (OAU) [217] to address the key shortcomings of the African Commission on Human and Peoples' Rights (which can only issue quasi-judicial recommendations to States and relies on States' undertakings to abide by the Commission's judgments),[218] the OAU Assembly of Heads of State and Government, at its summit in Tunis in June 1994, requested the Secretary General to convene a meeting of Government experts to:

> ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights.[219]

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights – the product of the "pondering" by the Government experts[220] **–** was adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou in June 1998[221] and entered into force on January 25, 2004, thirty days after the deposit of the fifteenth instrument of ratification.[222] As of October 31, 2018, fifty States have signed and thirty States have ratified the Protocol and are currently members of the Court but only a mere seven have deposited a declaration in conformity to Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights

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217 See Frans Viljoen, "A Human Rights Court for Africa, and Africans" Note 3 above, at 8.

218 See Articles 47 – 54 of the African Charter on Human and Peoples' Rights *(Adopted 27 June 1981 and entered into force on 21 October 1986)*, available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf accessed 30 September 2018.

219 See Preambular Paragraph 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, available at http://www.achpr.org/instruments/court-establishment/ accessed 30 September 2018. See also *Resolution on the African Commission on Human and Peoples Rights,* Assembly of Heads of State and Government, 30th Ordinary Sess., paragraph 4, Res. AHG/Res 230(XXX), available at https://au.int/sites/default/files/decisions/9539-1994_ahg_res_228-233_xxx_e.pdf accessed 30 September 2018.

220 The *pondering* produced a first draft Protocol at a meeting in Cape Town in September 1995 (Cape Town Draft Protocol), a second draft seventeen months later at meeting in Nouakchott, Mauritania in April 1997 (Nouakchott Draft Protocol) and a third draft in December 1997 at a meeting in Addis Ababa (Addis Ababa Draft Protocol). It was this last version that was reviewed by a Conference of Ministers of Justice and Attorneys-General (which made minor amendments) before it was tabled at the OAU Assembly of Heads of States and Government who adopted it in Ouagadougou in June 1998. For a detailed background on the path to creation of the African Court see Frans Viljoen, "A Human Rights Court for Africa, and Africans," Note 3 above. See Nsongurua J. Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late Than Never," (2000) 3(1) *Yale Human Rights and Development Journal* (Article 2) 1.

221 See Resolution on the Ratification of the Additional Protocol on the Creation of the African Court of Human and Peoples' Rights, 12th Ann. Activity Report of the African Commission on Human and Peoples' Rights, annex IV, at 28 (1998–1999). See http://www.achpr.org/sessions/24th/resolutions/29/ accessed 29 September 2018.

222 See List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights at official website of the African Court on Human and Peoples' Rights, available at http://en.african-court.org/images/Basic%20Documents/Statuts_of_the_Ratification_Process_of_the_Protocol_Establishing_the_African_Court.pdf accessed 1 June 2016.

on the Establishment of an African Court on Human and Peoples' Rights.[223] Article 34(6) permits relevant NGOs with observer status before the Commission and individuals to have legal standing to institute cases directly before it.

Comprising eleven judges, who are nationals of Member States of the OAU (and successor AU) and who shall serve in individual capacities upon election,[224] the African Court on Human and People's Rights may exercise jurisdiction over all cases and disputes concerning the interpretation and application of the Charter, its foundational Protocol and any other relevant human rights instrument ratified by the States concerned.[225]

While the Court's *raison d'être* is to complement[226] and enhance enforcement of human rights standards on the continent, the drafters of its constitutive instrument and member States have received a fair amount of criticism for limiting NGOs and individuals' access to the Court[227] by requiring a State, at the time of ratification, to make a declaration accepting the competence of the Court to receive cases from individuals and NGOs.[228] The absence of such declaration denies individuals and NGOs standing before the Court for cases that could otherwise have been brought against the State.[229]

The first judges of the African Court were elected on January 22, 2006 at the Eighth Ordinary Session of the Executive Council of the African Union, held in Khartoum, Sudan.[230] The Court officially started operations in Addis Ababa, Ethiopia, in November 2006 but moved to Arusha, Tanzania in August 2007,[231] where it heard its first case in 2008.[232]

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223 See List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Note 222 above.

224 See Article 11 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Note 219 above.

225 See Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Note 219 above.

226 See Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Note 219 above.

227 See Nsongurua J. Udombana "Toward the African Court on Human and Peoples' Rights: Better Late Than Never" (2000) 3(1) *Yale Human Rights and Development Journal*, (Article 2) 1. See also Solomon Ebobrah "The admissibility of cases before the African Court of Human and Peoples' Rights: Who should do what?" (2009) 3(1) *Malawi Law Journal* 87.

228 See Articles 5 and 34 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Note 219 above.

229 See Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Note 219 above.

230 See Decision on the Election of Judges of the African Court on Human and Peoples' Rights – Doc. EX.CL/241 (VIII) [EX.CL/Dec.261 (VIII)], available at https://au.int/sites/default/files/decisions/9639-ex_cl_dec_236_-_277_viii_e.pdf accessed 30 September 2018.

231 See Report of the African Court on Human and Peoples' Rights presented at the Thirteenth Ordinary Session of the Executive Council, 24 – 28 June 2008, Sharm El-Sheikh, Egypt, EX.CL/445 (XIII) at paragraph 21, available at http://en.african-court.org/index.php/publications/activity-reports accessed 2 June 2016.

232 See Application No 001/2008 – *Michelot Yogogombaye versus the Republic of Senegal,* available at http://en.african-court.org/#finalised-cases accessed 2 June 2016.

6.2 Court of Justice of the African Union.

The Constitutive Act of the African Union (AU Statute) which was adopted by the Assembly of Heads of States and Government of the OAU in 2000, seeks to promote continental integration along the lines of the European Union.[233] Instrumental to such a framework would be the African Economic Community,[234] the African Central Bank,[235] the African Monetary Union,[236] the African Court of Justice[237] and the Pan-African Parliament.[238]

Per Article 18, the AU Statute called for the establishment of a Court of Justice of the Union and left the details of composition and functions to a Protocol to be enacted for that purpose[239]

The Protocol of the Court of Justice of the African Union was adopted shortly after the 2002 launch of the African Union, on July 1, 2003, by the Second Ordinary Session of the Assembly of Heads of States and Governments in Maputo, Mozambique,[240] upon the recommendations of the Executive Council.[241] The Protocol came into force on February 11, 2009 and as of October 31, 2018, had received 44 signatures and 18 ratifications.[242]

Also comprising eleven judges who are to be elected by the AU Assembly, the Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and the Protocol which relate to: "(a) the interpretation and application of the Act; (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the

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233 At the fourth Extraordinary Session of the OAU Assembly of African Heads of State and Government held at Sirte, Libya on 8 and 9 September 1999, the Sirte Declaration was adopted by the Organisation of African Unity. This Declaration set out the framework for a new African Union and associated organs that would advance the cause of continental integration. See Sirte Declaration, available at http://www.au2002.gov.za/docs/key_oau/sirte.pdf, accessed 16 April 2016. See also Konstantinos Magliveras and Gino Naldi "The African Court of Justice" (2006) 66 *ZaöRV* 187, at 189.

234 See Treaty Establishing the African Economic Community (otherwise known as the Abuja Treaty), available at https://au.int/sites/default/files/treaties/7775-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf accessed 11 December 2018. This treaty, which was adopted on June 3, 1991 and entered into force on May 12, 1994, received its last signature on January 24, 2013 from South Sudan. As of October 31, 2018, out of 54 countries that had signed the Treaty, 50 countries had deposited instruments of ratification with the AU. See https://au.int/sites/default/files/treaties/7775-sl-treaty_establishing_the_african_economic_community.pdf, accessed 24 October 2018.

235 See Article 6 (2)(f) of the Abuja Treaty, Note 234 above.

236 See Note 235 above.

237 See Articles 7 and 18 of the Abuja Treaty, Note 234 above.

238 See Article 7 (c) and 14 of the Abuja Treaty, Note 234 above.

239 See Article 18(2) of the Constitutive Act of the AU, Note 208 above.

240 Decision on the Protocol of the Court of Justice of the African Union, AU. Doc. Assembly/AU/Dec.25 (II), available at https://au.int/sites/default/files/decisions/9548-assembly_en_10_12_july_2003_auc_the_second_ordinary_session_0.pdf accessed 30 September 2018.

241 Decision on the Draft Protocol of the Court of Justice, AU Doc. Dec.EX/CL/58 (III). available at http://www.au.int/en/sites/default/files/treaties/7784-sl-court_of_justice.pdf accessed 2 June 2016.

242 See List of Countries which have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the African Union, available at https://au.int/sites/default/files/treaties/7784-sl-protocol_of_the_court_of_justice_of_the_african_union_1.pdf, accessed 2 October 2018.

Union; (c) any question of international law; (d) all acts, decisions, regulations and directives of the organs of the Union; (e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court; (f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; and, (g) the nature or extent of the reparation to be made for the breach of an obligation" as well as any additional jurisdiction over disputes that the Assembly may confer on the Court.[243]

Although the Protocol birthing it entered into force in 2009, the Court of Justice of the African Union is – as Abass describes – stillborn.[244] This is essentially because even at the time when the ACHPR Protocol entered into force in 2004 and before the Court started sitting in 2008, the AU Assembly had started to discuss a merger of the two courts – the effect of which was to significantly slow down the pace of ratifications for the African Court of Justice. The fact however that some ratifications have been received even after the adoption by the AU of the Malabo Protocol which is intended to override the Protocol of the Court of Justice of the African Union is a curious development.[245]

The Protocol of the Court of Justice (together with the AU Statute) which spelt the demise of the Court of Justice contemplated by the African Economic Community,[246] has also failed to yield the Court it was supposed to establish.

6.3 The African Court of Justice and Human Rights.

On 1 July 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights[247] at the Eleventh Ordinary Session of the Assembly of Heads of States and Governments in Sharm El-Sheikh, Egypt.[248] As of October 31, 2018, the Protocol had been signed by thirty-one States and ratified by six.[249] It is not unreasonable to assume that the Malabo Protocol (to amend this Protocol and thereby expand the jurisdiction of the African Court of Justice and Human

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243 See Article 19 of the Protocol of the Court of Justice of the African Union, available at https://au.int/sites/default/files/treaties/7784-treaty-0026_-_protocol_of_the_court_of_justice_of_the_african_union_e.pdf accessed 30 September 2018.

244 See Ademola Abass, "The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects," Note 2 above at 30 – 31.

245 Burkina Faso and Liberia only deposited instruments of ratification in 2017. For further particulars, see List of Countries which have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the African Union. Note 242 above.

246 See Protocol of the Court of Justice of the African Union, Note 243 above.

247 See Protocol on the Statute of the African Court of Justice and Human Rights, available at https://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf accessed 30 September 2018.

248 See Assembly/AU/Dec.196 (XI): Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the African Court of Justice (Doc.Assembly/AU/13 (XI)), available at http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20196%20(XI)%20_E.PDF accessed 30 September 2018.

249 See List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights, available at https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf, accessed 30 September 2018.

Rights to include international criminal jurisdiction) has had an impact on the pace of ratifications.

The logic for merger of the African Court of Human Rights and the African Court of Justice includes the quest for simplicity.[250] In the words of Viljoen and Baimu:

> the idea of a single court is enticing for its simplicity. A single unified regional court would have been an antidote to the growing global phenomenon of proliferation of international judicial institutions dealing with human rights problems.[251]

Other reasons would be a need to avoid splitting human and financial resources between two courts and to avoid the risk of creating courts with overlapping mandates thereby risking incoherent jurisprudence.[252] There was however a real risk that a unified pan-African court that was supposed to have expertise in all areas of law, could very well turn into a 'Jack of all trades and master of none.'[253]

The Protocol intended for the Court to have two Sections - a General Affairs Section comprising eight (8) Judges and a Human Rights Section with eight (8) Judges.[254] Judges were to be drawn from two lists established by the Chair of the AU Commission – List A representing nominees from member States with competencies and experience in international law and List B representing nominees from member States with competencies and experience in human rights law. Judges would be elected by the Executive Council and appointed by the Assembly.[255]

The very broad jurisdiction conferred on the Court by the Protocol includes the interpretation, application or determination of validity of all AU Treaties and all subsidiary legal instruments adopted within the framework of the AU or the OAU; the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned; as well as any question of international law.[256]

While the right of access to the Court was limited – in the general division – to State Parties to the Assembly, the Parliament and other organs of the AU

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250 See Nsongurua Udombana**,** 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?' 2003 (28) *Brooklyn Journal of International Law* 811, at 835.

251 See Frans Viljoen and Evariste Baimu, "Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice" (2004) 22(2) *Netherlands Quarterly of Human Rights* 241, at 252.

252 See Frans Viljoen and Evariste Baimu, "Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice" Note 251 above at 252 – 255.

253 See Frans Viljoen and Evariste Baimu, "Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice" Note 251 above at 255.

254 See Article 16 of the Protocol on the Statute of the African Court of Justice and Human Rights, Note 247 above.

255 See Article 7 of the Protocol on the Statute of the African Court of Justice and Human Rights, Note 247 above.

256 See Article 28 of the Protocol on the Statute of the African Court of Justice and Human Rights, Note 247 above.

authorized by the Assembly and AU staff members on appeal from disputes with the AU,[257] the Protocol expanded access to the Court for the human rights division to include the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organizations accredited to the Union or its organs; national human rights institutions and individuals or relevant NGOs.[258]

With 5 ratifications and with momentum building for an African Court with international criminal jurisdiction, the African Court of Justice and Human Rights will likely never see daylight.[259]

7. The Legal Status of the Expanded African Court in International Law.

The Malabo Protocol seeks to amend the Protocol on the Statute of the African Court of Justice and Human Rights,[260] which was itself the product of the amendment or merger of two Protocols – the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights[261] and the Protocol of the Court of Justice of the African Union.[262]

The peculiar thing to note here, is that the Malabo Protocol seeks to modify a Protocol that has not yet entered into force, prompting some scholars to question what the legal effect would be.[263] There is indeed a general obligation under Article 18 of the Vienna Convention on the Law of Treaties, the title of which enjoins treaty signatories "not to defeat the object and purpose of a treaty prior to its entry into force."[264] Where one comes down however on whether the Malabo Protocol strengthens or subverts the African Court of Justice and Human Rights shall form the basis of whether the general edict of Article 18 in respect of treaty signatories has been breached.[265]

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257 See Article 29 of the Protocol on the Statute of the African Court of Justice and Human Rights, Note 247 above.

258 See Article 30 of the Protocol on the Statute of the African Court of Justice and Human Rights, Note 247 above.

259 See Parusha Naidoo and Tim Murithi "The African Court of Justice and Human Rights and the International Criminal Court: Unpacking the political dimensions of concurrent jurisdiction" *IJR Policy Brief* 20 October 2016, available at http://www.ijr.org.za/home/wp-content/uploads/2016/11/IJR-Brief-No-20-web-ready.pdf accessed 30 September 2018.

260 See Protocol on the Statute of the African Court of Justice and Human Rights, which was adopted in Sharm El Sheikh, Egypt, on 1st July 2008, Note 225 above. While the Protocol has 30 signatories, the 6 ratifications it has received to date has been a bar to its entry into force. See status at http://www.au.int/en/sites/default/files/treaties/7792-sl-protocol_on_statute_of_the_african_court_of_justice_and_hr_0.pdf accessed 1 July 2016.

261 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Note 219 above.

262 See Protocol of the Court of Justice of the African Union, Note 243 above.

263 See Ademola Abass, "The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects" Note 2 above at 45 – 46.

264 See Vienna Convention on the Law of Treaties, available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf accessed 30 September 2018.

265 For general critique on the confusion and dysfunction surrounding the process of the creation of the continental courts, see Max du Plessis and Lee Stone "A Court Not Found" (2007) 7 *African Human Rights Law Journa*l 522.

Assuming positive intent however, to the extent that the Malabo Protocol seeks State consent *de novo* and does not purport to carry over States' consent to the Protocol on the Statute of the African Court of Justice and Human Rights or its forbears, it does not breach the Vienna Convention on the Law of Treaties.[266] While there may be questions raised about the AU's consistency or its ability to think ahead or even about its own prior acts in creating judicial bodies,[267] no legal questions arise with respect to the effort to amend a Protocol that is yet to enter into force.

It is useful at this point to also address a question posed by Murungu who has asked whether the proposed Expanded African Court has "a legal basis under the ICC Statute." Per his assessment:

> … the clear position of the Rome Statute is to confer jurisdiction over international crimes on national courts. Nevertheless, a progressive interpretation of positive complementarity might, for the purposes of closing all impunity gaps, infer that even regional criminal courts could have jurisdiction over international crimes within the ICC jurisdiction. Although it can be argued that the establishment of the proposed Criminal Chamber will not compete with the ICC in terms of jurisdiction, from the reading of the Rome Statute it is difficult to establish clear legal basis for the proposed Criminal Chamber. A distinction should be made, however, for the crime of genocide. Article VI of the Genocide Convention empowers international penal tribunals (which would be interpreted to include regional criminal courts, such as the proposed Criminal Chamber) to prosecute and punish individuals who commit genocide.[268]

It is not entirely clear why Murungu finds it necessary to conjure a rationale or undertake such contortions in order to find legal basis for an African Court with international criminal jurisdiction. The AU is not party to the Rome Statute and can create any kind of organ or institution that the Constitutive Act of the AU permits.[269] As Abass has pointed out the notion that a court created by a multi-lateral treaty is somewhat subordinate to another court created by a multi-lateral treaty or that AU member States that are party to the Rome Statute may not create another court with similar jurisdiction to the ICC is not sustained by any lucid reading of international law or of treaty obligations.[270] For emphasis, Abass goes on to state, rather grandiloquently, that:

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266 See generally, Vienna Convention on the Law of Treaties, Note 243 above. See in particular Article 6 (Capacity of States to Conclude Treaties), Article 39 (General Rule Regarding the Amendment of Treaties), Article 40 (Amendment of Multilateral Treaties), Article 57 (Suspension of the Operation of a Treaty under its Provisions or by Consent of the Parties) and Article 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty).

267 The AU Act establishes the ACJ without making any reference whatsoever to the ACHPR established by the 1998 Protocol.

268 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights" Note 1 above, at 1081.

269 See Article 52 of the UN Charter, available at http://www.un.org/en/sections/un-charter/un-charter-full-text accessed 11 December 2018.

270 Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges" Note 3 above, at 941. In Abass' words:

> First, why should a court created by a multilateral treaty require the approval of another multilateral treaty creating a similar court to justify its own existence? Secondly, under what rules of international law, based on treaty or general principles, do states ratify a treaty to the exclusion of all other treaties, even those governing the same subject as the pre-existing one? Thirdly, why should the African Union, being a non-signatory to the Rome Statute, seek the legality of its own court under that Statute?

> an inquiry into the legality of the proposed international criminal jurisdiction in Africa with reference to the Rome Statute is fallacious, fundamentally mistaken and unscrupulous in international law.[271]

This writer, notwithstanding the bombast of Abass' critique, concurs.

8. The Emergence and Proffered Rationale for the Immunity Clause – Article 46A *Bis.*

While few have claimed detailed knowledge of the progeny of the immunity provision of the Malabo Protocol, there is little doubt that the accession by Uhuru Kenyatta and William Ruto to the high offices of President and Deputy President on 9 April 2013 was an early precursor to, and set in motion, the train of events that yielded the immunity provision.[272] Both Kenyatta and Ruto who had been indicted by the ICC[273] (but have since been discharged without prejudice following the collapse of the Prosecution's cases)[274] had won power in an election which was seen by Kenyans as an opportunity to bloody the nose of Western interferers who seemed to be urging rejection of Kenyatta and Ruto in the polls.[275]

At Kenyatta's maiden attendance at the AU Assembly of Heads of States and Governments in Addis Ababa in May 2013, concerns were raised during debates in the Assembly about the spectre of neo-colonialism and the subjugation of sovereignty that continued prosecution of the ICC cases against Kenyatta and Ruto would invoke. The AU called accordingly for:

> a deferral of the ICC investigations and prosecutions in relation to the 2007 post-election violence in Kenya, in line with the principle of complementarity, to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in support of the on-going peace building and

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271 See Ademola Abass, Note 3 above at 942.

272 See Laurence R. Helfer and Anne E. Showalter "Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC" *iCourts Working Paper Series,* No. 83, 2017, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6404&context=faculty_scholarship accessed 30 September 2018.

273 See Decision: Charges confirmed for Mr Muthaura and Mr Kenyatta (23 January 2012) in *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11, available at https://www.icc-cpi.int/kenya/kenyatta#8 accessed 30 September 2018. See also Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (04 February 2012) in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* ICC-01/09-01/11-373, available at https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF available 30 September 2018.

274 Kenyatta and Ruto are two of four persons whose cases have been terminated by the court (See Case Information Sheet ICC-PIDS-CIS-KEN-02-005/12, available at https://www.icc-cpi.int/iccdocs/PIDS/publications/MuthauraKenyattaAliEng.pdf accessed 11 December 2018); and Ruto and Song (See Case Information Sheet ICC-PIDS-CIS-KEN-01-012/14, available at https://www.icc-cpi.int/kenya/rutosang/Documents/rutosangEng.pdf accessed 11 December 2018).

275 A comment about the Kenya elections by Johnnie Carson, the top Obama administration official for Africa that "choices have consequences" was seen as a not-so-subtle discouragement for electing Kenyatta and Ruto. See Jeffrey Gettleman, *Leader of Vote Count in Kenya Faces U.S. With Tough Choices,* New York Times (7 March 2013), available at https://www.nytimes.com/2013/03/08/world/africa/kenyatta.html accessed 30 September 2018.

national reconciliation processes, in order to prevent the resumption of conflict and violence in Kenya.[276]

Shortly thereafter, in a move seen by some commentators as a provocation, evidence of ICC intransigence, and confirmation of disrespect for African countries,[277] the Appeals Chamber of the ICC suspended[278] a dispensation granted by the Trial Chamber to Ruto who had sought permission not to be continuously present in Court during his trial in order to enable him to perform his functions as Deputy President of Kenya.[279]

The ICC's dismissive response[280] to a letter that the AU sent on September 10, 2013[281] for reconsideration of the Appeal Chamber's decision is one of a number of perceived slights that seemed to validate the vote in Kenya's parliament to withdraw from the ICC on September 5, 2013,[282] and shortly thereafter (after spectacular terrorist attacks at a

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276 See Doc. Assembly/AU/13(XXI), Decision on International Jurisdiction, Justice and the International Criminal Court (ICC) at paragraph 7, available at https://au.int/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf accessed 30 September 2018.

277 See for instance the AU Commissioner of political affairs, Aisha Abdullahi, who is quoted as saying "Trying a sitting president is not dignifying to Africa." See Crystal Orderson, *AU is watching ex-Cote d'Ivoire President's case at the ICC,* The Africa Report (28 January 2016), available at http://www.theafricareport.com/East-Horn-Africa/au-is-watching-ex-cote-divoire-presidents-case-at-the-icc.html accessed 30 September 2018. See however Thomas Obel Hansen, "Caressing the Big Fish? A Critique of ICC Trial Chamber V(A)'s Decision to Grant Ruto's Request for Excusal from Continuous Presence at Trial," (2013) 22(1) *Cardozo Journal of International and Comparative Law*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298603 accessed 30 September 2018. See also Stephen Brown and Chandra Lekha Sriram "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya" (1 March 2012) 111(443) *African Affairs*, 244.

278 See Decision on the Request for Suspensive Effect, ICC-01/09-01/11-862 (20 August 2013), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* – Appeals Chamber; available at https://www.icc-cpi.int/CourtRecords/CR2013_05438.PDF accessed 30 September 2018.

279 See Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ICC-01/09-01/11-777 (18 June 2013), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* – Trial Chamber, available at https://www.icc-cpi.int/CourtRecords/CR2013_04536.PDF accessed 30 September 2018. The ASP seems to have found the case for an excusal convincing as it adopted, in November 2013, Rule 134 *quater* – which permits an accused to be excused from continuous presence at his or her trial when s/he has to perform "*extraordinary public duties at the highest national level*" – as an amendment to the Rules of Procedure and Evidence of the Court. Ruto was, almost immediately after the adoption of the Rule by the ASP and over the Prosecution's strident objections, relieved by the Trial Chamber from the obligation to attend all trial hearings for as long as he would be Vice-President of Kenya. He would be expected however be required to attend closing statements, the delivery of the judgement, hearings in which victims would present their views in person and the first five trial days after a judicial recess.

280 See letter of September 13, 2013 signed by Judge Cuno Tarfusser, Second Vice President of ICC, available at https://www.icc-cpi.int/itemsDocuments/pr943/130913-VPT-reply-to-AU.pdf accessed 30 September 2018. See Solomon Dersso, "The AU's Extraordinary Summit decisions on Africa-ICC Relationship" *EJILTalk* (28 October 2013), available at https://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/ accessed 30 September 2018.

281 See letter co-signed by Hailemariam Desalegn, Chairperson of the African Union and Nkosazana Dlamini Zuma, Chairperson of the African Commission, available at https://www.icc-cpi.int/itemsDocuments/pr943/130910-AU-letter-to-SHS.pdf accessed 30 September 2018.

282 On September 5, Kenya's parliament passed a motion to withdraw Kenya from the ICC. See Nicholas Kulish, *Kenyan Lawmakers Vote to Leave International Court*, New York Times (5 September 2013), available at https://www.nytimes.com/2013/09/06/world/africa/kenyan-lawmakers-vote-to-leave-international-court.html accessed 30 September 2018.

high end mall in Kenya),[283] to the Extraordinary Summit of Assembly of Heads of State and Governments that was held at the instance of Kenya on October 12, 2013.[284]

After the terrorist attacks in Kenya in September 2013, the imperative for duly elected leaders to play the role for which they had been elected was emphasized in the Welcome Remarks of the Chair of the AU Commission at the Extraordinary Summit.[285] While the summit failed to deliver what Kenya was pushing for – *en masse* withdrawal by African Countries from the Rome Statute[286] – it yielded the first iteration of the immunity provision, the content and rationale for which were summarily stated by the AU as follows:

> … to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.[287]

That the immunity provision of the Malabo Protocol is so uncannily similar to the foregoing text is therefore no surprise.[288]

9. Accountability or Impunity: The Litmus Test.

The sense of outrage with which the immunity provision of the Malabo Protocol has been greeted reflects a contestation of values: the one side representing sovereignty and the other representing the primacy of human rights.[289] More elegantly described, Tladi presents the contestation as a tussle for the soul of international law where proponents

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283 By Jeffrey Gettleman and Nicholas Kulish, *Gunmen Kill Dozens in Terror Attack at Kenyan Mall,* New York Times (21 September 2013), Note 103 above.

284 Kenya's request for the summit received the support of over two-thirds of AU member-States. See Laurence R. Helfer and Anne E. Showalter "Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC," Note 272 above.

285 See Welcome Remarks of the African Union Commission Chairperson, HE Dr Nkosazana Dlamini Zuma to the Extraordinary Session of the Assembly of Heads of State and Government, available at https://au.int/en/speeches/20131012 accessed 30 September 2018.

286 Although AU members discussed the possibility of an *en masse* withdrawal from the Rome Statute the decided against it, adopting instead two resolutions that Heads of State should be immune from international prosecution during their terms of office, and that Kenya should request a deferral of the ICC proceedings from the UNSC. See Laurence R. Helfer and Anne E. Showalter "Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC," Note 284 above. See Solomon Dersso, *Unplanned obsolescence: The ICC and the African Union,* Al Jazeera (11 October 2013), available at https://www.aljazeera.com/indepth/opinion/2013/10/unplanned-obsolescence-icc-african-union-201310913292871722.html accessed 30 September 2018.

287 See Ext/Assembly/AU/Dec.1, Decision on Africa's Relationship with the International Criminal Court (ICC) at paragraph 10(i), available at https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf accessed 30 September 2018.

288 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Volume 10, International Criminal Justice Series (Asser Press, 2017) 203 – 219.

289 See Dire Tladi, "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic," Note 21 above. See also Dire Tladi, "The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the Normative (Chaff)," (2015) 13 (1) *Journal of International Criminal Justice* 3, at 5 – 8.

for a "brave new world in international law argue for less recognition of immunities and more recognition of exceptions to immunities."[290]

The question to be answered then is to what extent, if any, the strides made to date in international criminal law to ensure individual accountability for egregious human rights wrongs, serve to limit the scope of application of immunity.[291]

As Judge Abdulqawi Yusuf noted in his dissenting opinion in the *Jurisdictional Immunities of the State Case (Germany v. Italy: Greece Intervening)* and as proponents for the "brave new world" would agree

> Immunity is not an immutable value in international law. Its adjustability to the evolution of the international society, and its flexibility, are evidenced by the number of exceptions built gradually into it over the past century, most of which reflect the growing normative weight attached to the protection of the rights of the individual against the State, be that as a private party to commercial transactions with the State or as a victim of tortious acts by State officials. This is not to say that the importance of immunity to the stability of relations among States or to the orderly allocation and exercise of jurisdiction in proceedings concerning States has been weakened. Immunity continues to perform those functions, despite the growing number of exceptions.[292]

The focus of the present thesis being primarily a doctrinal study of the legality or otherwise of immunity from prosecution – during incumbency – of "Heads of State and Governments or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions," the following analytical framework is proposed.

Article *46A Bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights will, after analysis of its construction to determine its true meaning, be tested against State practice to determine whether the normative shift espoused by such international legal moralists as Cançado Trindade[293] and Christine van den Wyngaert[294] is borne out by international conventions, international custom (as evidenced by State practice or *usus* and a sense of obligation or *opinio juris sive necesitatis*); general principles of law; the decisions of courts; and *the teachings of the most highly qualified publicists*.[295]

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290 See Dire Tladi, "The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?" (2018) 32 *Leiden Journal of International Law*, 169 – 187, *Leiden Journal of International Law.*

291 See Michael Tunks, "Diplomats or Defendants? Defining the Future of Head of State Immunity," (2002) 52 *Duke Law Journal*, 651 at 656. See also Sevrine Knuchel, "State Immunity and the Promise of Jus Cogens," (2011) 9(2) *Northwestern Journal of International Human Rights*, 149 and Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case" (1999) 10(2) *European Journal of International Law* 237, at 248 – 262.

292 See *Jurisdictional Immunities of the State Case (Germany v. Italy: Greece Intervening)* (*Jurisdictional Immunities of the State Case*). Judgment, I.C.J. Reports 2012, 99; available at http://www.icj-cij.org/docket/files/143/16893.pdf accessed 30 September 2018. See Paragraph 35 of the Dissenting Opinion of Abdulqawi Yusuf.

293 See Dissenting Opinion Judge Cançado Trindade in *Jurisdictional Immunities of the State Case (Germany v. Italy: Greece Intervening).* Judgment, ICGJ 434 (ICJ 2012), 3rd February 2012, International Court of Justice, available at http://www.icj-cij.org/docket/files/143/16891.pdf accessed 30 September 2018.

294 See Dissenting Opinion of Judge van den Wyngaert in the *Arrest Warrant Case*, International Court of Justice, 14 February 2002, available at http://www.icj-cij.org/docket/files/121/8144.pdf accessed 30 September 2018.

295 See Article 38(1) of the Statute of the International Court of Justice, available at http://www.icj-cij.org/documents/?p1=4&p2=2 accessed 30 September 2018.

While AU member States may have been motivated by instincts of self-preservation in including an immunity clause in the Malabo Protocol, the provision – if consistent with international law as determined from its various sources – cannot legitimately be dismissed out of hand as an illegal quest for impunity,[296] particularly if the said immunity clause confers immunity only during incumbency.

To a study of the origins of sovereign immunity – as a necessary backdrop to a study of its progeny and evolution over time – this dissertation now turns.

[296] See Paragraph 9 of Final Communique of Conference under the theme, "Understanding the Malabo Protocol: The Potential, the Pitfalls and Way Forward for International Justice in Africa Conference, Southern Sun Hotel Pretoria, South Africa, 7-8 November 2016. The Communique asserts among others that "[it] found no legal basis for the inclusion in the Malabo Protocol of article 46A *bis*…" available at http://www.hrforumzim.org/wp-content/uploads/2016/11/Malabo-Protocol-Communique.pdf accessed 30 September 2018.

Chapter 3

The Origins and Evolution of the Doctrine of Head of State Immunity.

1. Introduction.

The legitimacy or otherwise of the Malabo Protocol's immunity provision[1] rests on the current status of immunity in international law.[2] Legitimacy as presented in this case engages not a values-centric debate but the question of legality. Recognizing that discourse and debate about immunities – especially where they are invoked to evade accountability for violations of human rights and humanitarian law – compel emotive values-laden contestations of right,[3] this Chapter proposes to commence the inquiry into the status of sovereign immunity in international law by examining the origins, rationale and evolution of the principle of immunity. The focus of this Chapter will be to offer a dispassionate assessment that considers legal history, case law, State practice and academic expositions. It will examine the rationale for the doctrine of immunity, trace its evolution over time and determine the scope of its current application.

To be clear, the immunity that the Malabo Protocol provides is immunity from prosecution before the International Criminal Section of the Expanded African Court – an international tribunal, the jurisdiction of which will span inter-State disputes as well as human rights and international criminal law.[4] The corpus of international law on the subject may be derived however from a range of academic expositions and caselaw – civil and criminal – on sovereign immunity and the immunities it engenders – *ratione personae* and *ratione materiae* – before domestic courts of foreign States and before some international tribunals.[5]

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1 See Article 46A *Bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at https://www.au.int/web/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf accessed 9 October 2018.

2 See *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium*) Judgment of the International Court of Justice of February 14, 2002), ICJ Reports 2002 [*Arrest Warrant Case*]. Although the International Court of Justice (ICJ) made a definitive finding on the question of the availability of immunity to Heads of States and other senior officials before foreign courts in the *Arrest Warrant Case*, the dissenting opinion of Christine van den Wyngaert in that case and subsequent dissenting opinions by such ICJ judges as Concado Trindade in the *Jurisdictional Immunities of the State Case (Germany v. Italy: Greece Intervening),* ICGJ 434 (ICJ 2012), 3rd February 2012, International Court of Justice, available at http://www.icj-cij.org/docket/files/143/16891.pdf accessed 9 October 2018 *[Jurisdictional Immunities of the State Case]* have continued to fuel the debate about the legitimacy of sovereign immunity for gross violations of human rights.

3 See Op-ed by Desmond Tutu *In Africa, Seeking a License to Kill*, New York Times 10 October 2013 available at http://www.nytimes.com/2013/10/11/opinion/in-africa-seeking-a-license-to-kill.html accessed 9 October 2018. See also Human Rights Watch, *Statement regarding immunity for sitting officials before the Expanded African Court of Justice and Human Rights* at https://www.hrw.org/sites/default/files/related_material/Immunity%20Statement%20-%20African%20Court%20of%20Justice%20and%20Human%20Rights.pdf accessed 9 October 2018. See also Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" (Nov 2014), *Institute for Security Studies Paper 278*, generally.

4 See Article 3 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Note 1 above.

5 Arthur Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," (1995) 247 *Recueil de Cour de l'Academie de Droit International* 1.

2. *Rex Non Potest Peccare*:[6] The Origins of the Doctrine of Sovereign Immunity.

The precise origins of the doctrine of sovereign immunity have been acknowledged to be defiant of easy identification. In *United States v. Lee,*[7] Justice Miller – in a ruling in the US Supreme Court dispenses of an inquiry into the origins of the doctrine of sovereign immunity by stating that the

> principle has never been discussed or the reasons for it given, but it has always been treated as established doctrine.[8]

This is corroborated by distinguished jurist, Hersch Lauterpacht, who, in an authoritative academic paper published in 1951, argues that the hallowed status accorded to immunity and deemed to be settled requires re-examination. He submits that:

> … the view, so often expressed in textbooks and elsewhere, that the immunity of foreign states and their property from the jurisdiction of courts of foreign states follows from a clear principle of international law, namely, the principle of equality and independence of states needs re-examination. It finds no support in classical international law.[9]

Echoing Lauterpacht, Schmitthoff and Wooldridge[10] go even further to say that:

> the principle of sovereign immunity finds no support in classical international law. It is not referred to by Grotius, is deprecated by Bynkershoek, and Vattel is only prepared to admit it with regard to the person of the sovereign. The historical origin of the doctrine was bound up with the personal immunity of heads of state, and it was with regard to this that the distinction between acts *jure imperii* and *jure gestionis* attained prominence in Germany in the eighteenth century.[11]

In a paper titled *Historical Approach to the Doctrine of Sovereign Immunity*,[12] the author notes that "obscurity and uncertainty must characterize any discussion of the historical bases of the doctrine of sovereign immunity."[13] He also states that "legal historians now deprecate any attempt to enshroud the doctrine with the aura of Roman antiquity."[14]

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6 This translates as "the King can do no wrong."

7 See *United States v. Lee,* 106 U.S. 196 (1882).

8 See *United States v. Lee*, Note 7 above at page 207.

9 See Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States" [1951] *28 British Year Book of International Law* 220, at 228. A brief overview of Lauterpacht's scholarship and distinguished career as an international law jurist is presented in Elihu Lauterpacht, "Sir Hersch Lauterpacht: 1897-1960" (1998) 2 *European Journal of International Law* 313.

10 Schmitthoff and Wooldridge in "The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading" (1972) 2 *Journal of International Law and Policy* 199.

11 See Schmitthoff and Wooldridge in "The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading" Note 10 above at 199.

12 See George Pugh, "Historical Approach to the Doctrine of Sovereign Immunity" (1953) 13(3) *Louisiana Law Review* 476.

13 See George Pugh "Historical Approach to the Doctrine of Sovereign Immunity," Note 12 above, at 477.

14 See George Pugh, "Historical Approach to the Doctrine of Sovereign Immunity," Note 12 above, at 477.

While it is true that the origins of sovereign immunity and derivatives thereof appear to be somewhat obscure, there is good reason to seek its antecedents in ancient Roman law.[15] Several scholars have indeed traced the origins of the notion of sovereign immunity to the *Corpus Juris Civilis*,[16] better known as the Justinian Code, which was a compilation of laws, legal interpretations and jurisprudence developed under the sponsorship of Roman Emperor Justinian I from AD 529 to 565.[17] Some phrases from the Code that appear to assert the existence of sovereign immunity as an element of Roman law at the time were credited to a jurist named Ulpian.[18] The phrases – "*Princeps Legibus Solutus Est*" and "*Quad Principii Placuit Legis Habet"* – respectively mean "the King is not bound by statute"[19] and "what pleases the prince is law."[20]

Development of the doctrine of sovereign immunity in English law and its maturity have been influenced primarily by the personal immunity of the English sovereigns, some of whom claimed the right to rule as deriving from no less an authority than God.[21] Such immunity can also be traced to the four legal traditions – Roman law, Canon law, Tribal law and Feudal law – that have variously influenced English legal doctrine since medieval times.[22]

Although there seems to be some authority for asserting that prior to the reign of Edward I,[23] the king could be sued in his own courts,[24] other scholars have with no less authority asserted the exact opposite[25] saying "tongue in cheek" that Henry III, who became king

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15 See Ketana Krishna "Development of the Doctrine of Sovereign Immunity in England and India" (3 March 2012), available at SSRN https://ssrn.com/abstract=2402176 or http://dx.doi.org/10.2139/ssrn.2402176 accessed 9 October 2018.

16 See Guy Seidman "The Origins of Accountability: Everything I Know about the Sovereigns' Immunity, I Learned from King Henry III" Winter 2004/2005 49(2) *Saint Louis University Law Journal* 1, at 27, available at SSRN: https://ssrn.com/abstract=592053 accessed 9 October 2018. See also Ketana Krishna, "Development of the Doctrine of Sovereign Immunity in England and India," Note 15 above.

17 JAS Evans, *The Age of Justinian: The Circumstances of Imperial Power* (2000, Routledge).

18 Domitius Ulpian (170 – 223/228) was a highly respected Roman jurist whose writings comprised a significant part of the Digests (part of Corpus Juris Civilis), which Emperor Justinian commissioned in the 6th Century, even though he died some 300 years before that. See Olga Telegen-Couperus, *A Short History of Roman Law* (1993, Routledge), available at http://cnqzu.com/library/Philosophy/neoreaction/Olga%20Tellegen-Couperus/Short%20History%20of%20Roman%20Law.pdf accessed 9 October 2018. See also Jolowicz and Nicholas, *A Historical Introduction to the Study of Roman Law* (3rd Edition) (2008, Cambridge University Press).

19 See Guy Seidman "The Origins of Accountability: Everything I Know about the Sovereigns' Immunity, I Learned from King Henry III," Note 16 above at 27.

20 See Guy Seidman "The Origins of Accountability: Everything I Know about the Sovereigns' Immunity, I Learned from King Henry III," Note 16 above at 19.

21 James I of England (1603-1625) is associated most with the doctrine of divine right which asserted both political and religious legitimacy. James had acceded to the throne of Scotland as James VI in 1567 and ruled both England and Scotland until his death in 1625. See A.G. Dickens, *The English Reformation. London & Glasgow:* (1978, Fontana/Collins).

22 See Guy Seidman, "The Origins of Accountability: Everything I Know about the Sovereigns' Immunity, I Learned from King Henry III," Note 16 above at 19 – 43.

23 Edward I ruled England from 1272 until his death on 7 July 1307. See Caroline Burt*, Edward I and the Governance of England, 1272–1307* (2013, Cambridge University Press).

24 See Herbert Barry, "The King can do no Wrong" (1924 – 25) 11 *Virginia Law Review* 349, at 352.

25 See Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Volume 1), (Cambridge University Press, 1895).

at the age of nine, and who Edward I succeeded in 1272, would otherwise have spent his entire life in Court.[26]

It does appear that the doctrine of foreign sovereign immunity developed from two strands of sovereignty: immunity of a State (or sovereign) from its own courts and the imperative to accord protection and immunity to representatives of a sovereign or State so they could go about affairs of State unimpeded. The first strand has variously meant that (i) the King cannot by definition do wrong as he is above the law; (ii) the king cannot be held to account in courts that operate under his authority even if his actions could be construed to be wrongful; and, (iii) the King does not have capacity to do wrong, as would have been the case of Henry III who was a minor at the time of his investiture.[27] The second strand was born of a functional imperative that rested on the notional equality, independence and dignity of all States and their high representatives.

Because they derived authority from the King as a person, governments established under authority of the English crown, prior to the fourteenth century, endured many challenges including with the continuity of royal edicts and legal acts. This would explain why, for instance, the Magna Carta,[28] originally signed by King John in 1215,[29] had to be reissued under royal seal by subsequent Kings.[30] The accession to the throne of Henry III in his minority, and without legal capacity, would have exacerbated the challenges of the personal monarchy.[31]

Over time, the concept of a personal monarchy gave way to the more practical dual concept of a crown which embodied both the personal monarchy and the impersonal concept of government or body politic.[32] This would be the reason for the two types of sovereign immunity in English law – immunity of the King and immunity of the government. The proclamation 'the King (or Queen) is dead; long live the King (or Queen)' – no doubt derives its existence from the dual concept of the crown.[33]

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[26] See Frederick Pollock and Frederick Maitland, *The History of English Law Before the Time of Edward I*, Note 25 above at 515 – 518.

[27] See Guy Seidman "The Origins of Accountability: Everything I Know about the Sovereigns' Immunity, I Learned from King Henry III," Note 16 above, at 5.

[28] *The Magna Carta Libertatum* which is widely considered a foundational document for the concept of democracy was a charter, the first draft of which was developed by the Archbishop of Canterbury to restore peace between King John who was deeply unpopular and the barons of the realm. Signed on June 15, 1215, it sought to limit the power of the king and establish a rule of law. It ordained, amongst others, that a free man could only be punished under the law of the land and promised the protection of church rights, freedom for the barons from illegal imprisonment, access to swift justice, and reduced the value of payments to the Crown from the barons.

[29] See David Carpenter, *Struggle for Mastery: The Penguin History of Britain 1066–1284* (London, UK: Penguin Press, 2004).

[30] Henry III who occupied the throne of England from 1217 to 1272 had acceded to the throne as a minor. He reissued the Magna Carta in 1216, in 1217 and then again in 1225, 1237, 1253, and 1265. Edward I who succeeded Henry III and reigned from 1272 to 1307) also reissued the Magna Carta in 1297. See Frederick Powicke*, The Thirteenth Century 1216–1307* (Oxford University Press, 1963).

[31] See generally David Carpenter, *The Minority of Henry III*, (University of California Press, 1990).

[32] For further detail see Ernst Hartwig Kantorowicz *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press, 1957).

[33] The phrase, translated from French – *Le Roi est mort, vive le Roi* – which was meant to signify continuity of royal authority, is attributed to a proclamation upon the accession to the throne of France by Charles VII upon the death of his father, Charles VI, in 1422.

The maxim "the King can do no wrong" may indeed have owed its roots in English law, to a range of reasons including the King not being subject to courts established under his authority and even perhaps, in part, to the fact of Henry III's lack of legal capacity,[34] but as Lowell observes in 1908, it had become, by then, a "cardinal principle" of the unwritten English constitution.[35] Published in the latter part of the Eighteenth Century, Blackstone's Commentaries on the Law of England[36] – which would have been commentary on the received law in what is now the United States of America[37] and other former English colonies[38] – also firmly establish sovereign immunity as a settled doctrine of the realm at the time of his writing.[39] Thus was the US Supreme Court able to assert definitively in *Hill v. United States*[40] that:

> No maxim is thought to be better established or more universally assented to than that which ordains that a sovereign or a government representing the sovereign cannot *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfilment merely of its own legitimate ends.[41]

3. Rationales Undergirding Sovereign Immunity.

The obscurity of the precise origins of sovereign immunity notwithstanding, the doctrine has been grounded on a number of fictional and functional rationales which include (i) the notional equality of all States; (ii) the theory of extra-territoriality; (iii) the functional need of States and those who represent them to be able to go about their business unimpeded; and, (iv) the courtesies arising from comity and the expectation of reciprocity among States. These rationales, which are in some cases overlapping and in others, mutually exclusive[42] are expounded upon briefly as follows:

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34 See Guy Seidman, "The Origins of Accountability: Everything I Know about the Sovereigns' Immunity, I Learned from King Henry III" Note 16 above, at 5.

35 See A. Lawrence Lowell, *The Government of England* (1908, Macmillan). See also Guy Seidman "The Origins of Accountability: Everything I know about the Sovereigns' Immunity, I learned from King Henry III", Note 16 above, at 43.

36 The four volumes of Blackstone's Commentaries on the Laws of England were published in Oxford from 1765 – 1769. The volumes covered the rights of persons, the rights of things, of private wrongs and of public wrongs and were widely seen as an authoritative treatise on English law. See Wilfrid Prest (ed) *Commentaries on the Laws of England,* (Oxford University Press, 2016).

37 See Donald Lutz "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought" 78 (1984) *American Political Science Review* 189. See also Howard Lubert "Sovereignty and Liberty in William Blackstone's "Commentaries on the Laws of England"" (2010) 72(2) *The Review of Politics* 271, where he notes at page 271 that "references to Blackstone during the founding era (1760 – 1805) exceed references to all other political authorities save Montesquieu. In fact, between 1790 and 1805, citations to Blackstone exceed even those of the French Political Thinker."

38 Such colonies as Ghana almost two centuries later where English laws were carried over by a stature of received law at the time of independence in 1957. See William Harvey, *Law and Social Change in Ghana* (1966, Princeton University Press) at 268.

39 See Duncan Kennedy "The Structure of Blackstone's Commentaries," (1979) 28 *Buffalo Law Review* 209, where he says at page 209 of Blackstone's Commentaries that:

> "Blackstone's work is the only systematic attempt that has been made to present a theory of the whole common law system. It is the single most important source on English legal thinking in the 18th century and it has as much (or more) influence on American legal thought as it had on the British."

40 *Hill v. United States*, 50 US 386 (1850).

41 *Hill v. United States*, Note 40 above at page 389.

42 See Xiaodang Yang, *State Immunity in International Law*, (2012, Cambridge University Press), at 44 – 58. See also *Preliminary report on the topic of jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur* (A/CN.4/323) (June 18, 1979), available at https://www.legal-tools.org/doc/bc722c/pdf/ accessed 9 October 2018, at paragraph 59.

3.1 Sovereign Equality of States.

The 1868 Treaties of Westphalia,[43] which effectively sought to end papal control over European monarchies are widely credited with providing the foundations of the modern State and setting out the concept of territorial sovereignty and the implied right of the State to non-interference and freedom from external interference.[44]

Sovereign equality – the notion that all States are considered equal – is founded upon sovereignty, the essence of a State's authority, which was traditionally understood as empowering a State to act as it deems appropriate within its territory, without interference and without oversight. Writing in the Eighteenth Century, Vattel – a renowned jurist credited with expanding on Grotius' work in shaping modern international law (and who Lauterpacht cites with approbation)[45] – captures the concept thus:

> Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less sovereign than the most powerful kingdom.[46]

The modern international legal order is founded on this fiction, which has properly been described as having attained the status of *jus cogens*.[47] While it is true that the international legal order and international relations are – in reality – shaped by power dynamics among States, and by their relative strength, power and

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[43] The Treaties of Munster and Osnabruck signed, after five years of negotiation in 1648, to end the Thirty-Year war are referred to as the Treaties of Westphalia. The war, which came to involve the major powers of Europe – Sweden, France, Spain and Austria – began when Holy Roman Emperor Ferdinand II of Bohemia's efforts to limit religious activities of his subjects sparked a rebellion among Protestants. The war effectively diminished papal authority over Europe, reshaped the political map and saw a community of sovereign States emerge from the Roman Empire. See Peter Wilson, *Europe's Tragedy: A New History of the Thirty Years War* (Penguin, 2010).

[44] Although the Westphalia Treaties are largely credited with the concept of sovereignty, little mention of the doctrine appears in the said treaties. See Derek Croxton "The Peace of Westphalia of 1648 and the Origins of Sovereignty" (September 1999) 21(3) *The International History Review* 569.

[45] See Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", Note 9 above at 228.

[46] Emmerich De Vattel, *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Sovereigns*, (Translation from French) (Dublin: Luke White, 1792) at paragraph 18, page 9.

[47] See Kamrul Hossain "The Concept of *Jus Cogens* and the Obligation under the U.N. Charter" (2005) 3 *Santa Clara Journal of International Law* 72. See generally.

influence,[48] formally at least, all States are considered equal.[49] As Oppenheim has explained:

> whatever inequality may exist between states as regards their size, power, degree of civilization, wealth and other qualities, they are nevertheless equals as international persons.[50]

A necessary derivative of sovereignty and sovereign equality is sovereign immunity which precludes the exercise of jurisdiction by a State over a sovereign State and over certain senior officials of foreign States – primary among whom would be the Head of State.[51] This is articulated by the Latin maxim *par in parem non habet imperium* which means an equal has no power over an equal – a principle which is the cornerstone of sovereign immunity and the act of State doctrine which derives from it. For a Head of State or other senior officials to be subject to the jurisdiction of other States would be considered an abasement of one State before another and the assertion of superiority by the other.[52] In *The Schooner Exchange v. McFaddon*,[53] Chief Justice John Marshall of the United States Supreme Court presented the doctrine in the following oft-quoted words:

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48 The politics around Article 16 of the Rome Statute is but a tiny example of the use of power by some states to get their way. See Akande, Du Plessis and Jalloh, "Position Paper: An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC," (2010) *Institute of Security Studies*, available at https://oldsite.issafrica.org/uploads/PositionPaper_ICC.pdf accessed 9 October 2018. See also Kamari Clarke "The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise," (2014) 7 *African Journal of Legal Studies* 297. See also BS Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 *International Community Law Review* 3. See also *Kagame Takes Aim at the ICC* (October 16, 2013), available at http://www.iol.co.za/news/africa/kagame-takes-aim-at-the-icc-1592709 (accessed 9 October 2018), where Kagame is quoted as saying *[t]his world is divided into categories, there are people who have the power to use international justice or international law to judge others and it does not apply to them*. See Dire Tladi, "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic" (2014) *7 African Journal of Legal Studies* 381.

49 See second preambular paragraph of the Charter of the United Nations and Statute of the International Court of Justice (1945), available at https://treaties.un.org/doc/publication/ctc/uncharter.pdf accessed 9 October 2018. See also SW Armstrong "The Doctrine of the Equality of Nations in International Law and the Relation of the Doctrine to the Treaty of Versailles" (Oct 1920)14(4) *The American Journal of International Law* 540. See also UN General Assembly Resolution 2625 (XXV) Declaration on Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970, available at http://www.un-documents.net/a25r2625.htm accessed 9 October 2018.

50 See L. Oppenheim, *International Law*, Vol.1, (3rd edition) (1920, London: Longmans) at 15, cited in G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, (2004, Cambridge: University) at 27. Oppenheim echoes Moore who says (Digest of International Law, Vol. I, at 62.) that "[a]ll sovereign States, without respect to their relative power, are, in the eye of international law, equal, being endowed with the same natural rights, bound by the same duties, and subject to the same obligations."

51 Dapo Akande and Sangeeta Shah "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21(4) *The European Journal of International Law* 815, at 819. See also Paola Gaeta "Does President Al Bashir Enjoy Immunity from Arrest" (2009) 7 *Journal of International Criminal Justice* 315, at 320.

52 See Hazel Fox *The Law of State Immunity* (Oxford University Press, 2002)

53 See *The Schooner Exchange and Bonaparte (on the application of United States) v. McFaddon and Greetham,* Decision of the Supreme Court, 11 U.S. 116 (1812), 24th February 1812 (hereafter *The Schooner Exchange v. McFaddon)*, where Chief Justice Marshall says (page 136) that:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction.

> … full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[54]

The dignity of the State or the sovereign and the imperative not to impair such dignity played a key role in sustaining the doctrine of absolute immunity. In *The Parlement Belge*,[55] – an English Court of Appeal decision which prevailed for several years as the principal authority for the doctrine of absolute immunity – Brett L.J., after considering multiple authorities on the subject of sovereign immunity, concluded as follows:

> From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction *would be incompatible with his regal dignity*—that is to say, with his absolute independence of every superior authority."[56] (emphasis added).

While the notion of royal sovereignty and the dignity that attached to it may have been legitimate rationales for the doctrine of sovereign immunity which sought to render sovereign attributes immune, there are legitimate concerns about the continued appropriateness of such a rationale for immunity in modern times.[57] Indeed, as will be addressed more extensively in Chapter 4 of this thesis, the notion that the preservation of the dignity of a State can be invoked to deny a persistent abuse by a State of the dignity of its people[58] – from whom sovereignty is derived[59] – may be seen as a perverse irony.

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54 See Chief Justice Marshall *in The Schooner Exchange v. McFaddon*, Note 53 above at 137.

55 The *Parlement Belge* (1880) 5 P.D. 197.

56 See Brett L.J. in *The Parlement Belge*, Note 55 above at page 207.

57 See dissenting opinions of Christine van den Wyngaert and Concado Trindade in the *Arrest Warrant Case* and *the Jurisdictional Immunities Case* respectively, Note 2 above.

58 On 23 July 2003, President Charles Taylor had filed a motion at the Special Court of Sierra Leone – on grounds of Head of State immunity – to quash a warrant for his arrest that had been issued under seal by a judge of the Special Court on 7 March 2003 and unsealed and transmitted on 4 June 2003, to the authorities in Ghana where President Taylor was attending peace talks. The Ghanaian government declined to effect the arrest and President Taylor filed the said motion upon his return to Liberia. See *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-1, "Decision on Immunity from Jurisdiction" Appeals Chamber, 31 May 2004, available at http://www.haguejusticeportal.net/Docs/Court%20Documents/SCSL/Taylor_Decision%20on%20Immunity.pdf accessed 9 October 2016. See however James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone" (2007) 16 *Dalhousie Journal of Legal Studies* 21.

59 See Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*, (1988, W.W. Norton and Company). Most modern constitutions of democratic States establish that sovereignty resides in the people. See for instance the Kenyan Constitution of 2010, Article 1 of which states that "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution" and Article 1 of the 1992 Constitution of Ghana which states that "The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution." The Kenyan and Ghanaian Constitutions are respectively available at http://www.klrc.go.ke/index.php/constitution-of-kenya/106-chapter-one-sovereignty-of-the-people-and-supremacy-of-this-constitution/166-article-1-sovereignty-of-the-people and

3.2 The Theory of Extra-territoriality.

Another of the earliest rationales for sovereign immunity was the fiction of extraterritoriality – a theory which is founded on the notion that the property and person of a sovereign or other high representative of a State (including its ambassadors) remain fully within the sending State's jurisdiction wherever such property or person is found.[60] This theory contends that the person and property of a State and its high representatives are to be treated as though they remain within the jurisdiction of the sending State and not the receiving or forum State. Thus, a sovereign and/or other high representative of the State, are deemed never to place themselves – notwithstanding their actual geographical location – within the jurisdiction of another State. Emerich de Vattel, writing in 1758, notes to this end that: "an ambassador's house is, at least in all common cases of life, like his person, considered as out of the country."[61]

The effect of the theory, which is credited to such scholars as Pierre Ayraut,[62] Grotius[63] and Pufendorf[64] is to keep certain qualifying persons under cover of the laws of their country of origin and to render them exempt and immune from the host country's jurisdiction. This principle has, in modern times, been applied to troops in passage, passengers on war vessels, individuals on the premises of diplomatic missions, among others, but is always the subject of a bilateral agreement or other treaty.[65]

For reasons of its consequences, if carried to logical conclusions, the fiction that yielded the theory of extra-territoriality proved unsustainable. Justified concerns about the broad implications of a doctrine of extraterritoriality and the potential consequences of the practical application of such a doctrine – which would effectively confer upon a foreign State and its high representatives unlimited immunity – has led to its limited influence in the determination of the basis of sovereign immunity, or the rationale for same.[66]

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http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php?id=Gconst1.html accessed 9 October 2018.

60 See Grant McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (Institute for the Study of Diplomacy, Georgetown University, 1989) 30 – 32.

61 Cited by Grant McClanahan, *Diplomatic Immunity: Principles, Practices, Problems,* Note 60 above at 31.

62 Pierre Ayraut (1536–1601) is credited with proposing the theory that certain persons and things, remained within the legal jurisdiction of their own States even while within the territory of a foreign State. Grotius and Pufendorf are said to have further expounded on Ayraut's theory.

63 Hugo Grotius (1583–1645) is widely believed, because of his theory of natural law, to have played a key role in the laying of the foundation stones of international law. See generally H. Lauterpacht "The Grotian Tradition in International Law" (1946) *23 British Year Book of International Law* 1.

64 Pufendorf (1632–94) was the author of *De Iure Naturae et Gentium* (published in 1672), which built on the works of Grotius and Hobbes to develop his understanding of the law of nations.

65 See Grant McClanahan, *Diplomatic Immunity: Principles, Practices, Problems*, Note 60 above at 30 – 32.

66 See Grant McClanahan, *Diplomatic Immunity: Principles, Practices, Problems*, Note 60 above at 30.

This sentiment was shared by Sir Robert Phillimore who, in dismissing the theory of extraterritoriality as the foundation of sovereign immunity in the English Admiralty case of *The Charkieh*,[67] had noted that:

> [t]he true foundation is the consent and usage of independent states which have universally granted this exception from local jurisdiction in order that the functions of the representative of the sovereignty of a foreign state may be discharged with dignity and freedom, unembarrassed by any of the circumstances to which litigation might give rise.[68]

3.3 Representative and Functional Role of the Sovereign.

The third of the rationales presented for sovereign immunity has been the functional role of the sovereign in matters of State, the nature of which would require that the sovereign be allowed to undertake his functions without impairment.[69] This is reflective of the rationale for diplomatic immunity that is given expression by both the Vienna Convention on Diplomatic Relations,[70] and the Vienna Convention on Consular Relations.[71]

The functional integrity of a State's government and the need to allow it to operate without let or hindrance represents the hub around which this rationale for sovereign immunity revolves. Needless to say, where senior officials of a State are mired in litigation or are compelled to be defendants in criminal proceedings – particularly in jurisdictions other than their own – it is not unreasonable to presume that affairs of State will be adversely affected.

The preambles of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations therefore set out the rationale for customary law rules on diplomatic immunities as follows:

> the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.[72]

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67 *The Charkieh*. (6200.) [L.R.] 4 A. & E. 59

68 *The Charkieh,* Note 67 above at page 88.

69 See Grant McClanahan, *Diplomatic Immunity: Principles, Practices, Problems*, Note 60 above at 32 – 34.

70 See Vienna Convention on Diplomatic Relations. United Nations, *Treaty Series*, vol. 500, p. 95. Adopted in Vienna, Austria on April 14, 1961, the Convention entered into force on April 24, 1964 and as of October 31, 2018 had 192 parties. The text and status of Convention are respectively available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf and https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en, accessed 9 October 2018.

71 See Vienna Convention on Consular Relations. United Nations, *Treaty Series*, vol. 596, p. 261, adopted in Vienna, Austria on 22 April 1963, the Convention entered into force on 19 March 1967 and as of 31 October 2018 had 179 parties. The text and status of the Convention are respectively, available at https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-6.en.pdf and https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-6&chapter=3&lang=en accessed 11 December 2018.

72 See preambular paragraphs 4 and 5 respectively of the Vienna Convention on Diplomatic Relations (Note 70 above) and the Vienna Convention on Consular Relations (Note 71 above).

As the embodiment of the State, the sovereign was possessed of *ius repraesentationis omnimodae*, or the right to represent the State as a plenipotentiary.[73] Heads of State being even greater representatives of their States than Ambassadors or other diplomats, it would stand to reason that they are accorded similar or greater immunities by reason of such stature. This would be the reason why the Institut de Droit International stated in 1891, that rules according immunity to the State should apply *mutatis mutandis* to sovereigns and Heads of State.[74]

3.4 Courtesies Arising from Comity and Reciprocity.

Comity or reciprocity as a rationale for the principle of sovereign immunity has been proffered as a more persuasive rationale for sovereign immunity than such rationales as extra-territoriality.[75] The essence of this rationale is that sovereign immunity is not absolute and that a sovereign chooses not to exercise jurisdiction over another sovereign in his territory because of courtesies extended on grounds of international comity and goodwill as well as the expectation of reciprocity in similar circumstances.[76]

In *The Parlement Belge,* Brett L.J. noted that:

> *as a consequence* of the absolute independence of every sovereign authority, and *of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state*, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.[77] (Emphasis added)

The *ratio decidendum* of this decision was also relied upon in *Rahimtoola v. Nizam of Hyderabad* where Lord Reid noted in the English House of Lords that:

> The principle of sovereign immunity is not founded on any technical rules of law: it is founded on broad considerations of public policy, international law and comity.[78]

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[73] See Arthur Watts, The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers, (1994-III) 247 *Recueil des Cours,* at pages 31 – 32 and 53.

[74] M. Joe Verhoeven, "Institut de Droit international, Les immunités de juridiction et d'exécution du chef d'État et de gouvernement en droit international" (2002) 40 *Archiv des Völkerrechts* 50.

[75] See Sir Robert Phillimore in *The Charkieh*, Note 67 above at page 88.

[76] See Shobha Varughese George "Head of State Immunity in the United States Courts: Still Confused After All These Years" (1995-1996) 64 *Fordham Law Review* 1051.

[77] See Brett L.J. in *The Parlement Belge*, Note 55 above at pages 214 – 215. See also *Schooner Exchange v. McFaddon* (Note 53 above, at page 138) where Chief Justice Marshall states as follows:

> all sovereigns impliedly engage not to avail themselves of a power over their equal which a romantic confidence in their magnanimity has placed in their hands.

[78] See Lord Reid in the House of Lords in *Rahimtoola v. Nizam of Hyderabad and Another* [1958] A.C. 379 at page 404.

While courtesies extended on grounds of international comity and the concomitant expectation of reciprocity are practical and real-life reasons for States to accord such immunities, an assertion that such courtesies are the only basis for sovereign immunity would be of questionable standing. Courtesies are, by their very definition, non-obligatory, which would mean that there would be, in fact, no such thing as international law on sovereign immunity – a conclusion that would no doubt raise more than a few eyebrows at the United Nations[79] and in the International Court of Justice.[80]

In *Lafontant v. Aristide*,[81] the US District Court for the Eastern District of New York, noted the particular difficulty of grounding sovereign immunity on courtesies and expectations of reciprocity but acknowledged that the "concept of doing to others as you would have them do to you is the principal rationale for a number of important doctrines of international law."[82] These, the court said, included the rationale for enforcing arbitration agreements in international contracts,[83] the rationale for enforcing forum selection clauses in international contracts,[84] and the very concept of acts of State.[85] Citing *United States v. Noriega*,[86] the Court noted that General Noriega's assertion of entitlement to sovereign immunity from prosecution in US courts had failed because the US had withheld the courtesy of officially recognizing him as the Head of State of Panama. Even though General Noriega held *de facto* power in Panama and was treated as Head of State by some US officials, the United States had officially continued to recognize the deposed President Eric Arturo Delvalle as Head of State.

As Caplan also argues[87] founding the immunity of States and their high officials on practical courtesy is more consistent with reality because it acknowledges the breadth of a host country's jurisdiction and authority within its borders, and thereby fosters greater accountability by States.[88] The notion however that what has long been considered a pillar of international law is grounded on the uncertain precept of comity and the expectation of comity-induced reciprocity does give sustenance to those who doubt the legal foundations of the very concept of

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79 The United Nations has adopted a range of international treaties that have crystalized customary international law on sovereign immunities such as the Vienna Convention on Diplomatic Relations, The Vienna Convention on Consular Relations, the UN Convention on Special Missions, among others.

80 The ICJ has recognized sovereign immunity as having gained the status of customary international law. See *Arrest Warrant Case*, Note 2 above. See also *Jurisdictional Immunities Case*, Note 2 above. See also Jasper Fincke, "Sovereign Immunity: Rule, Comity or Something Else," (2010) 21(4) *The European Journal of International Law* 853, at 874.

81 See *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

82 See *Lafontant v. Aristide*, Note 81 above at page 132.

83 The court relied upon *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

84 The court sought to rely on *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

85 The court presented as authority *First National City Bank v. Banco National de Cuba,* 406 U.S. 759, 762, 92 Supreme Court. 1808, 1810, 32 L. Ed. 2d 466 (1972).

86 *United States v. Noriega*, 746 F. Supp. 1506 (S.D.Fla.1990).

87 See Lee Caplan, "State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory" (2003) 97(4) *American Journal of International Law* 741.

88 See Lee Caplan, "State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory," Note 87 above, at 745 – 755.

immunity.[89] Substantive law cannot be founded on the expectation of reciprocal courtesies.[90] Sucharitkul appears to recognize this when he states that

> Reciprocity of treatment, comity of nations and *courtoisie international* are very closely allied notions, which may be said to have afforded *a subsidiary or additional basis* for the doctrine of sovereign immunity.[91] (emphasis added)

4. Evolution of Sovereign Immunity.

The principle of sovereign immunity has undergone significant evolution from the absolute immunity that attached to the State, its sovereigns and other representatives to the more restrictive immunity that has been affirmed by the Tate Letter[92] and the Sovereign Immunity Acts of such countries as the United Kingdom[93] and Canada.[94]

Thus, did Judge Abdulqawi Yusuf note in his dissenting opinion in the *Jurisdictional Immunities of the State Case (Germany v. Italy: Greece Intervening)*[95] that:

> Immunity is not an immutable value in international law. Its adjustability to the evolution of the international society, and its flexibility, are evidenced by the number of exceptions built gradually into it over the past century, most of which reflect the growing normative weight attached to the protection of the rights of the individual against the State, be that as a private party to commercial transactions with the State or as a victim of tortious acts by State officials. This is not to say that the importance of immunity to the stability of relations among States or to the orderly allocation and exercise of jurisdiction in proceedings concerning States has been weakened. Immunity continues to perform those functions, despite the growing number of exceptions.[96]

The exceptions alluded to – the commercial exception and the exception for tortious acts or inactions by State officials have evolved as carve-outs from the doctrine of absolute immunity in the following manner:

4.1 The Doctrine of Absolute Immunity.

The doctrine of absolute immunity and the classical application of immunity effectively barred all suits against the State and its high representatives. There was therefore little distinction – if any – between the immunities accorded to the

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89 See Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," Note 9 above.

90 Sompong Sucharitkul, "Immunities of Foreign States before National Authorities" (1976-I) *Recueil des Cours* at 115 – 121.

91 Sompong Sucharitkul, "Immunities of Foreign States Before National Authorities", Note 90 above at 119.

92 A letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting US Attorney Gen. Philip B. Perlman signalling the US Government's adoption of a restrictive approach to sovereign immunity, (May 19, 1952), reprinted in 26 Department of State Bulleting 984 (1952).

93 The United Kingdom's State Immunity Act was enacted in 1978, available at http://www.legislation.gov.uk/ukpga/1978/33/pdfs/ukpga_19780033_en.pdf accessed 18 October 2018.

94 See Canada's State Immunity Act R.S.C., 1985, c. S-18, available at http://laws-lois.justice.gc.ca/PDF/S-18.pdf accessed 18 October 2018.

95 See Dissenting Opinion of Judge Abdulqawi Yusuf in *Jurisdictional Immunities of the State Case*. Note 2 above

96 See Dissenting Opinion of Judge Abdulqawi Yusuf in *Jurisdictional Immunities of the State Case*, Note 2 above, at paragraph 35.

State and those afforded to its high representatives.[97] Few cases illustrate this more than *Mighell v. Sultan of Johore*[98] where in the distinctly personal matter of a breach of a promise to marry, confirmation of the status of the Sultan of Johore as the head of a sovereign State by the British Colonial Office was enough to compel the Court of Appeal to afford him immunity from suit.[99] In his ruling concurring with the judgment of the Court, Lord Justice Lopes stated that:

> I am clearly of opinion that … the defendant is an independent sovereign. That such a sovereign is entitled to immunity from the jurisdiction of our Courts is beyond all question.[100]

In the *Parlement Belge* – which the Court of Appeal had relied upon in *Mighell*[101] – the English Court of Appeal had overturned an earlier ruling of Sir Robert Phillimore in the Admiralty Division of the High Court.[102] In that case, the owners of the *Daring*, a tug boat which had been damaged in the port and harbour of Dover by the negligence of the crew of the *Parlement Belge*, instituted an action *in rem* for damages. The *Parlement Belge* was an unarmed packet ship owned by the King of Belgium, flying his flag and under the command of officers holding commissions from the King of Belgium.[103] Although the Belgian King did not file a response to the writ, the Attorney General of England opposed the writ, claiming that the court had no jurisdiction to entertain the action because of the need to accord immunity to the King of Belgium.[104]

In ruling for the plaintiffs in this action, the High Court had founded its reasoning on the fact that although the ship was indeed owned by the King of Belgium, she was at the time of the collision engaged in carrying mail, passengers and merchandise and in earning passage-money and freight. Per Sir Robert Phillimore:

> The law of this country has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors; but I do not think that it has therefore given the Crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons, who are not really ambassadors.[105]

The Court of Appeal allowed the Crown's appeal in deference to precedent affirming the doctrine of absolute immunity. Lord Justice Brett, relying upon such

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97 See Joanne Foakes *The Position of Heads of State and Senior Officials in International Law*, (Oxford University Press, 2014) at 16.

98 See *Mighell v. Sultan of Johore* [1894] 1 QB 149 – 164.

99 See ruling of Lord Esher in *Mighell v. Sultan of Johore*, Note 987 above at page 158, where he said of the letter from the Colonial Office that "I think the letter has the same effect for the present purpose as a communication from the Queen."

100 See Lopes L.J in *Mighell v. Sultan of Johore,* Note 98 above at page 160.

101 See *Mighell v. Sultan of Johore,* Note 98 above at page 159.

102 The *Parlement Belge* (1879) 4 P.D. 129.

103 *The Parlement Belge* (1879) Note 102 above at page 130.

104 *The Parlement Belge* (1879) Note 102 above at page 131.

105 See Judgment of Sir Robert Phillimore in *The Parlement Belge* (1879) Note 102 above at page 155.

authorities as the *Schooner Exchange v. McFaddon*,[106] *De Haber v. Queen of Portugal*,[107] and *The Prins Fredrik*[108] stated that:

> as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.[109]

Although the absolute rule of immunity is described as admitting of no exceptions, a more accurate representation of absolute immunity is one that acknowledges one exception to the rule: where the impleaded sovereign waives his immunity expressly or impliedly by recognizing the jurisdiction of the court through his invocation of such jurisdiction. Implied waiver would be the case where the sovereign is the one who initiates the legal action.[110]

The former instance – express waiver – was described by Lord Justice Kay in *Mighell v. Sultan of Johore* as follows:

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[106] See *The Schooner Exchange v. McFaddon.* Note 53 above. See also *The Pesaro*, US, 271, US 562 (1926) where the Court, at page 574, dismissed any residual ambiguity about the application of the reasoning in the *Schooner Exchange* to ships of commerce by stating as follows:

> "The decision in The Exchange therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships came within those principles they must be held to have the same immunity as warships."

In *The Navemar*, US, 303 US 68, 74 (1938) the US Supreme Court confirmed its ratio in *The Pesaro* by holding that":

> "Admittedly, a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit"

[107] *De Haber v. Queen of Portugal* (1851-1852) 17 QB 196. The plaintiff in this case had, in suing the Queen of Portugal, claimed money which he said he had invested with a banker in Lisbon at a time when Don Miguel – a pretender to the Crown – ruled Portugal. When the pretender was driven out of Portugal, the banker – Francisco Ferreira – was compelled by a decree issuing from a court to pay over the plaintiff's funds to the Government of Portugal, represented by the Queen. The plaintiff secured judgment in the Court of the Mayor of London and shortly thereafter instituted another action in the same Court to garnish a third party – de Brito – who per an affidavit by the plaintiff, was said to have "money, goods and effects" of the Queen of Portugal in his possession. The Court granted the garnishing order whereupon an application for prohibition was made on behalf of the Queen of Portugal. Lord Campbell CJ, relying on a ruling of the House of Lords in *The Duke of Brunswick v. The King of Hanover* (1848) 2 HL Cas 1, ruled as follows at page 208:

> … an action cannot be maintained in any English Court against a foreign potentate for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and … no English Court has jurisdiction to entertain any complaints against him in that capacity… To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity is contrary to the law of nations and an insult which he is entitled to resent.

[108] *The Prins Frederik* (1820) 2 Dods 451.

[109] See Brett L.J. in *The Parlement Belge* (1880) Note 55 above, at pages 215 – 216.

[110] See Xiaodang Yang, *State Immunity in International Law,* Note 42 above at 10. The acquisition of immovable property in a foreign State has also been considered a waiver of immunity by the sovereign and a submission to the jurisdiction of the State in matters relating to the immovable property. See for instance *S v. British Treasury, Poland* (1948) 24 ILR 223.

> The principle [is] well settled by abundant authority that unless the foreign sovereign chooses to waive his rights when sued, he is not liable to the jurisdiction of the Courts of this country.[111]

The latter instance – implied waiver – was illustrated in another case involving the Sultan of Johore, albeit a different one, in *Sultan of Johore v. Abubakar Tunku Aris Bendahar and Others*.[112] In this case, the Sultan of Johore had sought and obtained from a Japanese Court in Singapore (during the occupation by Japan of Singapore in June 1945), a declaration that he was the sole beneficiary of certain plots of land in Singapore. At the end of the said occupation, the respondent – son of the appellant – applied under the Japanese Judgments and Civil Procedure Ordinance (by which persons aggrieved by rulings of Japanese courts during the occupation could seek review) to set aside the declaration. The appellant objected on grounds that he was an independent foreign sovereign over whom the court had no jurisdiction. In rejecting the appeal,[113] the Court grounded its reasoning on the facts as adduced as follows:

> The appellant himself started the proceedings before the Japanese court, thereby invoking its jurisdiction on his behalf. As plaintiff, he obtained the decree declaring that he was the beneficial owner of the properties in question. If, therefore, the steps taken by the respondents with a view to reversing this decision are in the nature of an appeal from it to a court having jurisdiction to reverse the decision which the appellant has obtained, he could not object to being made respondent in these appeal proceedings, for his original submission to the original court binds him to accept the jurisdiction on appeal.[114]

4.2 The Commercial Exception to Immunity.

Exceptions to the rule of absolute immunity have been founded on the distinction between sovereign or public acts of the State, *acta jure imperii*, and private or commercial acts, *acta jure gestionis*.[115] It has however proven quite difficult[116]

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111 See Kay L.J. in *Mighell v. Sultan of Johore,* Note 98 above at page 164.

112 See *Sultan of Johore v. Abubakar Tunku Aris Bendahar and Others* [1952] AC 318.

113 This case is distinguishable from *Duff Development Co. Ltd. v. Kelantan Government,* [1924] AC 797, where the Kelantan Government, which was recognized by the British Crown as a sovereign State, had agreed to arbitration and had itself applied to the British court to set aside the award. When the Kelantan Government invoked sovereign immunity at the point when Duff Development Company sought to levy execution and enforce the award, the Court of Appeal held that the action was a different proceeding in which the Kelantan Government was entitled to set up its sovereign immunity to deny the Court jurisdiction over the matter, even though it had waived same in the previous proceedings.

114 See Viscount Simon in *Sultan of Johore v. Abubakar Tunku Aris Bendahar and Others*, Note 112 above at page 341.

115 See Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law,* Note 97 above at 16 – 18.

116 An example of such difficulty is evident in the different rulings on similar facts from courts in Italy (*Governo Rumeno v. Trutta, Giurisprydenza Italiana*, 1926, Part I (1), page 774) and the United States (*Kingdom of Roumania v. Guaranty Trust Co. of New York*, (2nd) 250 Fed. 341, 343) on the question of whether a contract by a foreign State to purchase shoes for its army was *acta jure imperii* or *acta jure gestionis*. While the Italian court rules that it was *jure gestionis*, the US Court ruled it to be *jure imperii* – adding for good measure that the said transaction was in furtherance of "the highest sovereign function of protecting itself against the enemies."

to always distinguish between such acts – not least because the State always acts as a public person.[117]

The commercial exception to sovereign immunity was significantly influenced by the appropriation of the role of commercial actors by the State in socialist and communist countries in the early twentieth century. Active engagement of State-owned entities or corporate vehicles in commercial transactions with foreign companies – who had limited recourse if the State invoked immunity to evade obligations undertaken in commercial arrangements – played a defining role[118]

While it is clear that communist and socialist States' appropriation of commercial functions played a role in the formal adoption by countries like the United Kingdom[119] and the USA[120] of a commercial exception to sovereign immunity, there is clear evidence of unease, expressed by courts from several decades earlier, about the potential injustice that the absence of such an exception would cause.

In the *Porto Alexandre*,[121] the English Court of Appeal was called upon to address the question of the immunity of State ships engaged in commerce. Brief facts of the case are that on September 13, 1919, while *the Porto Alexandre* was carrying a commercial cargo from Lisbon to Liverpool, she ran aground in the Crosby Channel in the River Mersey and was salvaged by the steam tugs *Nora*, *Expert*, and *Torfrida*. Three days later on September 16, the owners, masters, and crews of the tug boats issued an action claiming salvage.[122] The *Porto Alexandre* was then arrested, and an appearance under protest was entered on behalf of the ship and freight.

In overturning the decision of the Admiralty Division of the High Court and holding that the *Porto Alexandre* was immune from arrest and therefore not liable to pay compensation for salvage, Bankes L.J., in the Court of Appeal, noted as follows:

> I gather from the judgment of Hill J., and from what has been said by learned counsel, that this question is becoming one of growing importance. In the days when the early decisions were given, no doubt what were called Government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times sovereigns and sovereign states have taken to owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in

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117 See Charles Fairman, "Some Disputed Applications of the Principle of State Immunity", *22 American Journal of International Law* (1928) 566. See also H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," Note 9 above at 224.

118 See Bernard Fensterwald, Jr. "Sovereign Immunity and Soviet State Trading" (February 1950) 63(4) *Harvard Law Review* 614. See also Alina Kaczorowska, *Public International Law* (4th ed) (*Routledge,* 2010) at 366 – 368.

119 See UK State Immunity Act, Note 93 above.

120 See Tate Letter, Note 92 above. See also Joan Donoghue, "Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception", (1992) 17 *Yale Journal of International Law* 489.

121 *The Porto Alexandre* [1920] Probate 30. The *Porto Alexandre* was an enemy ship of German origin which, after having been requisitioned by the Portuguese Government was declared a lawful prize of war and was used thereafter by Portugal for ordinary trading voyages, earning freight.

122 *The Porto Alexandre*, Note 121 above.

> ordinary trading. That fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest.[123]

Scrutton, L. J. also remarked that:

> … no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these courts. The *Parlement Beige* excludes remedies in these courts.[124]

The Court of Appeal's reliance on the *Parlement Belge* was a function of *stare decisis* but it is hardly obscure from the *obiter dicta* of the justices that they considered the shield of immunity for commercial activities to be fundamentally unjust.[125]

In *The Charkieh*[126] – a case before the Admiralty Division of the High Court some forty-five years before the *Porto Alexandre* – the owners, master and crew of *The Batavier*, a ship which suffered damage when *The Charkieh* collided with it in the Thames, instituted an action to recover damages. A petition on protest was filed on behalf of the defendants who claimed that *The Charkieh* was the property of the Khedive, reigning sovereign of the State of Egypt, and a public vessel of the Government.[127]

In this earlier case, Sir Robert Phillimore – whose similarly reasoned ruling in the High Court in *The Parlement Belge* six years later[128] was overturned by the Court of Appeal[129] – ruled that although the ship was owned by the Khedive of Egypt and was crewed by officers holding commissions as naval officers from the Khedive, *The Charkieh* had come with commercial cargo to England, had gone through customs as an ordinary merchant ship, was at the time of the collision with the *Batavier* under charter to a British subject and was billed to carry cargo as a merchant ship to Alexandria in Egypt. In the words of Sir Robert Phillimore:

> No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; while it would be easy

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123 See Bankes L.J. in *The Porto Alexandre*, Note 121 above, at page 34.

124 See Scrutton L.J. in *The Porto Alexandre*, Note 121 above, at page 38.

125 See Warrington L.J. in *The Porto Alexandre*, Note 121 above, at pages 35 – 36. See also *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. 9 Wheat. 904 (1824) at page 907 where Chief Justice Marshall, notwithstanding his full-throated support for absolute immunity in the *Schooner Exchange* twelve or so years before stated as follows:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

126 See *The Charkieh*, Note 67 above.

127 See *The Charkieh*, Note 67 above.

128 The *Parlement Belge* (1879), Note 102 above.

129 See *The Parlement Belge* (1880), Note 55 above.

> to accumulate authorities for the contrary position … Upon all grounds therefore I pronounce against the protest, and I think I must in justice to the suitor give him the costs of these proceedings.[130]

The *ratio* of this judgment in the Admiralty Division was overturned by the Court of Appeal in *The Parlement Belge*, which (notwithstanding Lord Denning's espousal in *Rahimtoola v. Nizam of Hyderabad*[131] of similar views as Sir Robert Phillimore) prevailed as a binding precedent in English Courts until 1975 when the Privy Council did away with it in *The Philippine Admiral.*[132]

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130 See Sir Robert Phillimore in *The Charkieh*, Note 67 above at pages 99 – 100. Sir Robert Phillimore provided the rationale for his judgment as follows:

> First, that his highness the Khedive, however exalted his position and distinguished his rank, has failed to establish that he is entitled to the privileges of a sovereign prince, according to the criteria of sovereignty required by the reason of the thing, and by the usage and practice of nations as expounded by accredited writers upon international jurisprudence; Secondly, that, on the assumption he is entitled to such privilege, it would not oust the jurisdiction of this Court in the particular proceeding which has been instituted against this ship; and thirdly, that, assuming the privilege to exist, it has been waived with reference to this ship by the conduct of the person who claims it.

131 See *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379. In 1948, when Indian troops invaded Hyderabad, money in the account of Hyderabad's absolute sovereign, or Nizam, and his Government at an English bank was transferred without authority by one of the persons entitled to operate the account into the account of the then High Commissioner for Pakistan in the United Kingdom. The latter received the funds on the instructions of the Foreign Minister of Pakistan. The Nizam and his Government brought an action against the High Commissioner and the bank to reclaim the money. The High Commissioner of Pakistan applied for the writ to be set aside and the proceedings against the Nizam be stayed because the action sought to implead a foreign sovereign, Pakistan, or sought to interfere with the right or interest of the Government of Pakistan in the money. Although it was conceded that the High Commissioner had not established any right to the money, the House of Lords held that the writs should be set aside against the High Commissioner and the proceedings against the bank stayed. Lord Denning, while ruling with the majority, held at page 422, that:

> If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: *but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.* (Emphasis added)

132 See *Philippine Admiral (Owners) v. Wallem Shipping (Hong Kong) Ltd. and Another* [1977] A.C. 373. This was an appeal from the full bench of the Supreme Court of Hong Kong to the Privy Council. The two respondents – as plaintiffs – had brought suit against the owners of the *Philippine Admiral* (the Philippine Reparation Commission, which was an agency of the Government of the Philippines) the first for goods supplied and disbursements made for the ship and the second for damages for a breach of charter-party. On the basis of interlocutory applications made by the owners of the ship, the Court set aside the writs of summons and all subsequent proceedings commenced by the respondents on the ground that the ship was the property of the Government of the Republic of the Philippines, a recognized foreign independent State. Upon appeal, the full bench of the Supreme Court allowed the respondents appeal and the Privy Council dismissed the application to overturn the full bench of the Supreme Court.

It was the reasoning of the Courts in those cases as well as the "Tate Letter"[133] in the United States[134] and subsequent legislation in both the United States[135] and the United Kingdom[136] that drove the final nails into the coffin of the doctrine of absolute immunity and concluded the evolution of the commercial exception thereto.[137]

4.3 The Territorial Tort Exception to Immunity.

A territorial tort exception to immunity is a fairly recent development and has not undergone the furnace moulding that the extensive period of development under common law generated for the commercial exception to immunity.[138] Indeed, whether or not there is a tort exception to both *acta jure imperii* and *acta jure gestionis* was the subject of extensive debate and deliberation in the *Jurisdictional Immunities of the State Case*[139] where the ICJ avoided making a definitive pronouncement on the former by stating that:

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133 Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney Gen. Philip B. Perlman (May 19, 1952), *reprinted in* 26 Department of State Bulleting 984 (1952). Citing trends in the Netherlands, Germany, Belgium, Italy, France, Austria, Greece, Romania, Peru and Denmark, the Tate Letter telegraphed the US Government's adoption of a restrictive approach to sovereign immunity which provided the cover of immunity for a State's public but not commercial acts. It is not unreasonable to believe that the writings of such eminent jurists as Professor H. Lauterpacht in 1951, such as "The Problem of Jurisdictional Immunities of Foreign States" (1951), Note 9 above, influenced the reasoning of the Tate Letter in 1952. Lauterpacht had argued against the doctrine of State immunity, by asserting that:

> At a period in which in enlightened communities the securing of the rights of the individual, in all their aspects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise whenever the state – our own state or a foreign state – screens itself behind the shield of immunity in order to defeat a legitimate claim.

See also Schmitthoff and Wooldridge in "The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading" Note 10 above, at 204.

134 Although the Tate Letter of 1952 is widely credited with the formal recognition of a restricted scope of sovereign immunity, such cases as *The Attualita* [4238 F. 909 (4th Cir. 1916)] before that certainly played a role. *The Attualita* was a private commercial ship, that had been requisitioned by the Italian government and directed to carry cargo. When an American Court assumed jurisdiction in an action instituted by the plaintiffs who claimed that the negligence of the Attualita's crew had caused their ship to sink, the Italian Government protested. In the District Court, the vessel was ordered released on grounds of sovereign immunity. The Fourth Circuit overturned the District Court citing a concern about the injustice of a plethora of similar plaintiffs being unable to claim a remedy on moral or legal grounds.

135 The Foreign Sovereign Immunities Act (FSIA) was enacted in 1976. It sets out the limitations for bringing suit against a foreign sovereign nation or its political subdivisions, agencies, or instrumentalities in US courts.

136 The State Immunity Act (SIA) was enacted in 1978, available at http://www.legislation.gov.uk/ukpga/1978/33/pdfs/ukpga_19780033_en.pdf, accessed on 31 October 2018.

137 Taking a cue from the US and the UK, multiple jurisdictions have enacted statutes similar to the FSIA and the SIA. A few examples of such are the State Immunity Act of Singapore (1979), the State Immunity Ordinance of Pakistan (1981), the Foreign States Immunity Act of South Africa (1981), the State Immunity Act of Canada (1982) and the Foreign Sovereign Immunity Act of Australia (1985).

138 The commercial exception to sovereign immunity, from the case law, was in development for over more than a century and a half.

139 See *Jurisdictional Immunities of the State Case,* Note 2 above. During the Second World War, Italy had fought as an ally of the German Reich until 1943, when she surrendered to Allied forces and declared war on Germany. German forces which occupied parts of Italy perpetrated several atrocities – including massacres and enslavement – against both civilians and soldiers. After the war, Germany had enacted several laws to facilitate compensation for such victims or waive their rights. Several Italian internees who had been subjected to forced labour were not able to secure compensation and instituted suit in Italian courts. Germany claimed jurisdictional immunity before foreign courts but the courts held that *"… jurisdictional immunity is not absolute…"* and that *"…in cases of crimes under international law, the jurisdictional immunity of States should be set aside."* Greek courts had, in cases arising from the same set of facts also set aside Germany's immunity

> The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary international law a "tort exception" to State immunity applicable to *acta jure imperii* in general.[140]

One of Italy's principal arguments before the Court had been that under customary international law, a State was no longer entitled to immunity where its actions had occasioned "death, personal injury or damage to property on the territory of the forum State, even if the act in question was performed *jure imperii*."[141]

As the Court found, any entitlement to immunity as between Germany and Italy could only be predicated on customary international law, rather than treaty. Although Germany was one of the eight parties to the European Convention on State Immunity,[142] Italy was party to neither the European Convention on State Immunity, nor the United Nations Convention on the Jurisdictional Immunities of States and their Property,[143] the latter of which is yet to enter into force.[144]

Notwithstanding the fact that the UN Convention on the Jurisdictional Immunities of States and their Property is yet to enter into force, Article 12 of the Convention provides clarity on what ill it sought to cure as follows:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.[145]

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for atrocities visited upon Greek plaintiffs towards the end of the Second World War. Because of a decision by the Greek Government, the Greek Courts' rulings became unenforceable in Greece, whereupon the claimants asked Italian courts to enforce the judgment. Italian courts obliged by issuing a charge over a building owned by the German Government in Italy.

140 See *Jurisdictional Immunities of the State Case,* Note 2 above at paragraph 65.

141 See *Jurisdictional Immunities of the State Case,* Note 2 above at paragraph 62.

142 See ETS No.074, European Convention on State Immunity. Adopted in Basel on Basel, May 16, 1972 and entered into force on June 11, 1976. Text of Convention and its status are respectively available at https://rm.coe.int/16800730b1 and https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074 accessed 11 December 2018.

143 See UN Doc A/59/508, United Nations Convention on the Jurisdictional Immunities of States and their Property, adopted in New York on December 2, 2004. Text of Convention and status are respectively available at http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf and https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-13&chapter=3&lang=en accessed 11 December 2018.

144 See *Jurisdictional Immunities of the State Case,* Note 2 above at paragraph 54.

145 Similarly worded, Article 11 of the European Convention on State Immunity provides as follows:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Travaux préparatoires and other commentary on the text of Article 12, including from the International Law Commission (ILC),[146] affirms that the article was intended to provide recourse for persons or estates of persons who suffer personal injury, death or loss of or damage to property through tortious – intentional, accidental or negligent – actions attributable to a foreign State. The provision sought to address the prejudice of *forum non-conveniens* that the victim would otherwise be subjected to if he were compelled to seek compensation in the courts of the perpetrator, rather than in the *lex loci delicti commissi*.

The ILC noted in its commentary that the provision sought particularly to address miscarriages of justice in cases where compensation was denied to victims for accidents occurring routinely in the forum State because the person who had caused the accident had immunity – even though the compensation would actually be sought from and paid by an insurance company. The removal of immunity in such cases would therefore deny insurance companies the possibility of evading responsibility and denying insurance claims properly arising.[147]

Beyond unintentional torts, such as motor vehicle accidents, however the reasoning that undergirded the ILC elaboration on a territorial tort exception had found application in dealing with such torts as assassinations and other intentional infliction of harm in US courts over a decade earlier. In *Letelier v. Republic of Chile*,[148] the US District Court for the District of Columbia had ruled as follows:

> Although the unambiguous language of the Act makes inquiry almost unnecessary, further examination reveals nothing in its legislative history that contradicts or qualifies its plain meaning. The relative frequency of automobile accidents and their potentially grave financial impact may have placed that problem foremost in the minds of Congress, but the applicability of the Act was not so limited, for the committees made it quite clear that the Act "is cast *in general terms* as applying to *all tort actions* for money damages" so as to provide recompense for "the victim of a traffic accident or *other noncommercial tort.*[149]

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146 See A/CN.4/SER.A/1991/Add.l (Part 2), 1991 2(2) *Yearbook of the International Law Commission*, Report of the Commission to the General Assembly on the work of its forty-third session, available at http://legal.un.org/ilc/publications/yearbooks/english/ilc_1991_v2_p2.pdf accessed 28 October 2018.

147 See ILC Commentary, Note 146 above.

148 See *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). In this case, Letelier a former Chilean Ambassador to the United States and the wife of his aide were killed when a bomb planted beneath the driver's seat of the car they were riding in was detonated. US investigations traced the assassination to the government of Chile. The estates of the former ambassador and his aide's wife instituted a civil tort action in the US District Court for the District of Columbia against the identified perpetrators and the Republic of Chile. Chile sent two Diplomatic Notes to the US State Department asserting its sovereign immunity and claiming that the allegations against it were false and the defendants failed to enter an appearance. The Court entered default judgment in favour of the plaintiffs.

149 See *Letelier v. Republic of Chile*, Note 148 above at pages 671 – 672. The judgment was made in accordance with the US' Foreign Sovereign Immunities Act, which had provided inspiration for the UN Convention. See Winston P. Nagan and Joshua L. Root "The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory," (2013) 38 *North Carolina Journal of International Law and Commercial Regulation* 375, at 418 – 433.

While tortious liability goes beyond physical injury or loss,[150] Article 12 does not lift immunity for defamation or libel – such injury not being considered physical injury or damage.[151] Other limitations to the ambit of Article 12 are that the tortious action or omission must occur in whole or in part in the forum State and that the perpetrator of the tortious action must also be present in that State at the time of the act or omission.[152]

It is important to note here that the above-enumerated exceptions to immunity – commercial exception and territorial tort exception – and the rationales for same are grounded on and have application only in civil actions.

5. Contemporary Application of Sovereign Immunity.

The types of immunity elaborated upon above are immunities that accrue to the State and through the State to its high representatives. The State immunity which sprung from the notional equality of States[153] has over time yielded a range of different types of immunity, some of which have been codified in multi-lateral treaties but some of which derive their force from customary international law. Immunities for diplomats[154] and immunities undergirding consular relations[155] and special missions[156] belong to the former category while immunities of Heads of State and other high-ranking officials are derived from custom.

Contemporary international law recognizes two types of immunities for officials of a State[157] both deriving from the sovereignty of a State and its jurisdictional immunities. The one is immunity *ratione personae*, or personal immunity, which attaches to the person of officials who occupy a limited number of defined high offices in their countries and the other is immunity *ratione materiae* – which is a functional immunity that is founded on the Act of State doctrine and insulates persons acting in their official capacities and on behalf of the State from liability.[158] Immunity *ratione materiae* also

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150 Black's Law Dictionary defines a tort as "a legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual." Definition available at http://thelawdictionary.org/tort/ accessed 28 October 2018.

151 See ILC Commentary, Note 146 above.

152 See Report of the Commission to the General Assembly on the work of its forty-third session, Note 146 above at 44 – 46. See also Judi Abbott, "The Noncommercial Torts Exception to the Foreign Sovereign Immunities Act" (1985) 9(1) *Fordham International Law Journal* 134, at 142.

153 See Chief Justice Marshall *in The Schooner Exchange v. McFaddon*, Note 53 above at page 137.

154 See Vienna Convention on Diplomatic Relations (1961), Note 70 above.

155 See Vienna Convention on Consular Relations (1963), Note 71 above.

156 See Convention on Special Missions (1969) *United Nations Treaty Series*, Volume 1400, p. 231. It was adopted by the UN General Assembly on 8 December 1969 and entered into force on 21 June 1985, available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf accessed 28 October 2018.

157 See Dapo Akande, *International Law Immunities and the International Criminal Court*, (2004) 98 American Journal of International Law 407, at 409 – 412.

158 See Joanne Foakes *The Position of Heads of State and Senior Officials in International Law,* Note 97 above at pages 7 – 10.

remains available, post incumbency, to persons who have previously enjoyed immunity *ratione personae* for their public actions on behalf of the State.[159]

5.1 Immunity *Ratione Personae*.

Personal immunity or immunity *ratione personae* is a type of immunity that accrues to a limited number of officials because of the office they hold, rather than actions that they have taken. This immunity, which applies during their incumbency, applies to both personal and official acts taken before and during their incumbency.[160] In the oft-cited *Arrest Warrant Case*, the ICJ noted at the outset that:

> in international law it is firmly established that … certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.[161]

Although it has been argued that the words "certain holders of high office" mean that the examples of offices mentioned by the Court were non-exhaustive and could conceivably permit the extension of immunity *ratione personae* to high ranking State officials other than the *troika* of Head of State, Head of Government and Minister for Foreign Affairs,[162] it is also arguable that the express mention of such offices as Head of State, Head of Government and Minister for Foreign Affairs, could – under the *expressio unius exclusio alterius*[163] rule of interpretation – serve to exclude offices that are not of equal or similar stature.

Accordingly, the rationale of the English Courts in declining to authorize the issue of an arrest warrant for the arrest of Israeli Defence Minister, General Shaul Mofaz,[164] was arguably – on the basis of the *Arrest Warrant* case – not

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159 See Article 1(b)(iv) of the UN Convention on the Jurisdictional Immunities of States and their Property which articulates the principle. The Convention, which is not yet in force includes "representatives of the State acting in that capacity" in the definition of State; available at https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf accessed 28 October 2018.

160 See *Arrest Warrant C*ase, Note 2 above at paragraphs 54–55. See also Thomas Weatherall "*Jus Cogens* and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence," (2015) 46 *Georgetown Journal of International Law* 1151, at 1157 – 1159.

161 See *Arrest Warrant Case*, Note 2 above at paragraph 51.

162 See Paragraph 9 of the AU Decision on Africa's Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1(Oct.2013), taken at the Extraordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia, on 12 October 2013, available at http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf accessed 28 October 2018.

163 See Edwin Kellaway, *Principles of Legal Interpretation of Statutes, Contracts and Wills* (Butterworths, 1995)) at 60 and 72. See also Clifton Williams "Expressio Unius est Exclusio Alterius," (June 1931) 15(4) *Marquette Law Review* 191.

164 See Ruling of Judge Pratt on 12 February 2004 in the Bow Street Magistrates' Court in *Application for Arrest Warrant Against General Shaul Mofaz*, 128 ILR 709. In 2004, relatives of persons alleged to have been killed in military operations executed by the Israeli Defence Forces (IDF) in Palestinian Territories occupied by Israel made application to the Bow Street Magistrates' Court to issue a warrant for the of arrest of Israel's Minister of Defense, General Shaul Mofaz who was visiting the UK at the time. The applicants alleged grave breaches of the Geneva Conventions by the IDF, under the command of General Mofaz, in the wilful killing, infliction of great injury and suffering and the disproportionate destruction and appropriation of property. Relying on *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)*, the Court held that although there appeared to be no statutory basis for a Defense Minister to claim to immunity, English courts would give effect to immunities available under customary international law, subject to a statutory requirement not to do so. The

unreasonable. A risk of proliferation of immunity *ratione personae* claims was however laid bare by such cases as *Evgeny Adamov v. Federal Office of Justice*,[165] where a Swiss court seemed to suggest – albeit *obiter* – that a Russian minister for atomic energy could possibly claim the cloak of immunity *ratione personae*.[166]

In likely response to what was clearly a topical issue then, the International Law Commission undertook in 2007 to include the subject of Immunity of State Officials from Foreign Criminal Jurisdiction in its work program.[167] The adoption by the Commission, in 2013, of Draft Articles on the scope of application of immunity *ratione personae*[168] restricted such immunity only to Heads of State and Government and Ministers of Foreign Affairs[169] – a conclusion which seems to have been arrived at only after robust debate among members of the Commission.[170]

While the list of persons covered by immunity *ratione personae* appears – from the International Law Commission's deliberations – to be relatively

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Court also affirmed the view that in holding - in the Arrest Warrant Case - that certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs, enjoy both civil and criminal immunities from jurisdiction in other States, the ICJ did not intend for the troika of Head of State, Head of Government and Minister for Foreign Affairs to be an exhaustive list. It held however that whether or not a high-ranking official could claim immunity *ratione personae* would depend on the position they held, it being unlikely that a Minister for Culture, Media, and Sports would automatically acquire State immunity.

165 See *Evgeny Adamov v. Federal Office of Justice*, Swiss Federal Tribunal, No. 1 A.288/2005.

166 See *Evgeny Adamov v. Federal Office of Justice*, Note 165 above at paragraph 3.4.2.

167 See Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law,* Note 97 above at 3. See also *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur [Document A/CN.4/601], (29 May 2008); *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur International Law Commission, U.N. Doc. A/CN.4/631 (10 June 2010), and, *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction,* by Roman Anatolevich Kolodkin, Special Rapporteur, International Law Commission, U.N. Doc. A/CN.4/646 (24 May 2011). See also *Preliminary Report on the Immunity of State Officials from Foreign Criminal Jurisdiction* by Concepcion Escobar Hernandez, Special Rapporteur, International Law Commission, U.N. Doc. A/CN.4/654 (31 May 2012); *Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction* by Concepcion Escobar Hernanez, Special Rapporteur, International Law Commission, U.N. Doc. A/CN.4/661(4 April 2013); *Third Report on the Immunity of State Officials from Foreign Criminal Jurisdiction* by Concepcion Escobar Hernanez, Special Rapporteur, International Law Commission, U.N. Doc A/CN.4/673 (2 June 2014); *Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction,* by Concepcion Escobar Hernanez, Special Rapporteur, International Law Commission, U.N. Doc A/CN.4/686 (29 May 2015); *Fifth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction,* by Concepcion Escobar Hernanez, Special Rapporteur, International Law Commission, U.N. Doc A/CN.4/701 (14 June 2016); all available at http://legal.un.org/ilc/guide/4_2.shtml, accessed 28 October 2018.

168 See text of Draft Articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission on Immunity of State officials from foreign criminal jurisdiction, available at http://legal.un.org/docs/?symbol=A/CN.4/L.814 accessed 28 October 2018.

169 See Draft Article 3 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission on Immunity of State officials from foreign criminal jurisdiction.

170 See page 12 of Statement of Mr. Dire Tladi, Chairman of the Drafting Committee, 7 June 2013, available at http://legal.un.org/docs/?path=../ilc/sessions/65/pdfs/immunity_of_state_officials_dc_statement_2013.pdf&lang=E accessed 28 October 2018. See also Commentary to Draft Art. 3, ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, Report of the International Law Commission on the Work of its Sixty-Fifth Session, 2013 YILC Vol. II (Part Two), at 45. It appears that Tladi, Petrič and Murase were the only members of the Commission that supported a restricted scope of immunity *ratione personae* (to the Troika), most members noting that the judgment in the *Arrest Warrant Case* Court's judgment, for lacking thorough analysis of State practice and for yielding inconsistent separate opinions from several judges, was not sufficient grounds for concluding that a customary rule existed. See Dire Tladi, "The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?" (2018) 32 *Leiden Journal of International Law*, 169 – 187.

straightforward, a country's constitution ultimately prescribes who is a Head of State or Head of government and in surprisingly more than a few cases, the situation is different from what one would ordinarily expect and may require facts to be adduced.

In Iran for instance, the most senior official is not the President of the Islamic Republic but rather the Supreme Leader.[171] Colonel Muammar Ghaddafi, who ruled Libya as Revolutionary Chairman of the Libyan Arab Republic from 1969 to 1977 and then as Brother Leader of the Great Socialist People's Libyan Arab Jamahiriya from 1977 to 2011 had no official title within the Government of Libya even though he was the *de facto* leader.[172] It is said also of the former North Korean leader, Kim Jong-Il that his official title was Chairman of the National Defense Commission while the formal roles of Head of State and Head of Government were respectively exercised by the Chairman of the Praesidium of the Supreme People's Assembly and a Premier.[173]

Also, although such positions as Head of State and Head of Government are typically occupied by one person, it may in some cases be a group of people as in the case of the Federal Council in Switzerland which comprises seven persons among whom the Presidency rotates annually.[174] There may be authority in the case of Switzerland for only the person holding the rotating presidency to claim the cloak of immunity *ratione personae*[175] but same cannot be said of the Principality of Andora where the position of Head of State is, by the constitution, occupied by two co-Princes – the President of France and the Bishop of Urgel.[176] This would mean that immunity *ratione personae* would attach to each.

As is the case with the President of France's leadership role in a country other than France, Queen Elizabeth II of the United Kingdom is not only Head of State of the United Kingdom but also Head of State of fifteen Commonwealth countries – where she is represented by a Governor General.[177] In a commonwealth country such as Australia, which still retains the Queen as Head of State, the Governor General would, by being a high representative of the Queen and

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171 See Articles 107 – 112 of the Constitution of the Islamic Republic of Iran, available at http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Iran_Constitution_en.pdf accessed 28 October 2018.

172 Ghaddafi's many titles – not necessarily grounded in reality – were a source of some amusement. See for instance *"Libya's Gaddafi: A man of many titles" Arabiya News* (1 April 2009), available at https://www.alarabiya.net/articles/2009/04/01/69716.html accessed 2 October 2016.

173 See Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law,* Note 97 above at 31, footnote 7.

174 See generally Chapter 3 (Federal Government and Federal Administration) – particularly Articles 174 – 177 of the 1999 Constitution of Switzerland, as amended, available at https://www.constituteproject.org/constitution/Switzerland_2002.pdf accessed 28 October 2018.

175 Since only one person would actually occupy the position of president at any given time, this would be similar to the Malaysian elected monarchy where the King (Yang di-Pertuan Agong) is elected for a term of five years from among the membership of the Conference of Rulers. See Article 32 of the Federal Constitution of Malaysia as amended in 2006 and reprinted in 2010, available at http://www.wipo.int/edocs/lexdocs/laws/en/my/my063en.pdf accessed 28 October 2018.

176 See Article 43 of the Constitution of the Principality of Andorra, available at http://unpan1.un.org/intradoc/groups/public/documents/UN-DPADM/UNPAN043624.pdf accessed 5 May 2019.

177 See Official website of Governor General of Australia, available at http://www.gg.gov.au/governor-generals-role accessed 28 October 2018.

notionally therefore, *acting* Head of State, also be entitled to immunity *ratione personae* – notwithstanding his largely ceremonial role.[178]

The constitutional rules that determine who can claim the cover of immunity *ratione personae* could potentially yield fairly intriguing circumstances. The arrest of, and announcement in June 2017 by the police in Australia that Cardinal Pell, who was Finance Minister of the Holy See and third in the Vatican's hierarchy,[179] would face trial for child abuse in the country of his birth, Australia,[180] is one such instance.[181] Barring the likely opprobrium for purveyors of morality (as men of the cloth are) seeking to avoid accountability,[182] it is likely that Cardinal Pell in this instance, would – on a purely doctrinal basis – be entitled to immunity as a citizen and high representative of the Holy See. The case for such immunity would be even stronger if he were foreign minister of the Holy See.[183]

5.2 Immunity *Ratione Materiae*.

Immunity *ratione materiae* or functional immunity, unlike immunity *ratione personae* attaches to a person not for the office he occupies but for official acts attributable to the State.[184] This cloak of immunity may be claimed by all persons and bodies who have undertaken official acts on behalf of the State including

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178 Section 61 of the Australian Constitution provides that "*The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."* The Constitution of Australia is available at https://www.legislation.gov.au/Details/C2005Q00193 accessed 29 October 2018.

179 Per Law n. CXXXI of February 22 of 2011 (signed by Pope Benedict), Cardinal Pell had since acquired citizenship of the Holy See and would not, if he chose to, be invoking immunity – by reason of an official position – against his country of citizenship. For further detail see Dante Figueroa, "The Current Legislation on Citizenship in the Vatican City State" *In Custodia Legis Blog*, Library of Congress (18 July 2012), available at https://blogs.loc.gov/law/2012/07/the-current-legislation-on-citizenship-in-the-vatican-city-state/ accessed 11 December 2018.

180 See Joshua Berlinger and Laura Smith-Park, "Top Adviser to Pope Charged with Sexual Assault Offenses" *CNN* (30 June 2017) which identifies Cardinal Pell as third in the Vatican's hierarchy, available at http://edition.cnn.com/2017/06/28/asia/cardinal-pell-australia/index.html accessed 29 October 2018. See also Elliot Hannon "Vatican No. 3 Charged With Sexual Abuse by Australian Court" *Slate* (28 June 2017), available at http://www.slate.com/blogs/the_slatest/2017/06/28/vatican_number_three_charged_with_sexual_abuse_by_australian_court.html accessed 29 October 2018. A 12-member jury unanimous convicted Cardinal Pell on n December 11, 2018. See *Top Vatican cleric Cardinal George Pell convicted of child sex crimes*, available at https://www.dw.com/en/top-vatican-cleric-cardinal-george-pell-convicted-of-child-sex-crimes/a-47688228**.**

181 See Associated Press *Australian Police Charge Vatican Cardinal With Sex Offenses,* New York Times (28 June 2017), available at https://www.nytimes.com/aponline/2017/06/28/world/asia/ap-as-australia-cardinal-charged.html, accessed on 30 June, 2017.

182 See for instance Michael Dougherty *A Child Abuse Scandal is Coming for Pope Francis*, This Week (3 January 2017), available at http://theweek.com/articles/670249/child-abuse-scandal-coming-pope-francis accessed 29 October 2018.

183 This is not purely idle musing as there is a precedent of Pope Benedict XVI claiming immunity from suit with the support of the US Department of Justice. This was in a civil action in 2005 – the year Cardinal Ratzinger became Pope where it was alleged that Pope Benedict XVI had, in his prior life, participated in a conspiracy to shield a seminarian who had sexually molested three boys. See *John Doe I, John Doe II, And John Doe III v. Roman Catholic Diocese of Galveston-Houston et al* [Civil Action No. H-05-1047 – Filed in TXSD on 12/22/05, available at https://www.gpo.gov/fdsys/pkg/USCOURTS-txsd-4_05-cv-01047/pdf/USCOURTS-txsd-4_05-cv-01047-2.pdf accessed 29 October 2018. Given that Popes are popes for life (Pope Benedict being the only to have retired from the papacy since Gregory XII in 1415), the promise of a time-bound immunity *ratione personae*, would in their case, be ordinarily illusory.

184 See Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law*, Note 97 above at 7 – 9.

persons who were previously cloaked with immunity *ratione personae* for official acts during their incumbency.[185] Immunity *ratione personae* is primarily a procedural defence but immunity *ratione materiae* is both a substantive and procedural defence founded on act of State.[186]

As Dapo Akande and Sangeeta Shah have noted, immunity *ratione materiae* of State officials is – in order to avoid a situation where foreign courts seek to sidestep a State's immunities by acting against persons who act on behalf of the State – broader than the immunity of the State itself.[187] An official would therefore be immune not only for a State's sovereign acts for which immunity can be claimed, but also for official albeit non-sovereign acts. Thus did the English Court of Appeal state in *Propend Finance Pty Ltd v. Sing*[188] that:

> The protection afforded by the Act of 1978 to States would be undermined if employees, officers (or, as one authority puts it, 'functionaries') could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself.[189]

While immunity *ratione personae* is ordinarily time-bound,[190] immunity *ratione materiae* does not suffer any such constraints and hence the effort – particularly by human rights advocates – to limit the ability to invoke same.[191] Two related arguments are typically proffered in service to this objective: the first is that immunity *ratione materiae* may only be invoked for official acts and that international crimes may not properly be described as official acts, thereby rendering immunity *ratione materiae* unavailable for such crimes.[192] The second is that because some international crimes have attained the status of *jus cogens*, immunity *ratione materiae* should not be available because *jus cogens* violations

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185 See Dapo Akande and Sangeeta Shah, Note 51 above at 815 – 852. See also *Hatch v. Baez*, 7 Hun 596, New York Supreme Court, 1876.

186 See Dapo Akande and Sangeeta Shah, Note 51 above at 826 – 827.

187 See Dapo Akande and Sangeeta Shah, Note 51 above at 827. See also Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law,* Note 97 above, at 9.

188 See *Propend Finance Property Ltd and Others v. Sing and Another*, (1997) 111 ILR 611.

189 See *Propend Finance Property Ltd and Others v. Sing and Another,* Note 188 above at page 670. See also the House of Lords in *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 at paragraph 130.

190 Africa's history with elected leaders seeking to stay in office interminably through revisions to constitutions suggest that the temporariness of the application of immunity *ratione personae* cannot be assumed. See Isaac Mufumba. *Presidents who amended constitution to stay in power* Daily Monitor (18 September 2017), available at http://www.monitor.co.ug/Magazines/PeoplePower/Presidents-who-amended-constitution-to-stay-in-power/689844-4099104-qj5n58z/index.html accessed 29 October 2018. See also Kamissa Camara *Here's how African leaders stage 'constitutional coups': They tweak the constitution to stay in power* Washington Post (16 September 2016), available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/16/heres-how-african-leaders-stage-constitutional-coups-they-tweak-the-constitution-to-stay-in-power/?noredirect=on&utm_term=.b0c3ac592882 accessed 29 October 2018.

191 See Sevrine Knuchel "State Immunity and the Promise of *Jus Cogens*," (2011) 9(2) *Northwestern Journal of International Human Rights* 149. See also Andrea Bianchi "Immunity versus Human Rights: The Pinochet Case" (1999) 10 *European Journal of International Law* 237.

192 See Andrea Bianchi, "Immunity Versus Human Rights: The Pinochet Case", Note 191 above at 265. See also Belsky, Merva, and Roht-Arriaza "Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law" (1989) 77 *California Law Review* 365.

– for violating non-derogable norms – cannot be sovereign acts. Even if, the argument goes, it is possible to invoke immunity *ratione materiae* for international crimes, because *jus cogens* norms trump all other norms, immunity that would be ordinarily available should yield to accountability for the breach of *jus cogens* norms.[193]

The next chapter proposes to delve specifically into whether or not there are *jus cogens* human rights exceptions to immunity, so suffice it to say here – in countering the above proffered arguments – that the proffered arguments suffer material defects. While torture is considered to be a *jus cogens* crime in customary international law,[194] the Torture Convention which outlaws it, defines torture as;

> any act by which severe pain or suffering … is … inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[195]

The fact that the *jus cogens* crime of torture requires official action to qualify it as such, appears to negate the argument that a breach of jus cogens cannot be an official act, which is the essence of the argument presented to limit the scope of application of immunity *ratione materiae*.[196]

6. Conclusion.

For purposes of being able to ground subsequent chapters on the essence of the present chapter, it is useful to recap the content hereof as follows:

(i) The origins of sovereign immunity, while obscure,[197] can be found in the royal prerogatives of Europe in the latter part of the middle ages;[198]

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193 See Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," Note 191 above at 265.

194 See Ruth Wedgwood "Augusto Pinochet and International Law" (2000) *Faculty Scholarship Series,* Paper 2283, available at http://digitalcommons.law.yale.edu/fss_papers/2283 accessed 29 October 2018

195 See Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UNTS 85, is limited to acts 'of a public official or other person acting in *an official capacity*'.

196 See reasoning of US Supreme Court in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) where the petitioner Saudi Arabia sought to overturn a ruling of the Court of Appeal to allow a civil claim against Saudi Arabia for the torture of the respondent. In overturning the Court of Appeal and affirming that the petitioner, Saudi Arabia was entitled to immunity Justice Souter noted at page 361 that:

> The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign State's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.

See also Dapo Akande and Sangeeta Shah, Note 51 above, at 842.

197 See George Pugh "Historical Approach to the Doctrine of Sovereign Immunity" Note 12 above at 477. See also Schmitthoff and Wooldridge in "The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading" Note 10 above at 199. See also Andrea Bianchi "Immunity versus Human Rights: The Pinochet Case" Note 191 above at 262. See also Hersch Lauterpacht "The Problem of Jurisdictional Immunities of Foreign States," Note 9 above at 228.

198 See Blackstone Commentaries, Note 36 above.

(ii) The doctrine of sovereign immunity appears to have been influenced by Roman Law, Canon Law, Tribal Law and Feudal Law – each strand of which variously influenced legal doctrine and the common law in England and Europe and subsequently the United States;[199]

(iii) With the emergence of the modern Westphalian State, immunities were expanded beyond the sovereign to the State and its agents and instrumentalities;[200]

(iv) Sovereign immunity has been founded on a number of theories – the notional equality of all States;[201] the theory of extra-territoriality;[202] the functional need of States and those who represent them to be able to go about their business unimpeded;[203] and, the courtesies arising from comity and the expectation of reciprocity among States[204] – some of which overlap and some of which are mutually exclusive;

(v) Immunities play a critical role in international statecraft as there are, without a doubt, very profound and cogent reasons for States and their high representatives to be able to conduct business and go about their affairs unimpeded;[205]

(vi) Even where sovereign immunity was absolute, a sovereign could still be subject to the jurisdiction of a foreign court in cases where he waived his immunity expressly[206] or impliedly by invoking the foreign court's jurisdiction;[207]

(vii) The rationales for immunities notwithstanding, sovereign immunity and derivatives therefrom, admit of certain exceptions – all of which can be traced to a recognition of changes in the circumstances upon which the doctrine was originally founded.[208] The profound need to offer remedies to persons who have suffered manifest

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199 See Guy Seidman, Note 16 above, at 19 – 43. See also Pollock and Maitland, Note 25 above at 515 – 518. See also Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," Note 191 above at 262.

200 See Andrea Bianchi. "Immunity versus Human Rights: The Pinochet Case." Note 191 above at 263.

201 See Emmerich De Vattel, *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Sovereigns*, Note 46 above. See also Chief Justice Marshall *in The Schooner Exchange v. McFaddon* Note 53 above at paragraph 11.

202 See Grant McClanahan, *Diplomatic Immunity: Principles, Practices, Problems*, Note 59 above.

203 See Arthur Watts, The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers, Note 5 above. See also preambular paragraphs 4 and 5 of the Vienna Convention on Diplomatic Relations (Note 70 above) and the Vienna Convention on Consular Relations (Note 71 above) respectively.

204 See Brett L.J. in *The Parlement Belge*, Note 55 above at pages 214 – 215. For more recent authorities see *Lafontant v. Aristide*, Note 81 above at page 132.

205 See Richard Garnett "The Defence of State Immunity for Acts of Torture" (1997) 97 *Australian Yearbook of International Law* 3, available at http://www.austlii.edu.au/au/journals/AUYrBkIntLaw/1997/3.html#fn1 accessed 29 October 2018. See also Dapo Akande and Sangeeta Shah, Note 51 above at page 818. See also Chanaka Wickremasinghe, "Immunities Enjoyed by Officials of States and International Organizations," in Michael Evans (Ed), *International Law* (3rd Edition, 2010), at page 380.

206 See Kay L.J. in *Mighell v. Sultan of Johore,* Note 98 above at page 164.

207 See also *Sultan of Johore v. Abubakar Tunku Aris Bendahar and Others*, Note 112 above.

208 See for instance Bankes L.J. and Scrutton L.J. in *The Porto Alexandre*, respectively note 123 and 124 above.

injustice from their inability to penetrate the cloak of immunity to seek remedy for injury has motivated the exceptions to the doctrine of absolute immunity;[209]

(viii) Contemporary international law recognizes two types of immunity, founded on State immunity, for natural persons: personal immunity or immunity *ratione personae* and functional immunity or immunity *ratione materiae*;[210]

(ix) Immunity *ratione personae* is said to attach to a limited number of persons, during their incumbency in certain high offices and immunity *ratione materiae* – it has been held – is co-extensive with and can even exceed the immunity of a State in order not to indirectly implead the State by going after its proxies.[211]

The origins of sovereign immunity, the exceptions it admits to and why are a necessary backdrop to addressing the source of human rights advocates' antipathy to the doctrine of sovereign immunity, the personal immunities (immunity *ratione personae* and *ratione materiae*) accruing therefrom and by extension, the immunity provision of the Malabo Protocol. The labour of the next chapter will be to interrogate the claim that the doctrine of Head of State immunity admits *or should admit* one more exception – a *jus cogens* human rights exception.[212]

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209 See dissent of Judge Yusuf in the *Jurisdictional Immunities of the State Case*, Note 96 above, at paragraph 35. See also Sir Robert Phillimore in *The Charkieh*, Note 67 above at pages 99 – 100. See also ILC Commentary on United Nations Convention on the Jurisdictional Immunities of States and their Property, Note 143 above. See also *Letelier v. Republic of Chile*, Note 148 above.

210 See Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law,* Note 97 above at pages 7 – 11.

211 See *Propend Finance Property Ltd and Others v. Sing and Another*, Note 188 above.

212 See Sevrine Knuchel "State Immunity and the Promise of *Jus Cogens*," Note 191 above. See also Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," Note 191 above. See also Brian Man-Ho Chok "Let the Responsible be Responsible: Judicial Oversight and Over-optimism in the *Arrest Warrant* Case and the Fall of the Head of State Immunity Doctrine in International and Domestic Courts" (2015) *30 American University International Law Review* 489. See also Jarrad Harvey "(R)evolution of State Immunity *Following Jurisdictional Immunities of the State (Germany v. Italy)* – Winds of Change or Hot Air?" (2013) 32 *University of Tasmania Law Review* 208.

Chapter 4

A *Jus Cogens* Human Rights Exception to Immunity: Fact, Fiction or Wishful Thinking?

1. Introduction.

In an article, which seems at first blush to be devoid of nuance, Bassiouni asserts forcefully that:[1]

> International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, *the non-applicability of any immunities up to and including Heads of State*, the non-applicability of the defense of "obedience to superior orders" (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under "states of emergency," and universal jurisdiction over perpetrators of such crimes.[2] (Emphasis added).

The seeming categorical assertions notwithstanding, the issue on which Bassiouni waxes lyrical is anything but settled. The question of whether or not continued recognition of immunity for Heads of State or other high-ranking officials must yield to accountability for violations of human rights norms that have attained the stature of *jus cogens* norms is one that has engaged no shortage of scholars. It has stimulated considerable and passionate debate and has produced streams of ink in many academic publications.[3] As

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1 See M Cherif Bassiouni "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'" (1996) 59(4) *Law and Contemporary Problems* 63, at 63.

2 The article itself is a thoughtful piece that sets out challenges in determining *jus cogens* and in identifying the elements of a peremptory norm, as well as challenges in determining priority over other competing or conflicting norms. Bassiouni admits (see page 67) that:

> … there is no scholarly consensus on the methods by which to ascertain the existence of a peremptory norm, nor to assess its significance or determine its content. Scholars also disagree as to the means to identify the elements of a peremptory norm, to determine its priority over other competing or conflicting norms or principles, to assess the significance and outcomes of prior application, and to gauge its future applicability in light of the value-oriented goals sought to be achieved.

3 See for example Andrea Bianchi "Immunity versus Human Rights: The Pinochet Case" (1999) 10 *European Journal of International Law* 237; Dapo Akande and Sangeeta Shah "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," (2010) 21(4) *The European Journal of International Law* 815; Dire Tladi "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff" (2015) 13 *Journal of International Criminal Justice* 3; Pasquale De Sena and Francesca De Vittor "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case", (2005) 16(1) *European Journal of International Law* 89; Thomas Weatherall "*Jus Cogens* and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence" (2015) 46 *Georgetown Journal of International Law* 1151 at 1157 – 1159; Roger O'Keefe "State Immunity and Human Rights: Heads and Walls, Hearts and Minds", (2011) 44 *Vanderbilt Journal of Transnational Law* 999; Liam Elphick "State Consent and 'Official Acts': Clearing The Muddied Waters of Immunity *Ratione Materiae for* International Crimes" (2016-2017) 41(1) *University of Western Australia Law Review* 275; Brian Man-Ho Chok "Let the Responsible be Responsible: Judicial Oversight and Over-optimism in the *Arrest Warrant* Case and the Fall of the Head of State Immunity Doctrine in International and Domestic Courts" (2015) 30 *American University International Law Review* 489; and Brian Man-Ho Chok "The Struggle between the Doctrines of Universal Jurisdiction and Head of State Immunity" (2013 – 2014) 20 *University of California, Davis Journal of International Law and Policy* 233. See also Rosanne Van Alebeek *The Immunities of States and their Officials in International Criminal Law and International Human Rights Law* (2008) Oxford University Press; See also Joanne Foakes, *The position of heads of State and senior officials in international law* (Oxford University Press, 2014); See also Hazel Fox and Philippa Webb, *The Law of*

Bassiouni himself acknowledges, the effect of *jus cogens* and the consequences of the breach thereof would be subject to disagreements informed by the philosophical premises of scholars and different standpoints on values such as the primacy of human rights and the preservation of world order.[4]

Indeed, the fact that the International Law Commission had occasion to consider various aspects of State and Sovereign immunity at its very first meeting in 1949,[5] has considered it multiple times since,[6] and is still seized with the subject of immunity, albeit in a different context,[7] attests to its complexity and its defiance of easy resolution because of political and other reasons.[8]

This Chapter proposes to examine the claim that recent strides in international human rights law, international humanitarian law and international criminal law have collectively served to vanquish any claims to immunity by Heads of State and high-ranking officials who commit international crimes.[9] This is a necessary backdrop to answering the purely doctrinal question as to whether in the face of breaches of *jus cogens* human rights norms, the immunity that Article 46A *bis* of the Malabo Protocol[10] confers on "Heads of State or Heads of Government, or anybody acting or entitled to act in such capacity" coheres with international law – *lex lata* – or represents a retrogression in international law norms that seek to prevent impunity for international crimes.

The inquiry will start with a brief overview of the concept of *jus cogens*, its philosophical underpinnings and its legal definition. This will be followed by a presentation of the arguments proffered to justify a *jus cogens* human rights exception to immunity for Heads of State and other high-ranking officials.[11] The inquiry will then proceed to

State Immunity (Oxford University Press, 2013); See also Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill/Nijhoff, 2015) and Yitiha Simbeye, *Immunity and International Criminal Law* (Ashgate, 2004).

4 See M Cherif Bassiouni "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'," Note 1 above at 67.

5 The Secretariat of the Commission prepared a survey of international law before the Commission's very first sitting in 1948, a section of which survey was titled Jurisdiction over foreign States." This was referenced in the Preliminary Report of Roman Kolodkin as covering "the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of their armed forces." See paragraph 6 of *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur [Document A/CN.4/601, 29 May 2008), available at http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_601.pdf&lang=ESX accessed 11 November 2018.

6 For detail on the work of the ILC on immunity and related subjects see Chapter 2 of *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur, Note 5 above.

7 At its fifty-eighth session, in 2006, the International Law Commission, on the recommendation of the Planning Group, endorsed the inclusion in its long-term programme of work of the topic "Immunity of State officials from foreign criminal jurisdiction". The ILC has since appointed two special Rapporteurs on the subject – Roman Kolodkin (2007 – 2011) and Concepcion Escobar-Hernandez (2012 – present).

8 Paul B. Stephan "The Political Economy of Jus Cogens," (2011) 44 *Vanderbilt Journal of Transnational Law* 1073.

9 See Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case" Note 3 above; See also Brian Man-Ho Chok "The Struggle between the Doctrines of Universal Jurisdiction and Head of State Immunity" Note 3 above.

10 See Article 46A *Bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at https://www.au.int/web/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf accessed 11 November 2018 accessed 11 December 2018.

11 Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," Note 3 above.

examine whether the tendered arguments do indeed sustain such an exception to the doctrine of immunity.

The current position of international law on the subject will be derived from, among others, cases where immunity has been invoked in both civil and criminal proceedings before the domestic courts of foreign States and from cases before international courts that have considered the legitimacy or correctness of such cases.[12] While some scholars have argued that the civil cases are of limited utility as authorities for the application of immunities in criminal proceedings,[13] the case will be made that the logic of the rationales undergirding the judgments relied upon would also apply to invocation of immunity in cases of individual criminal responsibility in international criminal law.[14]

2. *Jus Cogens.*

Accruing to every person by virtue of their humanity, human rights encompass a range of rights including the right to life, liberty and security of person,[15] freedom from torture or other cruel, inhuman or degrading treatment or punishment[16] and an inalienable right to dignity.[17] Such fundamental rights are protected in international law by a range of instruments[18] and norms of customary international law[19] – the substance and prohibitions of some of which are considered to be *jus cogens* which translates as compelling law.[20]

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12 See for instance *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ), 14 February 2002 (2002) ICJ Reports 3 (hereafter *Arrest Warrant Case*).

13 See Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur (A/CN.4/714), presented at the Seventieth session of the International Law Commission, New York, 30 April–1 June and New York, 2 July–10 August 2018, available at http://legal.un.org/docs/?symbol=A/CN.4/714 accessed 11 November 2018.

14 See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgment 3 February 2012 ICJ Reports 2012 (hereafter *Jurisdictional Immunities of the State Case*). See also Dapo Akande and Sangeeta Shah "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above at 826.

15 Universal Declaration of Human Rights (adopted 10 December 1948 United Nations General Assembly Resolution 217 A(III), available at http://www.un.org/en/universal-declaration-human-rights/ accessed 11 November 2018.

16 See Article 5 of the Universal Declaration of Human Rights, Note 15 above.

17 See Preamble to, and Article 1 of the Universal Declaration of Human Rights, Note 15 above.

18 See for instance *International Convention on the Elimination of All Forms of Racial Discrimination,* Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 (entry into force 4 January 1969, in accordance with Article 19), available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx accessed 11 November 2018; *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 23 March 1976, in accordance with Article 49), available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx accessed 11 November 2018; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 (entry into force 26 June 1987, in accordance with article 27 (1)), available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx accessed 11 November 2018.

19 See Anthony D'Amato, "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms" (2010) *Faculty Working Papers,* Paper 88, 1, available at http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88 accessed 11 November 2018.

20 See M. Cherif Bassiouni, "International Crimes: *'Jus Cogens'* and *'Obligatio Erga Omnes'*," Note 1 above at 63 – 74.

2.1 Definition of *Jus Cogens.*

Under international law, a *jus cogens* norm is a peremptory norm from which no derogation is permitted by any State.[21] The Vienna Convention on the Law of Treaties defines a peremptory norm of international law as:[22]

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

In the words of the International Law Commission's Special Rapporteur on the Law of Treaties, some seventy years ago, *jus cogens* norms spring not just from legal rules but also "considerations of morals and of international good order."[23] Among the norms which have gained the hallowed status of *jus cogens* are the prohibition of the use of force reflected in the United Nations Charter,[24] the prohibition of torture, the prohibition of piracy, and the prohibition of genocide.[25]

2.2 Origins and Theoretical Foundations of *Jus Cogens.*

The concept of *jus cogens* and its principal value as a superior law from which there can be no derogation may, quite easily, be traced as far back as the Justinian Code[26] and the Roman law that influenced it.[27] The natural law writings

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21 See First Report on *jus cogens* by Dire Tladi, Special Rapporteur, March 2016 *(*A/CN.4/693) at pages 38 – 44, available at http://legal.un.org/docs/?symbol=A/CN.4/693 accessed 11 November 2018.

22 See Article 53 of the Vienna Convention on the Law of Treaties, Adopted on 23 May 1969, and entered into force on 27 January 1980 *United Nations, Treaty Series,* Vol. 1155, p 331, available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf accessed 11 November 2018.

23 See G. Fitzmaurice, Special Rapporteur, Third Report on the Law of Treaties, 10th Session of the International Law Commission, A/CN.4/SER.A/1958/Add.1, 1958 at p. 41, available at http://legal.un.org/ilc/publications/yearbooks/english/ilc_1958_v1.pdf accessed 11 November 2018. See also Dinah Shelton, "Sherlock Holmes and the Mystery of *Jus Cogens"* in Maarten den Heijer and Harmen van der Wilt (Eds), 46 *Netherlands Yearbook of International Law* (TMC Asser Press, 2015) 23, at 26 where the author says that *Jus cogens* has been largely developed by international legal scholarship.

24 See Kamrul Hossain, "The Concept of *Jus Cogens* and the Obligation Under the U.N. Charter" (2005) *3 Santa Clara Journal of International Law* 72.

25 See M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" Note 1 above at 68.

26 See Dire Tladi, Special Rapporteur, First Report on *jus cogens*, March 2016 *(*A/CN.4/693), Note 21 above, at pages 9 – 10. The Special Rapporteur traces the notion of *jus cogens* to the Digest of Justinian where the term *jure cogente* (*jus cogens*) appears, although in a different context.

27 Wolfgang Kunkel *An Introduction to Roman Legal and Constitutional History* (Clarendon Press, 1966) (translated by J.M. Kelly).

in the seventeenth and eighteenth century of Grotius[28] and Vattel[29] respectively, sought to affirm the existence of an immutable law that is just and universal – *jus naturale necessarium* or necessary natural law. The concept appears to have suffered a fairly abrupt demise as a consequence of the post-Westphalian rise of the nation State[30] and the positivist legal doctrines of the 19th century,[31] but has since – with more than a little assistance from the International Law Commission (ILC) experienced a resurrection.[32]

Questions as to the theoretical foundations – natural law or positivism – of *jus cogens* however remain largely unresolved for the reasons elaborated upon below.[33]

Jus cogens' invocation of unassailable and fundamental moral truths hews almost exactly to natural law's invocation of a universal and immutable law upon which public conscience is founded.[34] The claim however that natural law is the source of *jus cogens* is, while appealing, unsustainable for two principal reasons. The first is that "fundamental truths" do not automatically become a part of international law[35] and the second is that the immutable truths that *jus cogens*

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[28] See A.C. Campbell *On the Law of War and Peace* (translated and abridged from the original Latin *De Jure Belli Ac Pacis* [1625]) (Kitchener: Ontario, 2001), available at https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/grotius/Law2.pdf, accessed 12 November 2018 where Grotius says at page 10 that:

> Now the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things, to which it does not extend. Because the things so expressed would have no true meaning, but imply a contradiction. Thus two and two must make four, nor is it possible to be otherwise.

See also First Report on *jus cogens* by Dire Tladi, Special Rapporteur, Note 21 above.

[29] Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and the Affairs of Nations and Sovereigns*, Translation of the Edition of 1758 by Charles Fenwick with an Introduction by Albert de Lapradelle (Carnegie Institution, 1916), available at https://archive.org/stream/ledroitdesgensou03vattuoft#page/n99/mode/2up accessed 12 November 2018.

[30] Derek Croxton "The Peace of Westphalia of 1648 and the Origins of Sovereignty" (1999) *The International History Review* 569.

[31] See David Kennedy,"International Law and the Nineteenth Century: History of an Illusion" (1996) 65 Nordic *Journal of International Law* 385, at 420.

[32] See Daniel Mirabella "The Death and Resurrection of Natural Law" (2011) 2 *The Western Australian Jurist* 251. See also J.M. Kelly *A Short History of Western Legal Theory* (Oxford University Press, 1992)

[33] See Dire Tladi, Special Rapporteur, First Report on *jus cogens (*A/CN.4/693), Note 21 above. See also Stefano Congiu "Jus Cogens: The History, Challenges and Hope of a Giant on Stilts" (2015) *Plymouth Law and Criminal Justice Review* 47, at 50 – 53. See however Martti Koskenniemi, "Hierarchy in International Law: A Sketch," (1997) 8 *European Journal of International Law,* 566. See also International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission* Finalized by Martti Koskenniemi (A/CN.4/L.682, 13 April 2006), available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, accessed on 15 November 2018

[34] See Thomas Aquinas, *Summa Theologica* (Christian Classics Ethereal Library), at 2270, Response to Question 91, available at https://www.ccel.org/ccel/aquinas/summa.pdf, accessed 12 November 2018.

[35] See Robert Kolb *Peremptory International Law: Jus Cogens* (Oxford, 2015) at 31. See also Mary-Ellen O'Connell "*Jus Cogens:* International Law's Higher Ethical Norms" in Donald Childress (Ed) *The Role of Ethics in International Law* (Cambridge University Press, 2012). Although *jus cogens* may emerge from the traditional sources of law identified by Article 38 (1)(c) of the Statute of the International Court of Justice, the concern has been that *jus cogens* may also emerge from indeterminate sources such as the conscience of mankind. Ascribing the source of *jus cogens* to natural law and its allegiance to superior moral values of indeterminate origin exacerbates this concern.

norms represent are – if the Vienna Convention on the Law of Treaties is of any authority[36] – not immutable after all.[37]

Neither Article 53 of the Vienna Convention's reliance on recognition by the international community of a norm as *jus cogens* before it may be classified as such, nor the acknowledgment that *jus cogens* "can be modified [even if] only by a subsequent norm of general international law having the same character" provide reason for viewing *jus cogens* as expressions of immutable moral truths, derogation from which does injury to the conscience of mankind. Recognition also by Article 64 of the Law of Treaties Convention that "new peremptory norm(s)" may emerge over time provides further reason for the agnosticism.[38]

Efforts to ground *jus cogens* on a positivist theoretical foundation[39] are not without their challenges either.[40] The doctrine of *pacta sunt servanda* (fidelity to agreements)[41] being the hallmark and defining feature of positivism in international law,[42] it is difficult to reconcile *jus cogens'* definition as a superior set of norms *from which no derogation is permissible* to positivism's affirmation of the will of States as the sole source of international rule making.[43] Even if one were to agree to the proposition that the peremptory status accorded to *jus cogens* norms are a product of consent among States, it is not clear how the peremptory status of such norms can be guaranteed in the face of positivism's acknowledgment of States' ability to withdraw consent or to make new rules.[44]

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[36] Codification of the law of treaties was a task that the ILC set itself at its first session in 1949. Although it has been ratified by only 116 countries (as of 31 October 2018) it has proven very influential as a source for treaty interpretation. See Olivier Corten and Pierre Klein (Eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, 2011). See also Oliver Dörr and Kirsten Schmalenbach (Eds) *The Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012). See also Mark Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009). See also Christian Djeffal "Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries," (2013) 24 (4) *European Journal of International Law* 1223.

[37] See Article 53 of the Vienna Convention on the Law of Treaties which acknowledges that *jus cogens* norms may be modified by other norms of similar stature, Note 22 above.

[38] See Matthew Saul, "Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges" (2015) 5 *Asian Journal of International Law* 26, at 31. See also Dire Tladi, Special Rapporteur, First Report on *jus cogens* A/CN.4/693, Note 26 above.

[39] See Evan Criddle and Evan Fox-Decent "A Fiduciary Theory of Jus Cogens" (2009) 34 *The Yale Journal of International Law* 331, at 339.

[40] See Gennady Danilenko "International *Jus Cogens*: Issues of Law-Making" (1991) 2 *European Journal of International Law* 42. See also Anthony D'Amato "The Neo-Positivist Concept of International Law" (1965) *Faculty Working Papers,* Paper 121, available at http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/121 accessed 12 November 2018. See also Dire Tladi and Polina Dlagnekova "The Will of the State, State Consent and International Law: Piercing the Veil of Positivism" (2006) 21 *SA Public Law.*

[41] Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (St. Paul, MN: West, 2004).

[42] Jianming Shen "The Basis of International Law: Why Nations Observe," (1999) 17(2) *Penn State International Law Review* 287, at 311 – 321.

[43] See George Augustus Finch *The Sources of Modern International Law, Volume 1*, (Carnegie Endowment for International Peace, 1937). See also Stephen Hall "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism" (2001) 12 *European Journal of International Law* 269.

[44] See Evan Criddle and Evan Fox-Decent "A Fiduciary Theory of Jus Cogens," Note 39 above at 339.

Another critique that a positivist view of the theoretical foundations of *jus cogens* engenders rests on the circular nature of the definition of *jus cogens*. Characterization of a norm as a *jus cogens* norm because the community of States recognizes it as a *jus cogens* norm provides very little guidance on why it is so or what its essential characteristics are. The definition of *jus cogens* thus assumes what is yet to be established.[45] Linderfalk however critiques the criticism of circularity thus:[46]

> … this criticism builds on wrongful assumptions. It assumes that Art. 53 explains the creation of *jus cogens*, which it does not; it explains only its existence. … *jus cogens* obligations derive from the usual processes creating ordinary customary international law.[47]

2.3 Nature of *Jus Cogens.*

Whatever the theoretical foundations of *jus cogens* are, and however they are determined,[48] it is a fact that *jus cogens* norms do exist and that, beyond the descriptions provided by Fitzmaurice,[49] their general nature is as described in Draft Conclusions submitted by the International Law Commission's Special Rapporteur on *Jus Cogens* and provisionally adopted by the Drafting Committee at its Seventieth session.[50]

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45 See J. Verhoeven "Jus cogens and reservations or counter-reservations to the jurisdiction of the International Court of Justice" in Karel Wellens (ed) *International Law: Theory and Practice – Essays in Honor of Eric Suy,* (Martinus Nijhoff, 1998) 195, at 196.

46 See Ulf Linderfalk "The Creation of *Jus Cogens*: Making Sense of Article 53 of the Vienna Convention" *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2011) 71(2) *Heidelberg Journal of International Law* 359.

47 While Linderfalk's position is not uncontested, it may be useful to await subsequent reports of the International Law Commission's Special Rapporteur on *Jus Cogens* to engage further.

48 Even the International Court of Justice has failed to provide a consistent view on the subject. In cases such as *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* Advisory Opinion of 28 May 1951, *ICJ Reports* 1951 the ICJ has seemed to equate the prohibition of genocide to a natural law view of *jus cogens* whereas in cases such as *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* Judgment of 20 July 2012, ICJ Reports 2012, the ICJ seemed to ground *jus cogens* on the State consent underpinning customary international law. See also Benedict Kingsbury "Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law" (2002) 13(2) *European Journal of International Law* 401.

49 See G Fitzmaurice, Special Rapporteur, Third Report on the Law of Treaties, 10th Session of the International Law Commission, Note 23 above.

50 See Annex to Statement of the Chairperson of the Drafting Committee (*Oral interim report),* Charles Chernor Jalloh, *on* Peremptory Norms of General International Law (*Jus Cogens*) on 14 May 2018 at the Seventieth session of the International Law Commission, New York, 30 April – 1 June, available at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_jc.pdf&lang=E accessed 12 November 2018. At its 3323rd meeting, on 19 July 2016, the Commission referred draft conclusions 1 and 3, as contained in the Special Rapporteur's first report, to the Drafting Committee. See ILC Report, (A/71/10), 2016, Chapter IX, paragraph 100, available at http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp9.pdf&lang=EFSRAC accessed 12 November 2018. In the Second Report, the Special Rapporteur undertook a robust rebuttal of the critique of Draft Conclusion 3 by members of the Commission during debate and in the Sixth Committee of the General Assembly. See A/CN.4/706, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 16 – 30, available at http://legal.un.org/docs/?symbol=A/CN.4/706 accessed 12 November 2018. See also Annex of Statement of the Chairman of the Drafting Committee, Mr. Aniruddha Rajput, on Peremptory Norms of General International Law (*Jus Cogens*), 26 July 2017, available at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf&lang=E accessed 12 November 2018.

Draft conclusion 2 [3(2)] General nature of peremptory norms of general international law (*jus cogens*)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

Draft conclusion 3 [3(1)] Definition of a peremptory norm of general international law (*jus cogens*)

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It is expected that the continuing scholarship of the Special Rapporteur will serve to purge any lingering questions about the origins, essence, nature and consequences of *jus cogens* norms.[51]

3. The Case for a *Jus Cogens* Human Rights Exception to Sovereign Immunity and Immunity for Heads of State and Other High-Ranking Government Officials.

The increasing focus of the international legal system on safeguarding human rights and on ensuring accountability for egregious human rights violations in a world with a serious dearth of accountability measures for such violations of human rights (particularly in times of war and civil conflict) have led inexorably to calls for States to consent to accept some limitations on their sovereignty.[52] Under the rubric of ostensibly noble objectives such as avenging victims of gross injustice and restoring or assuaging public conscience in the face of assaults on laws of humanity, courts in various countries have also sought to apply innovative exceptions to the principle of sovereign immunity.[53]

In spite of continuing hesitation about the precise nature of *jus cogens* or the criteria for norms to attain *jus cogens* status, as well as the acknowledgment by the International Law Commission of a lack of precision about what norms qualify as *jus cogens* or what consequences attach to the breach of such norms,[54] there appears to be consensus that

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51 For an Analytical Guide to the Work of the International Law Commission on Peremptory norms of general international law (*Jus cogens*) see http://legal.un.org/ilc/guide/1_14.shtml accessed 11 December 2018.

52 See Michael Tunks, "Diplomats or Defendants? Defining the Future of Head of State Immunity," (2002) 52 *Duke Law Journal* 651, at 656.

53 Some of the more noteworthy of such cases are *Ferrini v. Federal Republic of Germany*, *Prefecture of Voiotia v. Federal Republic of Germany* [citations provided below, see footnotes 61 and 68 respectively].

54 According to the International Law Commission's Special Rapporteur on *jus cogens*, "while the existence of *jus cogens* as part of the modern fabric of international law is now largely uncontroversial, its precise nature, what norms qualify as *jus cogens* and the consequences of *jus cogens* in international law remain unclear." The Commission is therefore currently in the process of studying the state of international law on *jus cogens in order to* provide an authoritative statement of the nature of *jus cogens*, the requirements for characterizing a norm as *jus cogens* and the consequences or effects or *jus cogens*. See Dire Tladi, "Annex on *Jus Cogens"* to A/69/10, Report of the International Law Commission Sixty-sixth session (5 May–6 June and 7 July–8 August 2014), available at http://legal.un.org/ilc/reports/2014/english/annex.pdf accessed 12 November 2018. For more recent updates see Draft Conclusions 4 (criteria for identification of a peremptory norm of general international law (*jus cogens*)), 5 (bases for peremptory norms of general international law (*jus cogens*)), 6 (acceptance and

jus cogens norms command peremptory authority and supersede not just conflicting treaties but also customary international law.[55] Indeed, the application by the ILC of *jus cogens'* normative superiority to hold that internationally wrongful conduct of an individual or State organ that is attributable to the State engages the international responsibility of the State;[56] are testaments to the force of *jus cogens*. So is the application of peremptory norms by the UN Human Rights Committee to invalidate amnesties for international crimes.[57] The notion therefore that perpetrators of egregious violations of human rights, could – under theories of quaint and uncertain origin, such as immunity[58] – escape accountability, invokes passionate reaction.[59] As one scholar has observed, contestations of right, influenced as they are by moralistic and values-laden viewpoints with respect to the accountability/immunity debate, have often blurred the line between doctrinal positions and normative policy assertions.[60]

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recognition) and 7 (international community of States as a whole) presented in Second Report on *jus cogens* by Dire Tladi, Special Rapporteur (A/CN.4/706) at the Sixty-ninth session of the International Law Commission in Geneva, 1 May-2 June and 3 July-4 August 2017; available at http://legal.un.org/docs/?symbol=A/CN.4/706 accessed 12 November 2018. See also Third Report on *jus cogens* by Dire Tladi, Special Rapporteur, Note 13 above.

55 See Christian Tomuschat "Reconceptualizing the Debate on *Jus Cogens* and Obligations *Erga Omnes* – Concluding Observations" in Christian Tomuschat and Jean-Marc Thouvenin (Eds) *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff, 2006) 425-436. See also Christian Tomuschat "The Security Council and *Jus Cogens*" in Enzo Cannizzaro (ed) *The Present and Future of Jus Cogens* (Sapienza Università Editrice, 2015) (Law, Politics and Economics – Gaetano Morelli Lectures Series) where the author traces the emergence of *jus cogens* in modern international law to German professor August Wilhelm Heffter who wrote in 1844 that a valid treaty requires a 'just cause'. See also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* Order of 13 September 1993, ICJ Reports 1993, 440. In a separate opinion, Judge Lauterpacht asserts that "the concept of *jus cogens* operates as a concept superior both to customary international law and treaty."

56 See Articles on State Responsibility, Report of the ILC, Fifty-Third Session, UN Doc. A/56/10 (2001), 206-209, 277-292, available at http://legal.un.org/docs/?path=../ilc/reports/2001/english/chp4.pdf&lang=EFSRAC accessed 12 November 2018.

57 See UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992, available at http://www.refworld.org/docid/453883fb0.html accessed 14 July 2018. See also *Prosecutor v. Furundzija* ICTY, Trial Chamber, IT-95-17/I-T, Judgment of 10 December 1998, paras. 155-156, available at http://www.un.org/icty/judgement.htm accessed 12 November 2018, where the ICTY said of amnesties granted for torture that:

> It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.

58 See Hersch Lauterpacht "The Problem of Jurisdictional Immunities of Foreign States", [1951] *28 British Year Book of International Law* 220, at 228. The sentiment has been echoed by Chris Maina Peter, a member of the International Law Commission. See Provisional summary record of the 3363rd meeting, held at the Palais des Nations, Geneva on 24 May 2017 (A/CN.4/SR.3363), available at http://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr3363.pdf accessed 13 November 2018.

59 See Human Rights Watch, *Statement regarding immunity for sitting officials before the Expanded African Court of Justice and Human Rights* at https://www.hrw.org/sites/default/files/related_material/Immunity%20Statement%20-%20African%20Court%20of%20Justice%20and%20Human%20Rights.pdf accessed 12 November 2018. See also Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" (Nov 2014) *Institute for Security Studies Paper 278*, generally. See also Op-ed by Desmond Tutu, *In Africa, Seeking a License to Kill*, New York Times (10 October 2013) available at http://www.nytimes.com/2013/10/11/opinion/in-africa-seeking-a-license-to-kill.html accessed 12 November 2018.

60 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff," Note 3 above at 4.

Legal constructs presented to highlight the peremptory nature of *jus cogens* norms and to justify the superiority and pre-eminence of *jus cogens* human rights norms against sovereign immunity were articulated comprehensively in the case of *Prefecture of Voiotia v. Federal Republic of Germany* (hereafter *Voiotia* or *Voiotia* case).[61] Summary facts of the case are that on November 27, 1995, the Prefecture of Voiotia instituted action on behalf of itself and a number of other claimants, in their individual capacities, against Germany before the Court of First Instance of Leivadia, Greece. The claim for indemnity was for atrocities and damage perpetrated in June 1944 upon the village of Distomo in Voiotia and its residents by Germany's occupying forces during World War II. The claim for compensation was for the mental anguish and material loss sustained in what came to be known as the Distomo Massacre.[62]

Upon receipt of the claim from the Greek Foreign Office, the German Foreign Office rejected and returned it to the Greek Embassy, asserting sovereign immunity. In the default judgment which the Court rendered in Germany's absence, the claimants were awarded just under ten billion drachmas or thirty million US dollars in satisfaction of their claim.[63]

The Court of first instance, in dismissing Germany's invocation of immunity, traced the history of nullification of immunities in the face of breaches of *jus cogens* norms to the Nuremberg trials and presented what, the court said, were instances in which the cloak of sovereign immunity would not be available to a State. The said grounds, which are evocative of Bassiouni's charge,[64] bear repeating in their entirety as follows:

a) When a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right (constructive waiver through the operation of international law);
b) Acts of the state in breach of peremptory international law cannot qualify as sovereign acts of state. In such cases the defendant state is not considered as acting within its capacity as sovereign;
c) Acts contrary to peremptory international law are null and void and cannot give rise to lawful rights, such as immunity (in application of the general principle of law *ex iniuria ius non oritur*);
d) The recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order;
e) The invocation of immunity for acts committed in breach of a peremptory norm of international law would constitute abuse of right; and finally
f) Given that the principle of territorial sovereignty, as a fundamental rule of the international legal order, supersedes the principle of immunity, a state in breach of the former when in illegal occupation of foreign territory, cannot possibl[y] invoke the principle of immunity for acts committed during such illegal military occupation.[65]

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61 *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997, Court of First Instance of Leivadia, Greece, 30 October 1997.

62 For further details on the Distomo Massacre during World War II, see Mark Mazower, *Inside Hitler's Greece* (Yale University Press, 1993).

63 See Ilias Bantekas, "Prefecture of Voiotia v. Federal Republic of Germany. Case No. 137/1997" (October 1998) 92(4) *The American Journal of International Law* 765, at 765.

64 See M. Cherif Bassiouni. "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'," Note 1 above.

65 See *Prefecture of Voiotia v. Federal Republic of Germany*, Note 61 above at page 13. See also Ilias Bantekas, "Prefecture of Voiotia v. Federal Republic of Germany. Case No. 137/1997," Note 63 above at 766 – 767.

As the Hellenic Supreme Court, *Areios Pagos,* made clear, when it upheld the ruling as well as the grounds upon which the Court had ruled for the Prefecture of Voiotia,[66] *jus cogens* norms compel – in fealty to stated values of the international community – behaviour from States that is consistent with those values.[67]

Parts of the reasoning of the Greek Supreme Court were followed by the Italian Supreme Court, *Corte di Cassazione,* in the case of *Ferrini v. Federal Republic of Germany* (hereafter *Ferrini* of *Ferrini* case*)*,[68] which was born of similar circumstances. On 23 September 1998, Luigi Ferrini filed suit against Germany in the Court of Arezzo claiming compensation for physical and psychological harm arising from the inhumane treatment he suffered when he was captured by German troops on 4 August 1944, deported to Germany and subjected to forced labour until 20 April 1945. The Court of First Instance, by recognizing foreign State immunity for all acts carried out by States in the exercise of their sovereign powers, held that Italian courts could not exercise jurisdiction over Germany.[69] The Court of Appeal upheld the ruling of the Court of first instance, prompting Ferrini to appeal to the Italian Supreme Court.

In allowing the appeal, the Supreme Court – while affirming the "existence of a *customary* norm of international law obliging States to abstain from exercising jurisdiction against foreign States" – noted that the norm, previously "absolute in nature … has become, and continues to become, gradually limited."[70] By finding both deportation and subjection to forced labour to be "war crimes" and therefore international law crimes, the Court sought to show that the gravity of the crimes perpetrated served to extinguish State immunity. The Court grounded its reasoning on Articles 40 and 41 of the Draft Articles on State Responsibility adopted by the International Law Commission in 2001.[71] Per the former, State responsibility is invoked in the event of serious – gross or systematic – breaches of peremptory norms.[72]

Beyond an exhortation and a stated positive obligation for States to bring an end to serious breaches of peremptory norms, Draft Article 41 also asserts that "*No State shall*

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66 *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre Case)* (Case No 11/2000) *Greece, Court of Cassation (Areios Pagos)* Judgment of 4 *May* 2000, 129 International Law Reports, 513. This judgment was however overturned by the Greek Special Highest Court, which in a closely contested six votes to five decided that Germany enjoyed immunity without any exceptions thereto and could therefore not be sued before any Greek Civil Court for torts committed. The Special Highest Court asserted a general norm of customary international law that rendered inadmissible any claim against a foreign State for torts committed by its armed forces. See *Federal Republic of Germany v. Miltiadis Margellos* No 6/17-9-2002.

67 See Ilias Bantekas, "*Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997," Note 63 above.

68 *Ferrini v. Federal Republic of Germany*, *Corte di Cassazione* (*Sezioni Unite*), Judgment No. 5044 of 6 Nov. 2003, registered 11 Mar. 2004, (2004) 87 *Rivista diritto internazionale* 539. See also Pasquale De Sena and Francesca De Vittor "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case" (2005) 16(1) *The European Journal of International Law* 89. See also Andrea Bianchi, "Ferrini v. Federal Republic of Germany" (Jan. 2005) 99(1) *The American Journal of International Law* 242.

69 *Ferrini v. Federal Republic of Germany,* Tribunale di Arezzo, decision No. 1403/98 of 3 Nov. 2000, unpublished. See Andrea Bianchi, Ferrini v. Federal Republic of Germany, Note 68 above.

70 See *Ferrini v. Federal Republic of Germany*, *Corte di Cassazione* (*Sezioni Unite*), Note 68 above at paragraph 5.

71 International Law Commission, *Report on the work of its fifty-third session* (23 April–1 June and 2 July – 10 Aug. 2001), *General Assembly, Official Records, Fifty-Fifth Session*, Supp. No. 10 (A/56/10), available at http://www.un.org/documents/ga/docs/56/a5610.pdf accessed 13 November 2018.

72 See International Law Commission *Report on the work of its fifty-third session*, Note 71 above at pages 282 – 286.

recognize as lawful, a situation created by a serious breach within the meaning of Article 40 *nor render aid or assistance in maintaining that situation*."[73] (My emphasis). By recognizing Germany's claim to be entitled to immunity, the Court held, it would thereby be unacceptably supporting the continuing effects or perpetuation of the breach of *jus cogens* that the plaintiff had suffered.[74] The Court also relied on the judgment of the International Criminal Tribunal for Yugoslavia in *Prosecutor v. Furundzija* (hereafter *Furundzija),*[75] where the Court had held that if the need to preserve values such as those violated in individual crimes removes certain types of functional immunities, it should also require fundamental changes in how State responsibility is considered.[76]

The reasoning of the Hellenic and Italian Supreme Courts in *Voiotia* and *Ferrini* have been further distilled to four values-laden grounds that human rights advocates have presented not only as a barrier to invocation of sovereign immunity by States but also as a barrier to invocation of immunity by Heads of State and other high-ranking officials whose immunity derives from the sovereignty of the State and the notional equality of States.[77] These grounds and advocacy for same, the principal flaws of which appear to be conflation of State immunity and individual immunities – personal (immunity *ratione personae*) and functional (immunity *ratione materiae*) – are presented summarily below and shall be interrogated in the section following that:[78]

3.1 *Jus Cogens* and Normative Hierarchy.

The first ground proffered for holding that *jus cogens* trumps immunity – the normative hierarchy theory – notionally derives from Article 53 of the Vienna Convention on the Law of Treaties, the first part of which states that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[79]

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[73] See International Law Commission *Report on the work of its fifty-third session*, Note 71 above at pages 286 – 292.

[74] See *Ferrini v. Federal Republic of Germany*, *Corte di Cassazione* (*Sezioni Unite*), Note 68 above.

[75] *Prosecutor v. Furundzija*, case No. IT-95–17/1-T10, ICTY Trial Chamber judgment of 10 Dec. 1998, available at http://www.icty.org/x/cases/furundzija/tjug/en/ accessed 13 November 2018, where the Court affirms at paragraph 155 that:

> [t]he fact that torture is prohibited by a peremptory norm of international law has other effects at the inter- state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture.

The accused in this case, Anto Furundžija, had been the commander of a special unit of the Croatian Defence Council called the "Jokers." He was indicted by the ICTY for crimes against Bosnian Muslims who had been interrogated at the Jokers' headquarters in May 1993 with the intention to obtain information which he believed would benefit the Croatian Defence Council (known by the acronym HVO). During the interrogations, the detained women were subjected to sexual assaults, rape, and severe mental and physical abuse – for which the Court found him guilty of a breach of peremptory norms.

[76] *Prosecutor v. Furundzija,* Note 75 above at paragraph 9.

[77] See Lee Caplan, "State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory" (2003) 97 *The American Journal of International Law* Volume 741. See also Alexander Orakhelashvili "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong" (2007) 18 *European Journal of International Law* 955, at 964.

[78] For structural purposes, this Chapter proposes to address the grounds for the exceptions to immunity presented by Voiotia and distilled below before addressing the more particular questions of whether there are exceptions to immunity *ratione personae* and immunity *ratione materiae*.

[79] See Article 53 of the Vienna Convention on the Law of Treaties, Note 22 above.

The theory asserts that immunity for Heads of State and other high-ranking officials must yield to the imperative to ensure accountability for *jus cogens* human rights violations.[80] Because the rules on immunities have not achieved the status of *jus cogens* and rank lower in the hierarchy of norms they must – the theory posits – necessarily be subordinate to *jus cogens* proscriptions of torture and other egregious violations of human rights, before which they must fall.[81] Otherwise stated, *jus cogens* human rights norms, from which there can be no derogation, are hierarchically superior to and must therefore defeat the application of such norms as sovereign immunity and its progeny, which have not generally been characterized as anything more than ordinary international law norms that are founded, among others, on a desire to ensure comity amongst States.[82] It must be noted here that although it has been suggested by some scholars that sovereign immunity is itself a peremptory norm,[83] the notion has received little doctrinal support and the overwhelming scholarship on the subject suggests otherwise.[84]

Adopting broad and purposive styles of interpretation, human rights scholars – including Bianchi, Cassese and Orakhelashvili – have argued that it is not only treaties that are rendered void if they conflict with *jus cogens* norms but also other international law norms of lesser stature.[85] This is indeed the finding also of the Third Report of the International Law Commission's Special Rapporteur on *jus cogens*, which received broad support for the proposition from the ILC members.[86] It is argued that to the extent that the immunity doctrine inhibits fulfilment of a peremptory norm such as ensuring accountability for genocide or torture it should fail.[87] Bianchi advocates to this end, a values-centric approach to international law which would require judges to give preference to peremptory norms, such as the protection of human rights, over norms of lesser importance, such as immunity.[88] As he opines rather forcefully, immunity for international

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80 See Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," Note 3 above; See also Brian Man-Ho Chok "The Struggle between the Doctrines of Universal Jurisdiction and Head of State Immunity," Note 3 above.

81 See M Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" Note 1 above. See also William F Webster *"Amerada Hess Shipping Corp. v. Argentine Republic:* Denying Sovereign Immunity to Violators of International Law" (1987-1988) 39 *Hastings Law Journal* 1109.

82 See Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," Note 3 above at 246.

83 See Paul Gully-Hart "The Function of State and Diplomatic Privileges and Immunities in International Cooperation in Criminal Matters: The Position in Switzerland," (1999) *23 Fordham International Law Journal* 1334.

84 See Note 3 above.

85 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens*" (2010-2011) *9 Northwestern University Journal of International Human Rights* 149. See also Brian Man-Ho Chok "Let the Responsible Be Responsible: Judicial Oversight and Over-optimism in the *Arrest Warrant* Case and the Fall of the Head of State Immunity Doctrine in International and Domestic Courts" 2015 30 (3) *American University International Law Review* 489, at 512. See also Antonio Cassese *International Law* (2nd ed) (Oxford University Press, 2005) at 205-208. See also Kyoji Kawasaki, "A brief note on the legal effects of *jus cogens* in International Law" (2006) 34 *Hitotsubashi Journal of Law and Politics* 27.

86 Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur (A/CN.4/714), Note 13 above: see paragraphs 86 – 102 and 113 – 159.

87 See Andrea Bianchi. "Immunity versus Human Rights: The Pinochet Case," Note 3 above at page 246 (see footnote 37). See also Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens"* (2008) 19(3) *The European Journal of International Law* 491.

88 See Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," Note 3 above.

crimes would be illogical since international law cannot simultaneously reprimand the commission of heinous acts as criminal and shield officials from prosecution for such acts.[89]

Bianchi's arguments are cited with approbation by Orakhelashvili who posits a principle of lesser evil or lesser harm in asserting that:

> Immunities under international law do not possess the same characteristics as peremptory norms. When a State's immunities are violated, there would be no injured State except that State itself. The interests to be balanced are that of the international community as a whole in punishing war crimes and crimes against humanity, and that of individual States…[90]

Although presented in dissent, the opinions of Judges Rozakis and Caflisch, in the case of *Al-Adsani v. The United Kingdom*[91] before the European Court of Human Rights (ECHR)[92] are particularly articulate in making the point that accountability for breaches of *jus cogens* norms should trump immunity. The applicant in that case had brought a claim in English courts against the Kingdom of Kuwait and another for compensation for injuries he sustained to his physical and mental health when he was subjected to torture by high ranking persons within the Kingdom. The English Court of Appeal gave him leave to serve the writ on the Kingdom of Kuwait which in turn sought an order striking out the proceedings against it. The High Court ruling that the applicant had not proven that his claim fell within the permitted exceptions of the UK's Foreign Sovereign Immunities Act was upheld by the Court of Appeal. The applicant approached the ECHR when the English House of Lords refused to grant leave to appeal the Court of Appeal's ruling.[93] In dissent to the ECHR judgment, which had gone in favour of the UK government, Judges Rozakis and Caflisch argued that:

> By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms …
>
> … The Court's majority do not seem… to deny that the rules on State immunity; customary or conventional, do not belong to the category of *jus cogens*; and rightly so …
>
> … The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules

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89 See also Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens"* Note 87 above.

90 See Alexander Orakhelashvili, "State Immunity and International Public Order," (2002) 45 *German Year Book of International Law* 227, at 263.

91 *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001, available at http://www.refworld.org/cases,ECHR,3fe6c7b54.html accessed 15 July 2018.

92 *Al-Adsani v. The United Kingdom*, Note 91 above. See Joint Dissenting Opinion of Judges Rozakis and Caflisch (Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic) at paragraphs 1 – 3. See also Thomas Kleinlein "*Jus Cogens* as the 'Highest Law'? Peremptory Norms and Legal Hierarchies" in Maarten den Heijer and Harmen van der Wilt (Eds) 46 *Netherlands Yearbook of International Law,* Note 23 above, at 173 – 210.

93 The facts of the case and details of the injuries suffered as well as the chronology of the various legal actions pursued by the applicant and Kuwait are detailed in paragraphs 9 – 19 of the judgment of the ECHR in *Al-Adsani v. The United Kingdom*, Note 91 above.

> (in this case, those on State immunity) to avoid the consequences of the illegality of its actions … Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity … to refuse an applicant adjudication of a torture case.[94]

As the fact of it being a dissent suggests, this persuasive argument failed to move the Court, which in ruling narrowly for the UK (9 to 8) seemed constrained to have arrived at its decision only because of the dearth of case law that would have permitted an alternative conclusion. Per the Court:

> The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity[95]

3.2 Universal Jurisdiction Trumps Immunity.

The second ground upon which advocates hang the proposition that *jus cogens* trumps immunity for Heads of State and other high-ranking officials invokes universal jurisdiction as a foil against immunity.[96]

Originally framed narrowly as an exception to traditional grounds of jurisdiction – territoriality, nationality, active and passive personality – universal jurisdiction may be invoked by all States to exercise jurisdiction over such persons as pirates, whose activities on the high seas put them beyond the reach of ordinary grounds for the exercise of jurisdiction.[97] Their crimes rendered them *hostes humani generis* or enemies of mankind and subject to prosecution by any and all States on behalf of humankind.[98] In the last century however, the atrocities of both World Wars and the profound sense of revulsion they invoked resulted in a significant expansion of the scope of what crimes the community of States were willing to pursue under the cover of universal jurisdiction. Few cases typify this more than *Attorney-General of Israel v. Eichmann* (hereafter *Eichmann* or *Eichmann Case*).[99]

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94 See Joint Dissenting Opinion of Judges Rozakis and Caflisch (Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic). Note 92 above.

95 *Al-Adsani v. The United Kingdom*, Note 91 above at paragraph 66.

96 See generally Dalila Hoover, "Universal Jurisdiction not so Universal **–** Time to Delegate to the International Criminal Court?" (2011-2012) *8 Eyes on the ICC,* 73 – 105.

97 See Principle 2 of Princeton Principles on Universal Jurisdiction, Princeton Project on Universal Jurisdiction (2001) Under these principles, serious crimes under international law include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture, available at https://lapa.princeton.edu/hosteddocs/unive_jur.pdf accessed 13 November 2018. See also *United States v. Smith,* 18 U.S. 153 (1820) where the Court held at page 160 that piracy was "an offense against the universal law of society" over which all States could exercise jurisdiction.

98 See M. Cherif Bassiouni "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes,*" Note 1 above.

99 *Attorney General of the Government of Israel v. Eichmann (Dist. Ct. Jerusalem),* Criminal Case No. 40/61 Supreme Court of Israel, available at https://www.legal-tools.org/doc/aceae7/pdf/ accessed 13 November 2018.

Infamous for executing the "final solution" of the Nazi regime to exterminate Jews,[100] Adolf Eichmann was abducted by Israeli agents from Argentina (where he had fled to at the end of World War II) in May 1960. He was smuggled back to Jerusalem to stand trial for his role in the murder of one-third of Europe's Jewish people during the second World War.[101] Eichmann, was found guilty by the District Court of Jerusalem of offences of the most extreme gravity against the Nazis and Nazi Collaborators and was sentenced to death. The Court in so doing rejected[102] the objections of counsel who challenged the basis of the Court's jurisdiction over his client by arguing that by punishing the accused for his actions undertaken in furtherance of duties on behalf of a foreign State, outside the boundaries of Israel, before the creation of Israel and perpetrated against persons who were not citizens of Israel, the laws of Israel violated international law.[103]

In affirming Eichmann's conviction for crimes against humanity, war crimes and crimes against the Jewish people (genocide), the Supreme Court of Israel[104] presented the justification for Israel's assertion of jurisdiction over Eichmann as follows:

> Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.[105]

With the evolution of humanitarian law and human rights law and the strengthening of the concept of crimes *erga omnes*, there is a not unreasonable belief amongst some human rights advocates that there is universal jurisdiction for a wide range of egregious violations of human rights.[106] Indeed, in the run-up to the Rome Conference where the Statute of the International Criminal Court was adopted, Germany had made a case for the jurisdiction of the ICC to be founded on universal jurisdiction because:

> [u]nder current international law, all states may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes

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100 For further particulars on Nazi atrocities and the "Final Solution" during World War II see Peter Longerich, *Holocaust: The Nazi Persecution and Murder of the Jews* (Oxford University Press, 2010).

101 See Hans W Baade "The Eichmann Trial: Some Legal Aspects," (1961) *Duke Law Journal* 400.

102 See *Attorney General of the Government of Israel v. Eichmann (Dist. Ct. Jerusalem)*, Note 99 above at paragraph 30.

103 See Covey Oliver "The Attorney-General of the Government of Israel v. Eichmann," (July 1962) 56(3) *The American Journal of International Law* 805.

104 *Attorney-General of the Government of Israel v. Eichmann* (Israel Supreme Court 1962), International Law Reports Vol. 36, p. 277, 1968 (English translation).

105 See *Attorney-General of the Government of Israel v. Eichmann* (Israel Supreme Court 1962), Note 104 above at paragraph 12 (f).

106 See M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes,*" Note 1 above. See also Dalila Hoover, "Universal Jurisdiction not so Universal **–** Time to Delegate to the International Criminal Court?" Note 96 at 79 – 89.

> regardless of the nationality of the offender the nationality of the victims and the place where the crime was committed.[107]

While the German proposition failed on account of US opposition,[108] the German formulation for what should be the basis of the ICC's jurisdiction proved persuasive before the UK House of Lords in the case of *Pinochet Ugarte*[109] where the concept of universal jurisdiction came up against immunity.

The facts of the case are that in October 1998, General Augusto Pinochet, a former military dictator of Chile, was arrested in London where he had gone to seek medical treatment. The arrest was at the request of a Spanish magistrate – Balthazar Garzon – who was acting pursuant to domestic legislation that permitted Spain to exercise jurisdiction over certain types of international crimes, wherever committed. Pinochet was accused of having – following his overthrow of President Allende's elected government in 1973 – ordered, authorized or allowed the torture and disappearance of several Chileans and citizens of other countries (including Spain) as part of a crackdown on his opponents, some of whom were in other countries. In seeking to quash the arrest warrant and the extradition request, Pinochet claimed immunity as a former Head of State.[110]

Having recognized that torture is a crime over which universal jurisdiction can be asserted, Lord Brown Wilkinson in rendering judgment in the House of Lords, held that if the immunity claimed by Pinochet were recognized:

> the whole elaborate structure of universal jurisdiction over torture committed by officials [would be] rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. In my judgment, all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.[111]

Echoing Lord Browne Wilkinson, Lord Phillip of Worth Matravers, made an even more forceful case for immunity to yield to accountability for breaches of *jus cogens* norms by asserting that:

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107 See "The jurisdiction of the International Criminal Court - An informal discussion paper submitted by Germany to Preparatory Committee on the Establishment of an International Criminal Court, 16 March – 3 April 1998, available at https://www.legal-tools.org/doc/5e6109/pdf/ accessed 14 October 2018. See also Sharon A. Williams "The Rome Statute on the International Criminal Court - Universal Jurisdiction or State Consent - To Make or Break the Package Deal" (2000) 75 *International Law Studies* 539, at 544 – 546.

108 See Michael P. Scharf "The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position" (2001), *Faculty Publications,* Paper 257, available at http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1256&context=faculty_publications accessed 14 October 2018.

109 See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147.

110 See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte*, Note 109 above.

111 See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3),* Note 109 above at page 205.

> International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity *ratione materiae* can coexist with them. The exercise of extraterritorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. *Once extraterritorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.*[112] (my emphasis)

The plethora of actions instituted against Heads of State and senior government officials, particularly in the courts of Belgium[113] and Spain,[114] but also in the courts of other European countries[115] in the aftermath of *Pinochet*, affirmed – for human rights advocates – an opportunity to ensure accountability for *jus cogens* violations, even over invocations of sovereign immunity and immunity for Heads of State and other high-ranking officials.[116]

3.3 Disqualification of International Crimes as Legitimate Acts of State for which Immunity may be Invoked.

The third ground presented by human rights and international criminal justice advocates for holding that sovereign immunity may not be invoked in the face of violations of *jus cogens* norms, seeks to delegitimize and invalidate the contentious act as an act of State. Taking a cue from the reasoning that informed courts' willingness to distinguish between *acta jure imperii* and *acta jure gestionis* in order to do justice to parties prejudiced or denied a remedy by a State's invocation of immunity in commercial matters,[117] human rights advocates have

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112 See Lord Phillip of Worth Matravers in *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)*, Note 109 above at page 289

113 See for instance case instituted against Ariel Sharon by 23 Palestinian refugees: Sultana Tafadar, *The Legal Case Against Ariel Sharon,* Islamic Human Rights Commission, 1 (2003), available at https://www.ihrc.org.uk/content/uploads/2009/07/7203_03sep24thecaseagainstarielsharon.pdf accessed 14 November 2018.

114 See for instance the criminal case instituted in 2006 by Spanish prosecutors against former Chinese President Jiang Zemin, his Prime Minister, Li Peng, and five other Chinese officials for genocide in Tibet: Audiencia Nacional, Sala de lo Penal, Seccion *4,* Diligencia Previas 237/05, Rollo de Apelaci6n 196/05, 1, Madrid, Auto (10 Jan. 2006). See also case instituted in 2009 by Iraqi claimants against former U.S. presidents George H. W. Bush, William J. Clinton, George W. Bush, and Barack H. Obama, as well as Vice President Dick Cheney, Secretary of State Colin Powell, and four UK prime ministers for war crimes, crimes against humanity, and genocide committed during the bombings of Baghdad in 1991 and 2003: See *For Justice for Iraq: Legal Case Filed Against Four US Presidents and four UK Prime Ministers for War Crimes, Crimes Against Humanity, and Genocide in Iraq,* The Brussels Tribunal, (7 Oct. 2009), available at www.brussellstribunal.org/Genocideo7oog.htm accessed 14 November 2018.

115 See 2009 arrest warrant issued in the UK for Israeli Foreign Minister, Tzipi Livni, for alleged atrocities committed during Operation Cast Lead by Israeli forces against Palestinians. *See* Ian Black and Ian Cobain, *British Court Issued Gaza Arrest Warrant for Former Israeli Minister Tzipi Livni,* The Guardian (14 December 2009), available at www.guardian.co.uk/world/2000/dec/14/tzipi-livni-israel-gaza-arrest accessed 14 November 2018.

116 Dalila Hoover, Universal Jurisdiction not so Universal **–** Time to Delegate to the International Criminal Court? Note 96 above at 73 – 75.

117 See Judgment of Sir Robert Phillimore in *The Charkieh*. (1873) [L.R.] 4 A. & E. 59 at pages 99 – 100. See also Bernard Fensterwald, Jr., "Sovereign Immunity and Soviet State Trading" (February 1950) 63(4) *Harvard Law Review* 614.

argued that immunity cannot avail perpetrators of *jus cogens* violations because such violations cannot be recognized as sovereign acts.[118]

In the *Eichmann Case,*[119] the Supreme Court of Israel had occasion to address this point as follows:

> There is no basis for the [act of state] doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of "crimes against humanity" (in the wider sense). Of such odious acts, it must be said that in point of international law, they are completely outside the "sovereign" jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission or behind the "Laws" of the State by virtue of which they purported to act.[120]

The tendered rationale is that by acting against norms that have been established by the community of States in order to preserve humanity and human conscience – and from which there can be no derogation – immunity cannot be invoked by a State to excuse wilful disregard of such norms. Otherwise stated, a State or Head of State cannot legitimately claim *acta jure imperii* for acts so rejected by the international community (of which the State forms a part) as to be absolutely proscribed – without the possibility of lawful deviation.

The argument that certain kinds of conduct are not legitimate acts of State for which immunity may be invoked has been extended also to State officials for whom, it is said, immunity *ratione materiae* may not be pleaded because their actions – for being inconsistent with normal actions on behalf of a State – cannot be official acts.[121]

This argument, which is essentially that international law would not permit violations of *jus cogens* norms to be a part of any legitimate official mandate because they would be illegal in the extreme, has received endorsement before the UK House of Lords. In the first Pinochet case before the House of Lords,[122] the majority effectively held that a Head of State who ordered or committed torture was not, when so doing, acting as a Head of State. Per Lord Steyn:

> [T]he development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'état [in Chile], and certainly ever since, international law condemned genocide, torture, hostage taking and crimes

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118 See Rosanne Van Alebeek, *The Immunities of States and their Officials in International Criminal Law and International Human Rights Law,* Note 3 above at 241.

119 See *Attorney-General of the Government of Israel v. Eichmann* (Israel Supreme Court, 1962), Note 104 above.

120 See *Attorney-General of the Government of Israel v. Eichmann,* Note 104 above at pages 309 – 310. See also Amnesty International, *Eichmann Supreme Court Judgment 50 Years on, its Significance Today* (2012) Amnesty International Publications at 8 – 9.

121 See Andrea Bianchi, "Denying State Immunity to Violators of Human Rights," (1994) 45 *Austrian Journal of Public and International Law* 195, at 227 – 228.

122 *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, 3 WLR 1,456 (H.L. 1998) available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1221&context=djcil accessed 14 November 2018.

> against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. *Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State*.[123] (my emphasis)

This argument was echoed in the second appeal by Lord Hutton who declared that:

> [T]he commission of acts of torture is not a function of a head of State, and therefore in this case the immunity to which Senator Pinochet is entitled as a former head of State does not arise in relation to, and does not attach to, acts of torture.[124]

3.4 Implied Waiver of Immunity.

The fourth ground presented by international criminal justice advocates to invalidate sovereign immunity and by extension, the immunity of Heads of State and high-ranking officials in the face of serious violations of *jus cogens* norms is the implied waiver. This argument acknowledges a State's agency but asserts that because the State's actions do not cohere with its obligations under customary international law as well as various international instruments, a sovereign State's only explanation for such actions, that expressly violate obligations founded on values it continues to uphold, is that it intended to submit to the sanction that such breach or violation would ordinarily incur.

As the argument goes, by acceding to human rights treaties which impose an obligation on States to protect human rights and provide effective remedies in the event of their breach, States impliedly waive their right to invoke immunity.[125] Differently framed, States' obligations – through customary international law or treaty – to recognize peremptory norms, implicitly represents an agreement to renounce or waive immunity when they violate such norms.[126]

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123 *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, Note 122 above at page 1506. See also Michael Byers, "The Law and Politics of the Pinochet Case" (2000) *Duke Journal of Comparative and International Law* 415, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1221&context=djcil accessed 14 November 2018.

124 *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3),* Note 109 above at page 263

125 See *Prefecture of Voiotia v. Federal Republic of Germany*, Note 61 above.

126 *Siderman De Blake v. Republic of Argentina*, 965 F.2d 699 (1992), United States Court of Appeals for the Ninth Circuit, 22 May 1992, available at http://www.refworld.org/cases,USA_CA_9,56d6bf794.html accessed 30 December 2017. Following the overthrow by the Argentine military of the government of President Maria Estela Peron on March 24, 1976, the plaintiff, a wealthy property owner was arrested by masked men who beat and tortured him for 7 days. Upon his release, the plaintiff and his family fled to the United States. In 1982, the plaintiff instituted an action against the Government of Argentina for compensation for torture and for recovery of expropriated property effected through a sham judicial intervention which saw the government put the plaintiff's hotel into receivership. The court dismissed the claim grounded on expropriation on the basis of the act of State doctrine but awarded damages for the torture suffered. On appeal, the 9th Circuit Court of Appeal allowed the appeal on the expropriation but granted Argentina immunity in respect of the torture claim. While the *ratio* of the 9th Circuit's ruling was that Argentina had waived its immunity by engaging legal proceedings in the US, (by requesting via a letter rogatory that the Los Angeles Superior Court serve Siderman with documents relating to the Argentine government's action against him) the court, said with approbation of the plaintiff's

This legal construct was first articulated by Belsky, Merva and Roht Arriaza's[127] who had been inspired by the case of *Amerada Hess Shipping Corp. v. Argentine Republic.*[128]

The facts were that Argentine military aircraft had severely damaged a Liberian-registered oil tanker in international waters during the war between the United Kingdom and Argentina over the Falkland/Malvinas islands in 1982. The Court in that case had to determine whether it could exercise jurisdiction over the suit brought by the owners and charterers of the ship for compensation from the Government of Argentina. Unable to find any applicable exception to the Foreign Sovereign Immunities Act (FSIA) that would permit the exercise of such jurisdiction, the Second Circuit of the United States Court of Appeal ruled – on the basis of the Alien Tort Claims Act[129] – that Congress could not have intended to exempt foreign States from the jurisdiction of U.S. courts when those foreign States commit violations of international law.[130]

The Second Circuit was overturned by the Supreme Court – which found that Congress intended for the FSIA to be the exclusive basis for the exercise of jurisdiction over foreign sovereigns and that none of the exceptions therein contained were applicable to the case.[131] The Supreme Court's rejection of the reasoning of the Second Circuit notwithstanding, the mould for a legal argument, borrowed from the implied waiver of a sovereign's status as a sovereign when it enters into the world of commerce, had been cast. Belsky, Merva and Roht Arriaza made the case as follows:

> The existence of a system of rules that states may not violate implies that when a state acts in violation of such a rule, the act is not recognized as a sovereign act. When a state act is no longer recognized as sovereign, the state is no longer entitled to invoke the defense of sovereign immunity. Thus, in recognizing a group of peremptory norms, states are implicitly consenting to waive their immunity when they violate one of these norms.[132]

The argument hews closely to the *acta jure commercii* rationale presented in a wide range of cases in multiple jurisdictions, which formed the basis of the restrictive theory of sovereign immunity. Courts have, on the basis of case law

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argument (that the breach by Argentina of a *jus cogens* prohibition should trump immunity) that "[a]s a matter of international law, the Sidermans' argument carries much force."

127 See Adam C. Belsky, Mark Merva, and Naomi Roht-Arriaza, "Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law" (1989) 77 *California Law Review* 365 – 415. See also Lee Caplan, "State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory" Note 77 above at 766.

128 *Amerada Hess Shipping Corporation, Appellant, v. Argentine Republic, Appellee. United Carriers, Inc., Appellant, v. Argentine Republic, Appellee*, 830 F.2d 421 (2d Cir. 1987).

129 See *Amerada Hess Shipping Corporation, Appellant, v. Argentine Republic, Appellee. United Carriers, Inc., Appellant, v. Argentine Republic, Appellee*, Note 128 above. The Alien Tort Statute (28 U.S.C. § 1350; ATS), also called the Alien Tort Claims Act (ATCA) was enacted by the US Congress as part of the Judiciary Act of 1789.

130 *Amerada Hess Shipping Corp. v. Argentine Republic*, Note 128 above, at page 425.

131 *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428 (1989) at pages 436 – 443.

132 See Adam C. Belsky, Mark Merva, and Naomi Roht-Arriaza, "Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law," Note 127 above at 394.

and legislation developed on the back of such case law, ruled that a State could be held – by its conduct – to have waived immunity.[133] Thus had Chief Justice Marshall held in *Bank of United States v. Planters Bank of Georgia*[134] that:

> It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union who have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the bank and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act.[135]

In the context of ensuring accountability for human rights abuses over invocation of immunity, the principle of implied waiver has also been adopted and relied upon by both the Hellenic and Italian Supreme Courts. In the *Voiotia Case*,[136] the Supreme Court of Greece ruled precisely on this point, citing as the first of six reasons that:

> a) When a state is in breach of jus cogens rules, it cannot bonafide expect that it will be granted immunity privileges. Therefore, it is assumed that it tacitly waives the privilege. (constructive waiver through the operation of international law)[137]

The argument is all the more persuasive because of the rule of interpretation that laws are to be construed, where possible, in a manner consistent with a country's international law obligations.[138]

4. Interrogating the Case for a *Jus Cogens* Human Rights Exception to Immunity.

While the assertion of a *jus cogens* exception to sovereign immunity and immunity for Heads of State and other high-ranking officials has found favour before a number of

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133 See *The Parlement Belge* (1880) 5 P.D. 197. See also Hersch Lauterpacht "The Problem of Jurisdictional Immunities of Foreign States," Note 58 above. See also the Letter of Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney Gen. Philip B. Perlman (May 19, 1952), *reprinted in* 26 Department of State Bulleting 984 (1952). Citing trends in the Netherlands, Germany, Belgium, Italy, France, Austria, Greece, Romania, Peru and Denmark, the Tate letter telegraphed the US Government's adoption of a restrictive approach to sovereign immunity which would provide cover of immunity for a State's public but not commercial acts.

134 See *Bank of United States v. Planters' Bank of Georgia*, 22 U.S. 9 Wheat. 904 (1824).

135 *Bank of United States v. Planters' Bank of Georgia*, Note 134 above at page 907.

136 *Prefecture of Voiotia v. Federal Republic of Germany*, Note 61 above.

137 See Ilias Bantekas, "Prefecture of Voiotia v. Federal Republic of Germany. Case No. 137/1997," Note 62 above at 766.

138 See UN General Assembly Resolution 2625 (XXV): *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/25/2625 (24 October 1970), available at http://www.un-documents.net/a25r2625.htm accessed 14 November 2018.

courts,[139] the argument that such judgments evince a legal norm in international law is questionable. Not least of the reasons being that almost without exception, the judgments finding that there is a *jus cogens* human rights exception to immunity have been overturned by appellate courts or have had the rationale undergirding them traversed by authoritative international courts.[140]

In the face of what has been described as the hero / villain dichotomy,[141] any contestation of the position that there is a *jus cogens* human rights exception to immunity puts one – notionally at least – on the side of villains.[142] The lure of the values-laden formulation of the normative hierarchy theory notwithstanding, values do not law make. This section of the Chapter proceeds therefore to interrogate the policy preferences or leanings and the normative postulations and extrapolations that represent the essence of the case for a *jus cogens* exception to immunity by setting out the proffered grounds *in extenso* and contesting said grounds *seriatim*. It does this as a necessary backdrop to addressing the more particular questions as to whether immunity *ratione personae* and immunity *ratione materiae* admit of any exceptions for *jus cogens* crimes.

4.1 *Jus Cogens* and Normative Hierarchy.

The soundness of the normative hierarchy argument is tested when one properly identifies that invocation of immunity is fundamentally a rule of procedure that prevents the exercise of process and does not traverse any substantive norms. States that assert sovereign immunity or immunity for Heads of State and other high-ranking officials, and States that accord such immunity are therefore not thereby trivializing *jus cogens* human rights norms or impugning their peremptory nature. They are merely postponing the judicial process or invoking alternative means of settlement. Hazel Fox notes to this end that:

> [s]tate immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.[143]

Indeed, in the *Arrest Warrant Case*, the Court's majority was at pains to point out that:

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal

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139 See *Voiotia,* Note 61 above; *Ferrini,* Note 68 above; and, *Pinochet,* Note 109 above.

140 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens.*" Note 85 above. See also *Fifth report on immunity of State officials from foreign criminal jurisdiction* by Concepción Escobar Hernández, Special Rapporteur (A/CN.4/701) at paragraph 237, available at http://legal.un.org/docs/?symbol=A/CN.4/701 accessed 14 November 2018.

141 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff," Note 3 above.

142 See also Op-ed by Desmond Tutu, *In Africa, Seeking a License to Kill*, New York Times, Note 59 above.

143 See Hazel Fox, *The Law of State Immunity* (2nd ed) (Oxford University Press, 2008) at 525.

> responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.[144]

Beyond the fact that "there is *no substantive content in the procedural plea of State immunity upon which a jus cogens mandate can bite*," the view that immunity should not be available to persons accused of breaching *jus cogens* human rights norms because of the latter's superiority in the hierarchy of norms raises other difficulties.

The prohibition of torture, which is a primary norm with *jus cogens* stature is a norm the sole objective of which is to render the practice of torture illegal. It does not, in so doing, prescribe how such prohibition must be actualized or enforced. In order for the normative hierarchy argument to succeed, even if one were to agree that sovereign immunity is a substantive and not a procedural hurdle, one would need to prove the existence or emergence of another *jus cogens* norm that would compel the forum State to provide remedies to the victim for acts committed by the foreign State and/or its representatives. While this would significantly aid the quest for accountability for *jus cogens* crimes, there is no such rule.[145] Thus does Lord Hoffman note in *Jones* that:

> To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary … rule which, by way of exception to state immunity, entitles or perhaps requires states to assume … jurisdiction over other states in cases in which torture is alleged.[146]

Indeed, presented with arguments founded on normative hierarchy, the European Court of Human Rights has also stated categorically that there is, from its review of "international instruments, judicial authorities or other [international law] materials" no basis to conclude the existence or emergence of a *jus cogens* human rights exception to sovereign immunity.[147]

Beyond the foregoing, and in order to sustain the argument that sovereign immunity must yield to *jus cogens* norms because of normative hierarchies, proponents must prove that there exists a *jus cogens* norm that proscribes the recognition of sovereign immunity for human rights violations perpetrated by the State or its sovereign. There is however, in international law, no such *jus cogens* prohibition of immunity. Indeed, case law in domestic and international fora is replete with evidence to the contrary.[148]

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144 See *Arrest Warrant Case*, Note 12 above at paragraph 60.

145 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens,*" Note 85 above at 160.

146 *Case of Jones and Others v. The United Kingdom* App Nos. 34356/06 and 40528/06 Council of Europe: European Court of Human Rights (ECtHR, 14 January 2014), available at file:///C:/Users/KDaniel/Downloads/001-140005.pdf, accessed 14 November 2018. See also Cedric Ryngaert, "Jones v. United Kingdom: The European Court of Human Rights Restricts Individual Accountability for Torture" (2014) *Utrecht Journal of International and European Law* 1.

147 See *Al-Adsani v. The United Kingdom*, Note 91 above at paragraph 61.

148 A few examples would be the following: *Bouzari v. Iran*, 114 A.C.W.S. 3d 57 (Ont. Super. Ct. Justice 2002), affd 71 O.R.3d 675 (Ont. Ct. App. 2004), 128 ILR *586,* 587-590; *Al-Adsani v. Government of Kuwait and Others*, CA,12 March 1996, 107 ILR 536, 537; *Jones (Respondent) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS*

The consequences also of such an interpretation on international relations has been highlighted by Judge Pelonpaa in *Al Adsani* who, in a concurring but separate opinion renders a caution worth repeating that:

> A holding that immunity is incompatible with Article 6 of the Convention because of the *jus cogens* nature of the prohibition of torture would have made it difficult to take into account any considerations of this kind. … [T]he Court would have been forced to hold that the prohibition of torture must also prevail over immunity of a foreign State's public property, such as bank accounts intended for public purposes, real estate used for a foreign State's cultural institutes and other establishments abroad (including even, it would appear, embassy buildings), etc., since it has not been suggested that immunity of such public property from execution belongs to the corps of *jus cogens*. Although giving absolute priority to the prohibition of torture may at first sight seem very "progressive", a more careful consideration tends to confirm that such a step would also run the risk of proving a sort of "Pyrrhic victory". International cooperation, including cooperation with a view to eradicating the vice of torture, presupposes the continuing existence of certain elements of a basic framework for the conduct of international relations. Principles concerning State immunity belong to that regulatory framework, and I believe it is more conducive to orderly international cooperation to leave this framework intact than to follow another course.[149]

If, as advocates argue, a *jus cogens* prohibition obliterates any procedural or other obstacles (born of practical considerations) to ensuring accountability for breach of such prohibitions,[150] the dynamics of international relations could, even more profoundly, affirm that *might is right*. The risks that this might pose to the notional equality of States upon which international law rests has spawned an effort to avoid overreach and to situate the effect of *jus cogens* within defensible limitations. Thus, does Orakhelashvili, one of the greatest proponents of the theory of normative hierarchies, concede – albeit reluctantly – that:

> … the impact of *jus cogens* is, in principle, indiscriminate in its effects, and may trump immunity of incumbent officials in the same way as that of former officials. But there can be factors demonstrating that this indiscriminate effect is kept within its proper limits and results in no undue harassment of serving heads of State and foreign ministers. *The context of the peremptory duty to prosecute may sometimes allow for the postponement of accountability without harming public order*.[151] (My emphasis)

Saudiya (the Kingdom of Saudi Arabia) (Appellants); Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Jones (Appellant) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) (Conjoined Appeals), [2006] UKHL 26 (June 14, 2006) [hereinafter *Jones* or *Jones v. Saudi Arabia]; Bucheron v. Federal Republic of Germany*, Cass. lebnki civ., Dec. 16, 2003, Bull. civ. *02-45961.*

149 See concurring but separate opinion of Judge Pelonpaa (joined by Judge Bratza) in *Al Adsani*, Note 91 above.

150 See Alexander Orakhelashvili, "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong," Note 77. Orakhlelasvili argues that all legal standards supporting enforcement of peremptory norms should also be peremptory.

151 See Alexander Orakhelashvili, "State Immunity and International Public Order," Note 90 above at 265. See also Alexander Orakhelashvili, "State Immunity and International Public Order Revisited," (2006) 49 *German Year Book of International Law* 327.

Scholars like Orakhelashvili have picked fights with scholars who have not agreed with his views[152] and voiced strident condemnation of the myriad cases that run athwart his theories and effectively disprove his views about a *jus cogens* human rights exception to all types of immunity in international law.[153] His aggressive stance notwithstanding, the case law from national courts – as evidence of State practice – and international Courts, is clear: *jus cogens* does not, on the basis of normative hierarchy, render immunity inapplicable before the courts of foreign States.[154]

4.2 Does Universal Jurisdiction for *Jus Cogens* Crimes Trump Immunity?

In a 2003 article, Cassese notes rather dramatically, that:

> … the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes.[155]

Long derided and condemned by the African Union as a tool capable of abuse for neo-colonialist domination,[156] prosecutions under universal jurisdiction – previously presented as a bulwark for accountability – have proven, unsurprisingly, to be pliable to political influence.[157] In acknowledgment of the

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[152] See Alexander Orakhelashvili, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah" (2011) 22(3) *European Journal of International Law* 849. With little reason to be provoked but feeling "attacked" nonetheless, Orakhelashvili launches a broadside into Akande and Shah, characterizing the conclusions of their joint article variously as "false" and "fallacious" and asserting that their,

> objections to the primacy of *jus cogens* over immunities rely only on factors and evidence that support the conclusions reached in that contribution, disregard the evidence that would stand in their way, and ascribe to some authorities the impact they have never been intended to produce.

See however Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili," (2011) 22(3) *European Journal of International Law* 857.

[153] See Alexander Orakhelashvili, "State Immunity and International Public Order," Note 90 above; Alexander Orakhelashvili, "State Immunity and International Public Order Revisited," Note 151 above; and, Alexander Orakhelashvili, "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong," Note 77 above. See also, Alexander Orakhelashvili, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah, Note 152 above.

[154] See Phillip Wardle "The Survival of Head of State immunity at the International Criminal Court," (2011) 18 *Australian International Law Journal* 181.

[155] Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" (2003) 1 *Journal of International Criminal Justice* 589, at 589. See generally, Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholders*, International Criminal Justice Series (Volume 13) (Asser Press, 2017).

[156] See Report of the AU Commission on the Abuse of the Principle of Universal Jurisdiction, available at http://archive.iccnow.org/documents/EX_CL540(XVI).pdf accessed 15 November 2018. See also Harmen G van der Wilt, "Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered..." (2011) 9 *Journal of International Criminal Justice* 1043.

[157] The blowback, for entertaining actions to indict leaders and former leaders of Western Governments, against European countries that had amended laws to permit universal jurisdiction and the rather swift acquiescence of such European countries to the dictates of the Western governments is a testament to remarkable hypocrisy on the part of the said European countries. See Katherine Gallagher "Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture" (2009) 7 *Journal of International Criminal Justice* 1087. See also Dalila Hoover, "Universal Jurisdiction Not So Universal: Time to Delegate to the International Criminal Court?" Note 96 above.

political harassment claims that have engendered the paring back in European countries of the broad ambits of legislation permitting universal jurisdiction, Bassiouni notes that:

> Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory.[158]

As the argument grounded on universal jurisdiction goes, violations of *jus cogens* norms engender a right among States to exercise universal jurisdiction and prosecute *hostes humanis generis*. From this "right" human rights advocates have asserted, by extrapolation, that the right to prosecute is also a *jus cogens* norm which prevails over any rights of States which are not themselves peremptory norms.[159]

At best, this is a fairly significant overreach for which there is little to no known support in international case law or State practice. It is therefore not clear what is the source of scholars like Orakhelashvili's assurance of the existence of such a rule. The definitive assertion that violations of peremptory norms compel invocation of universal jurisdiction is clearly undermined by the absence of State practice in the invocation of universal jurisdiction for the crime of aggression – which is also a *jus cogens* prohibition.[160] In any case, universal jurisdiction for a crime does not suggest that there would be no immunity for that crime just as territorial jurisdiction over a crime does not suggest that immunity does not avail perpetrators of that crime. Otherwise stated, although immunity presupposes jurisdiction (immunity is a factor only where there is jurisdiction in the first place), the ability to exercise jurisdiction cannot mean that there can be no immunity.[161]

Attempts have been made to situate an obligation upon States to prosecute crimes prohibited through treaty obligations that confer universal jurisdiction for such crimes,[162] but the ICJ specifically addressed the question in the *Arrest Warrant Case*, holding that:

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158 See M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," (2001) 42 *Virginia Journal of International Law* 81, at 82.

159 See Alexander Orakhelashvili, "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong," Note 77 above.

160 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above at 837 – 838.

161 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir:* The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir (ICC-02/05-01/09-370), 16 July 2018, available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-370 accessed 15 November 2018.

162 See Alexander Orakhelashvili, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah," Note 152 above.

> [A]lthough 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 of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs*. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.[163] (Emphasis mine).

There would only be very limited instances, if any, in which the failure by a State to prosecute the authors of egregious violations of *jus cogens* human rights norms perpetrated in foreign countries, or to allow civil redress by according immunity to or recognizing the immunity of the perpetrator, would represent a breach of international obligations. Even in cases where such an obligation can be established, the obligation would not be, of itself, a *jus cogens* obligation. There would therefore be no conflict between the rules of immunity and the *jus cogens* nature of the proscribed conduct.[164]

Case law from the European Court of Human Rights sustains this fact. In *Al Adsani*,[165] the ECHR in dismissing the argument that the UK Government had, by granting immunity to the Kingdom of Kuwait, denied the claimant access to Courts and the opportunity for legal redress for a crime for which there is universal jurisdiction, held by a 9 – 8 majority that:

> While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity.[166]

Some commentators have extracted from this ruling and the court's distinction between civil and criminal liability that the Court would have found that sovereign immunity would not have applied in the latter case.[167] This may well be true but given that the ECHR does not have criminal jurisdiction and that the case before the Court was not one of criminal culpability, the extrapolation from *Al Adsani* can only be described as conjecture deriving from *obiter*. Tellingly, the Court's

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163 See *Arrest Warrant Case*, Note 12 above at paragraph 59.

164 See Dapo Akande and Sangeeta Shah, Note 3 above.

165 *Al-Adsani v. The United Kingdom*, Note 91 above.

166 *Al-Adsani v. The United Kingdom*, Note 91 above at paragraph 61 of majority opinion.

167 See Hazel Fox "Approaches of Domestic Courts to the Assertion of International Jurisdiction" in Patrick Capps, Malcolm Evans and Stratos Konstadinidis (Eds) *Asserting Jurisdiction – International and European Legal Perspectives* (Hart Publishing, 2003) 175, at 185.

subsequent rulings on similar matters as well as the ICJ's finding in the *Jurisdictional Immunities Case* that violations of *jus cogens* norms may still be considered *acta jure imperii* – for which immunity avails the State – seem to suggest otherwise.[168] As the ICJ noted:

> … there is a substantial body of State practice … which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.[169]

The ECHR had occasion to rule again on the question of whether States may rely on sovereign immunity in cases concerning breaches of non-derogable and peremptory (*jus cogens*) norms the very next year but this time, with a more robust margin. In *Kalogeropoulou v. Greece and Germany,*[170] two hundred and fifty-seven victims and relatives of victims of Nazi war crimes committed in Greece in 1944 (the Distomo Massacre) had petitioned the European Court of Human Rights that the refusal of the Greek Justice Minister to authorize the seizure of German property situated in Greece and levy execution against such assets infringed their right of access to court. Describing the applicants' petition as "*manifestly ill-founded*," the Court asserted – in declining admissibility of the case – that it was not yet established in international law that States may not invoke State immunity in cases concerning alleged violations of *jus cogens.*[171]

The repeal and amendment of laws permitting universal jurisdiction in Belgium[172] and in Spain,[173] in response to political pressure from the US and Israel, among others, clearly render hollow the stated concern for universal preservation of human rights (and commitment to accountability for their breach) that ostensibly led to the enactment of the laws in the first place.[174] In Belgium, for instance, the new law expressly accords immunity to Heads of State and other high-ranking government officials and requires that criminal prosecutions, and the investigations that precede them, may only be instituted by the Federal Attorney

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168 See *Jurisdictional Immunities of the State Case*, Note 14 above at paragraph 60.

169 See *Jurisdictional Immunities of the State Case*, Note 14 above at paragraph 84.

170 See *Kalogeropoulou v. Greece and Germany*, App. No. 59021/00 ECtHR, 12 Dec. 2002, 129 ILR (2007) 537, available at http://freecases.eu/Doc/CourtAct/4555291 accessed 15 November 2018.

171 See *Kalogeropoulou v. Greece and Germany*, Note 170 above. See also By Kerstin Bartsch and Björn Elberling "*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision" (2003) 4(5) *German Law Journal* 477.

172 *Loi Modifiant la Loi du 16 Juin 1993 Relative d la Ripression des Violations Graves du Droit International Humanitaire et larticle 144 ter du Code judiciaire,* Law No. S-C-2003/09412, F. 2003 - 1786, No. 167, 248 - 24853, art.5, *(7* May 2003), available at www.eiustice.iust.fov.be/mopdff2oogfos/o7_2.pdf accessed 15 November 2018. The 1993 law had permitted Belgian courts to exercise jurisdiction over offenses without regard to the place of commission. In the face however of the risk of losing the Head Quarters of NATO as US Defence Secretary Donald Rumsfeld (one of the persons accused of command responsibility for various atrocities in the Iraq War, Belgium capitulated.

173 See Law 1/2009 of November 3 in Article 23.4 of the Organic Law of the Judicial Power art. 1 (Ley Organica 1/2009, de 3 Noviembre, del Poder Judicial, Articulo primero, Apartados 4 del articulo 23 de la Ley Organica del Poder Judicial) modified Section 4 of Article 23 of the Law 6/1985 of July 1 of the Judicial Power (Ley Orginica 6/1985, de 1 de Julio, del Poder Judicial).

174 See "Observations by Belgium on the scope and application of the principle of universal jurisdiction," available at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf accessed 17 November 2018.

General of Belgium, whose assessments on whether to proceed or not may not be subjected to review.[175]

In the face of US pressure, the abandonment also of jurisdiction-enabling laws by self-declared champions for accountability, such as Germany (which had strongly advocated universal jurisdiction as the basis for the ICC's exercise of jurisdiction)[176] and Spain (whose laws had permitted Balthazar Garzon's assertion of universal jurisdiction and issue of arrest warrant for Augusto Pinochet Ugarte)[177] belies such countries' stated commitment to accountability.[178]

Notwithstanding the well documented and proven instances of torture – as confirmed by various investigations into US treatment of prisoners of war in the Iraqi theatre and in various detention centres,[179] legal actions against the US and named individuals in these countries went nowhere.[180] The seeming indifference to, and even subversion by authorities of the legal actions instituted by various plaintiffs in Germany and Spain over US atrocities hardly validate images that those countries had cultivated as bastions of accountability for international crimes.[181] They also serve to erode the moral force of the grounds presented for the exercise of universal jurisdiction and application of exceptions to immunity.

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175 *See* Belgium's Amendment to the Law of 15 June 1993 (as amended by the law of 10 February 1999 and 23 April 2003) Concerning the Punishment of Grave Breaches of Humanitarian Law (5 Aug. 2003), International Brief (26 Aug. 2003), available at www.asil.orgfilibo61s.cfm#I accessed 17 November 2018. See also Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law," (2003) 1 *Journal of International Criminal Justice Eichmann* 679 – 689.

176 See "The jurisdiction of the International Criminal Court - An informal discussion paper submitted by Germany to Preparatory Committee on the Establishment of an International Criminal Court, 16 March – 3 April 1998, Note 107 above.

177 As the judge who issued the warrant of arrest for Augusto Pinochet Ugarte in London in 1998, Balthazar Garzon has been credited with stimulating public interest in international criminal justice that has persisted over time. See Naomi Roht-Arriaza *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press, 2006).

178 See Andreas Fischer-Lescano, 'Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law,' (2005) 6 *German Law Journal* 689. See also Scott Lyons, 'German Criminal Complaint Against Donald Rumsfeld and Others,' *10 ASIL Insights*, No. 33 (14 December 2006), available at https://www.asil.org/insights/volume/10/issue/33/german-criminal-complaint-against-donald-rumsfeld-and-others accessed 17 November 2018. See also Marlise Simons, *Spain's Attorney General Opposes Prosecutions of 6 Bush Officials on Allowing Torture*, The New York Times (16 April 2009), available at http://www.nytimes.com/2009/04/17/world/europe/17spain.html accessed 17 November 2018. See also FIDH Press Release of 27 November 2009: "France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint," available at https://www.fidh.org/en/region/americas/usa/USA-Guantanamo-Abu-Ghraib/FRANCE-IN-VIOLATION-OF-LAW-GRANTS,4932 accessed 17 November 2018.

179 See Investigation Report of US Senate Armed Services Committee, "Inquiry into the Treatment of Detainees in U.S. Custody" (20 November 2008), available at https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf accessed 17 November 2018. See also James Schlesinger (Chair), "Final Report of the Independent Panel to Review Department of Defense Detention Operations" (August 2004), available at http://www.dtic.mil/dtic/tr/fulltext/u2/a428743.pdf accessed 17 November 2018. See also Katherine Gallagher, "Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture," (2009) 7 *Journal of International Criminal Justice* 1087.

180 See Katherine Gallagher, "Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture," Note 179 above.

181 See Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law," Note 175 above. See also Andreas Fischer-Lescano, "Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law," Note 178 above. See also Daryl Lindsey, *Dead-End for War Crimes Accusations: German Prosecutor Won't Pursue Rumsfeld Case*, Die

4.3 Disqualification of International Crimes from Legitimate Acts of State for which Immunity may be Invoked.

The argument that certain breaches of *jus cogens* norms are so heinous that they cannot qualify as acts of State has gained some traction and has been relied upon in such landmark cases as *Eichmann*[182] and *Pinochet*.[183] While it is true that immunity lies only for *acta jure imperii* (and not *acta jure gestionis*) the US Supreme Court has recognized in such cases as *Saudi Arabia v. Nelson*,[184] that the abuse by a State of *jus cogens* norms does not automatically render such acts of State, *acta jure gestionis*.[185] The criminal enterprises of the Second World War, for which Germany's responsibility was invoked attest to this.[186]

The claim has been made, in an extrapolation from the foregoing, that the perpetration by government functionaries of egregious breaches of *jus cogens* norms such as torture cannot be considered official acts.[187] They must therefore be individual acts. The stated rationale is that to consider such crimes as normal State functions would be to legitimize them. Shorn of legitimacy however, the offending act cannot be considered an official act or a normal act by an official.

This deft reasoning however flies in the face of the definition of torture in the Torture Convention, Article 1(1) of which states that:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering *is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (my emphasis)

The very definition of torture invalidates the suggestion that certain egregious violations of *jus cogens* norms cannot be considered official acts. This is affirmed by distinguished human rights scholar Antonio Cassese, who as president of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia

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Spiegel Online (10 February 2005), available at http://www.spiegel.de/international/dead-end-for-war-crimes-accusations-german-prosecutor-won-t-pursue-rumsfeld-case-a-341131.html accessed 17 November 2018.

182 See *Attorney-General of the Government of Israel v. Eichmann (Israel Supreme Court 1962)*, Note 104 above.

183 See the opinions of Lord Hutton and Lord Browne-Wilkinson in *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)*, Note 109 above.

184 *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

185 Per Justice Souter, in *Saudi Arabia v. Nelson*, Note 184 above at page 361:

> The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.

186 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens,*" Note 85 above at 165.

187 See Andrea Bianchi, "Denying State Immunity to Violators of Human Rights," Note 121 above.

in *Prosecutor v. Blaškić*[188] ruled to reduce Blaškić's sentence, amongst others, because "such officials are mere instruments of a State and their official action can only be attributed to the State."[189]

While the argument which seeks to disqualify breaches of *jus cogens* as acts of State may seem clever, it may also have the unwitting effect of permitting States to evade responsibility for the actions of their organs and agents.[190] The views of the International Law Commission are particularly instructive on this point. Article 7 of its *Articles on* Responsibility of States for Internationally Wrongful Acts affirms that:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[191]

4.4 Implied Waiver?

The argument that a State which violates *jus cogens* human rights norms, tacitly waives any immunity it is entitled to has also received a fair amount of attention.[192] It has however been routinely unsuccessful – particularly in the United States where its formulation and enunciation by Belsky, Merva and Roht Arriaza as a ground for invalidating immunity had given it some currency.[193]

In *Siderman de Blake v. Republic of Argentina*,[194] *Princz v. Federal Republic of Germany*[195] and *Sampson v. Federal Republic of Germany*,[196] the courts consistently declined to accept the argument and held that there must be evidence of an intention to waive immunity, the fact of the breach alone being insufficient to establish waiver.

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188 *Prosecutor v. Blaškić* (1997) 110 ILR 607.

189 *Prosecutor v. Blaškić*, Note 188 above at page 707.

190 See James Crawford, Jacqueline Peel and Simon Olleson "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading" (2001) 12(5) *European Journal of International Law* 963.

191 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at http://www.refworld.org/docid/3ddb8f804.html accessed 17 November 2018.

192 See for instance Thomas Weatherall, "*Jus Cogens* and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence," (2015) *46 Georgetown Journal of International Law* 2151. See also Thora Johnson, "A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act," (1995) 19 *Maryland Journal of International Law* 259.

193 See Adam C. Belsky, Mark Merva, and Naomi Roht-Arriaza, "Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law," Note 127 above.

194 *Siderman De Blake v. Republic of Argentina*, Note 126 above.

195 *Princz v. Federal Republic of Germany* 26 F. 3d 1166.

196 *Sampson v. Federal Republic of Germany and Conference on Jewish Material Claims Against Germany*, Inc, Appeal Judgment, 250 F 3d 1145 (7th Cir 2001).

Beyond the US, the argument has not fared much better: In both *Ferrini*[197] and *Voiotia*,[198] Germany's acceptance of culpability for the atrocities of the Second World War and even payment of compensation in some instances did not preclude it from invoking immunity in the face of civil suits – an immunity which has been upheld by the International Court of Justice[199] and the European Court of Human Rights.[200] In the *Jurisdictional Immunities of the State Case*, the Court held that the fact that "Germany still has a responsibility towards Italy, or individual Italians, in respect of war crimes and crimes against humanity committed by it during the Second World War [would] not affect Germany's entitlement to immunity."[201] In *Kalogeropoulou and Others v. Greece and Germany* the ECHR dismissed the finding of the Greek Court of Cassation that the organs of the Third Reich had misused their sovereignty and violated the *jus cogens* rules with the result that Germany had tacitly waived its immunity.

The point is reinforced by Libya's defense in a civil claim brought against her in the United States. In *Smith v. Socialist People's Libyan Arab Jamahiriya*,[202] the Libyan government, in claiming immunity from suit asserted that it was entitled to such immunity even though its alleged participation in the deaths caused by the explosion of Pan Am Flight 103 over Lockerbie in Scotland would be a breach *of jus cogens*.[203] The judgment of the Court upholding Libya's immunity was affirmed by the Court of Appeal of the Second Circuit which held that:

> The bombing of Pan Am Flight 103 was an act of terrorism that has properly drawn the condemnation of the world community. Horrific as that act was, it cannot provide a basis for giving an unwarranted interpretation [implied waiver of immunity] to an act of Congress simply to achieve a result beneficial to the families of the victims of the bombing.[204]

The implied waiver argument has also enjoyed a fair bit of traction with respect to the application of human rights treaties. As the argument goes, a State's ratification of a treaty which obliges it to provide effective remedies to victims in the event of the breach of treaty proscriptions prevent the State from invoking immunity or any such defences that will render the obligation to provide effective

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197 *Ferrini v. Federal Republic of Germany*, *Corte di Cassazione* (*Sezioni Unite*), Note 68 above.

198 *Prefecture of Voiotia v. Federal Republic of Germany*. Case No. 137/1997, Note 61 above.

199 *Jurisdictional Immunities of the State Case*, Note 14 above.

200 *See Kalogeropoulou and Others v. Greece and Germany,* No. 59021/00, ECtHR (First Section), Admissibility Decision of 12 December 2002, Reports of Judgments and Decisions 2002-X. It must be noted that even before the European Court ruling, the Special Highest Court of Greece, which had become seized of the matter ruled in *Federal Republic of Germany v. Miltiadis Margellos*, Case 6/17-9-2002 (Decision of 17 September 2002) by a six to five vote margin that Germany enjoyed immunity without any restrictions or exceptions and therefore could not be sued before any Greek Civil Court for torts committed. See Kerstin Bartsch and Björn Elberling "*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision" (2003) 4(5) *German Law Journal* 477.

201 *Jurisdictional Immunities of the State Case*, Note 14 above at paragraph 108.

202 *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306.

203 See Leslie McKay, "A New Take on Antiterrorism: Smith v. Socialist People's Libyan Arab Jamahiriya," (1997) 13(2) *American University International Law Review* 439.

204 *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242 (2d Cir. 1996) at paragraph 34.

remedies impotent.[205] While the argument could be reasonably employed to pull down domestic barriers to suits against senior government officials that are insulated procedurally or otherwise from being impleaded, it is not likely that this argument will enjoy much success in relation to the invocation of immunity before foreign courts. This would be because the obligation to provide effective remedies would be an obligation to provide such remedies before a State's domestic and not foreign courts. To read into a State's treaty obligations to provide effective remedies for the breach within its jurisdiction of individual rights affirmed by those treaties, a further obligation to permit suits before foreign domestic courts will be a stretch that few, if any, of even the most ardent internationalists can sustain.[206]

Even in the case of treaties where, because of *aut dedere aut judicare* provisions,[207] States parties have an obligation to try or to render perpetrators of treaty violations to other countries willing to try them,[208] courts have not been convinced that immunities available under customary international law would no longer avail persons entitled to claim them. In *Pinochet*[209] the Law Lords were unconvinced by the appellant's argument that by ratifying the Torture Convention, Chile had impliedly waived any immunities that persons such as Pinochet Ugarte could claim. The Law Lords in the Pinochet cases can hardly be characterized as paragons of clear or consistent reasoning[210] but Lord Goff's articulation, in dissent, of his concerns with the implied waiver argument are instructive. Per Lord Goff:

> there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied.[211]

As this Chapter has sought to show in the foregoing, the arguments proffered to justify a *jus cogens* human rights exception to immunity, have various deficiencies that render them unsustainable. The focus of this dissertation being to determine the status in international law of immunity in criminal proceedings, the next part of this Chapter shall endeavour to address this question.

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205 See Philip Tassin, "Why Treaties Can Abrogate State Sovereign Immunity: Applying Central Virginia Community College v. Katz to the Treaty Power," (2013) 101 *California Law Review* 755.

206 See *Al Adsani v. United Kingdom,* Note 91 above.

207 Treaties such as the Genocide Convention which oblige a State in which the alleged perpetrator is found to establish and exercise jurisdiction or to extradite the alleged offender. See Articles 6 and 7 of the Convention on the Prevention and Punishment of the Crime of Genocide. It was approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 and entered into force on 12 January 1951.

208 See Article 7 of the UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html accessed 12 January 2018, (Torture Convention).

209 *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3), Note 109 above.

210 The *ratio decidendi* of each of the Pinochet cases was different and even for each case, the reasons proffered by the Law Lords for their respective judgments in favour of the main judgment or in dissent were, in some cases, markedly different.

211 See Lord Goff in *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3), Note 109 above at page 217.

5. Determining *Lex Lata*: Are there *Jus Cogens* Human Rights Exceptions to Immunity *Ratione Personae* and Immunity *Ratione Materiae.*

Having illustrated, in the foregoing pages, the weaknesses of the grounds proffered to render a *jus cogens* exception to immunity in *Voiotia* and *Ferrini* and articulated in both civil and criminal proceedings before foreign domestic courts since then, it is necessary now to directly address the more relevant question as to whether personal immunities – immunity *ratione personae* and immunity *ratione materiae* – admit of any exceptions in criminal proceedings before foreign domestic courts. This part of the present Chapter argues firstly that immunity *ratione personae* is absolute and secondly that while limiting immunity *ratione materiae* may serve to advance individual accountability for international crimes, neither the above-proffered reasons nor State practice seem to bear out the claim that there is such an exception – *lex lata*. That is not to say definitively however, not at this point at least, that there are no exceptions.

5.1 Are there *Jus Cogens* Human Rights Exceptions to Immunity *Ratione Personae?*

The question whether there is an exception to immunity *ratione materiae* – in criminal or civil proceedings is easily answered and in categorical terms: there is not. As the International Law Commission's Special Rapporteur on *jus cogens* has acknowledged, "[i]t is generally accepted that there are no exceptions, even for *jus cogens* crimes, with respect to immunity *ratione* personae."[212]

From the authorities, not only is there consensus that immunity *ratione personae* avails the *troika* of Head of State, Head of Government and Foreign Minister where they are accused of international crimes, it also arguably avails others of similar stature in similar circumstances.[213] On this, State practice as evidenced by the rulings of domestic courts, is unanimous and there are no judicial authorities that support the claim that Heads of State and other high-ranking officials entitled to immunity *ratione personae* are subject to the jurisdiction of foreign courts where they are accused of international crimes.[214] This position has also been endorsed without equivocation by members of the International Law Commission.[215]

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[212] Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, Note 13 above at page 50.

[213] See Salvatore Zappala, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation,"* (2001) 13 (3) *European Journal of International Law* 595, at 595; See also Hazel Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government', (2002) 51 *International & Comparative Law Quarterly* 119.

[214] See Michael A. Tunks, "Diplomats or Defendants? Defining the Future of Head-of-State Immunity," Note 52 above. See also Dapo Akande, "International Law Immunities and the International Criminal Court," (2004) 98 *American Journal of International Law* 407. See also Antonio Cassese, "The Belgian Court of Cassation v. The International Court of Justice: The Sharon and Others Case," (2003) 1 *Journal of International Criminal Justice* 437 at 440.

[215] See Provisional summary record of the 3361st (A/CN.4/SR.3361), 3362nd (A/CN.4/SR.3361), 3363rd (A/CN.4/SR.3361) and 3364th (A/CN.4/SR.3361) meetings of the ILC, available at http://legal.un.org/ilc/guide/4_2.shtml accessed 17 November 2018.

In cases spanning multiple jurisdictions, it is clear that notwithstanding the efforts of proponents for normative progression on accountability for international crimes,[216] domestic courts have been resolute in recognizing immunity *ratione personae* where it is invoked by persons entitled to such immunity.[217] This has been the case across Europe,[218] in the United States[219] and in several other jurisdictions.[220] The French *Cour de Cassation* made the point succinctly in annulling an indictment against Muammar Gaddafi for his role in the terrorist act that downed a plane and killed over 170 persons over the Tenere desert in 1989. It asserted that there is no exception to immunity for incumbent Heads of State notwithstanding the gravity of the offence they stand accused of.[221]

The reasoning has been followed by the Courts of the United Kingdom, which have not only declined to exercise jurisdiction over incumbent Heads of State on grounds of the absoluteness of immunity *ratione personae* but have also

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216 Salvatore Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation," Note 213 above.

217 See *Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron),* Final appeal/Cassation (concerning questions of law), P.02.1139.F/2, JT 2003, 243, ILDC 5 (BE 2003), 12th February 2003, Belgium; Court of Cassation. In 2001, a private prosecution was instituted in a court in Brussels, Belgium against Mr Ariel Sharon and Mr Amos Yaron by 24 plaintiffs of Lebanese and/or Palestinian nationality. The action was the alleged commission by the accused of genocide, crimes against humanity, and grave breaches of the Geneva Conventions at Sabra and Shatila in 1982 when Mr. Sharon was Minister of Defense and Mr. Yaron was Division Commander of the Israeli Army. The matter and case file were referred by the investigating judge to the Prosecutor who raised before the Court of Appeal the question of whether prosecution of the two accused was admissible. In June 2002 the *Court of Appeal* held that the prosecution was not admissible. In February 2003 the Belgian Court of Cassation, to which the claimants had appealed, upheld the Court of Appeal decision and dismissed the prosecution against Mr Sharon. The Court also pointed out that Mr. Sharon was both the sitting Prime Minister of Israel as well as the Prime Minister at the time the indictment was sought. Accordingly, the Court held, he would be entitled under customary international law to the immunity that Heads of States and Governments enjoyed during their incumbency – an immunity from which there was no known exception for international crimes.

218 See for instance *Mobutu v. SA Cotoni,* judgment of the Belgian Civil Court of Brussels, 29 December 1988, in 91 ILR, at 260;

219 See such decisions of US courts as *Saltany v. Reagan,* decision of 23 December 1988 702 F Supp. 319 (DCC 1988) at 321-2, available at https://www.courtlistener.com/opinion/2252600/saltany-v-reagan/, accessed 17 November 2018; *Paul and others v. Avril,* US District Court, Southern District of Florida, decision of 14 January 1993, in 103 ILR, at 554-558; *Gladys M. Lafontant v. Jean-Bertrand Aristide,* decision of the US District Court for the Eastern District of New York, 27 January 1994, 844 F Supp.128, 1994 US Dist. LEXIS 641, at 129-139; *Alicog v. Kingdom of Saudi Arabia and others,* decision of the US District Court, Southern District of Texas, 10 August 1994, in 113 ILR, at 512. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

220 See Phillip Wardle, "The Survival of Head of State immunity at the International Criminal Court," (2011) 18 *Australian International Law Journal* 181.

221 See *Gaddafi Case*, General Prosecutor at the Court of Appeal of Paris, Appeal judgment of the French Court of Cassation of 13 March 2001 (no. 00-87215), (2001) 125 *International Law Report* 490, where, in the court's words (paragraph 6):

> … alors qu'en l'état dii droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions an principe de l'immunité de juridiction des chefs d'Etat étrangers en exercice, la chambre d'accusation a méconnu le principe susvisé.

which translates as

> in international law, the subject crimes, regardless of their gravity, do not fall within the exceptions to the principle of immunity from jurisdiction of an incumbent foreign Head of State, the indicting court ignored this principle

See however Salvatore Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation", Note 213 above.

extended the application of immunity *ratione personae* beyond the *troika*.[222] In *Pinochet* Lord Millet declared without equivocation that:

> *The immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office*. He is regarded as the personal embodiment of the state itself. *It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatsoever*.[223] (My emphasis).

In *In Re Mugabe*,[224] the Bow Street Magistrates Court held in response to an application for a warrant of arrest for President Mugabe (brought by human rights activist, Peter Tatchell) that:

> I am satisfied that Robert Mugabe is President and Head of State of Zimbabwe *and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention and I am therefore unable to issue the warrant that has been applied for*.[225] (My emphasis)

In *Application for Arrest Warrant against General Shaul Mofaz*,[226] relatives of victims of Israel's "Assassination Policy" or "Policy of Shooting with Impunity" applied for an arrest warrant against General Shaul Mofaz, who was Defence Minister of Israel, alleging that he had ordered the wilful killing and wanton destruction of the property of their relatives. In a ruling which relied heavily on the ICJ's reasoning in the *Arrest Warrant Case*, the court held that:

> The basis for saying that a Foreign Minister should have [S]tate immunity was to enable him effectively to fulfil his function which would include travel or diplomatic missions on behalf of the State. Would such immunity extend to any other Minister of State, including a Defence Minister? … I conclude that a Defence Minister would automatically acquire [s]tate immunity in the same way as that pertaining to a Foreign Minister. Given that finding, I decline to issue the warrant requested.[227]

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222 See *Arrest Warrant Case*, Note 12 above at paragraph 51 where the Court held that "holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal." Although not exhaustive, the three offices mentioned by the Court are referred to by scholars as the *troika*.

223 *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)*, Note 109 above at page 171.

224 See *Tatchell v. Mugabe*, England, Bow Street Magistrates' Court, 14 January 2004, available at http://ebooks.cambridge.org/clr/case.jsf?bid=CBO9781316152508&id=CBO9781316152508A014 accessed 17 November 2018. See also Tania Branigan, *Mugabe arrest bid fails*, The Guardian (15 January 2004), available at https://www.theguardian.com/uk/2004/jan/15/zimbabwe.world accessed 17 November 2018.

225 See *Tatchell v. Mugabe*, Note 224 above at paragraph 7.

226 *Application for Arrest Warrant Against General Shaul Mofaz*, First instance, unreported (Bow Street Magistrates' Court), available at https://www.dipublico.org/1825/application-for-arrest-warrant-against-general-shaul-mofaz-first-instance-unreported-bow-street-magistrates-court/ accessed 17 November 2018.

227 *Application for Arrest Warrant Against General Shaul Mofaz*. Note 226 above at paragraphs 12 – 15.

In *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*,[228] the ICJ in affirming the inviolability of the person of a Head of State or other person entitled to immunity *ratione personae* held that:

> … the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State. This provision reads as follows: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." This provision translates into positive obligations for the receiving State as regards the actions of its own authorities, and into obligations of prevention as regards possible acts by individuals. *In particular, it imposes on receiving States the obligation to protect the honour and dignity of Heads of State, in connection with their inviolability*.[229] (My emphasis).

Customary international law on immunity *ratione personae* and the absence of exceptions thereto is not traversed in any way by treaties on the subject of immunities. Treaties such as the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004),[230] explicitly affirm that privileges and immunities accorded under international law to Heads of State *ratione personae* are not compromised in any way by the convention.[231]

In the *Arrest Warrant Case*,[232] the ICJ, which can hardly be accused of indolence,[233] stated that it had rooted its decision on extensive case law and State practice, pointing to its careful, even if perhaps exaggerated,[234]

> … examin[ation of] State practice, including national legislation and those few decisions of national higher courts … [from which it had] been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and

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228 *Certain Questions of Mutual Assistance in Criminal Matters, (Djibouti v. France), Judgment*, ICJ GL No 136, [2008] ICJ Rep 177, ICGJ 1 (ICJ 2008), hereafter *Certain Questions of Mutual Assistance in Criminal Matters Case.*

229 See *Certain Questions of Mutual Assistance in Criminal Matters Case,* Note 228 above at paragraph 174. See also Article 2 of the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted on 14 December 1973 and entered into force on February 20, 1977), available at https://treaties.un.org/doc/Treaties/1977/02/19770220%2011-31%20PM/Ch_XVIII_7p.pdf accessed 17 November 2018.

230 See United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted on 2 December 2004), A/RES/59/38, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en accessed 17 November 2018.

231 See Article 3 (2) of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004). See also Article 21 of the Convention on Special Missions (1969); Immunities, Special Missions; Special Missions) UNGA Res 24/2530 or 2350 Convention on Special Missions (1969).

232 See *Arrest Warrant Case*, Note 12 above.

233 Christian J. Tams and James Sloan (Eds), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013).

234 See Steffen Wirth, "Immunity for Core Crimes: The ICJ's Judgment in the Congo v. Belgium Case," (2002) 13(4) *European Journal of International Law* 877, at 879 – 882.

> inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[235]

Thus, do Dapo Akande and Sangeeta Shah also assert – on the basis of a plethora of authorities – that:

> The absolute nature of the immunity *ratione personae* means that it prohibits the exercise of criminal jurisdiction not only in cases involving the acts of these individuals in their official capacity but also in cases involving private acts…
>
> The principle that immunity *ratione personae* extends even to cases involving allegations of international crimes must be taken as applying to all those serving state officials and diplomats possessing this type of immunity. Indeed, the principle is uncontroversial and has been widely applied by national courts in relevant cases, as well as being upheld in state practice.[236]

Having addressed the impregnability of immunity *ratione personae* – even in the face of *jus cogens* crimes, this Chapter now turns to the more difficult question of immunity *ratione materiae*.

5.2 Are there *Jus Cogens* Human Rights Exceptions to Immunity *Ratione Materiae?*

While the question of whether or not there is a *jus cogens* human rights exception to immunity *ratione personae* can be answered definitively in the negative,[237] the same cannot be said of immunity *ratione materiae*, on which consensus has eluded legal experts.[238] Various scholars have asserted that such an exception does exist,[239] Cassese among them, declaring quite eloquently that:

> To my mind five elements support the existence of a customary rule [removing functional immunity for international crimes] concerning *all state officials:* (i) case law; (ii) other manifestations of state practice; (iii) the rationale behind, and the essence of, the distinction between functional (or *substantive)* immunities and personal (or *procedural)* immunities; (iv) the very logic of the body of law governing international criminal law; and (v) new trends in the development of international law.[240]

And yet Cassese's claims that there exists a *customary international law rule removing functional immunity* for international crimes – categorical as it is – is not so easily borne out by case law, which admittedly, is predominantly from cases where State immunity has been invoked before civil and not criminal

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235 See *Arrest Warrant Case*, Note 12 above at paragraph 58.

236 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above at 819 – 820.

237 See *Arrest Warrant Case*, Note 12 above.

238 See Note 3 above.

239 See for instance See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above.

240 See Antonio Cassese, "The Belgian Court of Cassation v. The International Court of Justice: The Sharon and Others Case," Note 214 above at 445.

courts. The argument has been made by some scholars accordingly that the authorities presented to justify the absence of an exception to immunity, for being from civil cases are inadequate and that "[i]t is practice related to criminal responsibility that must form the basis of any international law rule relating to exceptions [or the absence thereof] to immunity on account of *jus cogens* crimes."[241]

Without a doubt, case law and State practice on criminal responsibility would assist in definitively answering the question of whether or not immunity *ratione materiae* may be invoked for international crimes. Necessarily however, because immunity is a matter of procedure, evidence of successful invocation of immunity may lie in the dearth of case law. The reality, as Knuchel notes, is that in the ordinary course of state-craft, most States will seek non-confrontational means of resolution. She says to this end that:

> international consensus on the matter exists only at a rather high level of abstraction … The opacity of state practice is also due to the sensitivity of the questions at stake: often, legal decisions regarding state immunity yield to considerations of foreign relations and policy, so as to maintain friendly relations with the foreign sovereign.[242]

It is in the absence of an abundance of such case law that reliance is placed upon the principles and logic that have informed courts' decisions in cases that have derived from similar facts. Indeed, the very essence of the common law's reliance on case law revolves around extrapolation from principles upon which previous cases have been decided.

As case law and relevant *obiter* illustrate, there is little reason for the rationale for (and logic of) immunity *ratione materiae* – whether or not there is a supporting body of case law – to be limited only to civil proceedings. In the English Court of Appeal case of *Zoernsch v. Waldock*, [243] Lord Justice Diplock said of immunity *ratione materiae* that:

> A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf.[244]

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241 See Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, Note 13 above at paragraph 124. See also Dire Tladi, "The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?" (2018) 32 *Leiden Journal of International Law*, 169 – 187.

242 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens,*" Note 85 above at 151.

243 See *Zoernsch v. Waldock* [1964] 1 WLR 675. The facts of the case are that the plaintiff had instituted proceedings against Germany before the European Commission on Human Rights alleging that Germany, which was party to the Convention for the Protection of Human Rights and Fundamental Freedoms had denied him certain rights that he was entitled to thereunder. In response to the Commission rejecting his petition on two occasions, the plaintiff sued former President and the Secretary of the Commission alleging that they had not properly presented his petition to the Court and hence the rejection. The Court held that after leaving office, State immunity continued to protect such an envoy from suit in respect of 'acts performed in his official capacity' or in respect of 'acts done in the course of their official duties.'

244 See *Zoernsch v. Waldock,* Note 243 above at page 692.

"Acts" in the above quote would necessarily apply to acts that draw both civil and criminal sanction. The rationale for immunity *ratione materiae* has stood the test of time and in the more recent case of *Jones v. Saudi Arabia*,[245] Lord Hoffman states that:

> It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.[246]

True enough both *Zoernsch* and *Jones* were civil matters, but the rationale presented in the above-referenced extracts of the judgments would seem to hold true whether the proceedings are under civil or criminal law.

This is consistent also with Article 7 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts. In identifying instances in which a State may be said to be acting through surrogates or proxies, thereby incurring liability for wrongful conduct of such surrogates and proxies, the Draft Articles affirm that the actions of State organs and State functionaries shall be considered acts of State even if the said organs and functionaries "exceed authority or contravene instructions"[247]

On the more specific question of individual criminal responsibility and whether - notwithstanding limited case law – immunity *ratione materiae* may be invoked in criminal cases – Akande and Shah have recognized that:

> [t]he application of immunity *ratione materiae* to state officials has been more common in civil than criminal cases… [and] the circumstances in which a state official may face criminal prosecution in a foreign state for an act done in the exercise of official capacity are limited. Nevertheless, the assertion of immunity *ratione materiae* in criminal cases is not unknown and the reasons for which the immunity is conferred apply *a fortiori* in criminal cases.[248]

Foakes also says of the case law, the relative dearth of which could otherwise have permitted a definitive determination as to whether immunity *ratione materiae* may be invoked before foreign domestic courts in criminal cases, that:

> One of the problems in trying to [identify a coherent and generally accepted exception to the functional immunity of officials with regard to international crimes] is that there are relatively few criminal cases in which state officials have invoked such immunity. There is also a political reluctance on the part of many

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245 *Jones v. Saudi Arabia*, Note 148 above.

246 *Jones v. Saudi Arabia*, Note 148 above at paragraph 78.

247 International Law Commission, *Articles on* Responsibility of States for Internationally Wrongful Acts, November 2001, Note 191 above.

248 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above at 826.

> states to prosecute former officials, particularly senior ones, of other states. This means that in practice the rules relating to the functional immunity of state officials have developed mainly in the context of civil proceedings.[249]

By definition and application, and as recognized by academic literature, immunity *ratione materiae* under customary international law is not only co-extensive with but arguably wider than the immunity of the State itself.[250] Accordingly, a State functionary, would, upon a State's instance be capable of claiming immunity for both sovereign acts for which the State is immune but also for official but non-sovereign acts.[251] Akande and Shah note accordingly that while

> … this type of immunity [immunity *ratione materiae*] constitutes (or, perhaps more appropriately, gives effect to) a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the state. Such acts are imputable only to the state and immunity *ratione materiae* is a mechanism for diverting responsibility to the state.[252]

This was the finding also of the Appeals Chamber of the ICTY, in *Prosecutor v. Blaškić*. Adopting the essence of the arguments articulated in *Jones*, the Appeals Chamber reversed the guilty verdict in 16 of the 19 charges that the accused had been convicted of and reduced the 45-year sentence to 9 years. Per the Court:

> … officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.[253]

Indeed, in the *Arrest Warrant Case*, the ICJ judgment, which notwithstanding some academic critique, has come to represent settled law on immunity *ratione personae*, the ICJ – in a paragraph that has elicited little commentary and generated even less analysis – also pronounced on immunity *ratione materiae*

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249 See Joanne Foakes, "Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts" (November 2011) Chatham House, at page 8, available at https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf accessed 17 November 2018.

250 See Joanne Foakes. *The Position of Heads of State and Senior Officials in International Law*, (Oxford University Press, 2014) at 16.

251 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above at 827.

252 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above at 826.

253 See *Prosecutor v. Blaškić* (Objection to the Issue of *Subpoena duces Tecum*) IT-95-14-AR108 (1997), 110 ILR (1997) 607, at 707, paragraph 38. Blaškić had been indicted in 1996 by the ICTY on 20 counts of international crimes including grave breaches of the Geneva Conventions, war crimes and crimes against immunity. Per the indictment, the accused was guilty of perpetrating the crimes in the municipalities of Vitez, Busovaca, and Kiseljak through his orders. The Trial Chamber found him guilty on 19 charges sentencing him to 45 years in prison. On appeal, the Appeals Chamber dismissed all but three of the convictions and reduced his sentence to nine years.

when it presented the four (non-exhaustive) instances in which a high-ranking official entitled to immunity *ratione personae* may face trial for international crimes. Per the Court:

> … after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed *prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity*.[254] (My emphasis).

While the list the ICJ presented as instances in which accountability could be ensured was not intended to be exhaustive, the above referenced part of the main judgment suggests that, unless immunity is revoked or waived,[255] a Minister of Foreign Affairs or other person entitled to immunity *ratione personae* may be tried in foreign domestic courts for crimes committed *prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity*. This clearly excludes liability for official actions taken during incumbency because immunity *ratione materiae* would avail the official post-incumbency.[256] Indeed, that would be the very definition of immunity *ratione materiae*.

Two years before the *Arrest Warrant Case*, Lord Brown Hope of Craighead had come to the same conclusions in *Pinochet* when he held that:

> … even in the field of such high crimes as have achieved the status of *jus cogens* under customary international law there is as yet no general agreement that they are outside the immunity to which *former heads of state* are entitled from the jurisdiction of foreign national courts.[257] (My emphasis).

This was also precisely the reasoning of the Senegalese Court of Appeal – in *Habré* – which held that Hissène Habré's immunities survived his exit from office.[258]

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254 See *Arrest Warrant Case*, Note 12 above at paragraph 61.

255 See second ground for possible exercise of jurisdiction by a domestic court over an official of another State in *Arrest Warrant Case*, Note 12 above at paragraph 61.

256 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens,*" Note 85 above at 158.

257 See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)*, Note 109 above at page 242.

258 See *L'avis de la Cour d'appel de Dakar sur la demande d'extradition de Hissène Habré (extraits)* which translates as Opinion/Judgment of the Court of Appeal on the Request for Extradition of Hissène Habré (extracts) at paragraphs 5 and 6, available at http://www.asser.nl/upload/documents/20120419T034141-Habr%C3%A9_Cour_Appel_Avis_Extradition_25-11-2005(Extraits).pdf accessed 17 November 2018. Per the Court,

> Considérant que Hissène Habré doit alors bénéficier de cette immunité de juridiction qui, loin d'être une cause d'exonération de responsabilités pénales, revêt simplement un caractère procédural au sens de l'arrêt Yéro Abdoulaye Ndombasi du 14/02/2002 rendu par la Cour Internationale de Justice dans le litige opposant le Royaume de Belgique à la République démocratique du Congo;

Tladi has argued that the Senegalese Court of Appeal erroneously relied on the *Arrest Warrant* case,[259] which turned on immunity *ratione personae,* but his views discount the fact that the ICJ also pronounced on immunity *ratione materiae* when it said that a Minister of Foreign Affairs may be tried in foreign domestic courts for crimes committed *prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.*[260] Excluded from this would be acts performed in an official capacity during incumbency.

The reasoning of Senegal's Court of Appeals in the *Habré* case and arguably also, the ICJ in the *Arrest Warrant* case are consistent also with the reasoning of the District Prosecutor of Paris, who was called upon to institute a criminal action against Donald Rumsfeld for torture perpetrated in US black sites and detention centres in Guantanamo Bay and Abu Ghraib. Upon receipt of the criminal complaint initiated by *Fédération Internationale des Ligues des Droits de l'Homme* (FIDH), the Prosecutor advised, in his response to the petitioners, that:

> The services of the [French] Ministry of Foreign Affairs indicated that in application of the rules of customary international law established by the International Court of Justice, *immunity from criminal jurisdiction for Heads of State and Government and Ministers of Foreign Affairs continues to apply after termination of their functions, for acts carried out during their time of office and hence, as former Secretary of Defense, Mr. Rumsfeld, by extension should benefit from this same immunity for acts carried out in the exercise of his functions*.[261] (My emphasis).

> Qu'il n'est du reste pas inutile de rappeler que ce privilège a vocation à survivre à la cessation de fonction du Président de la République quelle que soit sa nationalité et en dehors de toute Convention d'entraide;

This translates as:

> Considering that Hissène Habré must therefore benefit from this immunity which, far from being a source of exoneration from criminal responsibility, is simply a procedural rule, similar to the case of the arrest of Yerodia Abdoulaye Ndombasi of 14/02/2002 rendered by the International Court of Justice in the Case of *Belgium v. Congo*.
>
> It can only be recalled then that functional immunity survives the end of the role of President of the Republic whatever his nationality and beyond mutual conventions.

259 See *Third report on peremptory norms of general international law* (*jus cogens*) by Dire Tladi, Special Rapporteur, Note 13 above at paragraph 129.

260 See *Arrest Warrant Case*, Note 12 above at paragraph 61.

261 See FIDH Press Release, France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint (27/11/2007), available at https://www.fidh.org/en/region/americas/usa/USA-Guantanamo-Abu-Ghraib/FRANCE-IN-VIOLATION-OF-LAW-GRANTS,4932 accessed 17 November 2018. In November 2007, Paris District Prosecutor, Jean-Claude Marin**,** dismissed the complaint filed against Donald Rumsfeld by FIDH alleging his responsibility for torture perpetrated in US black sites and detention centres in Guantanamo Bay and Abu Ghraib. Although the Prosecutor, by referencing heads of state, sought to frame the immunity available to Rumsfeld as immunity *ratione personae*, which had lapsed upon his exit from office, the fact that he held that such immunity subsisted even after incumbency effectively renders the immunity availed to Rumsfeld immunity *ratione materiae*. See Thierry Leveque, James Mackenzie and Andrew Dobbie, *French Prosecutors Throw Out Rumsfeld Torture Case,* Reuters (23 November 2007) available at https://www.reuters.com/article/us-france-rights-rumsfeld/french-prosecutors-throw-out-rumsfeld-torture-case-idUSL238169520071123?feedType=RSS&feedName=politicsNews&rpc=22&sp=true accessed 17 November 2018.

In the third report of the ILC's Special Rapporteur for *jus cogens*, the *Mugabe* and *Gaddafi* cases have been proffered to substantiate the proposition that immunity *ratione materiae* may not be invoked for *jus cogens* crimes. This is however not borne out by the text of the judgments in the said cases. As the report contends, the Courts in those cases did say that the immunity under which the accused escaped prosecution was limited to their incumbency as President and Head of State respectively. This is indeed correct but only because the court only pronounced on immunity *ratione personae*. In *Mugabe*, Senior District Judge Tim Workman's words were that:

> Robert Mugabe is President and Head of State of Zimbabwe *and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention and I am therefore unable to issue the warrant that has been applied for.*[262]

No mention whatsoever was made of *immunity ratione materiae* or of Mugabe's ability or otherwise to invoke same post-incumbency. While it is true that courts have not always distinguished between the two types of immunity or accentuated the distinction between immunity *ratione personae* and immunity *ratione materiae*,[263] *Mugabe* can hardly be used as authority for the proposition that immunity *ratione materiae* may not be invoked in criminal matters.

Similarly, the French *Cour de Cassation* made no reference to immunity *ratione materiae* in its holding in *Gaddafi* that:

> the crime charged in this case, regardless of its gravity, did not constitute an exception to the principle of immunity from jurisdiction internationally recognized for incumbent heads of state in foreign courts.[264]

The contention that there is an exception to immunity *ratione materiae* for international crimes appears to be borne of fears that recognition of immunity *ratione materiae* would open the floodgates to impunity.[265] Such fears appear however to be overblown and overstated as the invocation of immunity *ratione materiae* for an international crime would necessarily not be a frivolous exercise but a consequential one.[266]

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262 See *Tatchell v. Mugabe*, England, Bow Street Magistrates' Court (14 January 2004), Note 224 above available at https://www.legal-tools.org/doc/ac15e8/pdf/ accessed 17 November 2018.

263 The judgment in cases such as the *Arrest Warrant* Case did not clearly distinguish between immunity *ratione personae* and immunity *ratione materiae*. See Steffen Wirth, "Immunity for Core Crimes: The ICJ's Judgment in the Congo v. Belgium Case," Note 235 above.

264 Gaddafi case, General Prosecutor at the Court of Appeal of Paris, Appeal judgment, Appeal No 00-87215, Decision No 64, (2001) 125 ILR 490, 13th March 2001, France; Court of Cassation, available at https://www.lumsa.it/sites/default/files/UTENTI/u831/OPL_%20Gaddafi%20case%2C%20General%20Prosecutor%20at%20the%20Court%20of%20Appeal%20of%20Paris%2C%20Appeal%20judgment%2C%20Appeal%20No%2000.pdf accessed 17 November 2018, at paragraph 9.

265 See Noah Benjamin Novogrodsky, "Immunity for Torture: Lessons from Bouzari v. Iran" (2007) 18(5) *The European Journal of International Law* 939.

266 See *Third report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur (A/CN.4/646), presented at the Sixty-third session of the International Law Commission at Geneva, 26 April – 3 June and 4 July – 12 August 2011 at pages 7 – 20, available at http://legal.un.org/docs/?symbol=A/CN.4/646 accessed 17 November 2018.

For immunity *ratione materiae* to bar the exercise by the domestic courts of a foreign State of jurisdiction over a government official – high-ranking or otherwise – it would have to be asserted by the State whose official has committed the criminal acts in question.[267] In cases where the State whose official has committed an international crime declines to lift immunity of the official upon request of the injured State, it, by so doing, recognizes, accepts and affirms the official's actions as its own and thereby incurs liability for same.[268] The injured State may on that basis, institute proceedings that compel the injuring State to take responsibility for its actions and provide just reparations.[269]

The fact that the United Nations Convention on the Jurisdictional Immunities of States and Their Property[270] is silent about immunity *ratione materiae* in the section on privileges and immunities not affected by the Convention[271] and fails to include international crimes in the list of proceedings in which State immunity cannot be invoked,[272] suggests that negotiators of the Convention were unwilling to change customary international law rules to create exceptions to immunity *ratione personae* and *ratione materiae* for international crimes. And this even while the negotiators and drafters were willing to limit the ambit of State immunity for proceedings arising from State participation in commercial transactions,[273] contracts of employment,[274] personal injuries and damage to property,[275] ownership, possession and use of property,[276] intellectual and industrial property,[277] participation in companies or other collective bodies,[278] ships owned or operated by the State[279] and the effect of an arbitration agreement.[280]

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267 See *Third report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Note 266 above at page 9.

268 See Draft Article 40 on State Responsibility adopted by the International Law Commission in 2001. See ILC *Report on the work of its fifty-third session* (23 April – 1 June and 2 July – 10 Aug. 2001), Note 71 above at pages 282 – 286.

269 See *Third report on immunity of State officials from foreign criminal jurisdiction,* by Roman Anatolevich Kolodkin, Note 266 above at page 35. See also Chapter II of International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. See *Yearbook of the International Law Commission, 2001,* Vol. II (Part Two), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf accessed 17 November 2018.

270 See United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on December 2, 2004, during the 65th plenary meeting of the General Assembly by UNGA Resolution A/59/38, available at https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf accessed 17 November 2018.

271 See Article 3, Note 270 above.

272 See Part III United Nations Convention on Jurisdictional Immunities of States and Their Property, Note 270 above.

273 See Article 10, Note 270 above.

274 See Article 11, Note 270 above.

275 See Article 12, Note 270 above.

276 See Article 13, Note 270 above.

277 See Article 14, Note 270 above.

278 See Article 15, Note 270 above.

279 See Article 16, Note 270 above.

280 See Article 17, Note 270 above.

In any event the fact that the Convention has not entered into force some fifteen years after its adoption suggests that questions on restrictions to customary international law rules on immunity are either fraught with disagreement or not a priority of the international community.[281] It is worth noting on this point also that none of the permanent members of the UN Security Council have ratified this Convention.[282]

At the heart of the inability to convincingly make a case that immunity *ratione materiae* may not be invoked by States – at least not successfully – for international crimes perpetrated by their officials is the question why *jus cogens'* superiority would also not override the immunity *ratione personae* of incumbent officials. As Knuchel observes:

> … the CAT [Convention against Torture] criminalizes torture without distinguishing between current or former state officials, one does not see why the abrogation of immunity induced by its regime should make this distinction.[283]

Challenges in understanding the stated limitations of immunity *ratione materiae* are also exacerbated by the logic to the question of why *jus cogens'* superiority would apply in criminal and not civil cases.[284] If the overarching need to avoid impunity requires a single-mindedness in ensuring accountability then surely, the absence of such exceptions must also apply to civil cases. In any case, a review of State practice does not substantiate Cassese's bold claim that the jurisdictional immunities a State may invoke, and by extension, immunity *ratione materiae* for its functionaries, have suffered such profound attrition as to produce a new customary law rule removing functional immunity for international crimes from *all* State officials. The following review of State practice seeks to illuminate this point.

5.2.1 State Practice through Domestic Legislation

The first port of call in determining whether State practice manifests a *jus cogens* human rights exception to immunity *ratione materiae* would be to review State practice as reflected in domestic legislation regulating jurisdictional immunity.

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281 Per Article 30 of the Convention, the Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. As of 31 October 2018, the Convention had been signed by 28 countries and ratified by 22, with the last ratification coming from Equatorial Guinea on 30 May 2018 and the one before that coming from Slovakia on December 29, 2015. For particulars of signatories and State parties see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en accessed 17 November 2018.

282 See Note 281 above.

283 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens,*" Note 85 above at page 171 – 172 (also footnote 136).

284 See *Jurisdictional Immunities of the State Case*, Note 14 above.

Even while many States have adopted laws punishing various *jus cogens* crimes,[285] the ILC's Special Rapporteur for crimes against humanity concedes that it does not appear that States regard themselves as bound to adopt such legislation.[286] In any case, as affirmed by the ICJ in the *Arrest Warrant Case*, jurisdiction and immunity are two distinct questions and adopting legislation to exercise jurisdiction over a crime does not suggest that immunity may not be invoked or exercised before a court seeking to exercise jurisdiction. Indeed, immunity would only be necessary where there is ordinarily jurisdiction in the first place.[287]

Although Escobar-Hernandez, the current International Law Commission's Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction, acknowledges that domestic legislation regulating jurisdictional immunity are not widespread – a fact which is in itself telling – it has not been possible to determine a *jus cogens* human rights exception to immunity *ratione materiae* in the laws of such countries as the United States,[288] the United Kingdom,[289] Spain,[290] Japan,[291] Canada,[292] Singapore,[293] Australia[294] and Pakistan[295] and South Africa[296] – as a sampling of State practice.[297]

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285 See Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, Note 13 above.

286 See Second report on Crimes against Humanity by Sean D. Murphy. Special Rapporteur (A/CN.4/690) presented at the Sixty-eighth session of the International Law Commission in Geneva, 2 May-10 June and 4 July-12 August 2016 at paragraphs 17–19, available at http://legal.un.org/docs/?symbol=A/CN.4/690 accessed 17 November 2018.

287 See *Arrest Warrant Case*, Note 12 above at paragraph 46.

288 US Foreign Sovereign Immunities Act (FSIA) 1976. The FSIA is a United States law, codified at Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611 of the United States Code, available at http://archive.usun.state.gov/hc_docs/hc_law_94_583.html accessed 17 November 2018.

289 UK State Immunity Act, Chapter 33 of 1978, available at https://www.legislation.gov.uk/ukpga/1978/33/pdfs/ukpga_19780033_en.pdf accessed 17 November 2018.

290 Privileges and Immunities of Foreign States, International Organizations with Headquarters or Offices in Spain and International Conferences and Meetings held in Spain Organic Act, 2015.

291 Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc. (Act No. 24 of April 24, 2009), available at http://www.japaneselawtranslation.go.jp/law/detail_main?re=2&vm=02&id=1948 accessed 17 November 2018.

292 Canadian State Immunity Act of 1985, as amended: R.S.C., 1985, C. S-18, available at http://laws-lois.justice.gc.ca/eng/acts/S-18/page-1.html accessed 17 November 2018.

293 State Immunity Act of Singapore, Chapter 313 (Original Enactment: Act 19 of 1979), available at https://sso.agc.gov.sg/Act/SIA1979 accessed 17 November 2018.

294 Foreign States Immunities Act of Australia, 1985, available at https://www.legislation.gov.au/Details/C2016C00947 accessed 17 November 2018.

295 The Pakistan State Immunity Ordinance, Ordinance VI of 1981, available at http://nasirlawsite.com/laws/sio1981.htm accessed 17 November 2018.

296 Foreign States Immunities Act, 87 of 1981 (as amended), available at http://www.dirco.gov.za/chiefstatelawadvicer/documents/acts/foreignstatesimmunitiesact.pdf accessed 17 November 2018.

297 The above sampling represents States selected by the Special Rapporteur. See Concepción Escobar Hernández, Special Rapporteur, *Fifth report on immunity of State officials from foreign criminal jurisdiction* [Document A/CN.4/701] at paragraph 44, available at http://legal.un.org/docs/?symbol=A/CN.4/701 accessed 17 November 20.

Even South Africa's much vaunted Rome Statute Implementation Act of 2002,[298] as amended, only asserts that a person's official status as Head of State or senior government official shall serve neither as a defense to a crime nor grounds for reduction of sentence if convicted.[299] It does not make any references to the irrelevance of immunities in instituting prosecutions against persons who would otherwise be entitled to claim such immunity,[300] as Section 27 of the Rome Statute does.[301]

While the above described pieces of legislation provide for jurisdictional immunities of the State, which per the ILC Articles on Responsibility of States for Internationally Wrongful Acts,[302] would extend also to offending States' proxies and agents, the fact that they do provide for commercial and territorial tort exceptions, but not a further exception for breaches of *jus cogens* human rights norms permits a reasonable conclusion to be drawn that there are no such exceptions. Indeed, the fact that Belgium – after years of applying an expansive law which permitted its courts to argue that accused persons could not invoke immunity[303] – has amended its laws to eliminate such expansive application, is illustrative of State practice in the opposite direction.[304]

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298 See Max du Plessis, "South Africa's International Criminal Court Act: Countering Genocide, War Crimes and Crimes against Humanity" Paper 172 (November 2008), *Institute of Security Studies*, available at https://issafrica.s3.amazonaws.com/site/uploads/Paper172.pdf accessed 17 November 2018.

299 See Section 4 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

300 Lest there be any ambiguity, South Africa has introduced in the National Assembly, the Rome Statute of the International Criminal Court Act Repeal Bill, a core objective of which, according the Bill's Memorandum, is to:

> give effect to the rule of international customary law which recognizes the diplomatic immunity of heads of state in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, but particularly on the African continent.

See Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 40403 of 3 November 2016), available at http://www.justice.gov.za/legislation/acts/2002-027.pdf accessed 17 November 2018.

301 See Section 27 of the Rome Statute of the International Criminal Court, available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf accessed 17 November 2018.

302 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Note 191 above.

303 See *Loi relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977* (1993 law). See also Amnesty International, "Universal Jurisdiction: Belgian prosecutors can investigate crimes under international law committed abroad," (*AI Index: IOR 53/001/2003)*, available at http://www.refworld.org/pdfid/3f1441b04.pdf accessed 17 November 2018.

304 See Luc Walleyn, "Universal jurisdiction: Lessons from the Belgian experience." (2002) 5 *Yearbook of International Humanitarian Law* 394.

In recent times and in likely response to the scourge of terrorism, the United States,[305] Canada[306] and Spain[307] have adopted amendments to legislation regulating jurisdictional immunity to include an exception to State immunity in the case of terrorism. In the case of the United States, the application of such an exception would be subject to the Secretary of State having officially designated the offending State as a State sponsor of terror, the victim being a US soldier, government employee or citizen; and, in cases where the offending acts occurred outside of the US, only if the victim had been denied an opportunity to seek redress in other more appropriate *fora*.[308]

These exceptions would be reasonable given that a principal foundation of the law on State and sovereign immunity is international comity – which a State sponsor of terror can hardly be said to subscribe to. Even if the referenced statutes provided for the criminal liability of persons who could otherwise invoke immunity (they do not) the practice of 3 States may hardly be said to demonstrate State practice.

5.2.2 State Practice in Decisions of Domestic Courts

States' invocations of immunity and objections to being impleaded in national courts are a particularly rich source of State practice on the subject.[309] To this end this Chapter undertakes a scan of multiple jurisdictions, case law from which appear to affirm the pre-eminence of sovereign immunity and the absence of exceptions thereto even for violations of *jus cogens* human rights norms.[310] The sampling of case

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305 See Section 1605 A of the US Foreign Sovereign Immunities Act, Note 288 above.

306 See Section 6.1 of the Canadian State Immunity Act which came into effect on March 13, 2012. See however *Stephan Hashemi et al. vs. The Islamic Republic of Iran et al*. [2012] QCCA 1694 where the Canadian Court of Appeal, in granting Iran immunity, relied upon the ICJ decision in the *Jurisdictional Immunities Case* to dismiss a suit brought against Iran by a Canadian citizen for the killing, by beating, of his mother, also a Canadian citizen in Iran.

307 See Spanish Organic Law No. 16/2015 on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain. It was adopted on 27 October 2015 (State Official Gazette No. 258 of 28 October 2015), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)035-e accessed 17 November 2018.

308 See Section 1605 A, (2) (A) of the US Foreign Sovereign Immunities Act, Note 288 above.

309 See Ingrid Wuerth, "National Court Decisions and *Opinio Juris"* A Conference Paper Prepared for *The Role of* Opinio Juris *in Customary International Law*, Duke – Geneva Institute in Transnational Law, University of Geneva, July 12-13, 2013, available at https://law.duke.edu/cicl/pdf/opiniojuris/panel_3-wuerth-national_court_decisions_and_opinio_juris.pdf accessed 17 November 2018. See also Hersch Lauterpacht, "Decisions of Municipal Courts as a Source of International Law," (1929) 10 *British Yearbook of International Law* 65.

310 See Lucas Bastin, "Case Note: International Law and the International Court of Justice's Decision in *Jurisdictional Immunities of the State*," (2012) 13 *Melbourne Journal of International Law* 1, at 6 – 7, where the author states that:

> In the context of this post-*Al-Adsani* discussion, numerous courts around the world considered whether allegations of breaches of *jus cogens* norms, or allegations of serious violations of international human rights or humanitarian law, were justiciable in spite of competing assertions of state immunity. Courts in the UK, Canada, France, Poland, New Zealand and Slovenia ruled that the immunity to which a state

law covers and goes beyond appellate courts in the United States,[311] the United Kingdom,[312] South Africa[313] and Canada.[314] Even in Greece, where *Voiotia's* bold articulation of the instances in which sovereign immunity would yield to accountability for violations of *jus cogens* human rights norms,[315] the highest Court had occasion to uphold Germany's invocation of immunity.[316]

Although the case law on the subject derives primarily from civil claims against the State, the reasoning of the courts would be relevant also for the question of the immunity of State officials from the jurisdiction of foreign courts. In not one of the cases have the courts held that the immunity that cloaks a State and extends to its proxies and agents may be snatched away where the State, acting through its agents and proxies – as it can only do – engages in torture or other *jus cogens* crimes.

In the US, the Supreme Court decision in the case of *Nelson v. Saudi Arabia*[317] is illustrative of the law notwithstanding the contortions that some lower and intermediate courts had undergone to establish a *jus cogens* human rights exception to the statute regulating jurisdictional immunities.[318]

In *Nelson*, the plaintiff was a monitoring system engineer who was recruited in the United States for employment at a hospital in Riyadh, Saudi Arabia. He, in the course of performance of his duties, brought to the attention of the hospital's administration a number of safety defects he had noticed in the hospital's oxygen and nitrous oxide lines, and after he had been told by the hospital officers to ignore the problems, informed a Saudi government commission of the defects. The plaintiff claimed that several months after he had made the reports, he was arrested and sent to a jail where he was tortured. He was released after thirty-nine days and permitted to leave Saudi Arabia.

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is entitled is not withdrawn simply because the allegations concern a breach of a *jus cogens* norm or a serious violation of human rights law or the laws of war.

311 *Nelson v. Saudi Arabia* (1991) 923 F. 2d 1528, available at https://openjurist.org/923/f2d/1528/nelson-v-saudi-arabia accessed 17 November 2018.

312 *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, Note 148 above.

313 *The Minister of Justice and Constitutional Development and Others v. South African Litigation Centre and Others*, Case no: 867/15, SCA, March 15, 2016 [2016] ZASCA 17, available at http://www.saflii.org/za/cases/ZASCA/2016/17.html accessed 17 November 2018.

314 *See Bouzari v. Iran* [2005] SCCA No. 410 Docket No. 30523.

315 See *Prefecture of Voiotia v. Federal Republic of Germany*, Note 61 above.

316 See *Federal Republic of Germany v. Miltiadis Margellos*, Case 6/17-9-2002 (Decision of 17 September 2002). Note 200 above. See also Kerstin Bartsch and Björn Elberling, "*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision" Note 200 above.

317 *Nelson v. Saudi Arabia,* Note 311 above.

318 See for instance the Second Circuit of the US Court of Appeal in *Amerada Hess Shipping Corporation, Appellant, v. Argentine Republic, Appellee. United Carriers, Inc., Appellant, v. Argentine Republic, Appellee*, Note 129 above.

The plaintiff filed suit upon arrival in the United States claiming damages for the injury suffered from his imprisonment and torture. The federal trial court, which heard the case dismissed it for lack of jurisdiction on the basis that the facts of the case did not invoke any of the exceptions of the Foreign Sovereign Immunities Act (FSIA) which would permit the lifting of Saudi Arabia's immunity from suit.[319] The United States Court of Appeals for the Eleventh Circuit, in overturning the trial court, based its reversal on the fact that the plaintiff had been hired in the US by an agent of the defendant and therefore fell within the commercial exception to immunity of the FSIA.[320] After the Court of Appeals denied the petitioner's suggestion for rehearing *en banc*, the Supreme Court granted a *certiorari* to quash the decision.[321]

Thus permitted, Saudi Arabia appealed to the US Supreme Court[322] which reversed the appellate court. Souter J, in an opinion in which Rehnquist C. J., O'Connor, Scalia, and Thomas, JJ., joined, and in which Kennedy, J. joined in part, ruled that:

> The [offending] conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.[323]

The reasoning of the US Supreme Court has found resonance in the UK, where the consolidated case of *Jones* and *Mitchell* represents current law.[324] The English House of Lords was called upon to rule on whether there is indeed a *jus cogens* human rights exception to sovereign immunity in a case where the claimants were seeking damages for the torture they said they had been subjected to by the Kingdom of Saudi Arabia.[325] As Lord Bingham of Cornhill noted however:

> there is no evidence that states have recognized or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law,

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319 *Nelson v. Saudi Arabia* 7 Fla. L. Weekly Fed. S 90.

320 *Nelson v. Saudi Arabia,* 923 F.2d 1528 (11th Cir. 1991).

321 *Nelson v. Saudi Arabia* 504 U. S. 972 (1992).

322 *Nelson v. Saudi Arabia* 507 U.S. 349 (1993).

323 See *Nelson v. Saudi Arabia*, Note 322 above at page 361. In the more recent US case of *Samantar v. Yousuf*, the US Supreme Court – by failing to consider international law – produced a judgment that can only be said to be of doubtful relevance to international law on the subject. The Court held that the FSIA would not apply to lawsuits brought against foreign government officials for alleged human rights abuses. See Curtis A. Bradley and Laurence R. Helfer, "International Law and the U.S. Common Law of Foreign Official Immunity" (2010) *The Supreme Court Review* 213 – 273, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2972&context=faculty_scholarship accessed 17 November 2018.

324 *Opinions of the Lords of Appeal for Judgment in the cause Jones (Respondent) v. Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Jones (Appellant) v. Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents)*, [2006] UKHL 26, United Kingdom: House of Lords (Judicial Committee), 14 June 2006, available at http://www.refworld.org/cases,GBR_HL,449801d42.html accessed 20 July 2018.

325 *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, Note 148 above.

> nor is there any consensus of judicial and learned opinion that they should. This is significant, since these are sources of international law. But this lack of evidence is not neutral: since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails.[326]

As recently as 2016 in South Africa, the Supreme Court of Appeal came to similar conclusions. In *Minister of Justice and Constitutional Development and Others v. South African Litigation Centre and Others*,[327] the Government of South Africa had been sued by a human rights NGO to compel the arrest of Omar al Bashir when he attended an AU meeting in South Africa.[328] The Government allowed al Bashir to leave notwithstanding a court order prohibiting his departure and compelling the government to prevent it.[329] The North Gauteng High Court found the Government to be in breach of its obligations under the Rome Statute and domestic law.[330] The Government of South Africa appealed.

The Supreme Court of Appeal – in the main judgment rendered by Wallis JA in which Majid and Shingle JJA concurred (Lewis and Poznan JJA concurred for separate reasons) – concluded:

> … with regret that it would go too far to say that there is no longer any sovereign immunity for *jus cogens* (immutable norm) violations ... In those circumstances, I am unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts.[331]

Although the above case deals with immunity *ratione personae* for which the absence of exceptions is absolute, its reliance on the development of customary international law as the basis for its ruling suggests that it would come to similar conclusions in the case of immunity *ratione materiae* – for which there is a similar dearth of authorities suggesting otherwise.

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326 See *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, Note 148 above at paragraph 27.

327 *The Minister of Justice and Constitutional Development and Others v. South African Litigation Centre and Others*, Note 313 above.

328 *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP). Records of court documents available at http://www.southernafricalitigationcentre.org/cases/ongoing-cases/southafricasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir accessed 18 November 2018.

329 Owen Bowcott, *Sudan president Omar al-Bashir leaves South Africa as court considers arrest*, The Guardian (15 June 2015), available at https://www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan accessed 18 November 2018.

330 See *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development & others*, Note 328 above at paragraphs 26 and 37.2.

331 *The Minister of Justice and Constitutional Development and Others v. South African Litigation Centre and Others*, Note 313 above at paragraph 84.

The ratio of the Canadian Supreme Court in *Bouzari v. Iran* (hereafter *Bouzari*)[332] was similar. In the Court of first instance, the trial judge – who had had opportunity to listen to two international experts, came down on the side of what international law currently is, as opposed to where it is arguably headed.[333] Swinton J. had noted accordingly that:

> An examination of the decisions of national courts and international tribunals, as well as state legislation with respect to sovereign immunity, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to *jus cogens*. Indeed, the evidence of state practice, as reflected in these and other sources, leads to the conclusion that there is an ongoing rule of customary international law providing state immunity for acts of torture committed outside the forum state.[334]

The Ontario Court of Appeal,[335] to which the appellant filed appeal, with intervention from the Attorney General upheld the trial judge. Goudge JA, in delivering the judgment of the Court of Appeal cited the trial judge with approbation,[336] stating that:

> Both under customary international law and international treaty there is today a balance struck between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction… In the future, perhaps as the international human rights movement gathers greater force, this balance may change, either through the domestic legislation of states or by international treaty. However, this is not a change to be effected by a domestic court adding an exception to the SIA that is not there or seeing a widespread state practice that does not exist today.[337]

It is certainly reasonable to conclude, on the basis of the foregoing, that State practice – as manifest in domestic legislation and the decisions of superior courts of judicature – provide little or no basis to believe that there is in customary international law, a *jus cogens* human rights exception to jurisdictional immunity and by extension, immunity *ratione materiae*.

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332 *Bouzari v. Iran* [2005] SCCA, Note 314 above.

333 *Bouzari et al. v. Islamic Republic of Iran [2002]* O.J. No. 1624 at paragraphs 36 – 52. See also Noah Benjamin Novogrodsky "Immunity for Torture: Lessons from Bouzari v. Iran" (2007) 18(5) *The European Journal of International Law* 939.

334 *Bouzari et al. v. Islamic Republic of Iran*, Note 333 above at paragraph 63.

335 *Bouzari et al. v. Islamic Republic of Iran; Attorney General of Canada et al., Intervenors* at paragraph 95, 71 O.R. (3d) 675 [2004] O.J. No. 2800

336 *Bouzari et al. v. Islamic Republic of Iran; Attorney General of Canada et al., Intervenors*, Note 335 above at paragraph 88.

337 *Bouzari et al. v. Islamic Republic of Iran; Attorney General of Canada et al., Intervenors*, Note 335 above at paragraph 95.

Beyond the present exposition, it is necessary also to address some specific cases that have been relied upon in academic literature as authority for a *jus cogens* exception to immunity *ratione materiae* in criminal proceedings. These include *Eichmann*,[338] *Barbie*,[339] *Pinochet*[340] and *Scilingo*.[341] With the exception of Pinochet where the extradition request from Spain was denied,[342] there were trials in all the other cases leading to the conviction of the accused. It is not clear however how such cases can – as has been claimed[343] – be said to manifest a subjugation of immunity *ratione materiae* to accountability for *jus cogens* crimes when in not one of the cases, did the home State invoke such immunity. Germany did not invoke such immunity in respect of *Eichmann* or *Barbie* and Argentina did not do so either in respect of *Scilingo*.

While the argument that the non-invocation of immunity *ratione materiae* may in itself be State practice and evidence that the home State did not believe immunity could be invoked is not unreasonable, neither is the argument, albeit speculative, that Germany was unlikely to claim immunity, invite widespread condemnation and incur State responsibility for the wartime actions of military officers credited with executing "the final solution."[344] Based on the authority of the ICJ in *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v. France),*[345] which ruled that in the case of functional immunity, the home State of the official entitled to immunity *ratione materiae* must invoke it to enjoy it,[346] it was unlikely that Barbie and Eichmann could have received the benefit of immunity without Germany's intervention. This would support a conclusion that immunity *ratione materiae* may be invoked for international crimes and that non-

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338 See *Attorney General of the Government of Israel v. Eichmann (Dist. Ct. Jerusalem),* Note 99 above. See also *Attorney-General of the Government of Israel v. Eichmann* (Israel Supreme Court 1962), Note 104 above.

339 See *The Prosecutor v. Klaus Barbie*, Case No. 83-93194, Arrêt, (6 October 1983); *The Prosecutor v. Klaus Barbie*, Case No. 85-95166, Arrêt, (20 December 1985); *The Prosecutor v. Klaus Barbie*, 86-92714, Arrêt, (25 November 1986); *The Prosecutor v. Klaus Barbie*, Case No. 87-84240, Arrêt, (3 June 1988), available at http://www.internationalcrimesdatabase.org/Case/182 accessed 18 November 2018.

340 See *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, Note 122. See also *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3),* Note 109 above.

341 See *Graciela P de L v. Scilingo*. Judgment 16/2005; Reference Aranzadi, JUR 2005/132318; ILDC 136. See also *Scilingo Manzorro (Adolfo Francisco) v. Spain*, Appeal judgment, No 798, ILDC 1430 (ES 2007), 1st October 2007, Spain; Supreme Court.

342 Although Pinochet lost the legal case he mounted to challenge his arrest and extradition to Spain, Jack Straw – as Home Secretary – accepted "unequivocal and unanimous" medical evidence that he was unfit to stand trial in Spain on charges of torture and released him. See Nicholas Watt, '*Pinochet to be Set Free*' *The Guardian*, 12 January 2000, available at https://www.theguardian.com/world/2000/jan/12/pinochet.chile3 accessed 18 November 2018.

343 See *Third report on peremptory norms of general international law* (*jus cogens*) by Dire Tladi, Special Rapporteur (A/CN.4/714), Note 13 above at paragraph 125.

344 See Christopher Browning, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939 – March 1942* (2007) University of Nebraska Press

345 *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, p. 177.

346 *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v. France)*, Note 345 above at paragraphs 194–97.

invocation represents more a waiver by the State entitled to invoke it than a belief that there is an international crimes exception to immunity *ratione materiae*.

Reliance on Pinochet is not without its challenges either. While three of the Law Lords held variously that immunity *ratione materiae* would not avail a government functionary who committed international crimes, the House of Lords' decision recognized that a former Head of State would ordinarily have immunity *ratione materiae* before UK courts but that such immunity would not avail Pinochet because of obligations assumed by Chile under the Torture Convention. The decision thus turned not on *jus cogens* and a finding of an exception to immunity *ratione materiae* but on treaty law – without which the Court would have found a customary international law entitlement to immunity *ratione materiae*.[347]

Beyond contesting the value of the authorities presented as authority for the proposition that immunity *ratione materiae* may not be invoked for international crimes – *Scilingo, Barbie, Pinochet, Gaddafi* and *Mugabe* – it is necessary also to offer authorities that expressly speak to immunity *ratione materiae* availing government functionaries for international crimes. *Habré* and *Rumsfeld* are offered to this end.

In *Habré*, the judgment of Senegal's *Cour de Cassation* that immunity survives incumbency could not have been clearer.[348] Similarly reasoned and equally persuasive as evidence of State practice is the District Prosecutor of Paris' stated reasons for declining to prosecute Rumsfeld.[349] The Prosecutor's reference to direction received from the

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[347] See Headnotes for *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3),* Note 109 above at page 148 where the Appeal Cases Law Reports, summarize the judgments as follows:

> … that, a former head of state had immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity as head of state pursuant to section 20 of the State Immunity Act 1978 when read with article 39(2) of Schedule 1 to the Diplomatic Privileges Act 1964; but that torture was an international crime against humanity and jus cogens and *after the coming into effect of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 there had been a universal jurisdiction in all the Convention state parties to either extradite or punish a public official who committed torture; that in the light of that universal jurisdiction the state parties could not have intended that an immunity for ex-heads of state for official acts of torture (per Lord Hope of Craighead, for systematic and widespread acts of official torture) would survive their ratification of the Convention*; that (per Lord Browne-Wilkinson, Lord Hope of Craighead and Lord Saville of Newdigate) since Chile, Spain and the United Kingdom had all ratified the Convention by 8 December 1988 the applicant could have no immunity for crimes of torture or conspiracy to torture *after that date*; that (per Lord Hutton) the relevant date when the immunity was lost was 29 September 1988 when section 134 of the Act of 1988 came into effect; that (per Lord Browne-Wilkinson, Lord Hope of Craighead, Lord Hutton and Lord Saville of Newdigate) *there was nothing to show that states had agreed to remove the immunity for charges of murder, which immunity accordingly remained effective.* (My emphasis).

[348] See Opinion/Judgment of the Court of Appeal on the Request for Extradition of Hissène Habré, Note 258 above.

[349] See *French prosecutors throw out Rumsfeld torture case,* Reuters (23 November 2007), available at https://www.reuters.com/article/us-france-rights-rumsfeld/french-prosecutors-throw-out-rumsfeld-torture-case-idUSL238169520071123?feedType=RSS&feedName=politicsNews&rpc=22&sp=true accessed 18 November 2018.

French Foreign Ministry that in "… application of the rules of customary international law established by the International Court of Justice, immunity from criminal jurisdiction … [would] continue to apply after termination of [Rumsfeld's] functions [as Secretary for Defence]"[350] invites no ambiguity.

In a commentary on the *Arrest Warrant Case*, Cassese asserts crystallization of a rule in international criminal law that:

> … provides that in case of perpetration by a state official of such international crimes as genocide, crimes against humanity, war crimes, torture, … such acts in addition to being imputed to the state of which the individual acts as an agent, also involve the criminal liability of the individual.[351]

While this may be broadly true, it does not mean that the individual, by incurring personal liability may not also be entitled to immunity that prevents him from being impleaded and subjected to trial. Recognition by the District Prosecutor of Paris of immunity for Donald Rumsfeld[352] confirms this. With all due respect accordingly, neither *Pinochet* nor the other cases referenced can be said to have crystallized a customary international law rule that immunity *ratione materiae* may not be invoked for *jus cogens* crimes.

5.2.3 State Practice through International Treaties.

International treaties represent a preeminent source of international law and State practice because of the principle of *pacta sunt servanda*, the positivist grounding of which recognizes the agency of a State to bind itself to various obligations. As Kolodkin notes:

> There can be no doubt that it is possible to establish exemptions from or exceptions to immunity through the conclusion of an international treaty.[353]

In the absence of treaties of general application, or even more contained bilateral or other treaties, conventional exceptions to sovereign immunity based on *jus cogens* human rights are impossible to establish. If anything, the United States' conclusion of over a hundred bilateral immunity agreements or treaties to prevent the exercise by the ICC of

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350 See FIDH Press Release, France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complain (27/11/2007), Note 261 above.

351 See Antonio Cassese, "When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case," (2002) 13(4) *European Journal of International Law* 853, at 864.

352 See Letter from La Fédération Internationale des Ligues des Droits de l'Homme (FIDH) to Jean-Claude Marin, Paris District Prosecutor, of 25 October 2007, available at https://ccrjustice.org/sites/default/files/assets/files/rumsfeld_0.pdf accessed 18 November 2018.

353 *Second report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur (A/CN.4/631), (63rd session of the ILC (2011)), at paragraph 54, available at http://legal.un.org/docs/?symbol=A/CN.4/631 accessed 18 November 2018.

jurisdiction over US citizens establishes practice in the opposite direction.[354]

While institution-creating treaties such as the Rome Statute of the International Criminal Court[355] clearly manifest a rejection of procedural and other barriers to the exercise of jurisdiction – such as immunity[356] – the unavailability of immunity would necessarily however apply only to member States of the Rome Statute, who by their signature and ratification of same, agree to be bound by the terms thereof.[357] Indeed, the contentious debate on the effect of Article 98 of the Rome Stature and the purported breach by such State parties thereto as Malawi,[358] Chad,[359] DRC,[360] and more recently South Africa[361] of their obligations under the Rome Statute in not arresting Omar al Bashir has centred on precisely this point.[362]

As has been presented in Chapter 2 of this dissertation, the several decisions of the ICC to the effect that, in declining to arrest al Bashir, the various countries breached their obligations are manifestly wrong and insupportable in international law[363] because of Article 98 of the

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354 See "Bilateral Immunity Agreements" *Human Rights Watch* (20 June 2003), available at https://www.hrw.org/legacy/campaigns/icc/docs/bilateralagreements.pdf accessed 18 November 2018.

355 See *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, available at https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf accessed 18 November 2018.

356 See Article 27 of the Rome Statute, Note 355 above.

357 See Paragraphs 25 and 26 of *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, ICC-02/05-01/09 (April 9, 2014), available at https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF accessed 18 November 2018.

358 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Corrigendum to the Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, (ICC-02/05-01/09-139), available at https://www.icc-cpi.int/pages/record.aspx?uri=1287184 accessed 18 November 2018.

359 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to the Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09-140-tENG), Pre-Trial Chamber I, 13 December 2011, available at https://www.icc-cpi.int/pages/record.aspx?uri=1384955 accessed 18 November 2018.

360 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Pre-Trial Chamber *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 9 April 2014, available at https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF accessed 18 November 2018, at paragraphs 26 and 27

361 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir ICC-02/05-01/09-302, 06 July 2017, available at https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF accessed 18 November 2018.

362 For an excellent overview of the rulings of the ICC's Pre-Trial Chamber see Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute ICC-02/05-01/09-290 (17 March 2017), available at https://www.icc-cpi.int/CourtRecords/CR2017_01350.PDF accessed 18 November 2018.

363 See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199, at 205.

Rome Statute and because Sudan is not party to the Rome Statute.[364] As Chapter 2 discusses extensively, the edict of the UN Security Council compelling compliance to Security Council Resolution 1593 of 2005 was directed only to Sudan[365] and, even more fundamentally, it is clear that the limited scope of application of Resolution 1593 was not unintentional and more likely a cynical move by some Security Council members to avoid creating obligations for themselves.[366] The sanguine reaction of the Security Council to the various reports of the ICC with the details of the failure of several States to arrest Omar al Bashir attests to this.[367]

5.2.4 International Case Law.

The vast majority of case law on immunities from the International Court of Justice[368] and the European Court of Human Rights[369] also affirm the absence of exceptions thereto even for violations of *jus cogens* human rights norms.

In the ICJ's oft-cited ruling in the *Arrest Warrant Case*, the Court pronounced definitively, after review not only of customary international law and the State practice that informs it but also of the legal instruments that spawned the Nuremberg and Tokyo post World War II tribunals as well as the more recent *ad-hoc* international criminal tribunals, that it had:

> examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. Z; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such [*jus cogens*] exception [to immunity] exists in customary international law in regard to national courts.[370]

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364 See Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (…At long Last …) But Gets the Law Wrong" *EJILTalk* (15 December 2011), available at http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 18 November 2018.

365 See André de Hoogh and Abel Knottnerus, "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again" *EJILTalk* (18 April 2014), available at http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/ accessed 18 November 2018.

366 See Dire Tladi, "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic," (2014) 7 *African Journal of Legal Studies* 381, at 393 – 398.

367 The Security Council has thus far, not taken any steps to sanction any of the States – Malawi, Chad, DRC, Djibouti among others – that have been referred to it by the ICC further to its findings of breach of an obligation of said State to arrest Omar al Bashir and render him to the ICC when he visited said countries. Other countries which have been found to have breached the obligation but were not so referred include Nigeria and South Africa.

368 See *Arrest Warrant Case*, Note 12 above.

369 *Al-Adsani v. The United Kingdom*, Note 91 above. See also *Kalogeropoulou v. Greece and Germany*, Note 170 above.

370 See *Arrest Warrant Case*, Note 12 above, at paragraph 58.

The Court went on to stress that its judgment did not make any findings on criminal responsibility and that the accused could indeed be tried at a later stage because:

> … Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. *Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.*[371] (my emphasis)

In the *Jurisdictional Immunities of the State Case*,[372] the ICJ – with the hindsight of the critiques received from human rights advocates for the *Arrest Warrant Case* a decade earlier[373] – affirmed its reasoning in the said case. The Court's conclusions – after an extensive review of both domestic and international caselaw – was that:

> … under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.[374]

The court did emphasize that its judgment was narrowly focused on the immunity of the State and not criminal liability of an official of the State – which issue was not before the court.[375] On the broader question however of whether or not the *jus cogens* nature of the crimes referenced served to invalidate the sovereign immunity under customary international law that Germany had invoked, the ICJ's answer, evocative of the ICJ in the *Arrest Warrant* Case, couldn't have been more categorical:

> The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful… recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.[376]

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371 See *Arrest Warrant Case*, Note 12 above at paragraph 60.

372 See *Jurisdictional Immunities of the State Case*, Note 14 above.

373 See Steffen Wirth, "Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case," Note 235 above. See also Alberto Luis Zuppi, "Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice," (2003) 63(2) *Louisiana Law Review* 303.

374 See *Jurisdictional Immunities of the State Case*, Note 14 above at paragraph 91.

375 See *Jurisdictional Immunities of the State Case*, Note 14 above at paragraph 91.

376 See *Jurisdictional Immunities of the State Case*, Note 14 above at paragraph 93, See however separate but concurring opinion of Judge Koroma, *Jurisdictional Immunities of the State Case,* Note 14 above at paragraph 3.

The reasoning of the European Court of Human Rights has been little different from the ICJ. In *Al-Adsani*, the European Court of Human Rights also held, albeit by a majority of one, that:

> While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, *it observes that the present case concerns not, as in Furundzija and Pinochet, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State*. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity.[377] (My emphasis).

The distinction the Court drew between the civil claim of the present case and the criminal basis of *Furundzija*[378] *and Pinochet*,[379] appeared to show agreement with the *ratio* of both cases and has indeed been relied upon by advocates of a *jus cogens* exception to immunity to assert judicial support for the subjugation of immunity to accountability in criminal matters.[380] And yet, if the reason for the court's finding was that there was little or no authority (State practice) for the proposition that there are exceptions to immunity *ratione materiae* in civil matters where there have been *jus cogens* crimes, the dearth of authority for exceptions to immunity *ratione materiae* in criminal matters must surely be equally persuasive. This is especially the case since the European Court went on to say in the very next paragraph that:

> while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of jus cogens, *in most cases (including those cited by the applicant in the domestic proceedings and before the Court) the plea of sovereign immunity had succeeded*.[381] (my emphasis).

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377 *Al-Adsani v. The United Kingdom*, Note 91 above.

378 *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at http://www.refworld.org/cases,ICTY,40276a8a4.htm accessed 18 November 2018.

379 *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3), Note 109 above.

380 See Redress "*The Impact of Al-Adsani v. The United Kingdom"* Report of a Meeting Convened by Redress at the House of Lords on London (13 February 2002), available at https://redress.org/wp-content/uploads/2018/01/A.-Nov-2002-THE-IMPACT-OF-AL-ADSANI-V.-THE-UNITED.pdf. See also Alexander Orakhelashvili, "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong," Note 77 above at pages 259 – 260.

381 *Al-Adsani v. The United Kingdom*, Note 91 above at paragraph 62.

The European Court's decision in the admissibility hearing for *Kalogeropoulou* where, on grounds of sovereign immunity, it declined to exercise jurisdiction over a civil claim arising from the Distomo massacre of World War II is the last on the subject, thus far, from the European Court of Human Rights.[382]

6. Recent Trends in the Development of International Law on Immunities.

What may be distilled from the reams of scholarly writings on the subject of immunity and exceptions thereto[383] is that there has, over time, been an attenuation of the absolute immunity that States, and their high representatives could invoke.[384] It is true also that the notion of exceptions to breaches of *jus cogens* human rights norms has gained some currency and is no longer associated with overreaching fringe argumentation and advocacy. Thus, does Orekhelashvili say, even if overstating support for his position, that:

> There is solid doctrinal support for the approach that *jus cogens* trumps state immunity before national courts, and this has been the case throughout the whole period in which this issue has been arising in practice. In fact, this approach is supported by at least as many scholars as it is contradicted by. It is no longer possible, if it ever was, to consider that the view of primacy of *jus cogens* is an isolated trend of the small minority, while the majority of scholars support the 'traditional' or 'orthodox' blanket understanding of state immunity.[385]

Of Orakhelashvili, it may be said the *he doth protest too much*![386]

It is not here intended to repeat the content of the doctrinal contestations or the depth of support for each side in the authorities cited and relied upon in this Chapter.[387] To say however – as Orakhelashvili does – that the scales of doctrinal support on the subject are evenly balanced would be a stretch. His own words quoted above seem to recognize this.

What is clear however is that the contestation revolves around what is current international law, *lex lata,* as opposed to what – arguably – the law should be, *lex ferenda*.[388] What is clear also is that international law experts who oppose the notion

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382 See *Kalogeropoulou v. Greece and Germany*, Note 170 above.

383 See Note 3 above.

384 See *Jurisdictional Immunities of the State Case,* Note 14 above. See dissenting Opinion of Abdulqawi Yusuf, available at https://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-05-EN.pdf.

385 See Alexander Orakhelashvili "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong," Note 77 above at 964.

386 Orakhelashvili's constant reference to the 1983 case of *I Congresso* – where Lord Wilberforce states that State conduct does not qualify for immunity if it could be performed by any private sector – is puzzling as the reasoning of the case has been overtaken by myriad authorities. In order not to risk gratuitous insult or accusations of attack, this critique – for now – proceeds no further. See Alexander Orakhelashvili, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah," Note 153 above.

387 See Note 3 above.

388 See Larry Helfer and Tim Meyer, "Codifying Immunity or Fighting for Accountability? International Custom and the Battle Over Foreign Official Immunity in the United Nations" in Curtis Bradley & Ingrid Wuerth (Eds) *Custom*

that there is a *jus cogens* human rights exception to immunity are not unpersuaded that such an exception may be useful in ensuring accountability for gross violations of human rights or even that international law should compel such accountability. Their position is that, the values deemed worthy of protection notwithstanding, current international law does not establish a *jus cogens* human rights exception to sovereign immunity.[389] The works of the Institute of International Law and the International Law Commission are particularly relevant to this discourse.

6.1 Institute for International Law.

The adoption in 2001 by the Institute of International Law (which represents a good barometer on the views of progressive scholars on the existence or otherwise of a *jus cogens* human rights exception to Sovereign immunity)[390] of a resolution titled "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law"[391] is particularly instructive because it came some years after the UK House of Lords ruling in *Al Adsani,*[392] some three years after the extensive debates leading up to the adoption of the Rome Statute of the International Court in 1998,[393] some three years after *Voiotia*'s articulation of exceptions to immunity,[394] and a year after the DRC had invoked the jurisdiction of the International Court of Justice to secure a declaration on the inviolability of sovereign immunity in the *Arrest Warrant Case*.[395]

While the resolution lifts immunity *ratione materiae* from former Heads of State and government for commission of international crimes, actions undertaken not in an official capacity but to satisfy personal interests, or illegal appropriations of

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in Crisis (Duke Law School, 2015) *(*Proceedings of Conference "Custom in Crisis: International Law in a Changing World," Duke Law School 31 October 2014).

389 See Sevrine Knuchel, "State Immunity and the Promise of *Jus Cogens*,*"* Note 85 above. See also Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 3 above. This was indeed the thrust of the debate in the International Law Commission when Special Rapporteur, Concepción Escobar Hernández, presented her Fifth report on immunity of State officials from foreign criminal jurisdiction.

390 See for instance Kolodkin's reference to the work of the Institute in Paragraph 26 of the Preliminary report on Immunity of State Officials from Foreign Criminal Jurisdiction, Note 404 below. Founded in the 19th century, the Institute of International Law, whose membership comprises eminent international law jurists who seek to advance the development of international law and whose work is regularly cited by the International Law Commission.

391 See Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, *Institut de droit International* (Vancouver, 2001), available at http://www.idi-iil.org/app/uploads/2017/06/2001_van_02_en.pdfn accessed 18 November 2018. In 1891, the Institute had first considered the issue of the immunity of Heads of State from the jurisdiction of foreign courts in the nineteenth century. See Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or Heads of State, referenced in "Competence of the Courts in Regard to Foreign States," (1928) 22(1) *The American Journal of International Law* Supplement: Codification of International Law, 117, 123.

392 See Lord Justice Ward in *Al-Adsani v. Government of Kuwait and Others (England and Wales, Court of Appeal, 1996),* ILR *107,* at pages 536, 545, 547.

393 See Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, available at http://legal.un.org/icc/rome/proceedings/contents.htm accessed 18 November 2018.

394 See *Prefecture of Voiotia v. Federal Republic of Germany*, Note 61 above at page 13.

395 See *Arrest Warrant Case*, Note 12 above.

State property,[396] the resolution provides for absolute immunity from criminal jurisdiction before foreign courts of a serving Head of State or Head of Government. Per Article 2 of the Resolution:

> In criminal matters, the Head of State 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*. (my emphasis)

The last word on immunities thus far from the Institute has been a Resolution adopted in 2009, with Hazel Fox as Rapporteur, titled *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*.[397]

While the preceding Article invokes an obligation on States to prevent and suppress international crimes and urges States to waive the immunity of their agents if they do commit such crimes,[398] Article 3 of the resolution, doing significantly more than Article 12 of the 2001 Resolution to eviscerate the breadth of immunity *ratione materiae*, states that:

1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.
2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases.
3. The above provisions are without prejudice to:

   (a) the responsibility under international law of a person referred to in the preceding paragraphs;
   (b) the attribution to a State of the act of any such person constituting an international crime.

It is not entirely clear why the Institute's 2009 Resolution represents such a marked departure from the 2001 Resolution as far as immunity *ratione materiae* is concerned. The text of Article 3, while seeking to eliminate the application of immunity *ratione materiae* for international crimes, vigorously however affirms the application of immunity *ratione personae*. In any case, for the limitations it introduces, the Institute does not purport to be codifying international law – a more accurate description of its work being the progressive development of international law.

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396 See Article 13(2) of the Institute for International Law Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Vancouver, 2001), Rapporteur: Mr Joe Verhoeven, available at http://www.idi-iil.org/app/uploads/2017/06/2001_van_02_en.pdf accessed 18 November 2018.

397 See Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes. *The Institute for International Law* (Napoli, 2009), Rapporteur: Lady Hazel Fox, available at http://www.idi-iil.org/app/uploads/2017/06/2009_naples_01_en.pdf accessed 18 November 2018.

398 See Article II(3)of Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Note 397 above.

6.2 International Law Commission.

Few institutions have had as much occasion, as the International Law Commission has, to consider the question of immunities of State officials.[399] In the last decade, the ILC has had two Special Rapporteurs – Kolodkin and Escobar-Hernandez – considering the question of the Immunity of State officials from foreign criminal jurisdiction and formulating draft articles thereon.[400] It has also had Special Rapporteurs on a range of related subjects such as *jus cogens*[401] and crimes against humanity,[402] thereby rendering the Commission's work uniquely insightful for the task at hand.[403]

In the first of Special Rapporteur Kolodkin's three reports[404] he traces the Commission's history with the subject of State and Sovereign immunity, identifies the sources of State and Sovereign immunity, distinguishes between the exercise of jurisdiction and immunity and sets out the rationale for the immunity of State officials and other agents of State from prosecution. The report concludes by setting out the range of persons who may seek the cover of immunity.[405]

The second Kolodkin report,[406] which examines immunities – *ratione materiae* and *ratione personae* – and the types of officials who may seek the cloak of the two types of immunities also examines the arguments proffered by *Voiotia* for an exception to the ability to invoke immunity for grave international crimes. The

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399 As Kolodkin notes in his Preliminary Report, the Commission has considered various aspects of the Immunity of State officials from foreign criminal jurisdiction since 1949.

400 In 2006, in response to an ILC proposal, the subject "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the ILC. Mr. Roman A. Kolodkin was appointed as Special Rapporteur for the topic in 2007, when the Commission decided to include this topic in its current programme. At the same session, the Secretariat was requested to prepare a background study on the topic. Over the course of 3 years, Kolodkin presented three reports on various elements of the subject. The Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, particularly in 2008 and 2011. In May 2012, the ILC appointed Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who no longer a member of the Commission. Ms. Escobar has since presented five reports to the ILC.

401 In 2014, during its sixty-sixth session, the Commission placed the topic "*Jus cogens*" (subsequently named Peremptory Norms) on its long-term programme of work and placed the topic on a current programme of work in 2015, appointing Dire Tladi as Special Rapporteur. For the analytical guide to the Commissions work on peremptory norms, see http://legal.un.org/ilc/guide/1_14.shtml accessed 18 November 2018.

402 In 2013, during its sixty-fifth session, the Commission placed the topic "Crimes against humanity" on its long-term programme of work and placed the topic on a current programme of work in 2014, appointing Sean Murphy as Special Rapporteur. For the analytical guide to the Commissions work on peremptory norms, see http://legal.un.org/ilc/guide/7_7.shtml accessed 18 November 2018.

403 For a comprehensive repository of the International Law Commission's recent work on Immunity of State officials from foreign criminal jurisdiction see *Analytical Guide to the Work of the International Law Commission* at http://legal.un.org/ilc/guide/4_2.shtml#dcommrep accessed 18 November 2018.

404 See *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur, [A/CN.4/601], available at http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_601.pdf&lang=ESX accessed 18 November 2018.

405 See Chapter 2 of Kolodkin's Preliminary Report, Note 404 above.

406 See *Second report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur (A/CN.4/631), Note 353 above.

report comprehensively contests such arguments, concluding dismissively as follows:

> … the arguments set out … demonstrate that the various rationales for exceptions to the immunity of officials from foreign criminal jurisdiction prove upon close scrutiny to be insufficiently convincing.[407]

With the sole exception of crimes committed in the territory of a forum State by a foreign State official, of whom the forum State is unaware,[408] the report's conclusions affirm, from State practice, doctrine and judicial decisions, the absence of exceptions to immunity – *ratione personae* and *ratione materiae*. Per paragraphs (b) and (c) of its conclusions, Kolodkin writes that:[409]

> b. State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself;
>
> c. There are no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other. There can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official. The issue of determining the nature of the conduct of an official — official or personal — and, correspondingly, of attributing or not attributing this conduct to the State, must logically be considered before the issue of the immunity of the official in connection with this conduct is considered;

The latter point is indeed one that the Commission has spoken on with a forked tongue in recent times. In its Articles on Responsibility of States for Internationally Wrongful Acts,[410] the Commission states that the conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*. In the draft Code of Crimes against the Peace and Security of Mankind (1996)[411] however, the Commission states in commentary on Article 7 thereof (irrelevance of a person's position) that

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407 See *Second report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur (A/CN.4/631), Note 353 above at paragraph 90.

408 See *Second report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur (A/CN.4/631), Note 353 above at paragraph 94(p).

409 See *Second report on immunity of State officials from foreign criminal jurisdiction,* by Roman Anatolevich Kolodkin, Special Rapporteur (A/CN.4/631), Note 353 above at paragraph 94(b) and (c).

410 See Articles 4, 5, 7 and 11 of International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Note 191 above.

411 See International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind with Commentaries (1996), adopted by the International Law Commission at its forty-eighth session and submitted to the General Assembly as a part of the Commission's report covering the work of that session *Yearbook of the International Law Commission, 1996*, vol. II, Part Two, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf accessed 18 November 2018.

it would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions.

Kolodkin goes even further however, positing that to find exceptions to immunity for foreign State officials, even *de lege ferenda*, would not be desirable, as it could potentially harm the stability of international relations.[412]

Kolodkin's third report[413] focuses on the procedural aspects of immunity and concludes that in cases where the *troika* of persons entitled to immunity *ratione personae* are concerned, the officials' State – per the authority of the Arrest Warrant Case – need not invoke such immunity before it applies.[414] Such immunity, the report further notes may not apply only in the case of an express waiver by the State. The report noted however that in order to avail officials of immunity in cases where a person entitled to immunity *ratione personae* was not one of the *troika* or a person was eligible only for immunity *ratione materiae*, the burden of invoking such immunity fell upon the official's State.[415] By invoking such immunity, the State affirms that the act constitutes an act of State thereby establishing the prerequisites for international legal responsibility of the State and permitting the institution of international legal proceedings against it by eligible actors.[416]

It is worth pointing out here that the various reports of Kolodkin were each extensively debated in the Commission.[417] While it is clear that the Commission was not *ad idem* or collectively in agreement with all parts of the content of the various reports – as is customary with all reports by Special Rapporteurs – the Commission consistently commended the Special Rapporteur for thorough, well researched and well-argued Reports. On the Third Report particularly, the

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412 See *Preliminary report on immunity of State officials from foreign criminal jurisdiction,* by Roman Anatolevich Kolodkin, Special Rapporteur, Note 404 above at paragraph 102(j) repeated in footnote 3 of the Third report.

413 See *Third report on immunity of State officials from foreign criminal jurisdiction,* by Roman Anatolevich Kolodkin, Special Rapporteur (A/CN.4/646), available at http://legal.un.org/docs/?symbol=A/CN.4/646 accessed 18 November 2018.

414 See *Third report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur, Note 413 above at paragraph 61.

415 See *Third report on immunity of State officials from foreign criminal jurisdiction,* by Roman Anatolevich Kolodkin, Special Rapporteur, Note 413 above at paragraph 61.

416 See *Third report on immunity of State officials from foreign criminal jurisdiction,* by Roman Anatolevich Kolodkin, Special Rapporteur, Note 413 above at paragraph 60. Kolodkin notes that the decision to invoke immunity or not is a serious matter with significant consequences for each of the binary choices:

> In stating that its official's actions were official in nature and that he enjoys immunity, the State is acting in the official's defence but is establishing significant premises for its own potential responsibility for what this person did. Yet, if it does not invoke the official's immunity, the State opens the way for this person to be criminally prosecuted in a foreign State and thereby creates the possibility of occasionally serious intrusion by a foreign State into its internal affairs.

417 See International Law Commission Report, 2008 (A/63/10) at Chapter X, Paragraphs 267–311, available at http://legal.un.org/docs/?path=../ilc/reports/2008/english/chp10.pdf&lang=EFSRAC accessed 18 November 2018; International Law Commission Report, 2011 (A/66/10) at Chapter VII, Paragraphs 106–140, available at http://legal.un.org/docs/?path=../ilc/reports/2011/english/chp7.pdf&lang=EFSRAC accessed 18 November 2018.

Commission's Report said that "it was considered that the analysis made in the report was convincing and the extrapolations drawn logical."[418]

As Special Rapporteur, Concepcion Escobar-Hernandez, who succeeded Kolodkin,[419] has had a rather different take on the subject of immunity of State officials from foreign criminal jurisdiction. While Kolodkin presented no draft articles, Escobar-Hernandez has presented, as of 31 October 2018, a number of Articles for consideration by the Commission, seven of which have been referred to the drafting committee.[420] The drafting committee has approved, and the Commission has voted to provisionally adopt each of the seven Articles.[421]

Article 7 of the Draft Articles (reproduced below)[422] which was presented in her fifth report generated explosive debate in the Commission, even after it had been modified by the Drafting Committee.[423]

Draft article 7

Crimes in respect of which immunity does not apply

1. Immunity shall not apply in relation to the following crimes:

(i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;

(ii) Corruption-related crimes;

(iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

(i) Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

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418 International Law Commission Report, 2011 (A/66/10), Note 417 above at paragraphs 159 and 160.

419 At its 3132nd meeting, on May 22, 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Roman Kolodkin, who was no longer a member of the Commission. See Chapter VII - Report of the International Law Commission: Sixty-Ninth Session [Document A/67/10] at paragraph 84, available at http://legal.un.org/docs/?path=../ilc/reports/2012/english/chp6.pdf&lang=EFSRAC accessed 18 November 2018.

420 See Chapter VII - Report of the International Law Commission: Sixty-Ninth Session [Document A/72/10] at paragraph 70, available at http://legal.un.org/ilc/reports/2017/english/chp7.pdf accessed 18 November 2018.

421 See Concepción Escobar Hernández, Special Rapporteur, Fifth report on immunity of State officials from foreign criminal jurisdiction [Document A/CN.4/701], available at http://legal.un.org/docs/?symbol=A/CN.4/701 accessed 18 November 2018 - see Annexes 1 – 3 on pages 96 – 99.

422 Text of Draft Article 7 proposed by Special Rapporteur. See Annex III of Fifth report on immunity of State officials from foreign criminal jurisdiction [Document A/CN.4/701], Note 421 above at page 99

423 See Provisional summary record of the 3378th meeting (second part of the 69th session) held at the Palais des Nations, Geneva, on Thursday, 20 July 2017, at 10 a.m., available at http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3378.pdf&lang=EF accessed 18 November 2018.

(ii) The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.[424]

Objectors to Draft Article 7 asserted that immunity, being procedural in nature, did not address any of the substantive questions of the legality or otherwise of impugned conduct – even if such conduct was prohibited by *jus cogens* norms.[425]

Noting the ICJ's ruling in the *Jurisdictional Immunities of the State Case*[426] they reiterated that State immunity and norms of *jus cogens* were different categories of international law and that a violation of a *jus cogens* norm did not deprive a State of its ability to invoke State immunity. Furthermore, they noted, reference to the severity of the offence was irrational, as immunity would apply equally to all crimes – serious or otherwise. They also noted that because consideration of immunity from foreign criminal jurisdiction in a court would be a preliminary matter and would be decided in *limine litis*, its invocation would not depend on whether or not a crime was serious or had actually been committed.[427]

The Commission duly considered the report and provisionally adopted, by a recorded vote – twenty-one in favour,[428] eight against[429] and one abstention[430] – the footnotes to Part Two Immunity *ratione personae* and to Part Three Immunity *ratione materiae*, Draft Article 7 and the Annex, together with commentaries thereon. Tellingly, Tladi, while voting to adopt Draft Article 7

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[424] The text which emerged from the ILC Drafting Committee was significantly different but generated no less heated debate:

Draft article 7 Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
   (a) crime of genocide;
   (b) crimes against humanity;
   (c) war crimes;
   (d) crime of *apartheid*;
   (e) torture;
   (f) enforced disappearance.
2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

[425] See Provisional summary record of the 3378th meeting, Note 423 above.

[426] See *Jurisdictional Immunities of the State Case,* Note 14 above.

[427] See Chapter VII - Report of the International Law Commission: Sixty-Ninth Session [Document A/72/10], Note 420 above.

[428] The Commissioners voting in favour of Article 7 were Gomez, Cissé, Escobar Hernández, Teles, Gómez-Robledo, Hassouna, Hmoud, Jalloh, Lehto, Murase, Nguyen, Oral, Chahdi, Park, Peter, Reinisch, Santolaria, Saboia, Tladi, Valencia-Ospina and Vázquez-Bermúdez.

[429] The dissentients were Huang, Kolodkin, Laraba, Murphy, Nolte, Petrič, Rajput and Wood. While ILC Commissioners serve in their individual capacities and do not represent their countries, it would be interesting to see how much support there will be for application of Draft Article 7 in the Security Council in light of the vociferous objection of Commissioners from four permanent members – China, the US, the UK and Russia.

[430] The sole abstention was Šturma.

stated that he was unconvinced by the authorities presented by Escobar-Hernandez as the justification for the Draft Article.[431]

In explaining their votes against adoption, Kolodkin,[432] Murphy,[433] Huang[434] and Wood[435] were particularly and uncharacteristically scathing of the Special Rapporteur's scholarship and what they said was the Commission's unreasonable haste in rushing through what they described as a very sensitive Draft Article. Rajput, who had chaired the drafting committee also declined to support it[436] and Nolte, who had chaired the Commission's meeting complained that none of the issues he had raised on the inadequacy of the Draft Article had been addressed.[437] Petric, Huang and Wood in particular bemoaned the absence of the spirit of mutual regard, collegiality and accommodation from within a body that

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431 See Provisional summary record of the 3361st meeting of the International Law Commission held at Geneva on 19 May 2017 (A/CN.4/SR.3361), 14 June 2017, available at http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3361.pdf&lang=EF accessed 18 November 2018. See also Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, Note 13 above at paragraph 122.

432 Kolodkin criticizes Draft Article 7 as being a construction based on quasi-legal theoretical premises, neither having a basis in existing international law, nor reflecting any real, discernible trend in State practice or international jurisprudence. See Provisional summary record of the 3378th meeting, Note 423 above at page 9.

433 Murphy is paraphrased as stating that the essential problem was that the exceptions identified in the draft article were not grounded in existing international law, nor could it be said that there was a trend towards such exceptions. The Commission was proceeding with Draft Article 7 even though there was only a handful of national laws and cases and no global treaties or other forms of State practice supporting such exceptions. As had become very clear in the Drafting Committee, there were no legal criteria for inclusion in or exclusion from the list of crimes that appeared in the annex to Draft Article 7. The list was purely an expression of the policy preferences of some members, largely grounded in the Rome Statute, which many States had not ratified, and which said nothing about the immunity of State officials from prosecution in national courts. See Provisional summary record of the 3378th meeting, Note 423 above at pages 9 – 10.

434 See Provisional summary record of the 3378th meeting, Note 423 above at page 11. Clearly blaming the new members of the Commission for 'breaking the mould,' the report on the Commission's deliberations has Mr. Huang as saying that:

> Both the re-elected and newly elected members should refuse to be led by their own subjective preferences and should seek an appropriate balance between the codification and progressive development of international law. The Commission's rigorous scholarship and scientific approach, for which it had won the respect of the international community, should not be abandoned. Regrettably, that rigorous scholarship and scientific approach had not been apparent during the consideration of draft article 7.

435 The report on the Commission's deliberations quotes Sir Michael Wood as being of the firm view that the text did not reflect existing international law or a trend, was not desirable as new law and should not be proposed to States. If it was nevertheless proposed, the Commission must make it clear that it was a proposal for new law, and not codification or progressive development of existing law. The materials cited by the Special Rapporteur in her report simply did not support Draft Article 7. He was therefore opposed to the plenary provisionally adopting Draft Article 7. See Provisional summary record of the 3378th meeting, Note 423 above at page 10.

436 It was clear from the statements in plenary that there was neither support in State practice nor any trend, since there was an inconsequentially small number of cases from domestic jurisdictions and no examples of domestic legislation or treaties. The Drafting Committee's conclusions had been based simply on preferences and choices rather than legal or policy reasons. See Provisional summary record of the 3378th meeting, Note 423 above at page 12.

437 Per the record of the meeting, Nolte had complained that there had been no effort in the Drafting Committee to agree that the commentary would clarify the character of Draft Article 7 as expressing *lex lata* or *lex ferenda*, existing law or new law. Even if it was sometimes difficult to make such distinctions, the Commission needed at least to make an effort to do so. That was particularly important when the outcome of its work was not merely addressed to States, but also to national courts, as in the present case. National courts needed to apply existing law, *lex lata*, and they were often not sufficiently experienced to distinguish existing law from proposals for new law. It was therefore necessary for the Commission to be as clear as possible; otherwise, the draft article risked being misleading. See Note 423 above at pages 12 – 13.

is supposed to generate thought leadership as the foundation, both for the codification and the progressive development of international law and for the international treaties, which may emerge therefrom.[438]

The content of Draft Article 7 is however not surprising in light of the fact that Escobar Hernandez had telegraphed in her first report that she – unlike Kolodkin – believed that in answering the question of whether there was a *jus cogens* human rights exception to sovereign and State immunity, the approach should engage both *lex ferenda* and *lex lata*, in order to fulfil the Commission's dual mandate of codification and progressive development of international law.[439]

Draft Article 7 is in substance little different from the 2009 Resolution of the International Law Institute. While it affirms the inviolability of immunity *ratione personae*, it marks a *volte face* from Kolodkin's position and eliminates any opportunity to invoke immunity *ratione materiae* for breaches of *jus cogens* human rights.

What is curious about the reasons proffered for the vote was that almost every single one of the Commissioners who voted to adopt the Draft Article 7 that emerged from the Drafting Committee did not give the reasons why they had voted for it or address the concerns of Kolodkin, Murphy, Huang or Wood that the draft article could only be justified as reflecting an effort at progressive development of international law rather than codification of *lex lata.*[440] Rather, they expressed their extreme dissatisfaction with exclusion of the crime of aggression from the definition of Article 7.[441]

Another curiosity was that even some of the members that voted to adopt Draft Article 7 were unpersuaded by the various authorities presented by the Special Rapporteur as justification for the text of Draft Article 7. Per Tladi's contribution to the debate, the Fifth Report in some cases focused inordinately on irrelevant or peripheral issues, inaccurately reflected domestic and international case law and conflated case law from civil and criminal proceedings.[442] His views on the authorities relied upon by the Special Rapporteur are reflective, in part of the critique of the Special Rapporteur by Sean Murphy, a member of the Commission who voted against Draft Article 7.[443] In Murphy's words:

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438 See Provisional summary record of the 3378th meeting, Note 423 above.

439 See *Preliminary report on immunity of State officials from foreign criminal jurisdiction* by Concepcion Escobar-Hernandez, Special Rapporteur, [Document A/CN.4/654], available at http://legal.un.org/docs/?symbol=A/CN.4/654 accessed 18 November 2018. See paras. 21, 34, 45, 68 and 72.

440 On this point Tladi notes that beyond the fact that it has not been the practice of the Commission to make such distinctions of draft articles, to specifically designate Draft Article 7 as a product of progressive development of international law rather than codification of *lex lata* would have the unwitting consequence of stunting its growth as international lawyers would be dismissive of it. Discussion of December 18, 2017. Notes on file with author.

441 See Provisional summary record of the 3378th meeting (second part of the 69th session) held at the Palais des Nations, Geneva, on Thursday, 20 July 2017, at 10 a.m., Note 423 above at pages 13 – 16.

442 See A/CN.4/SR.3361, Provisional summary record of the 3361st meeting held at the Palais des Nations, Geneva (19 May 2017).

443 See A/CN.4/SR.3378, Provisional summary record of the 3378th meeting held at the Palais des Nations, Geneva (20 July 2017).

> both the Commentary and the Fifth Report aggregate disparate practice into lengthy footnotes that are not targeted to the individual exceptions [to immunity *ratione* materiae] and that contain references to sources that are not directly germane to the issue at hand (*such as citing to civil rather than criminal cases*, or citing to national laws on immunity of foreign states rather than of foreign officials).[444] (My emphasis)

He goes further to note the complete dearth of State practice, let alone the "widespread, representative, and consistent State practice" that would be required to establish a customary international law norm that asserts exceptions to immunities for international law crimes.[445] Of genocide and crimes against humanity, Murphy notes that the Fifth Report cites for each, one national court case and no international court cases as authority for the proposition. With respect to war crimes, he notes that the Fifth Report invokes no international court cases but four cases from European courts; and, on the surprising inclusion of the crime of apartheid, Murphy notes that the Report cites no national laws and no international nor domestic court cases that support the proposition. On torture, Murphy notes also that the Fifth Report cites no international Court cases but five cases, of which the two from the UK – including *Pinochet* – were decided on reasons that are different from what the Fifth Report purports.[446]

The report of the Sixth Committee of the UN General Assembly which debated the Fifth Report of the Special Rapporteur and Draft Article 7 provides little assistance in reaching definitive conclusions on Draft Article 7 (based on State practice).[447] While twenty-three of the forty-nine States that participated expressed a largely positive view of Draft Article 7(1), eleven of those were concerned about the lack of procedural safeguards and expressed reservations to that end. Of the twenty-one who expressed negative views, the consensus was that there was insufficient State practice to justify the rule.[448] The absence of consensus in the Sixth Committee has also been reflected more broadly by the UN General Assembly.[449] In its topical summary of the debate held on the report of the Commission at the seventy-second session of the Assembly, the International Law Commission noted of the General Assembly that:

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444 See Sean D. Murphy, "Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is The State Practice in Support of Exceptions?" 112 (2018) *American Journal of International Law Unbound* 4.

445 See Sean D. Murphy, "Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is The State Practice in Support of Exceptions?" Note 444 above at 4.

446 The UK cases included *Pinochet* which was decided on the basis of obligations incurred by Chile under the Torture Convention – treaty and not customary international law.

447 See Sean D. Murphy, "Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is The State Practice in Support of Exceptions?" Note 444 above at 7.

448 See Sean D. Murphy, "Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is The State Practice in Support of Exceptions?" Note 444 above at 7 – 8. See also Dire Tladi, "The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?" Note 241 above

449 See Report of the International Law Commission on the work of its sixty-ninth session (2017): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session (A/CN.4/713), prepared by the Secretariat, available at http://legal.un.org/docs/?symbol=A/CN.4/713 accessed 18 November 2018.

> Several delegations [had] criticized the analysis of State practice in paragraph (5) of the commentary to draft article 7. In particular, it was asserted that the analysis confused the practice relating to State immunity and immunity of State officials; that it focused on civil rather than criminal proceedings; that account had not been taken of cases not prosecuted due to immunity; that there was insufficient analysis of the reasons for denial of immunity by States; that practice disproving an alleged trend had not been considered; that the analysis ran counter to recent international jurisprudence; that there was a bias towards case law from particular regions; that the focus was on treaty-based exceptions and limitations to immunity, rather than on those based on customary international law; that not enough attention was paid to treaty practice; and that the jurisdiction of international criminal courts had no bearing on the jurisdiction of domestic courts. It was suggested that the Commission establish a working group to further examine the practice of States.[450]

The last word thus far from the Commission on the subject of immunity *ratione materiae* is Draft Conclusion 23 from the Special Rapporteur's third report on peremptory norms of general international law (*jus cogens*) which states as follows:[451]

Draft conclusion 23

Irrelevance of official position and non-applicability of immunity *ratione materiae.*

1. The fact that an offence prohibited by a peremptory norm of general international law (*jus cogens*) was committed by a person holding an official position shall not constitute a ground excluding criminal responsibility
2. Immunity *ratione materiae* shall not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*).

Much like Draft Article 7 adopted by the Commission on immunities, this Draft conclusion is difficult to understand for the same reasons presented by the objectors to Draft Article 7.

In the *Arrest Warrant Case*[452] as affirmed by the *Jurisdictional Immunities Case*,[453] the ICJ was clear in its characterization of immunity as being a procedural measure as opposed to a substantive defense and described immunity as a bastion for the preservation of peaceful relations among States.[454] Customary international law's recognition of immunity has applied immunity as barring the exercise of jurisdiction as opposed to excusing substantive culpability based on the ability to invoke immunity. The fact therefore that immunity might prevent a court from exercising jurisdiction in cases where it is invoked does not

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450 See Report of the International Law Commission on the work of its sixty-ninth session (2017), Note 449 above at paragraph 37.

451 *Third report on peremptory norms of general international law* (*jus cogens*) by Dire Tladi, Special Rapporteur, Note 13 above at page 68.

452 See *Arrest Warrant Case*, Note 12 above.

453 See *Jurisdictional Immunities of the State Case*, Note 14 above.

454 See *Third report on immunity of State officials from foreign criminal jurisdiction* by Roman Anatolevich Kolodkin, Special Rapporteur (A/CN.4/646), Note 266 above.

in any way speak to the unlawfulness or seriousness of the crime committed or culpability for same.[455]

Since the only purpose of invoking immunity is to prevent the domestic courts of a foreign State from even being able to consider the legality or otherwise of an act of State it would make little sense if the ability to invoke immunity depended on a prior determination of the seriousness of the alleged crime. Immunity has never been invoked for lawful acts and has never been restricted only to marginally wrongful acts. To provide therefore that the gravity of the offence alleged would serve to prevent invocation of immunity or invalidate immunity where invoked, strips out the essence from the purpose of (and rationale for) immunity in the first place.[456]

The bid for normative progression of accountability for *jus cogens* crimes notwithstanding, the notion that invalidating immunity compels accountability is not necessarily accurate. As Judge Pelonpaa warns in *Al Adsani* they could also have the opposite effect.[457]

7. Conclusion.

From this Chapter's review of the case made by human rights advocates to assert a *jus cogens* human rights exception to immunity for Heads of State and other high-ranking government officials, a number of conclusions may be drawn. The first of these is that the principal four reasons articulated by and distilled from *Voiotia*, and expounded upon in many cases since then, to justify an exception to immunity are deficient in many material respects. And this notwithstanding their values-laden foundations and the hero-villain discourse they inspire. While this Chapter directly traverses and illuminates the unsustainability of the reasons tendered by *Voiotia* for a *jus cogens* human rights exception to immunity, the picture that emerges from academic discourse permits more nuanced conclusions on the question of whether there is – on account of *jus cogens* human rights – an exception to immunity.

The second conclusion to be drawn is that there is absolutely no exception to immunity *ratione personae* before foreign domestic courts.[458] On this, there is consensus before both domestic and international courts and, unusually, from academics. State practice, as manifested through domestic legislation regulating immunity and case law from national appellate courts is remarkably consistent in its rejection of the notion of a *jus cogens* human rights exception to immunity for not just the *troika* of Head of State, Head of Government and Foreign Minister, but also arguably other high ranking government officials of similar stature.[459] The decisions of international courts have

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455 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above at 827. See also footnote 92 thereof.

456 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above at page 830.

457 See concurring but separate opinion of Judge Pelonpaa in *Al Adsani,* Note 91 above.

458 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 3 above at 819 – 820.

459 Even the domestic statutes that the Special Rapporteur Concepcion-Escobar references in the Fifth Report do not support the conclusions that Draft Article 7 represents.

shown similar consistency in their categorical rejection of exceptions to immunity *ratione personae* notwithstanding, in some cases, robust dissents.[460] Both the International Court of Justice and the European Court of Human Rights have, while acknowledging a certain empathy for a values-based exception to immunity for Heads of State and other high-ranking government officials, have found that such an exception would not be consistent with current international law.[461]

Recent trends in international law, as manifested in the doctrinal writings – if not the codification efforts – from the Institute for International Law and the International Law Commission – are a different matter. There is consensus, consistent with international case law and the articulation of customary international law before domestic and international tribunals, that immunity *ratione personae* is absolute and inviolable, even if it remains unclear who – beyond the *troika* of the Head of State, Head of Government and Foreign Minister[462] – may be entitled to invoke such immunity.[463]

The application of immunity *ratione materiae* on the other hand engenders further debate. While there appears to be support for limiting the scope of immunity *ratione materiae*,[464] the logic of Kolodkin's position – that *"[t]here can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official"* – has not received a satisfactory rebuttal.[465] The effort by both the Institute for International Law and the International Law Institute to limit the application of immunity *ratione materiae* and provide exceptions for *jus cogens* crimes is, as the above analysis has sought to show, neither consistent with the logic of the rationale for

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460 See for instance dissent of Van der Wyngaert in *Arrest Warrant Case*, Note 12 above dissent of Conçade Trindade in *Jurisdictional Immunities Case,* Note 14 and dissent in *Al Adsani*, Note 91 above.

461 See *Arrest Warrant Case*, Note 12 above. See also *Jurisdictional Immunities of the State Case*, Note 14 above. See also *Al Adsani*, Note 91 above and *Jones*, Note 146 above.

462 See *Arrest Warrant Case*, Note 12 above at paragraph 51. The tendered rationale of the ICJ would permit extension of immunity *ratione materiae* to such persons as Defence Ministers as has indeed been the case. See *Re Mofaz*, First Instance, ILDC 97 (UK 2004), 12 February 2004.

463 Even the forward-looking resolution and draft article, respectively, of the Institute for International Law and the International Law Commission attest to this. See International Law Institute Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, *The Institute of International Law*, Note 398 above and the International Law Commission's Article 7 on 'Crimes under international law in respect of which immunity *ratione materiae* shall not apply', Note 422 above.

464 Dapo Akande and Sangeeta Shah, Note 3 above.

465 See *Prosecutor v. Blaškić* (Objection to the Issue of *Subpoena duces Tecum*) IT-95-14-AR108 (1997), 110 ILR (1997) 607, at 707, paragraph 38 where the ICTY held, in defense of immunity *ratione materiae* that:

> State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

See also *Jones v. Saudi Arabia*, note 148 above, where Lord Hoffman states at paragraph 78 that:

> It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.

See also Dapo Akande and Sangeeta Shah, Note 3 above at 325 – 327. See also Eileen Denza, '*Ex Parte Pinochet*: Lacuna or Leap', (1999) 48 *International and Comparative Law Quarterly* 949, at 952.

immunity *ratione materiae*[466] nor the State practice that would be required to establish a rule of *jus cogens* exceptions to immunity *ratione materiae* for international crimes.[467] As has been argued, because immunity is a matter of procedure, evidence of successful invocation of immunity may lie in the dearth of case law.[468] Where there is case law, they do not bear out the proposition that immunity *ratione materiae* may not be pleaded successfully in criminal cases. To the contrary, cases like *Habré*[469] and *Rumsfeld*[470] assert otherwise.

The endeavour to achieve normative progression that ensures accountability for international crimes is also hampered by the logic of why, if *jus cogens* international crimes compel accountability, such accountability only applies to limit immunity *ratione materiae* and not *personae,*[471] or, why such accountability is limited to criminal and not civil cases.[472] Such contestation renders the precise scope of immunity *ratione materiae* – in the face of the arguable overreach by both the Institute for International Law and the International Law Commission – uncertain.[473]

It can be said in conclusion then that given that members of the ILC have acknowledged that Draft Article 7 may be ahead of its time and will indeed benefit from further elaboration,[474] it is to be hoped that the dual objectives of the ILC, to codify and progressively develop international law, will achieve fruition founded on a reasoned understanding of what is *lex lata* and what remains *lex ferenda*.

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466 See Diplock L.J. in *Zoernsch v. Waldock*, Note 243 above at page 692 where he ruled thus:

> A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf.

467 See Sean D. Murphy, "Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is The State Practice in Support of Exceptions?" Note 444 above.

468 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens,*" Note 85 above at 151. See also Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law*, Note 250 above at 16.

469 See Opinion/Judgment of the Court of Appeal on the Request for Extradition of Hissène Habré (extracts) at paragraphs 5 and 6, Note 258 above.

470 See *French prosecutors throw out Rumsfeld torture case,* Reuters, Note 349 above.

471 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens,*" Note 85 above at 171 – 172 (footnote 136)

472 See *Jurisdictional Immunities of the State Case*, Note 14 above.

473 In the ILC's discussion of the commentary to Article 7, the members of the commission agreed to inclusion of the following as paragraph 19: "Some members noted, however, that the inclusion of those crimes in Draft Article 7 found little if any support in practice, in national and international jurisprudence or in national legislation." See Provisional Summary Record of the 3389th Meeting held at the Palais des Nations, Geneva, on Friday, 4 August 2017 (A/CN.4/SR.3389), available at

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3389.pdf&lang=E accessed 18 November 2018.

474 See generally, Provisional Summary Record of the 3388th Meeting. Held at the Palais des Nations, Geneva, on Friday, 4 August 2017 (A/CN.4/SR.3388), available at

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3389.pdf&lang=E accessed 18 November 2018. See also Provisional Summary Record of the 3388th Meeting (A/CN.4/SR.3388), Note 473 above.

The proper response to the titular question of this Chapter would seem then to be, in the circumstances, a little bit of fact, a little more of fiction and even yet more of wishful thinking.

Chapter 5

Immunity Before International Courts and Article 46A bis of the Malabo Protocol: Deconstructing the Immunity Clause and Assessing its Application and Coherence with International Criminal Law.

1. Introduction.

Geoffrey Robertson, Queen's Counsel, Chamber Master, Master of Middle Temple Inns of Court and Appeals Judge of the Special Court for Sierra Leone has declared, seemingly without fear of contradiction, that:

> No immunity may be asserted in an international criminal court to bar the indictment, arrest or trial of a serving head of state, head of government, ambassador or foreign minister or other high official for war crimes or crimes against humanity. Whether the indictee is a serving or former high official is irrelevant.[1]

While the exposition of the previous chapter on immunities of Heads of State and other high-ranking government officials before foreign domestic courts is a necessary and critical part to determining the legitimacy of the furore around Article 46A *bis* of the Malabo Protocol, the essence of this dissertation revolves around the status of current international law on the immunity of high-ranking officials before international courts. This of course would be the effect of the impugned and much maligned immunity provision of the Malabo Protocol.[2] Examining Robertson's claim will therefore be the labour of this Chapter.

This Chapter unfolds into two parts. The first proposes to examine the question of Head of State immunity before international tribunals and to assess the veracity of the bold claim that under customary international law there is no immunity before international courts.[3] The second proposes to undertake an examination of the text of the immunity provision in order to determine the range of its application and its effect. This will permit a determination of the coherence of the Malabo Protocol's immunity provision with international law and allow, one way or another, for conclusions to be drawn about the legality of the Malabo Protocol's immunity provision and the legitimacy of the controversy it has incurred.

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1 See Geoffrey Robertson, "Ending Impunity: How International Criminal Law Can Put Tyrants on Trial," (2005) 38 *Cornell International Law Journal* 649, at 667.

2 See Article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

3 See Geoffrey Robertson, "Ending Impunity: How International Criminal Law Can Put Tyrants on Trial," Note 1 above. See also *Prosecutor v. Charles Ghankay Taylor* (SCSL-03-01-I-059): Decision on motion made under protest and without waiving immunity accorded to a Head of State requesting the Trial Chamber to quash the indictment and declare null and void the warrant of arrest and order for transfer of detention 23 July 2003 (Decision on immunity motion), (SCSL AC, May. 31, 2004) at paragraphs 9 and 10, available at http://www.worldcourts.com/scsl/eng/decisions/2004.05.31_Prosecutor_v_Taylor.pdf accessed 7 December 2018.

2. A Review of Immunity before International Tribunals.

There is little doubt that one of the factors that exacerbated the tension between the AU and the ICC was the perception by the AU of the ICC's overreach.[4] Few instances illustrate this more than the ICC's Decision on the alleged non-cooperation and failure by the Government of Malawi to arrest Omar al Bashir[5] when he visited the country. The ICC's Pre-Trial Chamber declared, echoing Robertson, that:

> customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes.[6]

The AU's own position on the question of immunities for Heads of States and Governments and other high-ranking officials is that customary international law cloaks such persons with immunity and that such immunity can be invoked not just before foreign domestic courts but also before international courts.[7] And yet, the AU's claim that Heads of States may invoke immunities before international courts appears to be based on little more than the immunity *ratione personae* under customary international law that Heads of States and Governments and other high-ranking officials may invoke before foreign *domestic* courts.[8]

In the AU's swift condemnation of the ICC Pre-Trial Chamber's *Malawi* decision, the depth of the AU's antipathy towards the ICC was fully illustrated.[9] For gross misrepresentations of the *ratio* of the *Arrest Warrant* case[10] and for failure to do a proper analysis of the interplay between Articles 27 and 98 of the Rome Statute of the ICC, the Pre-Trial

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4 See Charles Chernor Jalloh, "The African Union and the International Criminal Court: The Summer of Our Discontent" (August 6, 2010) *JURIST – Forum*, available at SSRN, https://ssrn.com/abstract=2402306 accessed 7 December 2018. See also Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199. See also generally, Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholders* (2017) 13 *International Criminal Justice Series, Asser Press*

5 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Corrigendum to the Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, (ICC-02/05-01/09-139), available at https://www.icc-cpi.int/pages/record.aspx?uri=1287184 accessed 18 November 2018.

6 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*. Note 5 above at paragraph 43

7 See AU Press Release Nº 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan

8 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Volume 10, International Criminal Justice Series (Asser Press, 2017) 203 at 212.

9 See AU Press Release No.002/2012, Note 7 above.

10 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Corrigendum to the Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Note 5 above at paragraph 33.

Chamber that rendered the *Malawi* and *Chad*[11] decisions also drew significant criticism from scholars.[12]

What is important to note here is that whether or not immunity may be invoked by Heads of State and other high-ranking officials before international courts is a different question than whether or not States may breach immunities in order to arrest Heads of State and other high-ranking officials for purposes of rendering them to international courts, which – without police forces – rely on the cooperation of States to gain access to accused and indicted persons.[13] The consistent case made before the ICC by parties declining to "cooperate" in the arrest of al Bashir would seem to suggest that the answer to this question is obvious even though the ICC's several decisions on the subject would seem to suggest otherwise.[14] The question however as to whether immunity may be invoked before international tribunals requires an answer.

2.1 Proffered Grounds for Denying Immunity before International Courts.

Advocates of the view that under customary international law, immunity does not avail Heads of State and other high-ranking officials in proceedings before international courts present a number of inter-related arguments in support of the proposition.

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11 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to the Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir (ICC-02/05-01/09-140-tENG), Pre-Trial Chamber I, 13 December 2011, available at https://www.icc-cpi.int/pages/record.aspx?uri=1384955 accessed 18 November 2018.

12 See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98," Note 4 above. See also Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (… At long Last …) But Gets the Law Wrong" *EJILTalk* (15 December 2011), available at http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 7 December 2018. See also Charles Chernor, "Kenya vs. The ICC Prosecutor," (9 May 2013) 53 *Harvard International Law Journal* 269.

13 See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" Note 12 above. See also Dire Tladi, "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic," (2014) 7 *African Journal of Legal Studies* 381, at 393 – 398.

14 As examples, see *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09*:* Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir; available at https://www.icc-cpi.int/pages/record.aspx?uri=1287184; Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, (26th March 2013), available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-151; Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (9th April 2014), available at https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF; Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute (11th July 2016), available at https://www.icc-cpi.int/CourtRecords/CR2016_04947.PDF; Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, (July 11, 2016), available at https://www.icc-cpi.int/CourtRecords/CR2016_04993.PDF; Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, (6 July 2017), available at https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF; Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir, available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-309, all accessed 30 November 2018.

The first is that in the *Arrest Warrant* case,[15] the International Court of Justice (ICJ) acknowledged prosecutions before international criminal tribunals "where they have jurisdiction"[16] as one of four non-exhaustive instances in which the customary international law immunities which Heads of State and other high-ranking officials could ordinarily invoke would not apply.[17] According to such advocates, the ICJ's admonishment that immunity does not mean impunity could be realized through such courts.[18]

The second ground is that the traditional rationales for upholding immunity – the sovereign equality of States and the impairment of such equality that would result from one State exercising jurisdiction over another – do not hold true for international courts. By exercising jurisdiction over persons who would otherwise be entitled to immunity, it is argued, international courts would not thereby be breaching the notional equality of States.[19]

The third is that the constitutive statute of the International Military Tribunal for Nuremberg[20] and the more recent statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[21] and the International Criminal Tribunal for Rwanda (ICTR)[22] represent a progressive subjugation of immunity for State officials to accountability before international tribunals and the creation to this end of a norm denying immunity before international courts.[23] Thus does the Pre-Trial Chamber of the International Criminal Court say in the *Malawi*[24] decision – after citing the authorizing regimes for war crimes accountability in the aftermath

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15 See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ), 14 February 2002, I.C.J. Reports 2002, p. 3 (hereafter *Arrest Warrant Case*).

16 See *Arrest Warrant Case*, Note 15 above at paragraph 61.

17 There is some confusion as to whether the ICJ meant immunity *ratione personae* or immunity *ratione materiae* or both. See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," (2010) 21(4), *The European Journal of International Law* 815.

18 See Geoffrey Robertson, "Ending Impunity: How International Criminal Law Can Put Tyrants on Trial," Note 1 above.

19 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 8 above at 212 – 213.

20 Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, 82 UNTS 279 (1945), available at http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf accessed 7 December 2018.

21 See Statute of the International Tribunal for the Former Yugoslavia, Adopted on 25 May 1993 by UN Security Council Resolution 827, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf accessed 7 December 2018.

22 See Statute of the International Criminal Tribunal for Rwanda, Adopted on 8 November 1994 by UN Security Council Resolution 955, available at http://legal.un.org/avl/pdf/ha/ictr_EF.pdf accessed 7 December 2018.

23 See Geoffrey Robertson, "Ending Impunity: How International Criminal Law Can Put Tyrants on Trial," Note 1 above.

24 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Corrigendum to the Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Note 5 above.

of the first and second World Wars as well as the Statutes of the ICTY, ICTR and the Special Court for Sierra Leone[25] – that:

> … immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War 1. … the Chamber finds that *customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes*.[26] (My emphasis)

And yet, for all the seeming certainty of the ICC's Pre-Trial Chamber on the point, further inquiry into historical records going back to World War I suggests that the claim about these tribunals establishing a norm – let alone a customary international law rule – that invalidates immunities before international tribunals may be more than a little exaggeration. And this notwithstanding the text of the authorizing legal instruments for such tribunals. As Penrose notes:

> From these few tribunal statutes [Nuremberg Tribunal, ICTY and ICTR] and this lone treaty [the Rome Statute of the ICC], modern courts have strained to find a consistent practice regarding head of state immunity. Rather than relying on actions, however, these modern courts dogmatically overemphasize the hollow written words relating to head of state immunity and ignore the empty actions or actual practice.[27]

The above referenced tribunals, for representing a significant number of *ad hoc* tribunals and the sole – even if treaty based – international criminal court, can hardly be called "few" but a closer look at the actual precedents that these tribunals have presented is warranted.

2.2 Immunity before Post-World War I International Accountability Platform.

In modern times, the first wave of accountability for egregious breaches of humanitarian law was in the immediate aftermath of World War I. Triggered by the assassination of the Crown Prince and heir to the Austro-Hungarian empire by a Yugoslav nationalist in Sarajevo on June 28, 1914,[28] the entanglements of various international alliances and histories of antagonism among various States very quickly pulled several countries into what became known as the first World War.[29]

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25 Special Court for Sierra Leone, Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Case Number SCSL-2003-I-AR72(E), Decision on Immunity from Jurisdiction, 31 May 2004, paras 51-52.

26 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Corrigendum to the Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Note 5 above at paragraphs 38 – 43.

27 See Mary M. Penrose, "The Emperor's Clothes: Evaluating Head of State Immunity Under International Law," (2010) 7 *Santa Clara Journal of International Law* 85, at 90.

28 For an excellent history of the first World War, see John Keegan, *The First World War: An Illustrated History*, (Hutchinson, 2001).

29 For more precise details, see UK national archives at http://www.nationalarchives.gov.uk/education/greatwar/g2/backgroundcs1.htm accessed 7 December 2018.

By August 4, 2014, the major powers led by the Russian Empire, France and the United Kingdom of Great Britain and Ireland on the one side (the Allies) and the Central Powers led by Germany, Austria-Hungary and the Ottoman Empire were at war.[30] Involving twenty-eight countries in total and generating an unprecedented number of casualties – over forty-one million[31] – the first World War saw vicious campaigns and retaliatory measures that continued even after fighting ended on 11 November 1918,[32] when Germany signed an armistice agreement in France.[33]

The confluence of public horror at the atrocities of a protracted war and opportunism that saw political profit for European leaders in fulfilling wartime pledges to punish perpetrators of war crimes led to a public outcry for the prosecution of Kaiser Wilhelm II of Hohenzollern, Emperor of Germany, King of Prussia and principal architect of the war.[34]

At the start of the Paris Peace Conference,[35] (the meeting of Allied powers at the end of World War I to set the terms for peace and reparations for the defeated powers), the Allies appointed a Commission to undertake an inquiry into the causes of and responsibility for the war. The Commission was also charged with determining, among others, violations of laws and customs of war perpetrated by the German-led forces, the extent to which members of enemy forces should be held accountable and how a tribunal could be constituted to try the enemies'

The alliances included the following: The Germany and Austria-Hungarian alliance formed in 1879 (the Dual Alliance) that established them as a great power in central Europe; the French and Russian alliance formed in 1892 (the Dual Entente) that sought to box Germany in between unfriendly powers; The Dual Entente became the Triple Entente when the United Kingdom joined it in 1907 and although Italy joined the Dual Alliance to make it the Triple Alliance it stayed out of the first World War. The United Kingdom for instance was compelled to declare war on Germany because of the latter's invasion of Belgium and breach of Belgian neutrality. See also David Stevenson, *The First World War and International Politics* (Oxford University Press, 1988), where the author identifies as fuel for the conflagration, such factors as antagonism between Entente and Alliance powers, an arms race and French resentment over Germany's seizure of the Alsace-Lorraine region of France after the Franco-Prussian War of 1870.

30 Austria-Hungary declared war on Serbia on 28 July 1914. In response to Russia's mobilization on the German border and refusal to heed a German warning to cease such mobilization, Germany declared war on Russia on 1 August 1914. The Ottoman Empire joined the war through a secret treaty of alliance signed with Germany on 2 August 1914. Britain declared war on Germany on 4 August 1914 when Germany invaded Belgium.

31 Of the estimated forty-one million casualties of the First World War were an estimated 18 million deaths of which seven million were civilians. For further particulars, see Samuel Dumas*, Losses of Life Caused by War* (Clarendon Press, 1923).

32 Even after the signing of the 11 November 1918 Armistice, the Allied powers maintained a blockade of Germany, against rules of international law, which was responsible for several deaths. See M. Cherif Bassiouni "World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System," (2002) 30 *Denver Journal of International Law and Policy* 244, at 276 – 277.

33 See Nicholas Best, *The Greatest Day in History: How, on the Eleventh Hour of the Eleventh Day of the Eleventh Month, the First World War Finally Came to an End* (2008) Public Affairs.

34 See M. Cherif Bassiouni "World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System," Note 32 above at 250.

35 The Paris Peace Conference yielded, among others, the Treaty of Versailles, in which Germany acknowledged its responsibility for the war and accepted harsh terms of reparations and the establishment of the League of Nations (precursor to the United Nations). See Alan Sharp, *The Versailles Settlement, Peacemaking After the First World War, 1919 – 1923* (Second Edition) (Palgrave McMillan, 2008).

crimes.[36] Unsurprisingly, the Commission laid responsibility for the war squarely at the feet of Germany and Austria[37] and on the question of individual liability for a war that had been prosecuted by "barbarous or illegitimate methods" stated that:

> [T]here is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. *This extends even to the case of Heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a Sovereign of a State* ***...*** *However, even if, in some countries, a Sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.*[38] (My emphasis)

In Part VII to the Treaty of Versailles, signed by the Allied powers on June 28, 1919 to officially end the war with Germany,[39] Germany not only undertook to furnish all documents and other information to ensure full knowledge of incriminating acts but also recognized the right of the victors to bring to trial the German Emperor and other persons accused of having violated laws and customs of war.[40]

Notwithstanding the enabling environment provided by the Treaty of Versailles' express undertaking to prosecute instigators of, and perpetrators of the abuses of the war, irrespective of their rank and office,[41] Kaiser Wilhelm II who was largely responsible for the brutal prosecution of the war and had abdicated his throne immediately thereafter went into exile and was granted asylum by the Netherlands.[42] He was never brought to trial. As Bassiouni has noted with cynicism:

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36 See M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", (1997) 10 *Harvard Human Rights Journal* 11.

37 See "Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" (January - April 1920) 14(1/2) *The American Journal of International Law,* 95.

38 See "Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," Note 37 above at 116.

39 See Treaty of Peace with Germany (Treaty of Versailles). The Treaty was signed on 28 June 1919 and entered into force on 10 January 1920 with the United States not being party to it on account of the US Senate's refusal to ratify same. The text of the treaty of Versailles and a record of the US President's engagement with the senate is available from the Library of Congress https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf accessed 7 December 2018.

40 See Article 228 of the Treaty of Versailles, Note 39 above.

41 See Article 227 of the Treaty of Versailles, Note 39 above. Per this clause, the Allied Powers committed to indict "William II of Hohenzollern, formerly German Emperor for a supreme offence against international morality and the sanctity of treaties."

42 The Government of the Netherlands declined to extradite the Kaiser to stand trial primarily because the Treaty of Versailles, Article 227 of which charged Wilhelm II with "a supreme offence against international morality and the sanctity of treaties" did not allege commission of any crime known to international law at the time. Other reasons include the Kaiser's kinship with the royals of the Netherlands. See M. Cherif Bassiouni "World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System," Note 32 above at 271 and 279 – 281.

> … when World War I came to an end in 1919, Europe's leaders, who were mostly monarchs, were not about to prosecute one of their own any more than the European monarchs were willing to prosecute Napoleon in 1814 and 1815.[43]

The failure of the Allied powers to bring Kaiser Wilhelm II to trial – *in absentia* or otherwise – or to even seek his extradition in any timeous fashion from the Netherlands, ensured that World War I yielded no precedents for holding Heads of State to account.[44] The conclusion to be drawn from the unsurprising restraint of the Allied powers, even if shockingly discordant with their stated commitment to ensuring accountability, is that, as Bassiouni says, there was little appetite to create such a precedent.[45]

2.3 Immunity before Post-World War II Accountability Platforms.

The even greater horrors of World War II ushered in the second wave of the global quest for accountability for breaches of humanitarian law. They proved also to be a catalyst for urgency in laying down a number of rules both for the conduct of war[46] and to secure individual rights by limiting the power of governments to violate such individual rights. The timing of the four Geneva Conventions,[47] the Genocide Convention[48] and the Universal Declaration of Human Rights[49] was a clear testament to the revulsion that the war had wrought.[50]

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43 See M. Cherif Bassiouni, "Perspectives on International Criminal Justice" (2010) 50 *Virginia Journal of International Law* 269, at 312

44 See Paul Mevis and Jan Reijntjes, "Hang Kaiser Wilhelm! But for What? A Criminal Law Perspective", in Morten Bergsmo, Cheah Wui Ling and YI Ping (Eds), *Historical Origins of International Criminal Law: Volume 1*, (FICHL Publication Series, 2014) No. 20.

45 While there were some efforts by Prime Ministers Clemenceau of France and Lloyd George of England – each declined by the Netherlands - to seek the extradition of Wilhem, these have been described as half-hearted efforts. See James F. Willis, *Prologue to Nuremberg: the politics and diplomacy of punishing war criminals of the First World War* (Greenwood Press, 1982). See also M. Cherif Bassiouni, "Perspectives on International Criminal Justice," Note 43 above.

46 The first Geneva Convention protects wounded and sick soldiers on land during war [Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field]; The second Geneva Convention protects wounded, sick and shipwrecked military personnel at sea during war [Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea]; The third Geneva Convention applies to prisoners of war [Convention (III) relative to the Treatment of Prisoners of War]; The fourth Geneva Convention affords protection to civilians, including in occupied territory [Convention (IV) relative to the Protection of Civilian Persons in Time of War]. Common Article 3 of the four conventions, covers situations of non-international armed conflicts. All conventions are available at https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm accessed 7 December 2018.

47 Each of the four Geneva Conventions was adopted in Geneva, Switzerland, on 12 August 1949 and entered into force on 21 October 1950. Please see Note 46 above.

48 See Convention on the Prevention and Punishment of the Crime of Genocide. It was adopted by the General Assembly of the United Nations on 9 December 1948 and entered into force on 12 January 1951, available at https://ihl-databases.icrc.org/ihl/INTRO/357?OpenDocument accessed 7 December 2018.

49 See UN General Assembly Resolution 217 A. The Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948, available at http://www.un.org/en/universal-declaration-human-rights/ accessed 7 December 2018.

50 See generally Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999) University of Pennsylvania Press. See also UN, *Yearbook of the International Law Commission* (1976), Vol. II,

The failure of the Allied powers to subject the authors of World War I to any meaningful penal sanction for their part in the war provided even further motivation to try the war criminals of World War II.[51] Several months before the end of the war and even before Germany's assault on Russia, which yielded some of the greatest casualties of World War II,[52] representatives of nine governments in exile[53] had, in the Declaration of St. James Palace,[54] stated one of their principal war objectives as:

> … the punishment, through the channel of organized justice, of those guilty and responsible for these crimes, *whether they have ordered them, perpetrated them or in any way participated in them*.[55] (my emphasis)

The subsequently signed London Agreement[56] and the Charter for the International Military Tribunal annexed thereto, which became the legal basis for the trials conducted at Nuremberg, were clear also in their rejection of official status or position as a bar to criminal responsibility or as grounds for differential sentencing in the event of a finding of culpability. The provision rendering official positions irrelevant for trial and sentencing purposes was substantially mirrored (albeit with a critical difference, reasons for which became clear later) in the founding instrument for the International Military Tribunal for the Far East,[57]

Part II, at 101, where the International Law Commission, in a commentary on the need to punish egregious human rights violations noted as follows:

> The feeling of horror left by the systematic massacres of millions of human beings perpetrated by the Nazi regime, and the outrage felt at utterly brutal assaults on human life and dignity, have both pointed to the need to ensure that not only the internal law of States but, above all, the law of the international community itself should lay down peremptory rules guaranteeing that the fundamental rights of peoples and of the human person will be safeguarded and respected; all this has prompted the most vigorous affirmation of the prohibition of crimes such as genocide, apartheid and other inhuman practices of that kind.

51 See Gerry Simpson, *Law War and Crime* (Polity Press, 2007).

52 Some scholars have estimated that Russia sustained over 35 million casualties from the Eastern Front. See David Glantz, "The Soviet-German War 1941 – 1945: Myths and Realities: A Survey Essay" A Paper Presented at the 20th Anniversary Distinguished Lecture at the Strom Thurmond Institute of Government and Public Affairs Clemson University 11 October 2001, Clemson, South Carolina, available at https://web.archive.org/web/20110709141048/http://www.strom.clemson.edu/publications/sg-war41-45.pdf accessed 7 December 2018.

53 The exiled governments were of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, Yugoslavia and General de Gaulle of France.

54 See Declaration of St. James Palace, 13 January 1942, available at http://www.ibiblio.org/pha/policy/1942/1942-01-12a.html, accessed on September 2, 2018. See also website of US State Department's Office of the Historian, https://history.state.gov/milestones/1945-1952/nuremberg, accessed 20 October 2018.

55 See paragraph 3 of Declaration of St. James Palace, Note 54 above. See also Yves Beigbeder, *Judging War Criminals: The Politics of International Justice,* (Palgrave McMillan, 1999) at 32. See also Guenael Mettraux, "Trial at Nuremberg" in William Schabas and Nadia Bernaz (Eds) *Routledge Handbook of International Criminal Law* (Oxford, 2013) at 6.

56 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 (London Agreement of August 8, 1945), available at http://avalon.law.yale.edu/imt/imtchart.asp accessed 7 December 2018.

57 See Special Proclamation by the Supreme Commander for the Allied Powers for the International Military Tribunal for the Far East, Tokyo 19 January 1946 and Article 6 of annexed Charter of the International Military Tribunal

which was constituted to try persons for war crimes perpetrated in the eastern theatre of the war.

Unanimous affirmation by the UN General Assembly in 1946 of the principles of the Nuremberg Charter represent the foundations for accountability in international criminal justice.[58] Per Article 7 of the Nuremberg Charter:

> The official position of defendants, *whether as Heads of State or responsible officials in Government Departments*, shall not be considered as freeing them from responsibility or mitigating punishment.[59] (My emphasis)

And yet, while the suicides of Hitler and other German authors of the war may have robbed the Allied powers of the opportunity to indict key architects of the carnage of World War II,[60] the Allies failed to act against other authors of the war, with no less culpability than Hitler. Douglas MacArthur, the Supreme Allied Commander in the Far East declined to indict Emperor Hirohito of Japan[61] under the spurious grounds that he had had no actual criminal responsibility for a war,[62] the atrocities of which would not have been possible without his tacit or express consent.[63] Indeed, as various scholars have conclusively determined,[64] the omission of any reference to "Head of State" in the responsibility clause of the Charter for the Tribunal for the Far East,[65] unlike Article 7 of the Nuremberg Charter, was born of an express decision to dilute the legal basis for trying the

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for the Far East, available at http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf accessed 7 December 2018.

58 See "95 (I). Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal" Resolution adopted by the General Assembly at its 55th Plenary Meeting on 11 December 1946, available at http://www.un-documents.net/a1r95.htm accessed 7 December 2018.

59 See Nuremberg Charter, Note 56 above.

60 Beyond Adolf Hitler, commanding generals of German armed forces such as Heinrich Himmler, Wilhelm Burgdorf, Hans Krebs and Joseph Goebbels took their own lives in early 1945. See Richard Overy, *Making Justice at Nuremberg, 1945 – 1946*, BBC History (17 February 2011), available at http://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml accessed 7 December 2018.

61 See Neil Boister, "The Tokyo Trial" in William Schabas and Nadia Bernaz (Eds) *Routledge Handbook of International Criminal Law* (Oxford, 2013) at 17 – 32. Other scholars have suggested that differences in the text of the constitutive statute of the International Military Tribunal for the Far East were deliberate and were intended to provide grounds to immunize the Emperor. See Mary M. Penrose, "The Emperor's Clothes: Evaluating Head of State Immunity Under International Law," Note 27 above at 10. See also Herbert P. Bix, *Hirohito and the Making of Modern Japan Paperbac*k (Harper Perennial, 2001).

62 See M. Cherif Bassiouni, "Perspectives on International Criminal Justice," Note 43 above at 313.

63 See M. Cherif Bassiouni, "Perspectives on International Criminal Justice," Note 43 above at 313.

64 See Edward Behr, *Hirohito: Behind the Myth* (Villard, 1989). See also Zachary D. Kaufman, "Transitional Justice for Tojo's Japan: The United States Role in the Establishment of the International Military Tribunal for the Far East and Other Transitional Justice Mechanisms for Japan after World War II" (2013) 27 *Emory International Law Review* 755, at 791 – 793. See also Zhang Wanhong, "From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial," (2006) 27 *Cardozo Law Review* 1673, at 1675 – 1677.

65 See Charter of the International Military Tribunal for the Far East, Note 57 above. Per Article 6:

> 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.

Emperor.[66] Thus did Article 6 of the Charter of the International Military Tribunal for the Far East state that:

> 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.[67]

The stated commitment then to appeasing the conscience of mankind through trials of the perpetrators of the sustained conflict[68] appears to have been less ardent than the rhetoric,[69] and the various judicial pronouncements that have since been made,[70] would seem to suggest. In decrying what is clearly a case of *post hoc, ergo propter hoc*,[71] Penrose says of the post-World War II accountability measures that:

> Article 7 is believed by many to be the beginning of the end of head of state immunity. However, this belief is neither logically tenable nor historically supportable. In truth, no head of state was prosecuted at Nuremberg. And on the other side of the world, in Asia, the opportunity to actually prosecute the vanquished Emperor of Japan was deliberately sacrificed by the Allies.[72]

While the decision not to prosecute Hirohito has been said to have been warranted for political reasons, and may even have been an imperative in the circumstances to preserve stability in the region, the fact remains that the principles upon which the Nuremberg trials and the trials of the International Military Tribunal for the Far East (IMTFE) were ostensibly founded were abandoned in the case of Hirohito.[73] In any case, the opportunity to prosecute a Head of State having been forgone, it is curious that the forgone opportunity is

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66 See Herbert P. Bix, *Hirohito and the Making of Modern Japan* (HarperCollins, 2000).

67 See Article 6 of the Charter of the International Military Tribunal for the Far East, Note 57 above.

68 See Declaration of St. James Palace, 13 January 1942, Note 55 above.

69 Prince Yasuhiko, uncle of Emperor Hirohito who led Japanese incursions into the Manchurian region of China and, it is alleged, ordered the "Rape of Nanjing" or Nanking Massacre in 1938 during which over 200,000 people were killed and up to 80,000 women raped was not prosecuted either. See M. Cherif Bassiouni, "Perspectives on International Criminal Justice," Note 43 above at 313.

70 See for instance *Prosecutor v. Charles Ghankay Taylor* (SCSL-03-01-I-059): Decision on motion made under protest and without waiving immunity accorded to a Head of State requesting the Trial Chamber to quash the indictment and declare null and void the warrant of arrest and order for transfer of detention 23 July 2003, Note 3 above. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Corrigendum to the Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Note 5 above.

71 Translated as "after this therefore because of it."

72 See Mary M. Penrose, "The Emperor's Clothes: Evaluating Head of State Immunity Under International Law," Note 27 above at 103.

73 See M. Cherif Bassiouni, "Perspectives on International Criminal Justice," Note 43 above.

cited so often as authority for the prosecution of Heads of State. Penrose's views on the curiosity are that:[74]

> Intellectual honesty demands that scholars and judges confess that neither the Nuremberg Tribunal nor the Tokyo Tribunal provided any evidence that head of state immunity had been legally eviscerated.[75]

What is clear from the foregoing is that as with World War I, notwithstanding the pronouncements of the Allied powers and their efforts to create accountability measures, neither the Nuremberg trials nor the trials of the IMTFE yielded any trials of Heads of State.[76] The belief that the death knell for the immunity of Heads of State was sounded by the post-World War II trials – a belief which has been repeated in several international criminal prosecutions and judgments[77] – can only therefore be described as founded on a myth: *post hoc, ergo propter hoc.*

2.4 Ad-hoc Tribunals Created under Chapter VII Powers of the United Nations Security Council.

More recently, the UN Security Council – under its Chapter VII powers – has created international tribunals to ensure accountability for instances of horrific carnage and abuses of international humanitarian law in non-international civil conflict. These are the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which were respectively created by UN Security Council Resolutions 827 of 25 May 1993[78] and 955 of 8

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74 See Mary M. Penrose, "The Emperor's Clothes: Evaluating Head of State Immunity Under International Law," Note 27 above at 107.

75 It is worth mentioning here (even if only as a footnote in order not to distract) that although reference to Nuremberg appears to validate the notion that perpetrators of humanitarian law shall be punished, whatever their status, the legality of the Nuremberg Tribunal itself has legitimately been contested. The Tribunal's reliance on the Kellogg-Briand Pact of 1928 (said to outlaw aggressive war), The Hague Convention of 1907 (outlawing certain methods of waging war), the League of Nations Protocol for the Pacific Settlement of International Disputes, (which never entered into force for want of ratification) and the Treaty of Versailles which was less than robustly implemented after World War I, hardly imbues the Nuremberg Tribunal with the moral authority that has been associated with it. See F. B. Schick, "The Nuremberg Trial and the International Law of the Future" (Oct. 1947) 41(4) *The American Journal of International Law* 770 – 794. See also Mary Jean Lopardo, "Nuremberg Trials and International Law" (1978) 8(2) *University of Baltimore Law Forum* 34.

76 It has been argued in opposition to this point that because Admiral Karl Doenitz, who had briefly succeeded Hitler in the period between his suicide and the German surrender (all of 23 days; 30 April – 23 May, 1945) was prosecuted by the Nuremberg Tribunal, the Nuremberg Tribunal did yield such a precedent. That he was sentenced to only 10 years imprisonment would however be an indication of how seriously the Court considered his infractions. See Eugene Davidson, *The Trial of the Germans: Account of the Twenty-Two Defendants Before the International Military Tribunal at Nuremberg* (University of Missouri Press, 1997).

77 See for instance *The Prosecutor v. Omar Hassan Ahmad Al Bashir*: Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (12 December 2011) at paragraph 22 – 28. See also *Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction Motion*, Note 3 above.

78 See UN Security Council Resolution 827 of 1993, adopted by the Security Council at its 3217th meeting on 25 May 1993, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf accessed 7 December 2018.

November 1994.[79] The creation of the first Court was inspired by atrocities committed in the civil conflict that was attendant to the breakup of the former Yugoslavia in the early 1990s and the latter was inspired by the genocide in Rwanda in 1994.

As with the Charters of the Nuremberg Tribunal and the IMTFE, the express affirmation by the Statute of the ICTY and the ICTR of the irrelevance of the position of the accused[80] has been presented as a norm which invalidates the immunity of Heads of State and other high-ranking officials before international tribunals. This however appears also – much like the ostensible authority of the post-world war tribunals – to be a stretch that is sustained neither by the text nor the context of the relevant provisions of the constitutive statutes of the tribunals.[81]

It must be noted firstly that the language of the constitutive statutes of the ICTY and the ICTR, adopted from the text of the Nuremberg Charter with little consideration for the fact that the victorious Allies in 1945 already had ready access to accused persons (who did not therefore need to be arrested and surrendered for trial by third parties),[82] speaks only to rank and status not being a bar to criminal responsibility or grounds for mitigation of punishment in the event of conviction.[83]

As noted in Chapter 4, because immunity is invoked as a matter of procedure preventing the exercise of jurisdiction, and preventing the arrest or other impairment of Heads of State and other high-ranking officials, the irrelevance of status per Article 7(2) of the ICTY Statute and Article 6(2) of the ICTR Statute is not what would invalidate immunity *ratione personae* if a person was entitled to invoke it because such invocation would occur at the point of arrest and in proceedings to determine the legitimacy of such arrest.[84] If anything therefore the invalidating force of the procedural immunities that would ordinarily avail high ranking officials is not Article 7(2) of the Statute of the ICTY or Article 6(2) of the

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79 See UN Security Council Resolution 955 of 1994, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement accessed 7 December 2018.

80 Per Article 7(2) of the ICTY Statute and Article 6(2) of the ICTR Statute:

> 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.

81 Daniel Singerman, "It's Still Good to be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity," (2007) 21 *Emory International Law Review* 413, at 429–440. See also Kelly O'Neill, "A New Customary Law of Head of State Immunity? Hirohito and Pinochet," (2002) 38 *Stanford Journal of International Law* 289, at 297.

82 See Benjamin B. Ferencz, "Nurnberg Trial Procedure and the Rights of the Accused," (1948-1949) *39 Journal of Criminal Law and Criminology* 144.

83 This would indeed be the reason why Article 27(2) of the Rome Stature of the ICC provides that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or International law, shall not bar the Court from exercising its jurisdiction over such a person." This is in addition to Article 27(1) rendering irrelevant rank and status of an accused person to culpability or as grounds for mitigation of punishment. See Dapo Akande, "International Law Immunities and the International Criminal Court" (2004) 98 *African Journal of International Law* 407, at 420.

84 See Hazel Fox, *The Law of State Immunity,* (2nd Ed) (Oxford University Press, 2008) at 525.

Statute of the ICTR, but rather, the authorizing Security Council Chapter VII Resolution[85] in terms of which the Council compels all States to:

> cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.[86]

The rejection by the UN Security Council, in its promulgation of the Statutes of the ICTY and ICTR of the status of an official as a bar to criminal responsibility was necessitated by the non-international conflicts in the former Yugoslavia and Rwanda where incumbent governments were accused of inflicting international crimes upon citizens. Indeed, such abuses were so gross that the Security Council had endorsed military interventions for humanitarian purposes undertaken by concerned States.[87] These were undertaken in the former Yugoslavia by NATO[88] and in Rwanda by Uganda, in whose army most of the forces of the Rwanda Patriotic Front (RPF) had served.[89]

Within such a context, insulation, through immunities, of the very people responsible for such grave breaches of humanitarian law as to compel the Security Council to seek to ensure judicial accountability under its Chapter VII powers, would have rendered the Chapter VII powers inconsequential. In that light, the rejection of immunities as a bar to the exercise of jurisdiction cannot, in and of itself, be said to be norm-creating on the question of immunities before international courts generally. The ICTY and the ICTR being creations of the Security Council, the Security Council was entitled to adopt *lex specialis* and to contract out of non-*jus cogens* norms of international law in order to address the peculiar challenges that warranted invocation of its Chapter VII powers. As Baker has noted,

> … this is exactly what they [UN Security Council] have done with regard to the immunities traditionally provided to heads of state and members of government. The potential problem that can arise is when this perfectly legitimate action is, rather than being accepted as what it is – the ability of a self-contained legal

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85 Cesare P.R. Romano and André Nollkaemper, "The Arrest Warrant Against the Liberian President, Charles Taylor," (20 June 2003) 16(8) *American Society for International Law Insights*, available at https://www.asil.org/insights/volume/8/issue/16/arrest-warrant-against-liberian-president-charles-taylor accessed 7 December 2018.

86 See Article 4 of UN Security Council Resolution 827, Note 78 above.

87 See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992) S/1994/674, available at http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf accessed 7 December 2018. See also Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994) S/1994/1125, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_1994_1125.pdf accessed 7 December 2018.

88 Michael R. Gordon, *Conflict in the Balkans: NATO; Modest Air Operation in Bosnia Crosses a Major Political Frontier,* New York Times (11 April 1994), available at https://www.nytimes.com/1994/04/11/world/conflict-balkans-nato-modest-air-operation-bosnia-crosses-major-political.html accessed 7 December 2018.

89 See *Uganda: Museveni - How I Supported RPF in Rwanda's 1994 Liberation War,* The Observer (18 January 2015), available at http://allafrica.com/stories/201501190109.html accessed 7 December 2018.

regime to contract out of a non-*jus cogens* norm of international law – is instead accepted by commentators as evidence of a general norm of international law.[90]

Notwithstanding the claims of some scholars about the demise of immunities that the case portended,[91] Miloševic's indictment by the ICTY while he was President of the Federal Republic of Yugoslavia must only be viewed within the context of extraordinary circumstances requiring extraordinary measures. Under Chapter VII powers of the UN, all member States of the UN were obliged – within the limited ambit of Security Council Resolution 827 – to overcome such procedural barriers as existed to bringing indictees before the Court.[92]

While it is not clear from the authorities whether there is a rule in customary international law affording immunity for Heads of State and other high-ranking officials before international courts, it cannot be said either that the ICTR and ICTY establish a customary international law rule rendering immunities of high-ranking officials inapplicable before international tribunals.[93]

2.5 Other *Ad-hoc* Tribunals Established under Authority of the United Nations.

Other *ad-hoc* criminal tribunals, supported by the UN and the international community include those set up in the aftermath of ruinous civil conflict in Sierra Leone,[94] to try the Khmer Rouge for decades of atrocities in Cambodia[95] and to

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90 See Roozbeh Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates," (2010) 21(1) *European Journal of International Law* 173, at 189.

91 Scot Grosscup, "The Trial of Slobodan Milošević: The Demise of Head of State Immunity and The Specter of Victor's Justice" (2004) *32 Denver Journal of International Law and Policy* 355. See also William Miller, "Slobodan Milosevic's Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice" (2000) 22 *Loyola of Los Angeles International and Comparative Law Review* 553. See also Geoffrey Robertson, "Ending Impunity: How International Criminal Law Can Put Tyrants on Trial," Note 1 above.

92 See Article 4 of UNSC Resolution 827, Note 78 above.

93 See Roozbeh Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates," Note 90 above.

94 See UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002, available at http://www.refworld.org/docid/3dda29f94.html accessed 7 December 2018. The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, with the Statute of the Court annexed thereto, was signed in Freetown, Sierra Leone, on 16 January 2002 and entered into force on 12 April 2002, following its ratification by Sierra Leone. The Trial Chambers convicted Charles Taylor, former president of Liberia on 11 charges including crimes against humanity, rape, the recruitment and use of child soldiers, sexual slavery and outrages upon personal dignity. See *Prosecutor v. Charles Ghankay Taylor*, Judgment of Trial Chamber SCSL-03-01-T-1283, 26 April 2012, available at http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf accessed 7 December 2018. The conviction was upheld by the Appeals Chamber of the Special Court. See *Prosecutor v. Charles Ghankay Taylor*, Judgment of Appeals Chamber SCSL-03-01-A-1389, 26 September 2013, available at http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf accessed 7 December 2018. For further details about the performance of the Special Court see Charles Chernor Jalloh, "Special Court for Sierra Leone: Achieving Justice?", (2011) 32(3) *Michigan Journal of International Law* 395. See also Charles C. Jalloh, "Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone" (2004) 8(21) *American Society for International Law (ASIL) Insight*, available at https://www.asil.org/insights/volume/8/issue/21/immunity-prosecution-international-crimes-case-charles-taylor-special accessed 7 December 2018.

95 See 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 (2004), available at

try persons responsible for the assassination of Prime Minister Hariri of Lebanon.[96] Each of these has sought to disavow impunity for international crimes.[97]

The Special Court of Sierra Leone, for being the only one of these that sought to arrest and bring to trial a sitting Head of State – Charles Taylor – is particularly relevant.[98] As with other authorities cited in support of the proposition that immunity may not be invoked – at least not successfully – in international courts, the authority of the Taylor case as precedent appears also to be overstated.[99]

2.5.1 *Prosecutor v. Charles Ghankay Taylor*:[100] Invocation of Immunity.

In March 2003, the Prosecutor of the Special Court had secured an indictment of Charles Taylor for war crimes, crimes against humanity, and other egregious violations of international humanitarian law, such as abductions, the use of child soldiers, and unlawful killings, allegedly committed in Sierra Leone.[101] Upon request of the Prosecutor, the indictment was sealed.[102]

On June 4, 2003 the Prosecutor secured from the Pre-Trial Chamber a warrant of arrest for Taylor while the latter was in Accra, Ghana, attending peace talks organized by the Economic Community of West African States

https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf accessed 7 December 2018. Prior to the UN / Cambodia Agreement, Cambodia had enacted, in 2001, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, which was amended in 2004 ("ECCC Law"). The law and the Agreement collectively created the legal framework for ECCC as a hybrid court in Cambodia with international judges, prosecutors and administrators working together with Cambodian counterparts, available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf accessed 7 December 2018.

96 See UN Security Council Resolution 1757 (2007) adopted by the Security Council at its 5685th meeting, on 30 May 2007, available at https://www.stl-tsl.org/en/documents/un-documents/un-security-council-resolutions/225-security-council-resolution-1757 accessed 7 December 2018.

97 See "Ad hoc Tribunals," *International Committee of the Red Cross* (29 October 2010), available at https://www.icrc.org/en/document/ad-hoc-tribunals accessed 7 December 2018.

98 See Charles C. Jalloh, "Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone," Note 94 above. See also Charles Chernor Jalloh, "The Law and Politics of the Charles Taylor Case," (2015) *43 Denver Journal of International Law and Policy* 229.

99 See James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone," (2007) 16 *Dalhousie Journal of Legal Studies* 21. See also Micaela Frulli, "The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities" (2004) 2(4) *Journal of International Criminal Justice* 1118.

100 See *Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction Motion*, Note 3 above.

101 See *Prosecutor v. Charles Ghankay Taylor: Indictment* (filed on 7 March 2003), available at http://www.rscsl.org/Documents/Decisions/Taylor/003/SCSC-03-01-I-001.pdf accessed 7 December 2018.

102 See *Prosecutor v. Charles Ghankay Taylor* (Case No. SCSL-2003-01–I.): Decision Approving the Indictment and Order for Non-Disclosure, available at https://www.legal-tools.org/doc/b2396c/pdf/ accessed 7 December 2018. The initial seventeen-count indictment (subsequently reduced to 11) accused Taylor of being responsible for inflicting horrors upon Sierra Leone's civilian population including recruitment of child soldiers, sexual and physical violence, unlawful killings, forced labour and attacks on peacekeepers and aid workers from humanitarian agencies.

(ECOWAS) to end the conflict in Liberia.[103] The warrant was forwarded to the High Commission of Ghana in Freetown and to the Ministry of Foreign Affairs in Accra[104] but the Government of Ghana declined to execute the warrant and availed Taylor transportation back to Monrovia where he returned.[105]

In July 2003, counsel for Taylor filed a motion before the Trial Chambers of the Special Court asserting immunity and, on that basis, seeking to quash the March 2003 indictment and vacate the arrest warrant.[106] Because it raised central questions of jurisdiction, the Trial Chamber referred the matter to the Appeals Chamber in September 2003.[107] In the meanwhile, Taylor had resigned the presidency of Liberia and gone into exile in Nigeria, accepting an offer of safe haven from Nigeria's President Obasanjo.[108]

Citing the *Arrest Warrant Case* as authority, Taylor argued that the Court had violated the sovereignty of Liberia and customary international law rules according incumbent Heads of State absolute immunity from criminal prosecution in foreign jurisdictions.[109] He asserted that any possible exceptions to his ability to invoke immunity such as under Resolutions by the UN Security Council in exercise of its Chapter VII powers, would not apply because the Court was essentially a national court and lacked the international attributes of the ICTY and ICTR. As a national court, even with primacy over other national courts, the motion argued, the bid to exercise jurisdiction over Taylor was a breach of the principle of sovereign equality and the immunity *ratione personae* that Heads of State and other high-ranking officials enjoyed thereunder.[110]

The Prosecutor's arguments in urging a dismissal of the motion were that Taylor had no standing to file a motion as he was not properly before the

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[103] The talks sought to end trenchant fighting between forces loyal to Taylor and various rebel factions that had led to the deaths of many civilians on the fringes of Liberia's capital, Monrovia. See *Liberia: A chronology of 25 years of conflict and turmoil* IRIN (17 January 2006), available at https://reliefweb.int/report/liberia/liberia-chronology-25-years-conflict-and-turmoil accessed 7 December 2018.

[104] See also Charles Chernor Jalloh, "The Law and Politics of the Charles Taylor Case," Note 98 above at 250.

[105] See Charles C. Jalloh, "Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone," Note 94 above. See also Kathy Ward "Might v. Right: Charles Taylor and the Sierra Leone Special Court" (2003) 11(1) *Human Rights Brief*, available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1337&context=hrbrief accessed 7 December 2018.

[106] See *Prosecutor v. Charles Ghankay Taylor* (SCSL-03-01-0015): Applicants motion made under protest and without waiving of immunity accorded to a Head of State President Charles Ghankay Taylor, available at http://www.scsldocs.org/documents/view/431-1737 accessed 7 December 2018.

[107] Taylor's Motion was referred by the Trial Chamber to the Appeals Chamber under Rule 72(E) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("the Rules") on 19 September 2003.

[108] See Somini Sengupta, *Liberian Leader Accepts Asylum Offer,* New York Times (6 July 2003), available at https://www.nytimes.com/2003/07/06/international/africa/liberian-leader-accepts-asylum-offer.html accessed 7 December 2018.

[109] See *Prosecutor v. Charles Ghankay Taylor*: Applicants motion made under protest and without waiving of immunity accorded to a Head of State President Charles Ghankay Taylor, Note 106 above at paragraph (3)1.

[110] See *Prosecutor v. Charles Ghankay Taylor*: Applicants motion made under protest and without waiving of immunity accorded to a Head of State President Charles Ghankay Taylor, Note 106 above at paragraph (3)2.

Court (he would only be if he surrendered to the Court); that the immunities accorded incumbent Heads of States would not apply to him as he was no longer Head of State and that the Special Court was an international court, thereby bringing his indictment within the instances anticipated and enumerated by the *Arrest Warrant Case*.[111]

2.5.2 The Ruling of the Appeals Chamber on Immunity.

The Court rejected the Prosecution's claim that Taylor's motion was premature since he was not properly before the court by noting that insistence on an accused Head of State subjecting himself to arrest and incarceration before being able to raise immunity would run counter to the very rationale for immunities.[112]

In denying Taylor's claim to immunity in his motion to quash the arrest warrant however, the Appeals Chamber claimed to rely on precedents from the Nuremberg and Tokyo tribunals, as well as the judgments of the English House of Lords in *Pinochet*[113] and of the ICJ in the *Arrest Warrant Case.* It found, adopting the Prosecutor's arguments, firstly that the Special Court was indeed an international criminal court established in agreement with and endorsed by the UN, and secondly that being out of office, Taylor was no longer entitled to immunity *ratione personae*. The Appeals Chamber went even further to say that Taylor's status as an incumbent president at the time of the indictment would still not have insulated him from prosecution. The Court declared in justification that:

> … the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.[114]

From the Appeals Chamber's reasoning, what is clear is that its decision that Taylor could not invoke immunity rested on whether or not the Special Court was an international court. An affirmative response on this, in the Appeals Chamber's reasoning, brought the matter squarely within the instances in which the ICJ had acknowledged in the *Arrest Warrant Case* that persons who could otherwise invoke immunity *ratione personae* "may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[115]

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111 See *Prosecutor v. Charles Ghankay Taylor: Decision on Immunity from Jurisdiction Motion*, Note 3 above.

112 See *Prosecutor v. Charles Ghankay Taylor: Decision on Immunity from Jurisdiction Motion*, Note 3 above at paragraph 30.

113 See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147.

114 See *Prosecutor v. Charles Ghankay Taylor: Decision on Immunity from Jurisdiction Motion*, Note 3 above at paragraph 52.

115 See *Arrest Warrant Case*, Note 15 above.

In making the finding about the international status of the Special Court, the Appeals Chamber noted one of the mandates of the UN as being to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace …."[116] It then referred to the more specific powers of the UN Security Council in Articles 39 (which empowers the Security Council to determine the existence of threats or breaches to the peace and to decide what measures will be taken to maintain or restore international peace and security)[117] and Article 41 (which empowers the Security Council to decide on what non-military measures shall be used, and which member States shall be called upon to implement its decisions).[118]

On the basis of the foregoing, the Court found that acknowledgment by the UN Security Council's Resolution 1315 that "the situation in Sierra Leone continues to constitute a threat to international peace and security in the region"[119] read together with the Security Council's "[r]equest [to] the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court"[120] served to create an international criminal court in the mould of the ICTY and the ICTR.[121]

Indeed, in dismissing what the Chamber said was much being made of the absence of Chapter VII powers in the Special Court, the Appeals Chamber stated that because the Security Council acts on behalf of member States of the UN, the agreement between the UN Secretary General and Sierra Leone represented an agreement between all member States of the UN and Sierra Leone[122] to – as stated in the preamble to Resolution 1315 – "exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law."[123]

The Court's assertion that agreements entered into by the Secretary General of the UN bind every member state of the UN rather than just the

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116 See Article 1(1) of the Charter of the United Nations (signed at San Francisco on 26 June 1945 and came into force on 24 October 1945), 1 *United Nations Treaty Series* XVI, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf accessed 7 December 2018.

117 See Article 39 of the Charter of the United Nations, Note 116 above.

118 See Article 41 of the Charter of the United Nations, Note 116 above.

119 See UN Security Council Resolution 1315 (2000) at preambular paragraph 13. UN Security Council Resolution 1315 (2000) was adopted by the Security Council at its 4186th meeting, on 14 August 2000; available at http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf accessed 7 December 2018.

120 See Section 1 of UN Security Council Resolution 1315 (2000), Note 119 above.

121 See *Prosecutor v. Charles Ghankay Taylor: Decision on Immunity from Jurisdiction Motion*, Note 3 above at paragraphs 37 – 54.

122 See *Prosecutor v. Charles Ghankay Taylor: Decision on Immunity from Jurisdiction Motion*, Note 3 above at paragraph 38.

123 See *Prosecutor v. Charles Ghankay Taylor: Decision on Immunity from Jurisdiction Motion*, Note 3 above at paragraph 39.

UN, which has legal personality, certainly raised more than a few eyebrows in consternation.[124]

2.5.3 Critique of the Ruling.

The essence of the contestation between the Special Court of Sierra Leone and Taylor's lawyers in the former's exercise of jurisdiction over Taylor appears to have had two parts: The first as argued by Taylor's lawyers was that the Special Court of Sierra Leone was not an international court. As a domestic court, it could not – under the authority of the *Arrest Warrant* Case – exercise jurisdiction over Taylor whose status as President of Liberia, cloaked him with immunity *ratione personae* on the dates the indictment and arrest warrant were issued.[125] The second was that even if the Special Court was an international court, it could still not exercise jurisdiction over Taylor whose immunities under customary international law would also apply before an international court. Although there is ample authority for the first point, the latter point seems not to be so grounded.

The Appeals Chamber did take the opportunity to address the point about its status as an international court, reaching the conclusion that the arrest warrant it had issued was consistent with international law because the Special Court was an international court.[126] It appears however that the fact of Taylor's presence before the Special Court, the fact that he was no longer President of Liberia and the fact that Liberia had consented to his prosecution gave the court little incentive to address the broader legal issue and doctrinal question of whether or not Heads of State and other high-ranking officials may invoke immunity before international courts.[127]

While the Special Court for Sierra Leone did indeed have many attributes of an international court,[128] the conclusions reached by the Special Court on its status were – with due deference to the eminent jurists of the Appeals Chamber – not sustained by the evidence.

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124 See James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone" Note 99 above.

125 See *Prosecutor v. Charles Ghankay Taylor* (SCSL-03-01-0015): Applicants motion made under protest and without waiving of immunity accorded to a Head of State President Charles Ghankay Taylor, Note 106 above.

126 See James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone" Note 99 above at 36. See also Micaela Frulli, "The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities," Note 99 above at 1121 – 1122.

127 Robert Uerpmann-Wittzack, "Immunities before International Courts" in Bartłomiej Krzan (Ed), *Prosecuting International Crimes* (Brill/Nijhoff, 2016).

128 Such attributes include the appointment by the UN Secretary General of international judges who constituted a majority of the judges in both the Trial and Appeals Chambers, the immunities enjoyed by both the Court and its personnel and the express declaration by the Sierra Leone Special Court Agreement 2002 Ratification Act 2002 that the Special Court did not form part of the judiciary of Sierra Leone. This latter element appears to have been a rather clever effort of the legislature of Sierra Leone to address questions about the status of the Special Court that they knew would be forthcoming.

Self-explanatorily titled "*Agreement Between the United Nations and the Government of Sierra Leone* on the Establishment of a Special Court for Sierra Leone," (my emphasis)[129] the agreement to which the Statute of the Special Court was annexed, identified the parties thereto as Sierra Leone and the United Nations,[130] was signed only by representatives of Sierra Leone and the United Nations[131] and imposed rights and obligations thereunder only upon the Government of Sierra Leone and the United Nations as parties.[132] The Special Court was essentially therefore the product of a bilateral treaty between the United Nations (a multi-lateral international organization with independent legal personality) and Sierra Leone.[133] It was thus unlike the ICTY and the ICTR which, by being expressly created by the UN Security Council in exercise of its Chapter VII powers, were effectively subsidiary organs of the UN.[134]

Orentlicher notes in her *amicus* brief for the Special Court of Sierra Leone,[135] the danger of States unilaterally seeking to breach immunity *ratione personae* in defined circumstances but points out that the process of creating an international court, mitigates such dangers. International courts' exercise of jurisdiction would not fall under the prohibitions of domestic courts exercising jurisdiction over foreign government officials because, in her words:

> States have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area.[136]

The agreement between Sierra Leone and the Secretary General of the UN, even if with the encouragement of the Security Council does not meet

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129 See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, 2178 United Nations Treaty Series, 137, available at http://www.rscsl.org/Documents/scsl-agreement.pdf, accessed 4 December, 2017.

130 See last preambular paragraph of Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Note 129 above.

131 See signature page of Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Note 129 above. The Agreement was signed respectively for the UN and the Government of Sierra Leone by Hans Corell, Under-Secretary-General for Legal Affairs and Solomon Berewa, Attorney General and Minister of Justice.

132 See for instance Article 3 of the Agreement where the UN Secretary General may appoint the Prosecutor and his/her deputies in consultation with the Government of Sierra Leone.

133 See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. See also Celina Schocken, "The Special Court for Sierra Leone: Overview and Recommendations" (2002) 20 *Berkeley Journal of International Law* 436. See also Dapo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits (2003) *1 Journal of International Criminal Law* 618, at 631 – 633, where the author's argument that the Special Court was an international court exercising delegated authority from Sierra Leone brings into sharp relief the fact that the Special Court did not have authority – under delegated authority – to breach the immunity *ratione personae* of an incumbent Head of State because Sierra Leone had no authority to do so.

134 See UN Security Council Resolution 827 (1993), S/RES/827 (1993), Note 78 above. See also James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone," Note 126 above at 25.

135 See Submission by Professor Orentlicher of Amicus Curiae brief on Head of State Immunity in the case of the *Prosecutor v. Charles Ghankay Taylor*, SCSL–2003–01–I', 23 October 2003.

136 See *Prosecutor v. Charles Ghankay Taylor:* Decision on Immunity from Jurisdiction Motion, Note 3 above at paragraph 51.

this standard.[137] The notion that the Security Council would be vague, imprecise or cavalier in addressing such weighty matters in international law as annulling immunities of incumbent Heads of State is also not borne out by the practice of the Security Council.[138]

Recognition by UN Security Council Resolution 1315 that "the situation in Sierra Leone continues to constitute a threat to international peace and security in the region"[139] did not in any way elevate the Security Council's "[r]equest [to] the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court"[140] into a decision by the Security Council to create an international court under its Chapter VII powers as the Court sought to imply.[141] Even though the Appeals Chamber attempted through various contortions to find that the Special Court was an international court, it failed to direct its mind to the fundamental difficulty that the agreement by the UN and Sierra Leone to create the Special Court was binding only on the UN itself and not its member States who as third parties incurred no obligations in terms of the agreement.[142]

As the ICJ correctly held in the *Arrest Warrant Case*, the existence of jurisdiction does not imply the absence of immunities.[143] The fact

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137 See James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone," Note 99 above at 34 – 40.

138 The language of UN Security Council Resolution 827 could not have been more starkly different and precise about its objectives. In the preambular paragraphs of the Resolution, the Security Council was unequivocal about the rationale for, or the use of its Chapter VII powers. Beyond the preambular paragraphs by which the Security Council:

> Express[ed] … its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia …
>
> Determin[ed] that [the] situation continues to constitute a threat to international peace and security …
>
> Believ[ed] that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed …

The Security Council stated that by Resolution 827, it was "Acting under Chapter VII of the Charter of the United Nations … and went on per Article 4 of the Resolution to

> Decide that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.

139 See UN Security Council Resolution 1315 (2000), Note 119 above at preambular paragraph 13.

140 See UN Security Council Resolution 1315 (2000), Note 119 above at preambular paragraph 1.

141 See James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone," Note 99 above at 36.

142 A treaty is binding only on parties thereto. See Article 26 of the Vienna Convention on the Law of Treaties, which was adopted in Vienna on 23 May 1969, and entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331, available at http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed 7 December 2018. See James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone," Note 99 above at 35. See also Jianming Shen, "The Basis of International Law: Why Nations Observe," (1999) 17(2) *Penn State International Law Review* 287, at 311 – 321.

143 See *Arrest Warrant Case*, Note 15 above at paragraph 59.

therefore that the Special Court may have had jurisdiction over the atrocities perpetrated in the civil conflict in Sierra Leone and therefore over Taylor did not automatically vacate his immunity. Indeed, the Secretary General of the UN appears to have been conscious of this deficiency of the constitutive statute of the Special Court for Sierra Leone when he suggested to the Security Council, that:

> the Security Council may wish to consider endowing [the Special Court] with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.[144]

Clearly, the Security Council declined the invitation to so consider.

Had the Special Court been established under Chapter VII powers, all member States of the UN would have been compelled to cooperate with the Court and any requests for arrests and surrender issuing from it.[145] The stark difference between UN Security Council Resolution 1315 and UN Security Council 827 by which the Security Council "[d]ecided … to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia"[146] is telling. The suggestion that the absoluteness of immunity *ratione personae* before foreign domestic courts can be overcome by a bilateral treaty between two countries to create an "international court" or by a bilateral treaty between a country and a multi-lateral institution subverts the very essence of the rationale for immunity *ratione personae*.[147]

2.6 Immunity under the Rome Statute of the International Criminal Court.

The question of whether immunity may be invoked by high ranking officials to prevent the exercise by the ICC of jurisdiction over such persons has also received more than a little attention from scholars. Per Article 27 of the ICC Statute, titled "irrelevance of official capacity:"[148]

> 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

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144 See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN SCOR, UN Doc. S/2000/915 at paragraph 10, available at http://www.un.org/Docs/sc/reports/2000/sgrep00.htm accessed 7 December 2018.

145 See Micaela Frulli, "The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities," Note 99 above at 1125 – 1129.

146 See Paragraph 2 of UN Security Council Resolution 827, Note 78 above.

147 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 17 above at 820 – 825.

148 See Article 27 of the Rome Statute of the ICC, available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf accessed 7 December 2018.

criminal responsibility under this Statute, nor shall it, in and 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.

While the text of Article 27(1) is largely consistent with the text of the constitutive statutes of other international criminal tribunals rendering irrelevant the status of an official (including Heads of State) as a bar to prosecution or mitigation of penal sanction,[149] Article 27(2) goes much further to invalidate immunity or other procedural barriers that would otherwise have prevented the ICC from exercising jurisdiction.[150]

Because the Rome Statute is a multilateral treaty, accession to which is the basis of the ICC's jurisdiction over situations in a State,[151] State parties to the Rome Statute effectively waive any immunity that their high-ranking officials may otherwise have been able to invoke. This very expansive rejection of the capacity to invoke immunity would serve to exclude State responsibility (that would have arisen under customary international law) for a State party to the Rome Statute that arrests and surrenders to the ICC a high-ranking official of another State-party – even if such high-ranking official were on an official visit to the arresting State. Even if the State whose official is arrested raises an objection, the arrest and surrender would represent the product of treaty obligations voluntarily assumed by State-parties to the Rome Statute.[152]

On the further question as to whether the Rome Statute's rejection of official status or procedural limitations as a bar to criminal prosecution applies to non-State parties or represents a contraction of customary international law on immunities of high-ranking officials, the answer can only be no. What the Rome Statute represents and what State parties consent to is an express waiver or relinquishment of the immunities they could otherwise invoke under customary international law. The waiver of a right does not suggest that there is a norm – established or in development – eliminating such right. This the ICC Pre-Trial

[149] See for instance Article 7 of the Statute of International Military Tribunal for Nuremberg, Article 7(2) of the ICTY Statute and Article 6(2) of the ICTR Statute.

[150] See Dapo Akande, "International Law Immunities and the International Criminal Court," Note 83 above at 420.

[151] See Article 26 of the Vienna Convention on the Law of Treaties, Note 142 above. See also Article 11 of the Rome Statute of the ICC, Note 148 above. It is not being suggested here, as the US has done that the ICC may exercise jurisdiction over a citizen of a non-State party only with the consent of the State party. Indeed, notwithstanding strident US objections, the ICC may exercise jurisdiction over and prosecute citizens of non-State parties in three instances: where a situation involving citizens of non-State parties is referred to the ICC by the UN Security Council; where citizens of non-State parties commit a crime in a State that is a party to the ICC Statute or a State that has accepted the court's jurisdiction over said crime; and, where a non-State-party consents to the exercise by the court of jurisdiction over a crime which, by reason of such consent falls within the court's jurisdiction. See Sarah Sewall and Carl Kaysen, The United States and the International Criminal Court: The Choices Ahead (2000) *American Academy of Arts and Sciences*, available at https://amacad.org/content/publications/publication.aspx?d=637, accessed 7 December 2018

[152] See Dapo Akande, "International Law Immunities and the International Criminal Court," Note 83 above at 419 - 430

Chamber has recognized by affirming in the *DRC case*[153] – at variance with the earlier rulings on *Chad* and *Malawi* (in a different Pre-Trial Chamber) – that:

> Given that the [Rome] Statute is a multilateral treaty governed by the rules set out in the Vienna Convention on the Law of Treaties, the Statute cannot impose obligations on third States without their consent. Thus, the exception to the exercise of the Court's jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who have accepted it.[154]

Indeed, Article 98 of the ICC Statute, curiously titled, "cooperation with respect to waiver of immunity and consent to surrender" states that:

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

The drafting history of Article 98 also renders some assistance in determining what the drafters intended.[155] Per the report of the 1996 Preparatory Commission, the language proposed to compel States parties to comply with requests for surrender or assistance, whatever their obligations to third parties was:

> [the] obligation to cooperate **...** shall take precedence over all the legal obstacles which the State to which the request for judicial assistance is made invokes against the Court pursuant to internal law or the treaties to which it is a party.[156]

That the final version that appeared in the Rome Statute was a very dilute version of the original provision speaks for itself and shows very clearly the limitations that the drafters of the Rome Statute intended to place upon the Court, and what the plenipotentiaries at the Rome conference were prepared to accept. The prohibition represented by the text of "the court may not proceed with the request for surrender or assistance" was intended to prevent States being put in

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153 *The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09):* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (9 April 2014), available at https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF accessed 7 December 2018.

154 *Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09):* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Note 153 above at paragraphs 26 and 27.

155 For a comprehensive account of the legislative history of the Rome Statute, see Bassiouni (Ed) *The* Legislative *History of the International Criminal Court* Vols. I – III. See also Attila Bogdan, "The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98" (2008) *8 International Criminal Law Review* 1, at 18 – 21.

156 See Bassiouni (Ed) *The* Legislative *History of the International Criminal Court*, Note 155 above at 754.

the invidious position of risking breach of international obligations in having to comply with ICC requests for the arrest and surrender of indicted persons (of high-ranking status) from non-State parties.

Article 98 directs accordingly that the ICC not take any affirmative action to seek the arrest and surrender of such an official without first securing the cooperation of the third State to waive immunity.[157] Such a limitation, would under the authority of the *Arrest Warrant Case*, constrain the ICC from even issuing an arrest warrant.[158] Thus, does Paola Gaeta assert rather forcefully that in the absence of a waiver of immunity from Sudan, the request for the arrest and surrender of Omar al Bashir by the ICC to certain States parties was illegal. According to Gaeta:

> The steps taken by the ICC in this respect are *ultra vires* and at odds with Article 98(1). Therefore, states parties to the Statute are not obliged to execute the ICC request for surrender of President Al Bashir and can lawfully decide not to comply with it.[159]

Notwithstanding the foregoing about whether or not a Head of State may be arrested in a foreign country for purposes of being rendered to an international criminal court, the more fundamental question about whether or not immunity may be pleaded before international court remains to be answered.

The AU's position on this is that to hold immunities inapplicable before international tribunals would be to permit a State to sidestep its international law obligation by teaming up with one or more similarly minded States or a multi-lateral institution to create an international court before which immunities would not apply.[160] While this is true, as the case of the Special Court for Sierra Leone and the questionable ruling of the Appeals Chamber on its status as an international court bear out, such a fear is hardly reflective of the accountability enterprise that yielded the ICC and the more than one hundred and twenty States that are subject to its jurisdiction.

In any case whether or not immunities may be pleaded before international courts is incapable of being answered in the definitive terms that State practice

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157 See Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest," (2009) 7 *Journal of International Criminal Justice* 215, at 329.

158 See *Arrest Warrant Case*, Note 15 above at page 33. As earlier stated, this is the law and not the decisions per incuriam of the ICC's Pre-Trial Chamber in the *Chad* and *Malawi Cases*. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir*: Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir. (ICC-02/05-01/09,) 12 December 2011. See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199. See also Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (… At long Last …) But Gets the Law Wrong" (December 15, 2011) *EJILTalk*, available at http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 7 December 2018.

159 See Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest," Note 157 above.

160 See AU Press Release No. 002/2012, Note 7 above. See also Dapo Akande, "The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?' (8 February 2012) *EJILTalk,* available at http://www.ejiltalk.org/the-african-unions-responseto-the-iccs-decisions-bashirs-immunity-will-the-icj-get-another-immunity-case/, accessed 10 December 2015.

permits of immunities before domestic courts. In the absence of State practice that confirms that immunities may be pleaded before international tribunals, it would appear that the AU's position that customary international law permits immunities before international courts is insupportable.[161]

This of course does not mean – as has been argued[162] – that there is a customary international law rule that renders immunities inapplicable before international courts.[163] As has been presented earlier in the Chapter, reference to the post World War accountability measures as evidence of practice is of limited utility. So is reference to the ICTR, ICTY and the Special Court for Sierra Leone. In any case, even if the practice of the ICTY, ICTR and the Special Court for Sierra Leone could be said to evince a practice, the *opinio juris sive necessitatis* that would be required to transform the practice into custom remains elusive.[164]

Whether or not an international court or tribunal may exercise jurisdiction over a Head of State appears then to be a function of the constitutive instrument of the court or tribunal and not a rule of customary international law.[165] As has been presented in the foregoing, instances in which incumbent Heads of State have been unable to invoke immunity successfully have been demonstrably because of the constitutive instruments of the courts exercising jurisdiction[166] or because the court declined to recognise immunity *per incuriam*.[167] To give context to the assessment above, the appearance of Kenyatta and Ruto before the ICC was a function only of Kenya's accession to the jurisdiction of the ICC,[168] a jurisdiction which will end for similarly accused Kenyans, if not for the accused,[169] if Kenya withdraws from the Rome Statute[170] as it has threatened to do.[171]

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161 Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff" (2015) 13(1) *Journal of International Criminal Justice* 3, at 12 – 15.

162 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to the Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir; Note 11 above.

163 Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 161 above.

164 Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 161 above.

165 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 17 above. See also Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 161 above, at 15.

166 See Dapo Akande, "International Law Immunities and the International Criminal Court," Note 83 above at 418.

167 See James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone," Note 99 above.

168 For details of the Kenya Situation which spawned a number of indictments – including of President Kenyatta and Vice President Ruto, see ICC-01/09, Situation in the Republic of Kenya, available at https://www.icc-cpi.int/kenya accessed 7 December 2018.

169 Being already seized with the Kenya situation and exercising jurisdiction *ratione temporis*, Kenya's withdrawal from the ICC will not end such jurisdiction; See Articles 11 and 127 of the Rome Statute.

170 See *African Union backs mass withdrawal from ICC*, BBC News (1 February 2017), available at http://www.bbc.com/news/world-africa-38826073 accessed 7 December 2018.

171 See Rael Ombuor, *Kenya Signals Possible ICC Withdrawal*, Voice of America News (13 December 2016), available at https://www.voanews.com/a/kenya-signals-possible-icc-withdrawal/3634365.html accessed 7 December 2018.

2.7 Some Conclusions on Immunities before International Courts.

While the immunity of Heads of State and other high-ranking officials before foreign domestic courts is a rule of customary international law that is manifest through State practice and *opinio juris*, the same cannot be said for immunities before international courts for which no such practice exists.[172]

The principal authority that is proffered to explain why immunities fail before international courts is the *Arrest Warrant* Case where the ICJ noted trials before international courts as one of the instances in which incumbent office holders with immunity *ratione personae* could be held accountable for international crimes. It was quick to point out however that international tribunals could only exercise that function "where they have jurisdiction."[173] This latter part of the ICJ's ruling, which is conveniently omitted in the case presented by international criminal justice advocates that there is no immunity before international courts (and even by the Pre-Trial Chamber of the ICC) however makes all the difference. Akande has argued accordingly that:

> The statement by the ICJ [in the *Arrest Warrant Case*] that international immunities may not be pleaded before certain international tribunals must be read subject to the condition (1) *that the instruments creating those tribunals expressly or implicitly remove the relevant immunity*, and (2) that the state of the official concerned is bound by the instrument removing the immunity. Therefore, a senior serving state official entitled to immunity ratione personae (for example, a head of state) is entitled to such immunity before an international tribunal that the state concerned has not consented to. (My emphasis).[174]

Tladi agrees with Akande partially, noting to this end that "customary international law neither requires nor rejects immunity before international courts and tribunals."[175] Whether or not immunity may be invoked before an international tribunal appears therefore to be *sui generis* to the constitutive statute and the obligations assumed by States thereunder or under jurisdiction invoking instruments of the Security Council.

In concluding on the status of immunity *ratione personae* for high ranking officials before international courts, it is useful to briefly reprise the essence of the foregoing discussion. As the earlier parts of this Chapter have sought to illustrate, the claim advanced by the Pre-Trial Chamber of the ICC in the *Malawi* and *Chad* cases that the Nuremberg Tribunal, the Tokyo Tribunal (in the aftermath of World War II) and the International Criminal Tribunals for Yugoslavia and Rwanda manifest a customary law rule that immunity cannot be invoked before international tribunals is not sustainable for a number of reasons. The first is that neither the Nuremberg nor the Tokyo Tribunals after World War II yielded any

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172 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 8 above at 216.

173 See *Arrest Warrant Case*, Note 15 above at paragraph 61.

174 Dapo Akande, "International Law Immunities and the International Criminal Court," Note 83 above at 418.

175 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 8 above at 215.

trials of Heads of State – notwithstanding the enabling text of the constitutive statutes of those courts. The second is that the ICTY and the ICTR constitutive statutes were instances of *lex specialis* occasioned by extraordinary circumstances that do not establish a norm. The third is that there is little to no evidence of either the State practice or the sense of obligation that would be required to yield a customary international law that immunities may not be invoked before international tribunals.

Having dispensed with what can be described as the dispositive question, the Chapter now turns to what Article 46A *bis* of the Malabo Protocol actually says.

3. Interrogating Article 46A *bis* - Understanding the Import of the Immunity Provision of the Malabo Protocol.

In a critique of the AU, which is reflective of similarly expressed disdain of the AU's commitment to international criminal justice by Desmond Tutu,[176] Max du Plessis says of the immunity provision in the Malabo Protocol that:

> … the AU has shown itself to be committed to a regional exceptionalism of the most egregious kind: immunity for African leaders who have committed international crimes.[177]

A conference organized by human rights NGOs in Pretoria from November 7 – 8, 2016 titled "Understanding the Malabo Protocol: The Potential, The Pitfalls and Way Forward for International Justice in Africa" yielded similar sentiments. The final communique, authored by 47 human rights organizations including Amnesty International, the Southern African Litigation Centre and the Centre for Human Rights of the University of Pretoria, declared that:

> The meeting found no legal basis for the inclusion in the Malabo Protocol of article 46A *bis* … as this can only fuel impunity and defeat the very primary objective of the Malabo Protocol of creating an instrument and framework to effectively tackle impunity in Africa.[178]

Although the values-laden rhetoric that inspires deprecating language and sentiment about the AU's commitment to international criminal justice derive from normative postulations that are inaccurate representations of current international law (*lex lata)*,[179]

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[176] See for example Opinion Editorial of Desmond Tutu in the New York Times: Desmond Tutu, *In Africa, Seeking a License to Kill*, New York Times (10 October 2013), available at http://www.nytimes.com/2013/10/11/opinion/in-africa-seeking-a-license-to-kill.html accessed 7 December 2018.

[177] Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" (Nov 2014) *Institute for Security Studies Paper 278* 1, at 3.

[178] See Final Communique of Conference held at the Southern Sun Hotel in Pretoria on 7 – 8 November 2016 under the theme: "Understanding The Malabo Protocol: The Potential, The Pitfalls and Way Forward for International Justice in Africa" at paragraph 9; available at http://www.hrforumzim.org/wp-content/uploads/2016/11/Malabo-Protocol-Communique.pdf accessed 7 December 2018.

[179] See Alexander Orakhelashvili, "State Immunity and International Public Order" (2002) 45 *German Year Book of International Law* 227; Alexander Orakhelashvili, "State Immunity and International Public Order Revisited," (2006) 49 *German Year Book of International Law* 327; and, Alexander Orakhelashvili, "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong" (2007) 18 *European Journal of International Law* ,

it is important to understand what precisely Article 46A *bis* means in order to determine its effect and coherence with international law.[180]

Wedged between a provision on Rights of the Accused[181] and another on Individual Criminal Responsibility[182] Article 46A *bis* of the Malabo Protocol states as follows:

> No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.[183]

There is little risk that the provision will win any awards for elegant or precise drafting.[184] Amongst other deficiencies, the poorly drafted provision provides little clarity on the scope of the immunity or the type of immunity intended to be conferred.[185]

3.1 Scope of Immunity.

Although the first part of Article 46A *bis* – proscription of legal proceedings against serving Heads of State or Government during their incumbency – is clear enough, what is not so clear is the addition thereto of "or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions" and the extension of the said immunity to such persons. What level of seniority the provision refers to and who exactly would be a "senior State official" within this context, remain unknown.

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955. See also, Alexander Orakhelashvili, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah" (2011) 22(3) *European Journal of International Law* 849. See however Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili" (2011) 22(3) *European Journal of International Law* 857.

180 Being the sole known author to have extensively reviewed the import of Article 46A *bis*, this chapter relies upon and interrogates the findings of Tladi. See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 161 above; Dire Tladi, "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic," (2014) 7 *African Journal of Legal Studies* 381, at 393 – 398; Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Volume 10, International Criminal Justice Series (Asser Press, 2017) 203 – 219; D. Tladi, 'Immunity in the Era of "Criminalisation": The African Union, the ICC and International Law' (2015) 58 *Japanese Yearbook of International Law* 17.

181 See Article 46A of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), Note 1 above.

182 See Article 46B of the Malabo Protocol, Note 1 above.

183 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 177 above. While the progeny of the language of the immunity provision is uncertain, it is almost word for word consistent with Article 143 of the Kenyan Constitution which reads as follows:

> Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.

Given the Kenyan Government's antipathy to the ICC on account of the Kenya Situation, it is not a big stretch to lay the credit for the clause at the door of Kenya.

184 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 161 above at 5.

185 It bears repeating here that frequent reference to Tladi's scholarship in the following sections is only because his is the only other analysis that has been done, thus far, on the actual text of Article 46 A *bis*.

As Tladi has pointed out, depending on the constitutional provisions of a subject country, the construction of the immunity provision and the words "entitled to act in such capacity" could serve potentially to extend immunities to all Ministers or even to all members of parliament.[186] Providing context is the South African Constitution of 1996, Article 90 of which states:

> When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President:
>
> (a) The Deputy President.
>
> (b) A Minister designated by the President.
>
> (c) A Minister designated by the other members of the Cabinet.
>
> (d) The Speaker, until the National Assembly designates one of its other members.

In a number of African countries, the range of persons who may act as President is significantly narrower than is the case in South Africa. In Ghana for instance, in terms of Article 60 of the 1992 Constitution,

> 6 Whenever the President dies, resigns or is removed from office, the Vice-President shall assume office as President for the unexpired term of office of the President with effect from the date of the death, resignation or removal of the President.
>
> 8 Whenever the President is absent from Ghana or is for any other reason unable to perform the functions of his office, the Vice-President shall perform the functions of the President until the President returns or is able to perform his functions.
>
> 11 Where the President and the Vice-President are both unable to perform the functions of the President, the Speaker of Parliament shall perform those functions until the President or the Vice-President is able to perform those functions, or a new President assumes office, as the case may be.[187]

Constitutional dispensations for persons other than a Vice or Deputy President to act as President are also the case in countries such as Uganda,[188] the Gambia[189]

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[186] See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 161 above at 5. See also Section 90 of the 1996 South African Constitution.

[187] See Article 60 of the 1992 Constitution of Ghana. Available at http://www.icla.up.ac.za/images/constitutions/ghana_constitution.pdf

[188] See Article 109 of the 1995 Constitution of Uganda as Amended. Available at https://www.constituteproject.org/constitution/Uganda_2005.pdf?lang=en

[189] See Article 65 of the 1997 Constitution of the Gambia. Available at http://hrlibrary.umn.edu/research/gambia-constitution.pdf

Kenya,[190] and Liberia[191] where the Speaker of the Legislature may also act as President in the absence of the President and the Vice President. In Tanzania, the Chief Justice may also act in the absence of the President, the Vice President and the Speaker of Parliament,[192] in Cote d'Ivoire,[193] the Prime Minister acts as President in the absence of the President and the Vice President and in Sudan, a Presidential Council comprising the Speaker of the National Assembly and the two Vice Presidents shall act in the absence of the President.[194] In Zimbabwe, in the absence of the Vice Presidents, a Minister designated as such by the President or in the absence of such designation, a Minister designated by Cabinet may act as President.[195] This is also the case in Zambia[196]

While the words "entitled to act in such capacity" of Article 46A *bis*, could be construed narrowly to apply only to deputies of Heads of States or Governments, the fact that it will ultimately derive its meaning from the constitution of the subject country renders it – in the words of Tladi – "inherently relative"[197] and by reason thereof incapable of uniform application.[198] Given the AU's frequent declarations of aversion to impunity and fealty to accountability,[199] a charitable

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190 See Article 146 of the 2010 Constitution of Kenya. Available at http://www.klrc.go.ke/index.php/constitution-of-kenya/130-chapter-nine-the-executive/part-2-the-president-and-deputy-president. Per this provision,

> 146. (1) The office of President shall become vacant if the holder of the office—
>
> (*a*) dies;
>
> (*b*) resigns, in writing, addressed to the Speaker of the National Assembly; or
>
> (*c*) otherwise ceases to hold office under Article 144 or 145 or under any other provision of this Constitution.
>
> (2) When a vacancy occurs in the office of President—
>
> (*a*) the Deputy President shall assume office as President for the remainder of the term of the President; or
>
> (*b*) if the office of Deputy President is vacant, or the Deputy President is unable to assume the office of President, the Speaker of the National Assembly shall act as President and an election to the office of President shall be held within sixty days after the vacancy arose in the office of President.

191 See Articles 62 – 64 of the 1986 Constitution of Liberia. Available at http://ilo.org/dyn/natlex/docs/ELECTRONIC/3557/90469/F564655827/LBR3557.pdf

192 See Article 37 of the 1977 Constitution of the United Republic of Tanzania as Amended. Available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/56763/90488/F224631551/TZA56763.pdf

193 See Article 62 of the 2016 Constitution of Cote d'Ivoire. Available at https://www.constituteproject.org/constitution/Cote_DIvoire_2016.pdf?lang=en

194 See Articles 66 and 67 of the 2005 Constitution of Sudan. Available at https://www.constituteproject.org/constitution/Sudan_2005.pdf?lang=en

195 See Articles 95 – 101 of the 2013 Constitution of Zimbabwe. Available at https://www.constituteproject.org/constitution/Zimbabwe_2013.pdf

196 See Articles 105 – 109 of the 1991 Constitution of Zambia (as amended). Available at https://constituteproject.org/constitution/Zambia_2016.pdf?lang=en

197 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 161 above at 6.

198 As Tladi notes, at its narrowest interpretation, the provision could mean a deputy Head of State or government. The former interpretation, being dependent on the constitutional system of each State, would necessarily result in different rules being applicable to different officials from different States.

199 See for instance Assembly/AU/ Dec.199(XI): Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/Au/14 (Xi), available at https://www.au.int/en/sites/default/files/decisions/9558-assembly_en_30_june_1_july_2008_auc_eleventh_ordinary_session_decisions_declarations_tribute_resolution.pdf accessed 7 December 2018. See also Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/ AU/14(XI),

view would be that it is unlikely that the AU intended to give immunity to all members of a government as the constitution of South Africa would permit. Whether this is true or not the text of the immunity provision will also permit the more expansive interpretation to pass muster.

3.2 Type of Immunity: *Ratione Personae, Ratione Materiae* or Both?

The second difficulty with the provision is the lack of clarity on what type of immunity it seeks to cloak the subject with – immunity *ratione personae* or immunity *ratione materiae* or both. A purposive reading[200] of the impugned provision would appear to suggest that it seeks to invoke *both* types of immunities: immunity *ratione personae*, in respect of "Heads of State or Government" and in respect of persons "entitled to act in such capacity," and immunity *ratione materiae* in respect of "other senior officials based on their functions".[201]

Even if, as Tladi deduces,[202] the words "based on their functions" seek only to qualify "other senior officials" and not "Heads of State or Government, or anybody acting or entitled to act in such capacity" and even if it is indeed the case that the provision seeks to elaborate two distinct types of immunities – *ratione personae* for Heads of State and Government and persons entitled to act on their behalf (presumably their deputies) and *ratione materiae* for "other senior officials based on their functions" there would still be two primary difficulties.

Firstly, the provision would – in a divergence from the International Law Commission's Draft Articles on Immunity of State officials from foreign criminal jurisdiction,[203] and the authority of the International Court of Justice in the *Arrest Warrant Case*[204] – be excluding Foreign Ministers from the category of persons to whom immunity *ratione personae* attaches.[205] Secondly, beyond representing a departure from recent case law, the provision would also – against recent efforts to engender normative progression[206] (as evidenced by the efforts of the

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http://www.minec.gov.mz/index2.php?option=com_docman&task=doc_view&gid=12&Itemid=48 accessed 7 December 2018. The 10th and 11th meetings of the AU-EU Ministerial Troika addressed the issue of universal jurisdiction and the relationship between the AU and EU.

200 See Edwin Kellaway, *Principles of Legal Interpretation of Statutes, Contracts and Wills* (Butterworths, 1995).

201 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 161 above at 5 – 8.

202 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 161 above.

203 See Text of Draft Article 3 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission on Immunity of State officials from foreign criminal jurisdiction, available at http://legal.un.org/docs/?symbol=A/CN.4/L.814 accessed 7 December 2018.

204 See *Arrest Warrant Case*, Note 15 above.

205 See *Arrest Warrant Case*, Note 15 above. See also Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 8 above at 206 – 207.

206 See for instance Brian Man-Ho Chok "Let the Responsible be Responsible: Judicial Oversight and Over-optimism in the *Arrest Warrant* Case and the Fall of the Head of State Immunity Doctrine in International and Domestic Courts", (2015) 30 *American University International Law Review* 489. See also Jarrad Harvey, "(R)evolution of

Institute for International Law[207] and the work of the International Law Commission)[208] – be seeking to confer immunity from the jurisdiction of the Court – on an indeterminate number of State officials.

The additional qualifier, "during their tenure of office," creates further confusion. If indeed the Protocol's drafters intended to provide for both immunity *ratione personae* and immunity *ratione materiae* and distinguish between "Head of State or Government, or anybody acting or entitled to act in such capacity" and "other senior State officials based on their functions" as being the categories of persons respectively entitled to claim immunity *ratione personae* and immunity *ratione materiae*, there would be a further difficulty as it would seem to suggest that immunity *ratione materiae* is time-bound. It is, in fact – unlike immunity *ratione personae* – not.[209] As Tladi has suggested however, this could be a treaty restriction intended to reduce the ambit of immunity *ratione materiae* under customary international law.

Another possible interpretation is that the provision seeks only to confer immunity *ratione personae* – with the words "based on their functions" not designating the type of immunity but rather describing the senior government officials who would qualify for and be eligible for such immunity *ratione personae*.[210] This interpretation would also appear to be borne out by the words "during their tenure of office" and by the fact that the AU has never as yet sought to distinguish between Head of State immunity and immunity for other senior government officials.[211] Indeed, in Draft 2 of the AU's Withdrawal Strategy Document,[212] which articulates a two-pronged approach to secure African States'

State Immunity *Following Jurisdictional Immunities of the State (Germany v. Italy)* - Winds of Change or Hot Air?" (2013) 32 *University of Tasmania Law Review* 208.

207 See Institute for International Law Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Vancouver, 2001) Rapporteur: Mr Joe Verhoeven; available at http://www.idi-iil.org/app/uploads/2017/06/2001_van_02_en.pdf accessed 7 December 2018. See also Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes. *The Institute of International Law* (Napoli, 2009). Rapporteur: Lady Hazel Fox; available at http://www.idi-iil.org/app/uploads/2017/06/2009_naples_01_en.pdf accessed 7 December 2018.

208 See Concepción Escobar Hernández, Special Rapporteur, *Fifth report on immunity of State officials from foreign criminal jurisdiction* [Document A/CN.4/701], available at http://legal.un.org/docs/?symbol=A/CN.4/701 accessed 7 December 2018.

209 See Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014) at 7.

210 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff," Note 161 above at 7 – 8.

211 See Paragraph 9 of the AU Decision on Africa's Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1(Oct.2013), taken at the Extraordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia, on 12 October 2013; available at http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf accessed 7 December 2018.

212 This was adopted by the Assembly of Heads of States and Governments of the African Union at its Twenty-Eighth Ordinary Session in Addis Ababa, Ethiopia from January 30 – 31, 2017. See Assembly/AU/Dec.622(XXVIII) Decision on the International Criminal Court [Doc. EX.CL/1006(XXX)], available at https://www.au.int/web/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf accessed 7 December 2018. The non-binding resolution, which only "Calls on Member States to consider implementing … recommendations [of the Withdrawal Strategy]" received eight formal reservations. "Nigeria, Senegal, and Cape Verde ultimately entered formal reservations to the decision adopted by Heads of State. Liberia entered a reservation to the paragraph that adopts the strategy, and Malawi, Tanzania, Tunisia, and Zambia requested more time to study it." See Elise Keppler, *AU's 'ICC Withdrawal Strategy' Less than Meets the Eye – Opposition to Withdrawal by States* (1 February 2017), Human Rights Watch, available at

withdrawal from the Rome Statute,[213] the AU proposes an amendment to Article 27 of the Rome Statute which mirrors substantive parts of Article 46A *bis.*[214]

If it is indeed the case that the source of the Malabo Protocol's immunity clause is Kenya's 2010 Constitution,[215] Article 143 of which bears uncanny resemblance to Article 46A *bis*, the interpretation that the immunity clause intended only to confer immunity *ratione personae* would derive further support from the framers of Kenya's constitution who clearly intended the same.[216]

While the interpretation that the provision seeks only to confer immunity *ratione personae* could resolve the inconsistency between the authority of the *Arrest Warrant Case* and other incongruities with international law from the first interpretation of the immunity provision presented above, it could also – as framed – conceivably lead to a breath-taking expansion of the ambit of immunity *ratione personae*.[217] It remains to be seen whether if such a claim of immunity were to be presented to the Expanded African Court, when (or if) it becomes operational, it would decline the offer to adopt a wide interpretation and take the opportunity to narrow and not exceed the authority of the *Arrest Warrant Case* and the prescriptions of the eminent jurists of the International Law Commission.[218]

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https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye accessed 7 December 2018.

213 While the AU calls this a withdrawal strategy, commentators have suggested that this is a misnomer. See Mark Kersten, *Not All It's Cracked Up to Be – The African Union's "ICC Withdrawal Strategy* Justice in Conflict (6 February 2017), available at https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/ (accessed 7 December 2018) where the author notes for instance that:

> [i]ts title certainly sounds menacing. But in substance, it is anything but. For one, it doesn't actually call on a mass withdrawal of states from the Court… Perhaps the most unfortunate aspect of the Strategy is its misleading title. It is difficult, if not impossible, to read it and conclude that it proposes a roadmap for states to withdraw *en masse* from the Court. It really should be called "ICC Reform Proposals" or something similar. However, is clear that certain states prefer to muddy the waters and perhaps even want the media and observers to dramatize the possibility of a mass withdrawal.

214 The language proposed by the AU to amend Article 27 of the Rome Statute is: "Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the court under the same circumstances." Find copy of Withdrawal Strategy dated 12/01/2017 and only permitting restricted circulation at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf accessed 7 December 2018.

215 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff," Note 161 above at footnote 10.

216 See Article 147(3) of the 2010 Constitution of Kenya, by which the Deputy President shall "… when the President is absent or is temporarily incapacitated, and during any other period that the President decides … act as the President." See also Article 146 which requires the Speaker of the Legislature to act as President in the event of a vacancy in the Presidency "if the office of Deputy President is vacant, or the Deputy President is unable to assume the office of President".

217 It is true that the range of persons who may seek the cover of immunity is not entirely settled – the judgment in *The Arrest Warrant Case* being partly to blame for this state of affairs. The failure of the ICJ in the said case to distinguish between immunity *ratione personae* and immunity *ratione materiae* exacerbated the uncertainty. See however Dapo Akande and Sangeeta Shah, Note 17 above at 820 - 825, who argue that there are in fact two types of such immunity and that one type extends beyond senior officials such as the Head of State and Head of Government.

218 Draft Article 3 on Immunity of State officials from Foreign Criminal Jurisdiction provisionally adopted by the drafting committee of the International Law Commission limits immunity *ratione personae* to a troika of Head of State, head of government and minister for foreign affairs.

This latter interpretation, for being more coherent with authoritative sources of international law such as the ICJ[219] (although inconsistent with the push for progressive expansion of accountability regimes for international crimes of such entities as the ILC)[220] is more persuasive. It is not clear however whether the African Union sought to conform to precedent or to chart new territory through the treaty/protocol that will birth the Expanded African Court. Indeed, the failure of the Malabo Protocol to acknowledge the existence of the International Criminal Court or the Rome Statute which conceived it[221] or the potential overlap in jurisdiction of the ICC and the expanded African Court have been widely seen as the AU thumbing its nose at the inequities of the international legal order. In the words of du Plessis, "a symbolic fist-shake in the face of the ICC."[222]

In the absence of any drafting history for, or valuable tools of construction such as *travaux préparatoires* on the text of the immunity provision,[223] the AU and its member States' commitment to international criminal justice falls to be determined through obligations assumed and adherence thereto by AU member States under international law.

3.3 Assessing the Coherence of Article 46A *bis* with International Law.

In answer to the simple question of whether Article 46A *bis* of the Malabo Protocol is consistent with current international law, the not so simple answer is: it depends.

As has been established by customary law, doctrine and case law, immunity *ratione personae* for a certain category of State official – Heads of State, Heads of Governments and Foreign Ministers – from foreign criminal prosecution is incontrovertibly consistent with international law.[224] Based on the rationale however of such cases as the *Arrest Warrant Case*,[225] the *ratio* of which has been cited with approbation by domestic courts in multiple jurisdictions[226] as well as

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219 See for instance *Arrest Warrant Case*, Note 15 above.

220 See Reports of International Law Commission on *Immunity of State Officials from Foreign Criminal Jurisdiction*, Note 156 above.

221 See Rome Statute of the International Criminal Court, (U.N. Doc. A/CONF.183/9*), available at http://legal.un.org/icc/statute/english/rome_statute(e).pdf accessed 7 December 2018. The Rome Statute entered into force on 1 July 2002.

222 The language of the Withdrawal Strategy certainly lends credence to this. See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 177 above at 2.

223 As Max du Plessis notes, the Protocol was drafted with "unseemly haste" that did not permit much consultation or transparency.

224 See Paragraphs 58 and 59 of Judgment in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 3. See also Chapter 5 of the Report of the International Law Commission on the Work of its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-Eighth Session, Supplement 10 (A/68/10); available at http://undocs.org/A/68/10 accessed 7 December 2018.

225 See *Arrest Warrant Case*, Note 15 above.

226 See for example *The Minister of Justice and Constitutional Development and Others v. South African Litigation Centre and Others*, Case no: 867/15, SCA, March 15, 2016 [2016] ZASCA 17, available at http://www.saflii.org/za/cases/ZASCA/2016/17.html (accessed 7 December 2018) and *Bouzari et al. v. Islamic Republic of Iran* [2002] O.J. No. 1624.

international courts,[227] there is reason not to limit immunity *ratione personae* to the *troika* of Head of State, Head of Government and Foreign Minister.[228] And this in spite of the recent efforts of both the International Law Commission and the International Law Institute to limit the ambit of immunity.[229]

While the interpretation that Article 46A *bis* seeks only to confer immunity *ratione personae* to all of "… any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions,"[230] would certainly be a significant expansion of the ambit of immunity *ratione personae* in international law, it would not – on the authority of the *Arrest Warrant* case - be an illegality in international law.[231] In any case, for being time-bound ("during their tenure of office"), such immunities may only delay but not prevent accountability.[232]

The other interpretation of Article 46A *bis*, which the text of the provision permits, confers both types of immunities: *ratione personae*, in respect of "Heads of State or Government" and in respect of persons "entitled to act in such capacity … during their tenure", and immunity *ratione materiae* in respect of "other senior officials based on their functions."[233] Notwithstanding the restriction of immunity *ratione personae* to "Heads of State or Government" and to persons "entitled to act in such capacity," (thereby excluding Foreign Ministers) or the fact that because persons entitled to act in the capacity of Heads of State or Government are defined by national constitutions thereby making the immunity clause "inherently relative"[234] this interpretation cannot be said either to offend international law.

Indeed, it may even be said that by unwittingly or otherwise excluding immunity *ratione personae* for Foreign Ministers and thereby limiting the ability of the *ejusdem generis* rule of interpretation[235] to apply the immunity clause to other Ministers of similar rank,[236] stature and importance, the immunity clause hews

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227 See *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment of 4 June 2008, Judgment*, I.C.J. Reports 2008*, p. 177 (hereinafter *Certain Questions of Mutual Assistance in Criminal Matters Case)*. See also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgment 3 February 2012 I.C.J. Reports 2012, 99.

228 See Ruling of Judge Pratt on February 12, 2004 in Bow Street Magistrates' Court in *Application for Arrest Warrant Against General Shaul Mofaz*; 128 ILR 709.

229 See Chapter VII - Report of the International Law Commission: Immunity of State Officials from Foreign Criminal Jurisdiction, Sixty-Third Session [Document A/66/10] at paragraphs 107 - 110; available at http://legal.un.org/ilc/reports/2011/english/chp7.pdf accessed 7 December 2018.

230 See 46A *bis* of Malabo Protocol.

231 See Chapter VII - Report of the International Law Commission: Immunity of State Officials from Foreign Criminal Jurisdiction, Note 229 above.

232 See *Arrest Warrant Case*, Note 15 above at paragraph 60.

233 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff," Note 161 above at 7.

234 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff," Note 161 above at 6.

235 See Edwin Kellaway, *Principles of Legal Interpretation of Statutes, Contracts and Wills,* Note 200 above.

236 See *Application for Arrest Warrant Against General Shaul Mofaz*, Note 228 above.

quite closely to the work of such doctrinaires as Orakhelashvili who advocates a severe shrinkage of the ability to invoke immunity and the narrowest application possible of immunities, if at all.[237]

Another interpretation – not inconsistent with the interpretations set out above – which limits functional immunity of "senior State officials" to "their tenure of office" may also be a bid for accountability that shrinks the application of immunity *ratione materiae* in perpetuity and renders functional immunities time bound for State parties' senior State officials.[238] This again would be a significant narrowing of immunity ratione materiae – which is a substantive and potentially perpetual defence that invokes State responsibility.[239]

Because customary international law neither permits nor disallows immunity before international courts and because whether or not immunities may be invoked before such courts is purely a function of their constitutive statutes, the Malabo Protocol's immunity provision cannot be said to offend international law.[240]

4. Conclusion.

From the foregoing a number of conclusions may be drawn. The first of these is that customary international law does not disallow immunity for Heads of State or other high-ranking officials before international courts.[241] While some scholars have been quick to rely on the ICJ's ruling in the *Arrest Warrant Case* that Heads of State and other high-ranking government officials "may be subject to criminal proceedings before certain international criminal courts" there has been scant attention to the additional words "where they have jurisdiction."[242]

A second conclusion that may be drawn is that there is no support for the contention that immunity may be invoked before international tribunals. This notwithstanding the protestations of the African Union and its member States.[243] What is clear then is that whether or not immunity may be invoked before an international court is answered only by the constitutive statute of the international court and the legal authority of such statute.[244] For that reason, Article 46A *bis* is entirely consistent with international law.

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237 See Alexander Orakhelashvili, "State Immunity and International Public Order" (2002) 45 *German Year Book of International Law* 227. See also Alexander Orakhelashvili, "State Immunity and International Public Order Revisited" (2006) 49 *German Year Book of International Law* 327.

238 This would be a novel characterization of the ambit of functional immunity under the Malabo Protocol.

239 See *Second report on immunity of State officials from foreign criminal jurisdiction* by Roman Anatolevich Kolodkin, Special Rapporteur, [Document A/CN.4/631], available at http://legal.un.org/docs/?symbol=A/CN.4/631 accessed 7 December 2018.

240 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff," Note 161 above at 16 – 17.

241 See Dapo Akande, "International Law Immunities and the International Criminal Court," Note 83 above at 418.

242 See *Arrest Warrant Case*, Note 15 above.

243 See AU Press Release No. 002/2012, Note 7 above.

244 See Dapo Akande, "International Law Immunities and the International Criminal Court," Note 83 above.

The third conclusion is that irrespective of the finding of the Special Court of Sierra Leone that it was an international court and notwithstanding its views as to invocation of immunity before international courts, the case of *Prosecutor v. Charles Ghankay Taylor* is, notwithstanding its initial appeal, of limited utility in determining whether immunities may be invoked by Heads of State and high-ranking officials in international courts. This is because the Special Court was essentially the product of a treaty between one State and the United Nations in its capacity as a legal entity.[245] Its decision on its status was accordingly *per incuriam*.

Claims advanced by the Pre-Trial Chamber of the ICC in the *Malawi* and *Chad* decisions that the Nuremberg Tribunals, the Tokyo Tribunals (in the aftermath of World War II) and the International Criminal Tribunals for Yugoslavia and Rwanda manifest a customary law rule that immunity cannot be invoked before international tribunals is simply not sustainable for a number of reasons: firstly, neither the Nuremberg nor the Tokyo Tribunals after World War II yielded any trials of Heads of State – notwithstanding the enabling text of the constitutive statutes of those courts; secondly, the ICTY and the ICTR constitutive statutes were arguably no more than self-contained instances of *lex specialis* to contract out of non-*jus cogens* norms of international law occasioned by extraordinary circumstances and the need to address the exigent circumstances that compelled invocation of the Security Council's Chapter VII powers to guard against threats to global peace;[246] thirdly there is little to no evidence of either the State practice or the sense of obligation that would be required to yield a customary international law rule that immunities may not be invoked before international tribunals. As Tladi says,

> … as a matter of customary international law, it is difficult to see how a rule of customary international law can form when the African Union, representing more than a quarter of states, rejects the rule.[247]

Article 27 of the Rome Statute of the ICC does not either establish a norm-creating trend because the waiver of a right does not mean that the right does not exist or is under erosion. Indeed, an express waiver is, in itself, an affirmation of the existence of such a right: *exceptio probat regulam de rebus non exceptis*.[248] In any case the express waiver of sovereign immunities effected by the signing and ratification of the Rome Statute, which is said to evince State practice and perhaps even *opinio juris*, is in the process of being reversed by a number of countries.[249] The fact that only two of the five permanent

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245 See James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone," Note 99 above at 35. See also Micaela Frulli, "The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities," Note 99 at 1124.

246 See text of UN Security Council Resolutions 827 of 25 May 1993 and 955 of 8 November 1994, Notes 78 and 79 above.

247 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 8 above at 214.

248 The exception establishes the rule as to what is not excepted.

249 Further to a notice of withdrawal to the UN Secretary General, Burundi's withdrawal from the Rome Statute took effect on 27 October 2017. See Jina Moore, *Burundi Quits International Criminal Court*, New York Times (27 October 2017), available at https://www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html accessed 7 December 2018. Although South Africa, had, by reason of a judgment invalidating same, withdrawn its earlier decision to withdraw from the ICC, the Government has drafted a bill to give legal backing to its intended withdrawal. See Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, New York Times (8 March 2017), available at https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html accessed 7 December 2018. See also, Lindsey Dentlinger, *SA govt's plans to withdraw*

members of the UN Security Council have acceded to the Rome Statute is testament also to its limited stature as a norm creating treaty. The conclusions then that have been drawn by some commentators would also appear to qualify more as wishful thinking by advocates for limitations of sovereignty in favour of accountability.

Given the status of immunity for Heads of State and high-ranking officials before international courts and given the unavoidable conclusion that Article 46A *bis* is not inconsistent with international law and can even be reasonably construed as advancing the cause of accountability for egregious human rights violations, it is clear that the hysteria that has greeted Article 46A *bis* is inspired by other factors which warrant examination. To these factors, this dissertation shall now turn.

from ICC revived, Eye Witness News, available at http://ewn.co.za/2017/12/14/sa-govt-s-plans-to-withdraw-from-icc-revived accessed 7 December 2018.

Chapter 6

The AU and International Criminal Justice: Genuine Commitment or Sleight of Hand?

1. Introduction.

The focus of the preceding two chapters has been to determine whether or not there are *jus cogens* human rights exceptions to customary international law immunities of Heads of State and other high-ranking State officials. While there are ample authorities to come to well-reasoned and nuanced conclusions on immunity *ratione personae* and *ratione materiae* before foreign domestic courts, the question of immunities before international courts permits no such definitive conclusions. What can be said instead is that before international tribunals, there are no customary international law rules that strike down or sustain immunities.[1] Whether or not immunity may be invoked by a Head of State or other high-ranking official before such tribunals will therefore be a function of their constitutive statutes.[2]

Even though immunity from prosecution for Heads of State, Heads of Government and other senior government officials during incumbency,[3] and even afterwards,[4] may not be inconsistent with the corpus of customary international law, this fact provides little, if any proof that AU member States are not trying to evade accountability by adopting the immunity clause of the Malabo Protocol.[5] And this notwithstanding any legitimate critiques about the ICC's bias against African States[6] or the fact that there is a legitimate concern among African States that the architecture of the international legal order permits a fundamental disrespect for weaker countries[7] and allows for such countries to be manipulated and treated as guinea pigs in the "international criminal accountability experiment."[8]

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1 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Volume 10, International Criminal Justice Series (Asser Press, 2017) 203 – 219.

2 See Dire Tladi, "Immunities (Article 46A *bis*)," Note 1 above. See also Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21(4) *The European Journal of International Law* 815.

3 See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ), 14 February 2002 (2002) ICJ Reports 3 (hereafter *Arrest Warrant Case*)

4 See *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction* by Roman Anatolevich Kolodkin, Special Rapporteur, A/CN.4/631, (63rd session of the ILC (2011)), available at http://legal.un.org/docs/?symbol=A/CN.4/631 at paragraph 94(b) and (c).

5 See Article 46A *bis* of the Malabo Protocol.

6 See John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?" (2013) 11(3) *Journal of International Criminal Justice* 563. See also Max du Plessis, "Universalising International Criminal Law: The ICC, Africa and the Problem of Political Perceptions," (December 2013) *Institute for Security Studies, Paper 249.*

7 See Sarah Nouwen and Wouter Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2010) 21(4) *The European Journal of International Law* 941. See also Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror* (Cape Town HSRC Press, 2009). See also Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholders,* International Criminal Justice Series, (Asser Press, 2017).

8 See Ex.Cl/411(XIII) Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General, available at

The claim that the AU and its member States seek impunity has been argued by claimants in two parts. The first part, which is largely speculative, is founded on what are said to be AU intentions, derived from its pronouncements and attitude to accountability.[9] The second part is founded on the text of the Statute of the Expanded African Court (Malabo Protocol) itself and the immunity provision thereof which are said to undermine the Rome Statute of the ICC and the International Criminal Court that it birthed.[10]

Against the backdrop of the previous chapter's inquiry as to whether there is a *jus cogens* human rights exception to Head of State immunity before international courts – there is not one *per se* – and the textual analysis of the much-maligned immunity provision, this Chapter proposes to determine whether the accusation that the AU seeks impunity for Heads of State and other members of the "ruling classes" is a legitimate one borne out by the actions and inactions of the AU itself.

Taking at face value the AU's stated commitment to upholding human rights values, and to ensuring accountability in the event of their breach, this Chapter proposes also to summarily review the Malabo Protocol in order to determine whether it meets the burden that the AU places on itself "of unflinching commitment to combating impunity … throughout the entire continent, in conformity with its Constitutive Act."[11]

This Chapter proposes first to review the reasons presented as illustration of the AU's aversion to accountability and to examine whether the conclusions reached therefrom, that the AU seeks impunity, are sustainable.

2. By Their Deeds They Shall be Known (Matthew 7:15-20).[12]

In a blogpost titled *The International Criminal Court and Accountability in Africa*,[13] Gumede writes that the dynamics and inequities of the international legal order are a useful foil for AU member States' pursuit of impunity. He notes to this end that:

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http://archive.au.int/collect/oaucounc/import/English/EX%20CL%20411%20(XIII)%20_E.PDF accessed 26 November 2018. See also Charles Jalloh, "Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction" (2010) 21 *Criminal* Law *Forum* (CLF) 1 at 25. See also Miriam Mannak *Africa: Proving Ground for International Criminal Court?* Inter Press Service News Agency (20 August 2008), available at http://www.ipsnews.net/2008/08/africa-proving-ground-for-international-criminal-court/ accessed 26 November 2018.

9 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," (2011) 9 *Journal of International Criminal Justice* 1067, at 1087.

10 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," Note 9 above.

11 See Assembly/AU/Dec.482(XXI), Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), available at https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20482%20(XXI)%20_E.pdf accessed 26 November 2018.

12 See King James Version of the Bible. The very apt passage starts with an admonishment to be wary of dissemblers, who say one thing and do another: "Beware of false prophets, which come to you in sheep's clothing, but inwardly they are ravening wolves."

13 William Gumede, *The International Criminal Court and Accountability in Africa*, Wits School of Governance (31 January 2018), available at https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html accessed 11 December 2018.

> … African leaders do like to point to … Western hypocrisy to deflect their own crimes, corruption and mismanagement. The fact is that African countries are unequal in international law. The reality is, that almost all African leaders criticizing the ICC do so, not necessarily because of the lopsided global power in international law, governance and economic, market and political architecture; but because they fear they will be prosecuted for their crimes against their own people.[14]

The author also asserts that African leaders have purposefully created weak institutions of accountability or have made otherwise effective institutions of accountability weak.[15] This latter criticism mirrors the words of Ariranga Pillay, former Chief Justice of the Southern African Development Community (SADC) Tribunal[16] which was first rendered inquorate and ineffective by SADC leaders before they killed it off.[17] Of the SADC leaders, Pillay says that they …

> ... gave off all the right buzz words, you know, 'democracy, rule of law, human rights' and then they got the shock of their lives when we said these principles are not only aspirational but also justiciable and enforceable and we showed that we meant what we said.[18]

Considering that former President of Tanzania, Kikwete's, admonishment to colleagues that in the SADC Tribunal they "ha[d] created a monster that will devour us all,"[19] is perceived to have influenced the defanging of the SADC Tribunal, the notion that the Malabo Protocol's provisions and particularly its immunity clause represents an effort in

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[14] See William Gumede, *The International Criminal Court and Accountability in Africa*, Note 13 above.

[15] See Jeremy Sarkin, "A Critique of the Decision of the African Commission on Human and People's Rights Permitting the Demolition of the SADC Tribunal: Politics versus Economics and Human Rights" (2016) 24 *African Journal of International and Comparative Law* 215, at 221.

[16] The Protocol for the SADC Tribunal was adopted in 2000 and the Court became operational in 2005 with its seat in Windhoek, Namibia. See Protocol on the Tribunal and Rules thereof (2000), available at https://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf accessed 26 November 2018.

[17] In August 2010 the SADC Summit placed a moratorium on the Tribunal taking new cases and declined to renew the tenure of the Tribunal's judges. This ensured the Court was not quorate and deprived it of capacity to hear or decide cases. The Summit then ordered an independent review of the role of the Tribunal. Undertaken by an independent party, the review which was completed in early 2011 recommended that the reappointment and replacement of the Members of the SADC Tribunal be concluded. The SADC Committee of Ministers of Justice/Attorneys General meeting in April 2011 endorsed the recommendation but the SADC Summit, a month later, ignored both the findings of the independent reviewer and the decisions of the Committee of Ministers of Justice/Attorneys General. The Summit preserved the moratorium on the Tribunal's work, declined to renew expiring tenures of judges and refused to appoint new judges. In 2012, the 32nd SADC Summit dealt the Tribunal the death blow and decided to end its jurisdiction to hear individual cases. It then set in motion a process, which unsurprisingly went nowhere, to draft a new Protocol. See Jeremy Sarkin, "A Critique of the Decision of the African Commission on Human and People's Rights Permitting the Demolition of the SADC Tribunal: Politics versus Economics and Human Rights," Note 15 above. See also Laurie Nathan, "Solidarity Triumphs over Democracy the Dissolution of the SADC Tribunal," (2011) 12 *Development Dialogue* 131. See also Laurie Nathan, "The Disbanding of the SADC Tribunal: A Cautionary Tale," (2013) 35(4) *Human Rights Quarterly* 870, available at https://muse.jhu.edu/ accessed 6 October 2018.

[18] Sean Christie, *Killed off by Kings and Potentates,* Mail and Guardian (9 August 2011), available at https://mg.co.za/article/2011-08-19-killed-off-by-kings-and-potentates accessed 26 November 2018.

[19] Baobab**,** *Beheading the Monster,* The Economist (22 August 2012), available at https://www.economist.com/baobab/2012/08/22/beheading-the-monster accessed 26 November 2018.

self-preservation in the face of indictments by the ICC of African Heads of State is plausible and perhaps even likely,[20] even if unproven.

The misgivings of the international criminal justice community about the AU's motives in establishing a court with international criminal jurisdiction revolve around three principal elements. The first is the shifting rationale for the AU's objections to the exercise by the ICC of its mandate when it comes to Heads of State, which has inspired the belief that the AU is untrustworthy.[21] The second is the active engagement of the AU in the articulation and implementation of a multi-pronged strategy for African States' disengagement from the ICC which is intended to turn the trickle of withdrawals from the ICC into a deluge.[22] And, the third is the creation, in the Expanded African Court of an accountability mechanism for international criminal justice that, going by the AU's record on such institutions, has been described as being purposefully designed to fail.[23]

Whether there is merit to the proffered evidence of African leaders' aversion to accountability is what this Chapter tests.

2.1 The Shifting Sands of the AU's "Principled Objections."

Concerns about the sincerity of the AU's stated fealty to preserving customary international law rules on immunity have legitimately been voiced by various commentators.[24] The AU's latter-day advocacy for immunity as a bar to the prosecution of sitting Heads of State and persons entitled to act for them has been noted by such commentators as a stunning reversal of the AU's earlier commitment to the text of the Rome Statute and the principles it represented.[25] While the AU's position may be attributed to its *pique* over the dynamics of the international legal order,[26] its shifting positions on Article 27 provides little

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20 See Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" (Nov 2014) *Institute for Security Studies, Paper 278.*

21 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," (2017) 60 *German Yearbook of International Law* 43 – 71.

22 Ludovica Iaccino**, '**African Union approves mass withdrawal from ICC over war crimes 'bias'' *International Business Times* (1 February 2017), available at https://www.ibtimes.co.uk/african-union-approves-mass-withdrawal-icc-over-war-crimes-bias-1604238 accessed 26 November 2018. See also *African Union backs mass withdrawal from ICC,* BBC News (1 February 2017), available at https://www.bbc.com/news/world-africa-38826073 accessed 26 November 2018.

23 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2016), available at https://www.amnesty.org/download/Documents/AFR0130632016ENGLISH.PDF accessed 26 November 2018.

24 See Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 20 above. See also Evelyn Asaala, "Rule of law or realpolitik? The role of the United Nations Security Council in the International Criminal Court processes in Africa" (2017) 17 *African Human Rights Law Journal* 266. See also Simon Allison, "Think Again - At the New African Court, Will Power Mean Impunity?" (24 June 2014) *Institute for Security Studies*; See also "IMMUNITY = IMPUNITY" (2014-2015) *The Global Justice Monitor,* Issue No. 46, available at http://www.iccnow.org/documents/Monitor46_English_web.pdf accessed 26 November 2018.

25 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 21 above.

26 See Fred Oluoch *Mixed reactions to Kenya's push to establish African court,* The East African (7 February 2015), available at http://www.theeastafrican.co.ke/news/Mixed-reactions-to-Kenya-s-push-to-establish-African-court/-/2558/2616388/-/12dkljqz/-/index.html accessed 8 August 2018. See also Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 20 above.

comfort about its commitment to accountability or its consistency on important legal questions.[27]

Already cloaked with a sense of victimhood from what the AU had said was the abuse of the principle of universal jurisdiction over several years by Western States,[28] the AU had seen the referral of the Darfur situation by the UN Security Council[29] as the latter's continuation of a disrespectful practice that actively denigrated the AU[30] and its efforts to restore peace in the Sudan.[31] The AU's decision not to cooperate with the ICC and the reasons for same, which is reiterated in more than a few Decisions and Declarations from the AU Assembly was thus a clear manifestation of its ire towards the Security Council.[32]

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[27] The AU has since reverted to acknowledging the import of Article 27 of the Rome Statute. See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Supplementary African Union Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir" with Annex 1, Annex 2, Annex 3, Annex 4 and Annex 5 (ICC-02/05-01/09-389 28-09-2018 2/12 RH PT OA2); available at https://www.icc-cpi.int/CourtRecords/CR2018_04581.PDF accessed 26 November 2018.

[28] See Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General (Ex.Cl/411(XIII)), Note 8 above. See also Charles Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', Note 8 above, at 25.

[29] UN Security Council, *Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan]*, 31 March 2005, S/RES/1593, available at http://daq.un.org/handle/11176/20373 accessed 26 November 2018. See also UNSC Press Release SC/8351, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court (31 March 2005), available at https://www.un.org/press/en/2005/sc8351.doc.htm accessed 26 November 2018.

[30] See Ovo Imoedheme, "Unpacking the Tension between the African Union and the International Criminal Court: The Way Forward," (2015) 23(1) *African Journal of International and Comparative Law* 74, at 90 – 91.

[31] See AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) 21 July 2008. In the same Communique, the Peace and Security Council also called upon *the Commission to take all necessary steps for the establishment, within a period of 30 days following the adoption of the present decision, of an independent High-Level Panel made up of distinguished Africans of high integrity, to examine the situation in depth and submit recommendations to Council on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed*. See also "Special Research Report No. 2: Working Together for Peace and Security in Africa: The Security Council and the AU Peace and Security Council", *Security Council Report,* available at http://www.securitycouncilreport.org/special-research-report/lookup-c-glKWLeMTIsG-b-6769467.php?print=true accessed 26 November 2018.

[32] The AU's decision not to cooperate with the ICC is repeated in multiple Decisions and Declarations issuing from the Summits of the Assembly of Heads of States and Governments, see https://au.int/en/decisions/assembly accessed 26 November 2018. See for instance Paragraph 10 of Assembly/AU/Dec.245(XIII) Rev.1. Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII), Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009, available at https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf accessed 26 November 2018; Paragraph 5 Assembly/AU/Dec.296(XV), Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/Au/Dec.270(Xiv) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV) Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda, available at https://au.int/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf accessed 26 November 2018; Assembly/AU/ Dec.334(XVI) Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII). Adopted by the Sixteenth Ordinary Session of the Assembly of the Union on 31 January 2011 in Addis Ababa, Ethiopia, available at https://au.int/sites/default/files/decisions/9645-assembly_en_30_31_january_2011_auc_assembly_africa.pdf accessed 26 November 2018; Assembly/AU/Dec.366(XVII) Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc. EX.CL/670(XIX), Adopted by the Seventeenth Ordinary Session of the Assembly of the Union on 1 July 2011 in Malabo, Equatorial Guinea, available at

The AU grounded its position on Article 98(1) of the Rome Statute by which:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[33]

Sudan not being a party to the Rome Statute and unlikely to agree to cooperate with the ICC, the AU reasoned that because of the immunity *ratione personae* Al Bashir would be entitled to under customary international law, cooperation by AU member States with the ICC to apprehend him would be inconsistent with such States' obligations under international law with respect to "State or diplomatic immunity of a person or property of a third State."[34]

Although a legitimate argument can be made that Article 98 speaks to "State or diplomatic immunity" and not Head of State immunity – as Tladi[35] and Iverson[36] have done – the AU's broader conception of Article 98(1) as being inclusive of Head of State immunity is consistent with the functional theory of Head of State immunity by which a Head of State – as the ultimate representative and personification of a State (*ius repraesentationis omnimodae)* – is covered by the State's immunity and can claim diplomatic immunity thereunder.[37] The AU in so

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https://au.int/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf accessed 26 November 2018; Paragraph 8 of Assembly/AU/Dec.397(XVIII) Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. EX.CL/710(XX), adopted by the Eighteenth Ordinary Session of the Assembly of the Union on 30 January 2012 in Addis Ababa, Ethiopia, available at https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-_415_xviii_e.pdf accessed 26 November 2018.

33 See Article 98(1) of the Rome Statute of the ICC.

34 See AU Assembly, Decision on the Meeting of African States to the Rome Statute of the International Criminal Court (ICC), AU Doc. Assembly/AU/Dec.245 (XIII), 3 July 2009, paragraph 10, available at https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf accessed 26 November 2018. See also Bathandwa Mbola, 'AU leaders will not Extradite Al Bashir,' *South African Government News Agency (Monday*, 6 July 2009), available at https://www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir accessed 26 November 2018. See also Luke Moffett, "Al-Bashir's Escape: Why the African Union Defies the ICC," *The Conversation* (15 June 2015), available at http://theconversation.com/al-bashirs-escape-why-the-african-union-defies-the-icc-43226 accessed 26 November 2018.

35 See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199; See also Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 21 above at 14.

36 See Jens Iverson, "Head of State Immunity is not the same as State Immunity: A Response to the African Union's Position on Article 98 of the ICC Statute," *EJILTalk* (13 February 2012), available at https://www.ejiltalk.org/head-of-state-immunity-is-not-the-same-as-state-immunity-a-response-to-the-african-unions-position-on-article-98-of-the-icc-statute/ accessed 26 November 2018. Iverson argues that "Article 98 was crafted not to interfere with States *qua* States and with the efficient performance of the functions of diplomatic missions, while retaining the capacity to hold Heads of State to account" but it is hard to see how arresting a sitting Head of State would not qualify as interference.

37 See Lord Millet in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (No 3) at page 171 where he states that:

> The immunity of a serving Head of State is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the State itself.

doing, argued that it did not seek to invalidate the import of Article 27 – which renders immunities irrelevant when an accused person is before the ICC – but held that Article 27 "applies only in the relationship between the Court and the accused. In the relationship between the Court and States," the AU has stated, "Article 98(1) applies."[38]

The AU's indignation with the manifestly erroneous ICC Pre-Trial Chamber rulings[39] that had sought to write Article 98 out of existence in the *Malawi*[40] and *Chad*[41] decisions was therefore well grounded and has received validation by several scholars and experts.[42] And yet, while the AU's position in respect of al Bashir was founded on a reasonable interpretation of the Rome Statute and application of the principle of *pacta sunt servanda*, same cannot be said of the AU's position in respect of the Kenyatta[43] and Ruto[44] cases before the ICC.[45] The election of Kenyatta and Ruto, in what appeared to be a rebuke by the Kenyan electorate to international – mainly Western – meddling,[46] appears to have caused the AU to change tune.

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38 See AU Press Release Nº 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan (January 9, 2012), available at http://www.iccnow.org/documents/PR-_002-_ICC_English_2012.pdf accessed 26 November 2018.

39 See AU Press Release Nº 002/2012, Note 38 above. See also *AUC concerned over ICC decisions on Malawi and Chad*, available at https://europafrica.net/2012/01/17/8258/ accessed 26 November 2018.

40 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, available at https://www.icc-cpi.int/pages/record.aspx?uri=1287184 accessed 26 November 2018.

41 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to the Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09-140-tENG), Pre-Trial Chamber I, 13 December 2011, available at https://www.icc-cpi.int/pages/record.aspx?uri=1384955 accessed 26 November 2018.

42 See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199; See also Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But Gets the Law Wrong" *EJILTalk* (15 December 2011), available at http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 6 September 2018. See also André de Hoogh and Abel Knottnerus, "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again" *EJILTalk* (18 April 2014), available at http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/ accessed 26 November 2018.

43 See *The Prosecutor v. Uhuru Muigai Kenyatta*; formerly *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11). Case Information Sheet available at https://www.icc-cpi.int/kenya/kenyatta/Documents/KenyattaEng.pdf accessed 26 November 2018.

44 See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*; formerly *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC-01/09-01/11). Case Information Sheet available at https://www.icc-cpi.int/kenya/rutosang/Documents/RutoSangEng.pdf accessed 26 November 2018.

45 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 21 above at 14.

46 A comment about the Kenya elections by Johnnie Carson, the top Obama administration official for Africa that "choices have consequences" was seen as not-so-subtle discouragement for electing Kenyatta and Ruto. See Jeffrey Gettleman, *Leader of Vote Count in Kenya Faces U.S. With Tough Choices,* New York Times (7 March 2013), available at https://www.nytimes.com/2013/03/08/world/africa/kenyatta.html accessed 26 November 2018.

At the AU Extraordinary Summit of Heads of State in Addis Ababa, Ethiopia, in October 2013,[47] which was called at the instance of Kenya,[48]and shortly after terrorist attacks in Nairobi,[49] there was concern among international criminal justice advocates that under intense lobbying from Kenya, African States' would begin disengagement with the ICC.[50] The Assembly of Heads of State and Government, in the absence of general support for the more drastic move of mass withdrawal of member States from the Rome Statute, decided instead (applying to international tribunals, customary international law immunities for sitting Heads of State and other senior officials before foreign domestic courts) that:

> … to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any AU Head of State or anybody entitled to act in that capacity during their term of office.[51]

This paragraph which bears uncanny similarity to a provision in Kenya's constitution[52] and to the immunity provision of the Malabo Protocol was buttressed by a call for the trials of Kenyatta and Ruto to "be suspended until they complete their terms of office."[53]

Clearly then, the AU's professed commitment to the content of the Rome Statute and its invocation of Article 98 as reason not to surrender an official from a non-State party to the ICC, did not extend to other situations. At least not where the same Rome Statute would compel accountability by rendering irrelevant the status or position of an accused person – as President or otherwise – in standing trial [Article 27]. Tladi's view on the subject, reflective of the cynicism of the

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47 See Solomon Ayele Dersso, "The AU's ICC Summit: A Case of Elite Solidarity for Self-Preservation?" *Institute for Security Studies* (15 October 2013), available at https://issafrica.org/iss-today/the-aus-icc-summit-a-case-of-elite-solidarity-for-self-preservation accessed 26 November 2018.

48 Kenya's request for the summit received the support of over two-thirds of AU member-States. See Laurence R. Helfer and Anne E. Showalter "Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC" *iCourts Working Paper Series No. 83* (2017), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6404&context=faculty_scholarship accessed 26 November 2018.

49 Edmund Blair, Richard Lough, *Islamists Claim Gun Attack on Nairobi Mall, At Least 39 Dead*, Reuters (21 September 2013), available at https://www.reuters.com/article/us-kenya-attack/islamists-claim-gun-attack-on-nairobi-mall-at-least-39-dead-idUSBRE98K03V20130921 accessed 26 November 2018. See also Jeffrey Gettleman and Nicholas Kulish, *Gunmen Kill Dozens in Terror Attack at Kenyan Mall New York Times* (21 September 2013), available at https://www.nytimes.com/2013/09/22/world/africa/nairobi-mall-shooting.html accessed 26 November 2018.

50 See Solomon Dersso, "The AU's Extraordinary Summit decisions on Africa-ICC Relationship" (28 October 2013) *EJILTalk*, available at https://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/ accessed 26 November 2018.

51 See Ext/Assembly/AU/Dec.1, Decision on Africa's Relationship with the International Criminal Court (ICC) at paragraph 10(i), available at https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf accessed 26 November 2018.

52 See Article 143 of the 2010 Constitution of Kenya, available at http://www.icla.up.ac.za/images/constitutions/kenya_constitution.pdf accessed 26 November 2018.

53 See Decision on Africa's Relationship with the International Criminal Court (ICC) at paragraph 10(ii), Note 51 above.

international criminal justice community and hardly congratulatory of the AU, is that:

> … the AU has abandoned its more principled position and has adopted a position based purely on the need to protect particular individuals… the AU's position appears less intended to protect the sanctity of the law, as it seems to suggest, and more to protect particular individuals, in particular serving Heads of State.[54]

It is true that the image of an African Head of State sitting in the dock of a court that has been characterized by African leaders as a tool for neo-colonialist oppression[55] would be problematic for many reasons but the AU's abandonment of its stated fealty to the principle of *pacta sunt servanda* does little to engender confidence in its policy positions or its consistency on such positions.[56]

The irony which appears to be lost on many is that it is the AU position in endorsing the view that sitting Heads of State be not subjected to prosecution during their incumbency[57] that denigrates Kenya's sovereignty. Unlike the situation in Darfur, investigations in the situation in Kenya had not commenced on the basis of a Security Council referral but because Kenya, as a sovereign State, with full agency and fully cognizant of the obligations it imposed, had ratified the Rome Statute and become party to it.[58] The AU's paternalistic position, seeming to suggest that Kenya had not understood the obligations it had signed up to or that Kenya needed protection from obligations it had voluntarily assumed covers neither the AU nor Kenya in glory.[59]

2.2 Withdrawal from the Rome Statute in Pursuit of Impunity.

Also proffered as evidence of the 'AU's bad faith and quest for impunity' is the work of the AU on a withdrawal strategy from the Rome Statute of the ICC[60] in

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54 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 21 above at 16.

55 Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders* (Asser Press, 2017). See also Charles Jalloh, "Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa" (2014) 7 *African Journal of Legal Studies* 43, at 48.

56 See Solomon Ayele Dersso, *The AU's ICC summit: A case of elite solidarity for Self-preservation?* Note 47 above.

57 See Decision on Africa's Relationship with the International Criminal Court (ICC), Note 51 above.

58 Kenya signed the Rome Statute on 11 August 1999 and deposited its instrument of ratification to the Rome Statute on 15 March 2005. See https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/kenya.aspx accessed 26 November 2018.

59 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 21 above

60 Patrick Wintour, *African exodus from ICC must be stopped, says Kofi Annan,* The Guardian (18 November 2016), available at https://www.theguardian.com/world/2016/nov/18/african-exodus-international-criminal-court-kofi-annan accessed 26 November 2018.

the months preceding and following the actions taken by Burundi,[61] South Africa[62] and the Gambia[63] to terminate their status as parties to the ICC treaty.

In January 2016, the Summit of the Assembly of Heads of States and Governments had, per the Decision on the International Criminal Court,[64] stated that:

> The Open-ended Ministerial Committee's mandate will include the urgent development of a comprehensive strategy including collective withdrawal from the ICC to inform the next action of AU Member States that are also parties to the Rome Statute, and to submit such strategy to an extraordinary session of the Executive Council which is mandated to take such decision.[65]

The Decision went on to reiterate:

i) The imperative need for all African States Parties to the Rome Statute of the ICC to continue to ensure that they adhere and articulate common agreed positions in line with their obligations under the Constitutive Act of the African Union;
ii) Its call on all AU Member States to sign and ratify, as soon as possible, the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples' Rights;[66]

The 27th Summit of the Assembly of Heads of States and Governments held in Kigali in July 2016 affirmed the decisions of the previous summit, and called upon the Open-Ended Ministerial Committee to:

> Implement Decision Assembly/AU/Dec.590 (XXVI) adopted by the 26th Ordinary Session held in Addis Ababa, Ethiopia in January 2016 on the development of a comprehensive strategy including on a collective withdrawal from the ICC to

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61 On 12 October 2016, Burundi's Parliament voted in support of a plan to withdraw from the Rome Statute and on 18 October 2016, President Pierre Nkurunziza of Burundi signed legislation withdrawing the country from the ICC. See *Burundi walks away from the ICC - President signs law to begin withdrawal from the international court*, IRIN (19 October 2016), available at http://www.irinnews.org/news/2016/10/19/burundi-walks-away-icc accessed 26 November 2018.

62 On 19 October 2016, the South African Government submitted to the UN, a notice of withdrawal from the ICC in accordance with Article 127(1) of the Rome Statute. See S. Chan and M. Simons, *South Africa to Withdraw from International Criminal Court*, New York Times (21 October 2016), available at http://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html accessed 26 November 2018.

63 See *Gambia Announces Withdrawal from International Criminal Court*, Reuters World News, (26 October 2016), available at http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335?il=0 accessed 26 November 2018.

64 See Assembly/AU/Dec.590(XXVI), Decision on the International Criminal Court Doc. EX.CL/952(XXVIII), available at https://au.int/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf accessed 26 November 2018.

65 See Assembly/AU/Dec.590(XXVI), Decision on the International Criminal Court Doc. EX.CL/952(XXVIII), Note 64 above at paragraph 10(iv).

66 See Assembly/AU/Dec.590(XXVI), Decision on the International Criminal Court Doc. EX.CL/952(XXVIII), Note 64 above at paragraph 11.

> inform the next action of AU Member States that are also parties to the Rome Statute.[67]

Because the AU posture for collective withdrawal from the Rome Statute was opposed by the likes of Nigeria (whose delegation was led by Vice President Osinbajo – himself a human rights scholar),[68] Senegal, Ivory Coast, Tunisia, and Algeria,[69] it was not clear how much traction the strategy would receive.[70] It was therefore quite a surprise when Burundi, South Africa and the Gambia – in such rapid succession, over the course of 15 days, as to suggest consultation *inter-se*[71] – announced their withdrawal from the Rome Statute within three months of the July summit.[72]

At the 28th Summit of the Assembly of Heads of States and Governments in January 2017, the Assembly provided full throated endorsement of the announced withdrawals by "welcoming and fully supporting"

> … the sovereign decisions taken by Burundi, South Africa and The Gambia as pioneer implementers of the Withdrawal Strategy, regarding their notification of withdrawal from the ICC.[73]

That the decisions to withdraw in the case of Burundi and the Gambia were arguably motivated by clear-eyed decisions by Presidents Nkurunziza[74] and Jammeh[75] respectively to escape the clutches of the ICC for various transgressions[76] seemed to make little difference to the AU. The Summit went

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67 See Assembly/AU/Dec.616(XXVII), Decision on the International Criminal Court (Doc. EX.CL/987(XXIX)), available at https://au.int/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pdf accessed 26 November 2018.

68 See Yemi Osinbajo and Awa U. Kalu (Eds), *Perspectives on Human Rights* (Federal Ministry of Justice, 1992).

69 See Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" *EJILTalk* (15 February 2017), available at https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/ accessed 26 November 2018.

70 See Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" Note 69 above.

71 There is no actual record of consultation between Burundi, South Africa and the Gambia before they each issued the notices of withdrawal from the Rome Stature. See Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" Note 69 above.

72 A change in government in Gambia has eliminated the threat of withdrawal while intervention by the Courts in South Africa have put a temporary, if not permanent, brake in the efforts to withdraw from the ICC. Not similarly fettered, Burundi's withdrawal from the ICC became effective on 27 October 2017.

73 See Assembly/AU/Dec.622(XXVIII), Decision on the International Criminal Court (Doc. EX.CL/1006(XXX)), at paragraph 6, available at https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf accessed 26 November 2018.

74 See *Political Crisis in Burundi*, Council on Foreign Relations, available at https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/political-crisis-in-burundi accessed 26 November 2018.

75 Christopher Sanchez, "Alternative Reasons for Gambia's Withdrawal from the International Criminal Court," *ICCForum* (15 November 2016), available at https://iccforum.com/forum/withdrawal accessed 26 November 2018.

76 Manisuli Ssenyonjo, "State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia," (2018) *Criminal Law Forum* 63, at 69 – 70, available at https://link.springer.com/content/pdf/10.1007%2Fs10609-017-9321-z.pdf accessed 26 November 2018.

on – alarmingly in the opinions of some[77] – to adopt the ICC Withdrawal Strategy (along with its Annexes) and call on Member States to consider implementing its recommendations.[78]

Various commentators agree that the document that emerged from deliberations at the summit can hardly be called a withdrawal strategy, nor even a serious call for withdrawal[79] (but rather a set of broad policy proposals and an undertaking to conduct further legal research).[80] The fact however that the AU actively provided a platform for some States to launch a bid for mass withdrawal has been decried by the international criminal justice community.[81] Neither the absence of consensus on the question of withdrawal by African States nor on the content of the strategy [82] – even vociferous opposition from some quarters which resulted in the unusual filing of formal reservations to the Decision[83] – has assuaged the discontent.[84]

Although withdrawal from the Rome Statute may not, in itself, be conclusive of African States rejecting accountability or seeking impunity, especially where African States are simultaneously signing up to a continental international

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77 Elise Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye" *Human Rights Watch* (17 February 2017), available at https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye accessed 26 November 2018. For context see also Human Rights Watch, "South Africa: Continent Wide Outcry at ICC Withdrawal" (22 October 2016), available at https://www.hrw.org/news/2016/10/22/south-africa-continent-wide-outcry-icc-withdrawal accessed 26 November 2018.

78 See Assembly/AU/Dec.622(XXVIII), Decision on the International Criminal Court, Note 73 above at paragraph 8. See also *AU Withdrawal Strategy Document* (2017), available at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf accessed 26 November 2018.

79 See Elise Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye" *Human Rights Watch*, Note 77 above. See also Mark Kersten "Not All it's Cracked Up to Be – The African Union's "ICC Withdrawal Strategy" *Justice in Conflict* (6 February 2017), available at https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/ accessed 26 November 2018. See also Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" Note 69 above.

80 See Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" Note 69 above.

81 See Solomon Ayele Dersso, *The AU's ICC Summit: A Case of Elite Solidarity for Self-Preservation?* Note 47 above. See also Aaron Maasho, *African Union leaders back mass exodus from International Criminal Court*, Independent (1 February 2017), available at https://www.independent.co.uk/news/world/africa/african-union-international-criminal-court-a7557891.html accessed 26 November 2018.

82 See Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" Note 69 above. See also Elise Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye" Human Rights Watch, Note 77 above.

83 See Assembly/AU/Dec.622(XXVIII) Decision on the International Criminal Court1 Doc. EX.CL/1006(XXX)(28th Ordinary Session of the Assembly of the Union held in Addis Ababa, Ethiopia from 30 - 31 January 2017), available at https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf accessed 26 November 2018. See footnote 1 thereof: Reservations were entered by Benin, Botswana, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Lesotho, Liberia, Madagascar, Malawi, Mozambique, Nigeria, Senegal, Tanzania, Tunisia and Zambia.

84 See Mark Kersten "Not All It's Cracked Up to Be – The African Union's "ICC Withdrawal Strategy," Note 79 above. See also Elise Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye" Human Rights Watch, Note 77 above.

criminal court, it is the AU's history with accountability mechanisms that breeds the concerns about the AU's commitment to accountability.[85]

2.3 The AU's History of Ineffective Accountability Mechanisms.

The AU's history (and OAU before it) with creating institutions to ensure accountability for human rights abuses have been presented as Exhibit 1 by commentators who have reviewed the Malabo Protocol to assess the likely effectiveness of the Expanded African Court when (or if) it becomes operational. The "unseemly haste"[86] with which the drafting of the text of the Protocol was undertaken and the limited consultation by drafters with the human rights and international criminal justice academic and activist communities have provided fodder for reasonable conclusions to be drawn that the AU may never have intended to create an effective court.[87]

A summary review of the principal accountability frameworks that have been established by the continental organization is useful to assess the legitimacy of the concern.[88]

2.3.1 The African Charter on Human and People's Rights.

Entering into force on 21 October 1986,[89] the African Charter on Human and People's Rights, which was the first and remains the principal instrument to ensure accountability for human rights abuses on the African continent was influenced significantly by the statist orientation of the OAU. Given the post-colonial emphasis on non-intervention,[90] and the fact that governing regimes in Africa were mostly one-party States

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85 See Ademola Abass, "The Proposed Criminal Jurisdiction for the African Court: Some Problematical Aspects," (2013) 60 *Netherlands International Law Review* 27. See also Max du Plessis and Lee Stone, "A Court Not Found," (2007) 7 *Africa Human Rights Law Journal* 522.

86 See Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 20 above at 4.

87 See Chapter 4, *International Criminal Justice and Africa – The State of Play*, available at http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/International-Criminal-Justice-and-Africa.pdf accessed 26 November 2018.

88 John C Mubangizi, "Some Reflections on Recent and Current Trends in the Promotion and Protection Of Human Rights In Africa: The Pains and the Gains," (2006) 6 *African Human Rights Law Journal* 146.

89 The African Charter on Human and People's Rights was adopted in Nairobi, Kenya in June 1981 and entered into force on 21 October 1986. The Charter has 55 signatories and has been ratified by 54 countries, Morocco being the sole hold out. Text of African Charter, available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf accessed 26 November 2018. Status List is also available at https://au.int/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_2.pdf accessed 26 November 2018.

90 See Article III of the OAU Charter, available at https://au.int/sites/default/files/treaties/7759-sl-oau_charter_1963_0.pdf accessed 26 November 2018.

or military dictatorships,[91] the Charter did not come equipped with strong accountability mechanisms.[92]

The progressive portends of the African Charter notwithstanding,[93] its failure to institute a robust enforcement mechanism[94] and the fact that it was strewn with claw-back clauses that permit a State to limit the rights guaranteed by the Charter and State obligations thereunder (provided national law is enacted to that end),[95] have been described as some of its failings. The effects of the claw back clauses have since been tempered or neutralized by the African Commission's positive approach[96] but another of the perceived failings of the African Charter was the OAU's choice to establish a quasi-judicial supervisory body to be the enforcer of the Charter instead of a court, as other regional human rights mechanisms (in Europe and the Americas)[97] had done to ensure compliance with continental human rights instruments. This was ostensibly because of Africa's cultural affinity for non-adversarial models of dispute settlement.[98]

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91 There were 71 military coup d'état in Africa between 1952 and 1990. See Alex Thompson, *An Introduction to African Politics* (2nd ed) (Routledge, 2004).

92 Omoleye Benson Olukayode**,** "Enforcement and Implementation Mechanisms of the African Human Rights Charter: A Critical Analysis" (2015) *Journal of Law, Policy and Globalization* 47. See also Christof Heyns, "The African Regional Human Rights System: The African Charter" (2003-2004) 108 *Pennsylvania State Law Review*, 679.

93 See Barney Pityana, *"Reflections on the Future of the African Human Rights System: In Celebration of the 30th Anniversary of the African Commission on Human and Peoples' Rights."* Speech given in celebration of the 30th Anniversary of the African Commission on Human and Peoples' Rights (4 November 2017), available at https://www.mbeki.org/2017/11/13/reflections-on-the-future-of-the-african-human-rights-system-in-celebration-of-the-30th-anniversary-of-the-african-commission-on-human-and-peoples-rights/ accessed 26 November 2018.

94 John C Mubangizi, "Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and the Gains," Note 88 above.

95 Sandhiya Singh, "The Impact of Clawback Clauses on Human and Peoples' Rights in Africa" (2009) *African Security Review* 95.

96 The African Commission has since clarified that States that refer to domestic law to justify invoking the internal limits of the African Charter's "claw-back" clauses must act in accordance with international human rights law. See Amos O Enabulele, "Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?" (2016) 16 *African Human Rights Law Journal* 1.

97 Christof Heyns, Wolfgang Strasser and David Padilla, "A Schematic Comparison of Regional Human Rights Systems" (2003) 1 *African Human Rights Law Journal,* 76. See also Fekadeselassie Kidanemariam, "Enforcement of Human Rights under Regional Mechanisms: A Comparative Analysis," (2006) *LLM Theses and Essays,* Paper 80, available at https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&cad=rja&uact=8&ved=2ahUKEwjuzZP6r_7dAhUBhOAKHWLyAU84ChAWMAd6BAgBEAI&url=http%3A%2F%2Fdigitalcommons.law.uga.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1079%26context%3Dstu_llm&usg=AOvVaw3FPaAAwlCjEpl0779ts7dw&httpsredir=1&article=1079&context=stu_llm accessed 26 November 2018.

98 See Keba M'baye, Introduction to M'Baye Proposal, Draft African Charter on Human and Peoples' Rights of 1979, OAU Doc. CAB/LEG/67/1, paragraph 4, reprinted in Christof Heyns (Ed) *Human Rights Law in Africa* (1999), at 65. See also Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," (2013) 24(3) *European Journal of International Law* 933, at 936. See also Frans Viljoen, 'A Human Rights Court for Africa, and Africans', (2004–2005) 30 *Brooklyn Journal of International Law* 1, at 4 – 5.

Comprising eleven members nominated by States Parties to serve renewable six-year terms,[99] the Commission plays its watch dog role through consideration of communications received from complainants during its bi-annual sessions. Findings of the Commission, which lack any power of compulsion are issued in the form of "recommendations" to State parties[100] and such findings can only be made public if the Assembly consents to do so.[101] In cases where they decline to do so, as they have in some cases – albeit infrequently – even the public shaming that is seen as the only means to ensure adherence by States to Commission recommendations is not achieved.[102]

In a seminal and widely referenced study of State compliance with Commission recommendations, Viljoen and Louw provide a sobering assessment of sixteen years of the Commission's recommendations.[103] While they find, in 2003, a greater degree of compliance than was the case when the Commission's chair declared in 1997 that "none of the decisions on individual communications taken by the Commission and adopted by the Assembly had *ever* been implemented,"[104] Viljoen and Louw find nonetheless that in only 14% of cases had the Commission's recommendations been fully complied with.[105]

While it is clear that the record of AU member States in respect of compliance with the Commission's recommendations has not been exemplary, the African Commission has, itself, been described in some quarters as being complicit in permitting the rejection of the ideals of the African Charter. Notwithstanding the fact that the Commission was not designed to be particularly assertive,[106] what has been represented as acquiescence to the demolition of the SADC tribunal – an accusation which, on the evidence, is not entirely fair but has been touted by activists[107] – has been said to represent one of its low points.[108]

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99 See Article 31 of the African Charter on Human and Peoples' Rights, Note 89 above.

100 See Article 58 of the African Charter on Human and Peoples' Rights, Note 89 above.

101 See Article 59 of the African Charter on Human and Peoples' Rights, Note 89 above.

102 Frans Viljoen and Lirette Louw, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation," (2004) 48(1) *Journal of African Law*, 1. See also Rachel Murray and Elizabeth Mottershaw, "Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights (2014) 36 *Human Rights Quarterly* 349.

103 Frans Viljoen and Lirette Louw, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004," (2007) 101 *American Journal of International Law* 1.

104 Rachel Murray, "Report on the 1997 Sessions of the African Commission on Human and Peoples' Rights – 21st and 22nd Sessions: 15 – 25 April and 2 – 11 November 1997," (1998) 19 *Human Rights Law Journal* 169, at 170.

105 Frans Viljoen and Lirette Louw, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004," Note 103 above at 26.

106 See Vincent O. Nmehielle, "Development of the African Human Rights System in the Last Decade," (2004) 11(3) *Human Rights Brief* 6.

107 Nicole Fritz, "Human Rights Litigation in Southern Africa: Not Easily Able to Discount Prevailing Public Opinion," (2014) 11(20) *SUR-International Journal on Human Rights* 193, at 195.

108 See Jeremy Sarkin, "A Critique of the Decision of the African Commission on Human and People's Rights Permitting the Demolition of the SADC Tribunal: Politics versus Economics and Human Rights" (2016) 24 *African Journal of International and Comparative Law* 215.

While its conclusions can be said reasonably to have been founded on the text of the SADC Treaty and the Protocol thereto creating the Tribunal, the Commission's decision (in a complaint brought against SADC Heads of State for dismantling the SADC Tribunal)[109] that it did "not find any Charter obligation on the respondent [SADC] States to guarantee the independence, competence and institutional integrity of the SADC Tribunal"[110] was particularly curious. This curiosity given the stated commitment to justice[111] of both the African Charter and the SADC Treaty. Amongst others, the Commission's decision was founded on the determination that while SADC member States were under an obligation to provide recourse to competent tribunals in fulfilment of citizens' rights of appeal, such rights of appeal would only be to national courts because Article 7 specifically provides that the right to appeal is to appeal "to a competent national authority." This view failed however to adequately consider Article 26 where the obligation of SADC members to "guarantee the independence of the Courts" is not so constrained and would appear to apply to all courts – national and international.[112]

The Commission's decision may be said to have been not inconsistent with the letter of SADC obligations but the Commission could also have advanced the cause of human rights by holding – as has been properly argued – that while international courts such as the SADC Tribunal go beyond fulfilment of a right of access to courts under international law and represent an extra undertaking by States, such States cannot at the same time do with such courts (from which there is a reasonable expectation of justice) as they wish. The Commission not having explained how justice can be achieved in the absence of such fundamental safeguards for courts as independence, competence and institutional integrity, the answer to that question will remain a mystery.[113]

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109 See Communication 409/12, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others,* available at http://www.achpr.org/files/sessions/54th/comunications/409.12_/achpr54_409_12_eng.pdf accessed 28 November 2018, at paragraph 144. As background see *Mike Campbell (Pvt) Ltd and 79 Others v. the Republic of Zimbabwe* SADC Case No. SADC (T) 11/08.

110 See Communication 409/12 *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Note 109 above at paragraph 144.

111 See Jeremy Sarkin, "A Critique of the Decision of the African Commission on Human and People's Rights Permitting the Demolition of the SADC Tribunal: Politics versus Economics and Human Rights," Note 108 above at 224 – 240.

112 See Communication 409/12 *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Note 109 above at paragraph 139 – 146.

113 See Nicole Fritz, "Human Rights Litigation in Southern Africa: Not Easily Able to Discount Prevailing Public Opinion," Note 107 above. As Fritz notes:

> With hindsight, it seems clear that the Zimbabwean land cases should ideally never have been among the first cases heard by the Tribunal. All courts will find it difficult to withstand sustained political pressure, but new courts- domestic, regional or international - are particularly fragile creatures. They hold neither a sword nor a purse and depend for their survival on something much more ephemeral: an acceptance of their legitimacy and authority. As new courts cultivate, in their early years, this culture of acceptance, they can ill-afford to take on the most politically contentious matters - unless they can be assured, as was South Africa's Constitutional Court, that the backlash provoked will be controlled.

The move by the AU's Executive Council in mid-2018 to modify the African Commission's mandate and review the interpretative mandate of the ACHPR "in light of a similar mandate exercised by the African Court and the potential for conflicting jurisprudence",[114] seemingly innocuous, suggests that the whispers in the corridors of the Commission's seat in Banjul about existential risks in incurring the wrath of the political body were not completely unfounded.[115] This more recent move, which – from other whispers in the corridors of the AU headquarters – has been said, admittedly without hard proof, to be motivated by the Commission's 'effrontery' in granting the Coalition of African Lesbians (CAL) observer status and defying the AU Executive Council's directives to withdraw the accreditation.[116] The fact that the Commission has since heeded the Executive Council and has withdrawn observer status accreditation from CAL is a testament to the existentialist threat reasonably perceived from the AU's actions and pronouncements.[117]

2.3.2 Courts Established by the (O)AU.

Beyond the African Commission, the Courts established by the (O)AU appear not either to be reasons for the international criminal justice community to be confident about the AU's protestations about eschewing impunity. Of the three courts that have already been established by the (O)AU (the Expanded African Court would be the fourth), only one is currently operational. This represents neither a favourable testament to the AU's foresight nor its capacity to follow through on empowering the accountability mechanisms it creates.[118]

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[114] See Decision EX.CL/Dec.1015(XXIII). In April 2015, the African Commission had, to the delight of the LGBT community, granted observer status to the Coalition of African Lesbians (CAL), an NGO based in South Africa. Alleging incoherence with African values, the AU's Executive Council, at its summit in June 2015, instructed the Commission to withdraw the NGO's observer status (Decision EX.CL/887(XXVII)). With the support of the Centre for Human Rights at the University of Pretoria, CAL filed suit before the African Court on Human Rights in November 2015, seeking an advisory opinion on the legality of the Executive Council directive. The Court declined to render such opinion, citing the NGO's *locus standi*, in September 2017. Following the Commission's refusal to abide by further requests from the Executive Council to withdraw CAL's accreditation (Decision EX.C/Dec.995(XXXII)), the AU's Executive Council decided to get tough.

[115] See Jeremy Sarkin, "A Critique of the Decision of the African Commission on Human and People's Rights Permitting the Demolition of the SADC Tribunal: Politics versus Economics and Human Rights," Note 108 above at 224 – 240

[116] See Japhet Biegon, "The Rise and Rise of Political Backlash: African Union Executive Council's decision to review the mandate and working methods of the African Commission," *EJILTalk* (2 August 2018), available at https://www.ejiltalk.org/the-rise-and-rise-of-political-backlash-african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/#more-16384 accessed 28 November 2018.

[117] For a detailed chronology of the Executive Council's tussle with the African Commission on the observer status of the Coalition of African Lesbians, see International Justice Resource Centre, *African Commission Bows to Political Pressure, Withdraws NGO's Observer Status* (August 28, 2018). Available at https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/

[118] See Garth Abraham, "Africa's Evolving Continental Court Structures: At the Crossroads?" (2015) *South African Institute of International Affairs* Occasional Paper 209 at 10 – 11, available at http://www.saiia.org.za/wp-content/uploads/2015/02/saia_sop_209_-abraham_20150202.pdf accessed 8 August 2018. See also Max du Plessis and Lee Stone, "A Court Not Found," (2007) 7 *Africa Human Rights Law Journal* 522. See also Nsongurua

2.3.2.1 The African Court on Human and Peoples' Rights (ACHPR).

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (which gives the Court jurisdiction over all cases and disputes concerning the interpretation and application of the Charter, its foundational Protocol and any other relevant Human Rights instrument ratified by the States concerned)[119] was adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou in June 1998[120] and entered into force on January 25, 2004, thirty days after the deposit of the fifteenth instrument of ratification.[121] Fifty States have signed and thirty States have ratified the Protocol and are currently members of the Court but only a mere seven have deposited a declaration in conformity to Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[122]

The first judges of the African Court were elected on January 22, 2006 at the Eighth Ordinary Session of the Executive Council of the African Union, held in Khartoum, Sudan.[123] The Court officially started operations in Addis Ababa, Ethiopia, in

J Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late Than Never" (2000) 3(1) *Yale Human Rights and Development Journal* 45.

119 See Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

120 See Resolution on the Ratification of the Additional Protocol on the Creation of the African Court of Human and Peoples' Rights, 12th Ann. Activity Report of the African Commission on Human and Peoples' Rights, annex IV, at 28 (1998–1999).

121 See List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (updated on 31 October 2018) at official website of the African Court on Human and Peoples' Rights - http://en.african-court.org/images/Basic%20Documents/Statuts_of_the_Ratification_Process_of_the_Protocol_Establishing_the_African_Court.pdf accessed 1 June 2016.

122 Article 34(6) permits relevant NGOs with observer status before the Commission and individuals to have legal standing to institute cases directly before it. See List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (updated on 23 July 2013) at official website of the African Court on Human and Peoples' Rights - http://en.african-court.org/images/Basic%20Documents/Statuts_of_the_Ratification_Process_of_the_Protocol_Establishing_the_African_Court.pdf accessed 1 June 2016.

123 See Decision on the Election of Judges of the African Court on Human and Peoples' Rights – Doc. EX.CL/241 (VIII) [EX.CL/Dec.261 (VIII)], available at https://www.au.int/en/sites/default/files/decisions/9639-ex_cl_dec_236_-_277_viii_e.pdf accessed 28 November 2018.

November 2006 but moved to Arusha, Tanzania in August 2007,[124] where it heard its first case in 2008.[125]

A decent impression of the Court's performance to date may be gleaned from data from the Court's Registry on contentious matters. Out of a total of 180 applications received as of April 30, 2019 (from inception), the Court had dealt with and finalized 48 and transferred four to the African Commission in Banjul. The count of pending applications stands at 128, almost three times the number of matters the Court has dispensed with thus far.[126] It is not intended here to dwell on the performance of the Court so suffice it to say that the view that it is ill resourced and poorly equipped – borne out by data from the Registry – is a fairly common view among scholars and court watchers.[127]

2.3.2.2 The African Court of Justice (ACJ).

The Protocol of the Court of Justice of the African Union,[128] the second court, was adopted shortly after the 2002 launch of the African Union, on July 1, 2003 by the Second Ordinary Session of the Assembly of Heads of States and Governments in Maputo, Mozambique,[129] upon the recommendations of the Executive Council.[130] The Protocol came into force on February 11, 2009 and as of October 31, 2018, had received forty-four signatures and eighteen ratifications,[131] three more than the fifteen required to make it effective.[132]

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124 See Report of the African Court on Human and Peoples' Rights presented at the Thirteenth Ordinary Session of the Executive Council, 24 – 28 June 2008, Sharm El-Sheikh, Egypt, EX.CL/445 (XIII) at paragraph 21; available at http://en.african-court.org/index.php/publications/activity-reports, accessed 2 June 2016.

125 See Application No. 001/2008 *Michelot Yogogombaye v. The Republic of Senegal* available at http://en.african-court.org/index.php/55-finalised-cases-details/832-app-no-001-2008-michelot-yogogombaye-v-republic-of-senegal-details accessed 28 November 2018.

126 See List of Contentious Matters on website of African Court of Human and Peoples' Rights, available at http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21 accessed 28 November 2018.

127 George Mukundi Wachira, *African Court on Human and Peoples' Rights: Ten Years on and Still No Justice* (2008) Minority Rights Group International, available at https://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf accessed 28 November 2018.

128 See Protocol of the Court of Justice of the African Union, available at https://au.int/sites/default/files/treaties/7784-treaty-0026_-_protocol_of_the_court_of_justice_of_the_african_union_e.pdf accessed 28 November 2018.

129 Decision on the Protocol of the Court of Justice of the African Union, AU. Doc. Assembly/AU/Dec.25 (II), available at https://www.au.int/en/sites/default/files/decisions/9548-assembly_en_10_12_july_2003_auc_the_second_ordinary_session_0.pdf accessed 28 November 2018.

130 Decision on the Draft Protocol of the Court of Justice, AU Doc. Dec.EX/CL/58 (III).

131 See List of Countries which have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the African Union, available at http://www.au.int/en/sites/default/files/treaties/7784-sl-court_of_justice.pdf accessed 2 June 2016.

132 See Article 60 of the Protocol of the Court of Justice of the African Union, Note 128 above.

Although the Protocol birthing it entered into force in 2009, the African Court of Justice[133] appears to have been aborted or is, in the words of Abass, still born.[134] This is essentially because even at the time when the ACHPR Protocol entered into force in 2004 and before the Court started sitting in 2008, the AU Assembly had started to discuss a merger of the two courts – the effect of which was to significantly slow down the pace of ratifications for the ACJ. There is no reason to believe therefore that this court will ever be operationalized.[135]

2.3.2.3 The African Court of Justice and Human Rights (ACJHR).

The third court to be created by the (O)AU was the African Court of Justice and Human Rights. On 1 July 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights[136] at the Eleventh Ordinary Session of the Assembly of Heads of States and Governments in Sharm El-Sheikh, Egypt.[137] This Protocol would merge the currently operational African Court of Human and Peoples' Rights and the aborted Court of Justice of the African Union. As of October 31, 2018, the Protocol had been signed by thirty-one countries and ratified by six out of the fifteen countries that would be required to make the Protocol effective.[138]

Per the Protocol, the ACJHR would act as a dual-chamber court consisting of a General Affairs and a Human Rights Section

133 Per Article 19 of the Protocol of the Court of Justice of the African Union, the Court has jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which relate to: "(a) the interpretation and application of the Act; (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union; (c) any question of international law; (d) all acts, decisions, regulations and directives of the organs of the Union; (e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court; (f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; and, (g) the nature or extent of the reparation to be made for the breach of an obligation" as well as any additional jurisdiction over disputes that the Assembly may confer on the Court.

134 See also Ademola Abass, "The Proposed Criminal Jurisdiction for the African Court: Some Problematical Aspects," (2013) 60 *Netherlands International Law Review* 27, at 30 – 31.

135 Kristen Rau, "Jurisprudential Innovation or Accountability Avoidance - The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights," (2012) 97 *Minnesota Law Review* 669, at 677 – 679.

136 See Protocol on the Statute of the African Court of Justice and Human Rights, available at https://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf accessed 28 November 2018.

137 See Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the African Court of Justice, Assembly/AU/Dec.196 (XI) (Doc.Assembly/AU/13 (XI)), available at https://www.au.int/en/sites/default/files/decisions/9558-assembly_en_30_june_1_july_2008_auc_eleventh_ordinary_session_decisions_declarations_tribute_resolution.pdf accessed 28 November 2018.

138 See List of Countries which have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights, available at https://www.au.int/en/sites/default/files/treaties/7792-sl-protocol_on_statute_of_the_african_court_of_justice_and_hr_0.pdf accessed 28 November 2018.

and would be seized with two types of cases: actions instituted against States in respect of failures to preserve human rights and cases arising from the interpretation and adjudication of the rights and obligations accruing to parties under the Constitutive Statute of the AU and a plethora of continental treaties.[139]

While there was a logic to the proposed merger[140] there was also a legitimate concern that the scope of jurisdiction was too broad[141] and the number of judges too few.[142] For having much broader jurisdiction than the Inter-American Court of Human Rights and the European Court of Human Rights, but with predictably significantly fewer resources, there was a real concern that the Court would be ineffective.[143]

With 5 ratifications and with the AU focused on delivering an African Court with international criminal jurisdiction, the African Court of Justice and Human Rights will likely never see the light of day. As with the ACJ, the pace of accession to the ACJHR has been severely limited because of discussion within, and the drafting and adoption by, the AU of a Protocol for creation of a new Court that would render the Statute creating the ACJHR moot.[144]

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139 See Article 16 of Protocol on the Statute of the African Court of Justice and Human Rights, Note 247 above. See also Michelo Hansungule, "African courts and the African Commission on Human and Peoples' Rights," available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.490.6079&rep=rep1&type=pdf accessed 28 November 2018.

140 See Frans Viljoen and Evariste Baimu, "Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice," (2004) 22(2) *Netherlands Quarterly of Human Rights* 241, at 252.

141 See Article 28 of the Protocol on the Statute of the African Court of Justice and Human Rights. The very broad jurisdiction conferred on the Court by the Protocol includes the interpretation, application or validity of all AU Treaties and all subsidiary legal instruments adopted within the framework of the AU or the OAU; the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned; as well as any question of international law. See also Frans Viljoen and Evariste Baimu, "Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice," Note 140 above.

142 See Nsongurua Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?" (2003) 28 *Brooklyn Journal of International Law* 811, at 835. See Frans Viljoen and Evariste Baimu, "Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice," Note 140 above, at 252.

143 See Frans Viljoen "AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol" *AfricLaw Blog,* 23 May 2012. See also Kidanemariam Fekadeselassie, "Enforcement of Human Rights under Regional Mechanisms: a Comparative Analysis," (2006) *LLM Theses and Essays,* Paper 80, available at http://digitalcommons.law.uga.edu/stu_llm/80 accessed 28 November 2018.

144 See Parusha Naidoo and Tim Murithi, "The African Court of Justice and Human Rights and the International Criminal Court: Unpacking the political dimensions of concurrent jurisdiction" *Institute for Justice and Reconciliation Policy Brief No. 20* (October 2016), available at http://ijr.org.za/home/wp-content/uploads/2016/11/IJR-Brief-No-20-web-ready.pdf accessed 28 November 2018.

2.3.3 Priming the Expanded African Court to Fail.

The Expanded African Court to be established under the Malabo Protocol, would be the first court, ever, that would combine State-level accountability frameworks for preservation of human rights, a platform for inter-State dispute settlement and an accountability mechanism for individual criminal liability under international law.[145]

With respect to its international criminal jurisdiction, a primary concern presented by commentators lies in the fact that although the Expanded African Court would have much broader jurisdiction *ratione materiae* than the ICC,[146] it would have overlapping jurisdiction with the ICC over the latter's jurisdiction *ratione materiae*.[147] Because such overlap with a regional court had not been foreseen by the Rome Statute[148] and because the Malabo Protocol failed to even acknowledge the existence of the Rome Statute,[149] the likelihood of conflict and the risk of inconsistent international criminal jurisprudence – present in every instance where courts have overlapping jurisdiction *ratione materiae* – would need to be addressed.[150]

With the benefit of being able to assess the AU's competence, and previous experience (or the lack thereof) in setting up such accountability platforms as courts, commentators have legitimately also raised concerns of a more practical – as opposed to theoretical – nature.[151] The likely work load and dearth of resources had already been seen as challenges that would likely render the dual-chamber of the African Court of Justice and Human Rights ineffective[152] so the proposal to create a tri-chamber court has predictably prompted no elation from commentators.[153] A tri-chamber court with significantly broader

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145 Kristen Rau, "Jurisprudential Innovation or Accountability Avoidance - The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights," Note 135 above.

146 See Articles 3, 14 and 28 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), available at https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf accessed 28 November 2018.

147 See Articles 5 – 8 of the Rome Statute of the International Criminal Court, available at http://www.un.org/law/icc/index.html accessed 28 November 2018.

148 Kristen Rau, "Jurisprudential Innovation or Accountability Avoidance - The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights," Note 135 above.

149 Max du Plessis, "Implications of the AU Decision to give the African Court Jurisdiction over International Crimes," (June 2012) *Institute for Security Studies* Paper 235.

150 See Ademola Abass, "The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects," Note 134 above.

151 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

152 Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 20 above.

153 See Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 20 above. See also Amnesty International, *Malabo Protocol: Legal and Institutional Implications*

jurisdiction *ratione materiae* and the same number of judges – sixteen – as the still born dual-chamber court is arguably a wilful disregard by the AU for conditions that would make the Court effective.[154] The implications of this warrant further examination.

2.3.3.1 Jurisdiction *Ratione Materiae* of the Expanded African Court.

The scope of the jurisdiction *ratione materiae* of the Expanded African Court, to be exercised across its three sections – a General Affairs Section, a Human and Peoples' Rights Section and an International Criminal Law Section[155] – can only be described as overwhelming or, in the words of Amnesty International, breath-taking.[156]

Article 17 of the Malabo Protocol, which seems innocuous enough, states as follows:

> 1. The General Affairs Section shall be competent to hear all cases submitted under Article 28 of the Statute except those assigned to the Human and Peoples' Rights Section and the International Criminal Law Section as specified in this Article.
> 2. The Human and Peoples' Rights Section shall be competent to hear all cases relating to human and peoples' rights.
> 3. The International Criminal Law Section shall be competent to hear all cases relating to the crimes specified in this Statute.[157]

It is upon consideration of Article 28 that the magnitude of the scope of jurisdiction becomes apparent. Limited to cases that are not assigned to the Human and Peoples' Rights Section or the International Criminal Law Section as specified, the range of jurisdiction of the General Affairs Section is prodigiously broad. It shall be seized of all matters arising from the interpretation and application of the Constitutive Statute of the AU,[158] the interpretation application and determination of the validity of all (O)AU treaties and all subsidiary legal

of the Merged and Expanded African Court, Note 23 above. See also Ademola Abass, "The Proposed Criminal Jurisdiction for the African Court: Some Problematical Aspects, Note 134 above.

154 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

155 See Article 16 of the Malabo Protocol.

156 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

157 See Article 17 of the Malabo Protocol.

158 See Article 28(a) of the Malabo Protocol.

instruments adopted thereunder;[159] any questions of international law,[160] all acts, decisions, regulations and directives of AU organs;[161] all matters for which AU States parties confer jurisdiction on the Court;[162] the adjudication of rights and obligations accruing to member States from the AU Statute and other instruments;[163] and, the adjudication of the nature and value of reparations payable for the breach of international obligations by State parties.[164]

The Human and Peoples' Rights section shall, per Article 28, be seized with matters arising from the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa or any other legal instrument relating to human rights, ratified by the States Parties concerned.[165] This latter plank of jurisdiction over human rights matters is not restricted to matters arising from AU human rights instruments but rather from the universe of human rights instruments that may have been ratified by AU member States.[166]

The International Criminal Law Section, which would deliver the novelty in international criminal law of a permanent regional criminal tribunal is cloaked with a jurisdiction which exhibits little trepidation or caution. While jurisdiction *ratione materiae* of such criminal tribunals as the ICTY[167] the ICTR[168] have focused on three principal crimes, genocide, war crimes and crimes against humanity (the Rome Statute of the ICC adds aggression),[169] Article 28 of the Malabo Protocol bequeaths upon the Expanded African Court jurisdiction over

159 See Article 28(b) of the Malabo Protocol.

160 See Article 28(d) of the Malabo Protocol.

161 See Article 28(e) of the Malabo Protocol.

162 See Article 28(f) of the Malabo Protocol.

163 See Article 28(g) of the Malabo Protocol.

164 See Article 28(h) of the Malabo Protocol.

165 See Article 28(c) of the Malabo Protocol.

166 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

167 See Statute of the International Tribunal for the Former Yugoslavia, Adopted on 25 May 1993 by UN Security Council Resolution 827, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf accessed 28 November 2018.

168 See Statute of the International Criminal Tribunal for Rwanda, Adopted on 8 November 1994 by UN Security Council Resolution 955, available at http://legal.un.org/avl/pdf/ha/ictr_EF.pdf accessed 28 November 2018.

169 Apart from genocide, war crimes and crimes against humanity, the ICC includes jurisdiction over the crime of aggression, which remains undefined under the Rome Statute. See Coalition for the International Criminal Court, Factsheet: The Crime of Aggression within the Rome Statute of the International Criminal Court (2015), available at http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/ciccfactsheet_crimeofaggression_oct2017.pdf accessed 28 November 2018.

fourteen crimes comprising a range of international, transnational and more *quotidien* crimes such as corruption.

More specifically the Criminal Law Section will have jurisdiction over Genocide;[170] Crimes Against Humanity;[171] War Crimes;[172] the Crime of Unconstitutional Change of Government;[173] Piracy;[174] Terrorism;[175] Mercenarism;[176] Corruption;[177] Money Laundering;[178] Trafficking in Persons;[179] Trafficking in Drugs;[180] Trafficking in Hazardous Wastes;[181] Illicit Exploitation of Natural Resources;[182] the Crime of Aggression,[183] and inchoate offences deriving from each of the afore-listed crimes.[184] Remarkably, the Protocol provides opportunity for the Criminal Section's jurisdiction to be extended even further through State-Party consensus.[185]

Admittedly expansive and unwieldy, the range of jurisdiction *ratione materiae* that the Expanded African Court may exercise is not completely irrational or without reason.[186] The first of the reasons would be the undeniable fact that there are a range of international and trans-national crimes that are of little interest to the international community generally but are of critical importance to Africa.[187] The second would be

170 See Article 28 B of the Malabo Protocol.

171 See Article 28 C of the Malabo Protocol.

172 See Article 28 D of the Malabo Protocol.

173 See Article 28 E of the Malabo Protocol.

174 See Article 28 F of the Malabo Protocol.

175 See Article 28 G of the Malabo Protocol.

176 See Article 28 H of the Malabo Protocol.

177 See Article 28 I of the Malabo Protocol.

178 See Article 28 I *bis* of the Malabo Protocol.

179 See Article 28 J of the Malabo Protocol.

180 See Article 28 K of the Malabo Protocol.

181 See Article 28 L of the Malabo Protocol.

182 See Article 28 L *Bis* of the Malabo Protocol.

183 See Article 28 M of the Malabo Protocol.

184 See Article 28 N of the Malabo Protocol.

185 See Article 28 A (2) of the Malabo Protocol.

186 See Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges." Note 98 above at page 940.

187 The crime of unconstitutional change of Government would be one such crime. Per the African Union (AU) Committee on Unconstitutional Changes, unconstitutional changes of government occur in the following circumstances – (a) intervention by mercenaries to replace a democratically elected government; (b) replacement of a democratically elected government by armed dissident groups and rebel movements; (c) refusal by an incumbent government to relinquish power to the winning party after free and fair elections. See Oluwaseun Bamidele and Bonnie Ayodele, "In the Service of Democratic Governance: The African Union Normative Framework on Unconstitutional Change of Government and ECOWAS Protocol on Good Governance and Democracy in the Post-Arab Spring" (2016) 53(1) *Journal of Asian and African Studies* 132. Another would be Trafficking in Hazardous Waste. See *Sandra Aya Agouman v. Leigh Day* [2016] EWHC 1324. See also Gary

that several (O)AU treaties and conventions, have outlawed – upon pain of penal sanction – a range of crimes for which there is no court to ensure adherence to obligations thereunder.[188] As Abass notes:

> Without conferring on its court jurisdiction to prosecute international crimes, the AU will permanently face a rather absurd situation in which its member states recognize the existence of a crime in their region – a crime that they regard as very serious, as their practice dating back at least two decades shows – but one that the Union's court cannot prosecute.[189]

Notwithstanding the fact that there may be good reason for the criminal section of the Court and the scope of its jurisdiction *ratione materiae*, it is the limited capacity that the Expanded African Court is endowed with that raises concerns.

2.3.3.2 Bench of the Expanded African Court.

That the Expanded African Court, with its three chambers, will have the same number of judges as the dual chambered African Court of Justice and Human Rights was intended to have is a curiosity, the logic of and rationale for which is not obvious to scholars and commentators.[190]

Per the Malabo Protocol, five judges shall be elected from amongst candidates on list A (names of candidates having recognized competence and experience in International law), five judges shall be elected from amongst candidates on list B (names of candidates having recognized competence and experience in international human rights law and international humanitarian law and six judges shall be elected from amongst the candidates of list C (names of candidates having recognized competence and experience in international criminal law respectively).[191] Given the particular competencies of the five judges from list B (human rights

Cox, "The Trafigura Case and the System of Prior Informed Consent Under the Basel Convention – A Broken System?" (2010) 6(3) *Law, Environment and Development Journal* 263.

188 See for instance the OAU Convention for the Elimination of Mercenarism in Africa, Adopted on 3 July 1977 in Libreville, Gabon, and entered into force on 22 April 1985. As of 31 October, 2018, the Convention had been signed by 36 countries and ratified by 32, available at https://www.au.int/en/treaties/convention-elimination-mercenarism-africa accessed 28 November 2018. See also the Article 4h obligations in the Constitutive Act of the African Union, available at https://www.au.int/en/treaties/constitutive-act-african-union accessed 28 November 2018.

189 Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," Note 98 above at 940.

190 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

191 See Article 4 of the Malabo Protocol.

expertise) and the six judges from list C (international criminal law expertise), one can presume with a fair degree of confidence that the five judges from List A are destined for the General Affairs Section. This would give the Expanded African Court a grand total of sixteen judges.

While the AU has never had an operational continental court with jurisdiction of the kind conferred upon the General Affairs Section (the ACJ would have had similar jurisdiction), there are other courts, such as the European Court of Justice (ECJ) against which parallels may be drawn.

Charged principally with adjudicating over matters of EU law and rights and obligations accruing to member States *inter se* as well as between member States and the EU Commission,[192] the ECJ, is a unique court, which arguably exercises, in part, the jurisdiction conferred upon the General Affairs section of the Expanded African Court. To play this role, the ECJ comprises 28 Judges, one from each of the EU's 28 members (from 2019, there will be 56 judges or two from each country).[193] The work of the judges is made significantly easier by the fact that they may also call upon the assistance of Advocates General who may, upon request, present legal opinions on the cases assigned to them.[194]

It may be argued that the ECJ is a unique Court ill-suited for comparison but what cannot be argued away is why the General Affairs section is required, under the Malabo Protocol to do with five judges what the ACJ would have done with eleven.[195]

For the Human Rights Section of the Expanded African Court, the African Court on Human and Peoples' Rights provides a more comparable basis for assessing the appropriateness of the five judges who shall sit in the Human Rights Section of the Court as the Malabo Protocol does not change its subject matter jurisdiction in any material way.[196]

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192 See European Parliament Fact Sheet, The Court of Justice of the European Union, available at http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.9.pdf accessed 28 November 2018.

193 See European Parliament Fact Sheet, The Court of Justice of the European Union, Note 192 above.

194 See European Parliament Fact Sheet, The Court of Justice of the European Union, Note 192 above.

195 See Article 3 of the Protocol of the Court of Justice of the African Union.

196 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Article 3 thereof establishes the court's jurisdiction as extending to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

With a current bench of eleven judges,[197] more than twice what the Malabo Protocol proposes for the Human Rights Section, the African Court of Human Rights has been described as, among others, inadequately resourced to perform optimally.[198] This is borne out by the case statistics from the Court's Registry.[199]

There is little reason to believe in the circumstances that adjudication of human rights cases – undertaken thus far by the African Court on Human and Peoples' Rights – will improve when the Human Rights Section of the Expanded African Court takes over this role but with less than half of the judges in the African Court.[200] Requiring a quorum of only seven judges,[201] the Rules of the African Court on Human Rights permitted the President to constitute the benches in such a way as to maximize the number of cases heard. With a bench of five, the Human Rights Section of the Expanded African Court would seem not to have this luxury.

With respect to the International Criminal Section, Amnesty International has noted with alarm that:

> The international crimes section will perhaps be the most affected by the shortage of judges. This raises questions around the capacity of the Court to deliver justice with any form of relative speed. The experience of the ICC shows that for a case to proceed from the pre-trial to the appellate stage, a total of eleven judges are required: three judges are required for the pre-trial chamber, three for the trial chamber, and five for the appellate chamber. However, in order to deal with the Court's workload, the ICC has eighteen judges. Of these, the five appellate judges can only be assigned to the Appeal's Chamber, with the other judges being assigned to pre-trial and trial chambers. Judges in the pre-trial and trial chambers can be temporarily attached to the other, provided that a pre-trial judge cannot serve on the same proceeding at the trial phase.[202]

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197 See Article 11 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Note 196 above.

198 George Mukundi Wachira, *African Court on Human and Peoples' Rights: Ten Years on and Still No Justice*, Note 127 above.

199 See List of Contentious Matters on website of African Court of Human and Peoples' Rights, available at http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21 accessed 28 November 2018.

200 See Frans Viljoen and Evariste Baimu, "Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice," Note 140 above.

201 See Rule 17 of the Rules of Court, African Court on Human and Peoples' Rights, available at http://www.african-court.org/en/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf accessed 28 November 2018.

202 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

Per Article 10(3) – (5) of the Malabo Protocol, the Pre-Trial Chamber of the Court shall be manned by one person, the Trial Chamber shall be constituted by three judges and the quorum for the Appeals Chamber shall be five judges. Even with such frugal deployment of judges,[203] there is little doubt that there is an insufficient number of judges to see a case through from the indictment phase in a Pre-Trial Chamber to the post-trial appeals phase. With only six judges in the International Crimes Section, it appears that the drafters of the Malabo Protocol have an abiding, yet wholly unsustainable faith, not only that the members of the bench shall be immune from the misfortune of infirmity but also that the Court's caseload will be sufficiently limited to permit a trial to be dispensed with before another begins.[204]

Beyond that, the risk of cross contamination[205] that will arise in the case of judges sitting in more than one stage of the trial – as the Malabo Protocol clearly anticipates – will undoubtedly compromise any belief that the court can deliver a fair trial.[206] Could, for instance, the three out of five judges in the Appeals Chamber who would necessarily also have sat either in pre-trial proceedings or in the Trial Chamber be capable of being seen as fair by counsel for a convicted accused? The fact that such fundamental questions were not addressed before the Protocol was adopted by the AU validates the concerns raised by commentators and the international criminal justice community.

2.3.3.3 Financing the Expanded African Court.

Yet another source of concern about the AU's commitment to accountability and the ability of the Expanded African Court to fulfil its mandate has been the question of financing for the court[207] – a question made all the more relevant because of the AU's reliance on donor funds as a consequence of the persistent dearth of resources the AU itself and its institutions

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203 See Article 4(3) of the Malabo Protocol. See, for comparison, Article 39 of the Rome Statute of the ICC.

204 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

205 Cross-contamination of a bench occurs when a judge in a case is assigned to sit on the bench of a different phase of the same case – as would be the case when a Pre-Trial Judge sits in the Trial Chamber.

206 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

207 Max du Plessis, "Implications of the AU decision to give the African Court jurisdiction over international crimes," Note 149 above.

and organs have endured.[208] According to a report prepared by Paul Kagame,[209] upon commission by the AU:[210]

> In 2014, the African Union's budget was US$308 million, more than half of which was funded by donors. In 2015, it rose by 30 per cent to US$393 million, 63 percent of which was funded by donors. In 2016, donors contributed 60 percent of the US$417 million budget. In 2017, member states are expected to contribute 26 percent of the proposed US$439 million budget, while donors are expected to contribute the remaining 74 percent.[211]

Although a positive development which saw a fivefold increase in its budget from the previous year,[212] the fact that it took the African Commission on Human and People's Rights twenty-two years to get its own budget,[213] instead of being funded out of the budget of the AU Commission's Political Affairs Department,[214] is a testimony to the reason for concern.[215]

A dearth of funding has similarly dogged the African Court on Human and Peoples Rights,[216] which has been compelled to rely substantially on resources from donors and development

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208 See Frans Viljoen "A Human Rights Court for Africa, and Africans" (2004) 30 *Brooklyn Journal of International Law,* 1.

209 H.E. Paul Kagame, *The Imperative to Strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union*, African Union (29 January 2017), available at http://www.rci.uct.ac.za/sites/default/files/image_tool/images/78/News/FInal%20AU%20Reform%20Combined%20report_28012017.pdf accessed 28 November 2018.

210 See Assembly/AU/Dec.606 (XXVII), Decision on the Institutional Reform of the African Union, available at https://au.int/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pdf accessed 28 November 2018.

211 H.E. Paul Kagame, *The Imperative to Strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union*, Note 209 above.

212 The USD 6 million the African Commission received in 2008 was five times the USD 1.2 million it had received in 2007 from the budget of the AU Commission's Political Affairs Department. See Japhet Biegon and Magnus Killander, "Human rights developments in the African Union during 2008," (2009) 9 *African Human Rights Law Journal* 295 at, 297. See also 23rd Activity Report of the African Commission on Human and Peoples' Rights at paragraph113, See also 24th Activity Report of the African Commission on Human and Peoples' Rights, paragraph 246.

213 In July 2007, the AU Executive Council directed the African Commission to present and defend its own budget before the Permanent Representatives' Committee (PRC). See EX-CL/Dec.344 (X): Decision on the 21st Activity Report of the African Commission on Human and Peoples' Rights, 2(iv).

214 See Decision on the 21st Activity Report of the African Commission on Human and Peoples' Rights, Note 213 above.

215 See Max du Plessis, "Implications of the AU decision to give the African Court jurisdiction over international crimes," Note 149 above.

216 George Mukundi Wachira, *African Court on Human and Peoples' Rights: Ten Years on and Still No Justice*, Note 127 above.

partners.[217] The 2017 mid-term activity report of the Court[218] shows its approved budget as USD10,315,284, comprising USD8,709,318 (84%) from AU members States and USD1,605,966 (16%) from International Partners.[219] This budget pales in comparison to the budgets of similar Courts such as the ECHR,[220] which – with jurisdiction over fewer States and narrower jurisdiction *ratione materiae* – received 71,279,600 Euros in 2017,[221] 71,175,800 Euros in 2016,[222] 69,438,200 Euros in 2015[223] and 67,650,400 Euros in 2014.[224]

Because of the more exacting standards for establishing culpability, and the need to fund international investigations,[225] defence counsel,[226] ultra-secure detention facilities[227] and expansive witness protection programs,[228]

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217 Of the USD 12 million (approx.) budget of the African Court for 2012, approximately 20% was to be raised from donors/development partners. See EX.CL/783(XXII) Report on the Activities of the African Court on Human and People's Rights Annual report of the African Court on Human and Peoples' Rights, 2013, available at http://www.african-court.org/en/images/Activity%20Reports/EXECUTIVE%20COUNCIL%20Twenty-Second%20Ordinary%20Session%2021%20%2025%20January%202013%20Addis%20Ababa%20ETHIOPIA%20REPORT%20ON%20THE%20ACTIVITIES%20OF%20THE%20AFRICAN%20COURT%20ON%20HUMAN%20AND%20PEOPLES%20RIGHTS.pdf accessed 14 December 2018.

218 See African Court on Human and Peoples Rights, *Mid -Term Activity Report of the African Court on Human and Peoples' Rights 1 January – 30 June 2017*, appended to Oliver Windridge, "The Results Are In: The African Court's 2017 Mid-Year Report Analysed" *The ACtHPR Monitor* (1 August 2017), available at http://www.acthprmonitor.org/the-results-are-in-the-african-courts-2017-mid-year-report-analysed/ accessed 28 November 2018.

219 See Note 218 above.

220 Per Article 50 of the European Convention on Human Rights, the Council of Europe funds the ECHR from its budget. The Court's budget for 2018 is 71,670,500 Euros. For further particulars see the ECHR budget on the Council of Europe website: https://www.echr.coe.int/Documents/Budget_ENG.pdf accessed 28 November 2018.

221 Comité de Ministres, *Programme et Budget 2016-2017 du Conseil De l'Europe*, Conseil de l'Europe (December 2015). Tableau 1, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c054b accessed 28 November 2018.

222 See *Programme et Budget 2016-2017 du Conseil De l'Europe*, Note 221 above.

223 Ministers' Deputies, *Council of Europe Programme and Budget 2014-2015*, Council of Europe (December 2014), available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804bd606 accessed 28 November 2018.

224 See *Council of Europe Programme and Budget 2014-2015*, Note 223 above. See also 2014 Annual Report, European Court of Human Rights, at 14, available at http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf accessed 28 November 2018.

225 See David Wippman, "The Costs of International Justice," (Oct. 2006) 100(4) *The American Journal of International Law* 861. See also Rupert Skilbeck, "Funding Justice: The Price of War Crimes Trials," Note 207 above. See also Stuart Ford, "Complexity and Efficiency at International Criminal Courts," (2004) 29 *Emory International Law Review* 1.

226 Mark S. Ellis, "Achieving Justice before the International War Crimes Tribunal: Challenges for the Defense Counsel," (1997) 7 *Duke Journal of Comparative and International Law* 519. Ellis argues that the very low rates paid to defence counsel could compromise justice.

227 See Doreen Carvajal, *Accused of War Crimes and Living with Perks*, New York Times (3 June 2010), available at https://www.nytimes.com/2010/06/04/world/europe/04iht-hague.html accessed 28 November 2018.

228 Markus Eikel, "Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice," (2012) 23 *Criminal Law Forum* 97.

amongst others, international criminal courts are even more resource intensive than human rights courts. The average annual budgets for the ICTY and the ICTR were respectively in excess of US$100 million[229] and USD95 million,[230] and the Special Court for Sierra Leone, nick-named the shoe-string court,[231] was no laggard with an average annual budget of USD30 million.[232] Even the Extraordinary African Chambers within the Courts of Senegal, which were constituted to try just one person – Hissène Habré – and which, for being within Senegal's judiciary did not have to be built from scratch, had a budget of almost nine million Euros[233] over the duration of the trial and appeal.

To its credit, the AU appears to be conscious of the concerns about funding, even if it is not entirely clear from the reporting that it is conscious of the magnitude of the resource needs of an international criminal court.[234] At its 26th Ordinary Session in January 2015, the AU Executive Council, noted the imperative to "ensure predictable and sustainable funding" for the Expanded African Court.[235] The Executive Council committed also to raising, through a special fund, the resources required to operationalize the Court.[236] As Amnesty International has observed however:

> These twin efforts may possibly raise the resources to start off the operations of the Court, but it is doubtful whether they are sustainable sources of funding. The ideal source of funding for the Court should be the state parties themselves and/or the AU. Yet, the AU has traditionally struggled to

[229] The budget of the ICTY for the period 2014-2015 was USD179,998,600, USD250,814,000 for the period 2012-2013, and USD286,012,600 for the period 2010-2011. See http://www.icty.org/en/about/tribunal/the-cost-of-justice accessed 28 November 2018.

[230] See Mary Kimani, *Expensive Justice: Cost of Running the Rwanda Tribunal*, All Africa (5 April 2002), available at https://allafrica.com/stories/200204050232.html accessed 28 November 2018.

[231] See Avril McDonald, "Sierra Leone's shoestring Special Court," *IRRC* Vol. 84 No. 845 (March 2002), 121 – 143., available at https://www.icrc.org/eng/assets/files/other/121-144-mcdonald.pdf accessed 28 November 2018.

[232] See Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots (2017) at page 9, available at http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/amnesty_international-africa-malabo_protocol-2017.pdf accessed 28 November 2018. See also Mary Kimani, *Expensive Justice: Cost of Running the Rwanda Tribunal*, Note 230 above.

[233] The budget agreed by Senegal and various donor countries for Habré's trial was €8.6million or USD 11.4 million. See Human Rights Watch, Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal (3 May 2016), available at https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal#22 accessed 28 November 2018.

[234] See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

[235] See: Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (EX.CL/Dec.868(XXVI)), at paragraph xii.

[236] See: Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court EX.CL/Dec.868(XXVI), at paragraph xiv(b).

adequately finance the operations of its own institutions, including human rights treaty bodies.[237]

Given the marked antipathy to the immunity provision of the Malabo Protocol from the donor community,[238] there is little likelihood that traditional donors will be able to justify the funding of the Expanded African Court to the taxpayers of their countries who permit development financing.[239]

3. A Second Look at the AU's Pedigree for Accountability.

While in a 2018 submission to the Appeal Chamber of the ICC, the AU appears to acknowledge the effect of Article 27 of the Rome Statute,[240] it is true that the AU has strayed from the legitimate principles upon which its objections to the arrest by AU member States of Al Bashir were initially grounded. It is also true that the AU's pursuit of (in its words) a "withdrawal strategy" provides valid reason to question its fealty to accountability. And, it is also undeniable that, based on the AU's own history and record, as well as the structure proposed for the Court by the Malabo Protocol, the Expanded African Court is unlikely to have a workable operational framework or adequate resources to execute its mandate.

And yet, the picture that emerges from the foregoing and the constant refrain about the AU's impure motives – seemingly without nuance – is not fully reflective of reality. This part of the Chapter proposes to review other aspects of the ostensibly impunity-nurturing conduct of both the AU and its member States that may provide some much-needed colour and nuance to the afore-stated reasons for the perpetual flagellation of the AU.

3.1 Treaties to Ensure Accountability.

Although the African treaty regime is inconclusive one way or another about the AU's commitment (and the OAU before it) to human rights,[241] it is useful to point

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237 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above at 30.

238 See Human Rights Watch, "Call for African States to Reject Immunity for Serious Crimes by African Civil Society Organizations and International Organizations with a Presence in Africa" (25 August 2014), available at https://www.hrw.org/news/2014/08/24/call-african-states-reject-immunity-serious-crimes-african-civil-society-organisatio accessed 28 November 2018.

239 The AU Assembly is cognizant of the "dire financial situation of the AU" and has acknowledged concern over "the growing reliance on partner funds to finance the continental integration and development agenda." See Decision on Alternative Sources of Financing the African Union, Assembly/AU/Dec.364 (XVII), paras 3 and 4.

240 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Supplementary African Union Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir" with Annex 1, Annex 2, Annex 3, Annex 4 and Annex 5 (ICC-02/05-01/09-389 28-09-2018 2/12 RH PT OA2). Available at https://www.icc-cpi.int/CourtRecords/CR2018_04581.PDF accessed 28 November 2018.

241 Of the Sixty-two conventions, treaties and charters adopted by the OAU / AU from inception until 30 June 2018, only thirty of which are in force, seventeen relate directly or tangentially to human rights. Of these twelve have been ratified and are in force. 'Directly' in terms hereof is applied fairly liberally to include such norm-creating or norm-affirming treaties as the African Charter on Human and Peoples Rights, the African Charter on the Rights and Welfare of the Child, the Cultural Charter for Africa and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and, such institution creating treaties as the Constitutive Act

out that the African Charter, to which continental efforts to preserve human rights can be traced, represented a pioneering effort in international treaty law to put together the so-called three generations of human rights: civil and political rights; economic, cultural and social rights; and rights that go beyond the mere civil and social to include collective and environmental rights such as a right to a healthy environment, a right to self-determination and a collective right to the benefit of natural resources.[242] This pioneering trend has been present also in other continental conventions adopted by the (O)AU.

From its inception, the AU has – inspired by motivations that have been markedly different from the predecessor OAU[243] – not only proclaimed but also demonstrated its commitment to upholding human rights standards through assumed treaty obligations.[244] Thus does the Constitutive Act of the AU not only undertake to "[p]romote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments"[245] but also and even more profoundly, "to intervene in a Member State … in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[246] The creation of a basis, by treaty, to fulfil a responsibility to protect[247] and to allow for humanitarian intervention where warranted, is also unprecedented in international law.[248] While the critique that Article 4(h) has not been acted on in spite of circumstances which would warrant its invocation would be legitimate, Article 4(h) nonetheless represents a treaty undertaking that goes significantly beyond commitments to human rights and a responsibility to protect by other regional bodies.

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of the African Union, the Protocol of the Court of Justice of the African Union, and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. 'Tangentially' is also applied quite liberally, even if a bit arbitrarily, in terms hereof to include the Statute of the Pan African Intellectual Property Organization (PAIPO) and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. The former for ensuring the preservation of intellectual property rights and therefore the right to property and the latter for securing the right to health. It excludes such treaties as the Convention for the Establishment of the African Centre for Fertilizer Development, which even if conceivably intended to ensure the right to food security is a stretch too far. See OAU/AU Treaties, Conventions, Protocols & Charters at https://au.int/en/treaties accessed 28 November 2018.

242 Kristen Rau, "Jurisprudential Innovation or Accountability Avoidance - The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights," Note 135 above.

243 Established in May 1963, among others to spearhead the fight against colonialism, white minority rule on the African continent and neo-colonialism, the OAU was particular about preserving the independence and sovereignty as well as territorial integrity of African States to the detriment of championing human rights. See Charter of the Organization of African Unity, available at https://au.int/en/treaties/oau-charter-addis-ababa-25-may-1963 accessed 28 November 2018.

244 See Constitutive Act of the African Union, which was adopted on 7 November 2000 and entered into force on 26 May 2001, available at https://au.int/sites/default/files/treaties/7758-treaty-0021_-_constitutive_act_of_the_african_union_e.pdf accessed 28 November 2018.

245 See Article 3(h) of the Constitutive Act of the African Union, Note 244 above.

246 See Article 4(h) of the Constitutive Act of the African Union, Note 244 above.

247 Dan Kuwali and Frans Viljoen (Eds), *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (Routledge, 2014).

248 Ben Kioko, "The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention" (December 2003) *International Committee for the Red Cross*, available at http://www.operationspaix.net/DATA/DOCUMENT/5868~v~The_right_of_intervention_under_the_African_Union_8217s_Constitutive_Act__From_non-interference_to_non-intervention.pdf accessed 28 November 2018.

The fact also that AU member States represent the largest bloc of parties to the Rome Statute of the ICC may be described as a testament to AU members States' commitment to accountability.[249] Indeed, forty-seven African States participated in the 1998 Rome Conference which adopted the Rome Statute of the ICC and a third of the countries that first ratified the Rome Statute were African.[250] Also, because the 2004-2007 Strategic Plan of the AU expressly urged member States to ratify the Rome Statute,[251] thirty-three African States – before Burundi's withdrawal, thirty-four – are currently parties to the ICC.[252]

As has been established from the foregoing, the bid to create an African Court with international criminal jurisdiction may also – notwithstanding the negative perceptions around the immunity provision[253] (which, as was shown in Chapters 4 and 5, is not inconsistent with international law)[254] – be reasonably construed as further affirmation of a commitment to accountability. Submission to the authority of two courts, rather than one, each with jurisdiction over egregious international crimes can, on the face of it, hardly be classified as a regression on the scales of accountability. As one scholar has noted:

> the expansion of the jurisdiction of the African Court does not, in any way, affect the jurisdiction of other courts, including the ICC, and can in no way prevent the exercise of jurisdiction by those courts over individuals who may be immune from prosecution before the African Court by virtue of Article 46A *Bis*[255]

Also, while the immunity provision of the Malabo Protocol may, at first blush, not be interpreted as a contribution to the normative progression that international criminal justice advocates campaign for,[256] a closer look provides ample evidence

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249 See Charles Chernor Jalloh, "Regionalizing International Criminal Law?" (2009) 9 *International Criminal Law Review* 445, at 448.

250 Seventeen of the first 60 ratifications of the Rome Statute (that permitted it to enter into force on July 2, 2002) were by African countries: Senegal (February 2, 1999); Ghana (December 20, 1999); Mali (August 16, 2000); Lesotho (September 6, 2000); Botswana (September 8, 2000); Sierra Leone (September 15, 2000); Gabon (September 20, 2000); South Africa (November 27, 2000); Nigeria (September 27, 2001); Central African Republic (October 3, 2001); Benin (January 22, 2002); Mauritius (March 5, 2002); Democratic Republic of Congo (April 11, 2002); Niger (April 11, 2002); Uganda (June 14, 2002); Namibia (June 25, 2002); Gambia (June 28, 2002). For further detail on States parties to the Rome Statute and dates of accession see https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx accessed 28 November 2018.

251 Strategic Plan of the Commission of the African Union (Volume 3) 2004-2007 Plan of Action – Programmes to Speed up Integration of the Continent, at 67, available at https://www.issafrica.org/uploads/ACTPLAN.PDF accessed 28 November 2018.

252 As of 31 October 2018, the African membership of the ICC stands at 33. See list of African States parties at https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx accessed 28 November 2018.

253 See Final Communique of Conference titled: "Understanding the Malabo Protocol: The Potential, the Pitfalls and Way Forward for International Justice in Africa Conference, Southern Sun Hotel Pretoria, South Africa, 7-8 November 2016, available at http://www.hrforumzim.org/wp-content/uploads/2016/11/Malabo-Protocol-Communique.pdf accessed 28 November 2018.

254 See *Arrest Warrant* Case, Note 3 above. See also Roozbeh Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates," (2010) 21(1) *European Journal of International Law* 173, at 189.

255 See Dire Tladi, "The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the Normative (Chaff)" (2015) 13 (1) *Journal of International Criminal Justice* 3, at 17.

256 See M. Cherif Bassiouni, "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'" (1996) 59(4) *Law and Contemporary Problems* 63.

of treaty restrictions to the ambit of immunity *ratione personae* and *ratione materiae* under customary international law.

By excluding immunity *ratione personae* for Foreign Ministers and thereby limiting the ability of the *ejusdem generis* rule of interpretation[257] to apply the immunity clause to other Ministers of similar rank,[258] Article 46A *bis* significantly restricts the scope and application of immunity *ratione personae*.[259] The rationale presented by courts in such cases as *Mofaz*[260] and *Sharon*[261] and by prosecutors in such cases as *Rumsfeld*,[262] to deny prosecution would arguably then fall away.[263]

Article 46A *bis* also introduces, arguably, another treaty restriction to the customary international law on immunities by limiting functional immunity of "senior State officials" to "their tenure of office." Because immunity *ratione materiae* under customary international law is a substantive and potentially perpetual defence that invokes State responsibility, rendering it time bound – as Article 46A *bis* seems to do – would also represent a significant narrowing of customary international law immunities and a big leap forward for normative progression.

Little attention has been paid by scholars to analysing the text of the immunity provision but such restrictions, which in the absence of celebration by the AU may conceivably have been unintended, would undoubtedly be considered progressive by international criminal justice advocates.[264]

3.2 Immunity not Impunity.

Another point that bears a second look is the fact that notwithstanding accusations to the contrary, the AU has been remarkably consistent in its insistence that it rejects impunity – a sentiment and stated commitment that is

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257 See Edwin Kellaway, *Principles of Legal Interpretation of Statutes, Contracts and Wills (Butterworths, 1995)*, at 66 – 68.

258 See *Application for Arrest Warrant Against General Shaul Mofaz*: *Re Mofaz*, First Instance, ILDC 97 (UK 2004), 12 February 2004.

259 See *Arrest Warrant Case*, Note 3 above.

260 See *Application for Arrest Warrant Against General Shaul Mofaz*, Note 258 above.

261 See *Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron),* Final appeal/Cassation (concerning questions of law), P.02.1139.F/2, JT 2003, 243, ILDC 5 (BE 2003), 12 February 2003.

262 See FIDH Press Release, France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complain (27/11/2007), available at https://www.fidh.org/en/region/americas/usa/USA-Guantanamo-Abu-Ghraib/FRANCE-IN-VIOLATION-OF-LAW-GRANTS,4932 accessed 28 November 2018. See also Thierry Leveque, James Mackenzie and Andrew Dobbie, *French Prosecutors Throw Out Rumsfeld Torture Case* (23 November 2007) Reuters, available at https://www.reuters.com/article/us-france-rights-rumsfeld/french-prosecutors-throw-out-rumsfeld-torture-case-idUSL238169520071123?feedType=RSS&feedName=politicsNews&rpc=22&sp=true accessed 28 November 2018.

263 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 1 above.

264 See Dire Tladi, "The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the Normative (Chaff)," Note 255 above.

present in no less than *every single one* of the AU Assembly of Heads of State and Governments' summit declarations that make mention of the ICC or of international criminal justice.[265]

[265] See Paragraph 6 of: Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan Assembly/AU/Dec.221(XII) (12th Ordinary Session of AU Assembly, February 1 – 3, 2009, Addis Ababa, Ethiopia), available at https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf accessed 28 November 2018; Paragraph 4 of Assembly/AU/Dec.245(XIII) Rev.1: Decision on the Meeting of African States Parties to the Rome Statute Of The International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) (13th Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009), available at https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf accessed 28 November 2018; Paragraph 3, Assembly/AU/Dec.270(XIV) Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC) DOC. Assembly/AU/8(XIV) (14th Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010), available at https://au.int/sites/default/files/decisions/9561-assembly_en_31_january_2_feburuary_2010_bcp_assembly_of_the_african_union_fourteenth_ordinary_session.pdf accessed 28 November 2018; Paragraph 2 of Assembly/AU/Dec.292(XV) Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/606(XVII) (15th Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda), available at https://au.int/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf accessed 28 November 2018; Paragraph 2, Assembly/AU/ Dec.334(XVI) Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII) (16th Ordinary Session of the AU Assembly, 30 - 31 January 2011 Addis Ababa, Ethiopia), available at https://au.int/sites/default/files/decisions/9645-assembly_en_30_31_january_2011_auc_assembly_africa.pdf accessed 28 November 2018; Paragraph 2, Assembly/AU/Dec.371(XVII), Decision on the Hissène Habré Case Doc. Assembly/AU/8(XVII) (17th Ordinary Session held in Malabo, EQUATORIAL GUINEA, 30 June - 1 July 2011, available at https://au.int/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf accessed 28 November 2018; Paragraph 2, Assembly/AU/Dec.397(XVIII) Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. EX.CL/710(XX) (18th Ordinary Session 29 – 30 January 2012 Addis Ababa, Ethiopia), available at https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-_415_xviii_e.pdf accessed 28 November 2018; Paragraph 2, Assembly/AU/Dec.419(XIX) Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/731(XXI) (19th Ordinary Session 15 - 16 July 2012 Addis Ababa, ETHIOPIA), available at https://au.int/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf accessed 28 November 2018; Paragraph 2, Assembly/AU/Dec.482(XXI): Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)2 Doc. Assembly/AU/13(XXI) (21st Ordinary Session 26 - 27 May 2013 Addis Ababa, ETHIOPIA), available at https://au.int/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf accessed 28 November 2018; Paragraph 2, Ext/Assembly/AU/Dec.1(Oct.2013): Decision on Africa's Relationship with the International Criminal Court (ICC) (Extraordinary Session of the Assembly of the African Union 12 October 2013, Addis Ababa, Ethiopia), available at https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf accessed 28 November 2018; Paragraph 2, Assembly/AU/Dec.493(XXII): Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court Doc. Assembly/AU/13(XXII) (22nd Ordinary Session 30 - 31 January 2014 Addis Ababa, Ethiopia), available at https://au.int/sites/default/files/decisions/9659-assembly_au_dec_490-516_xxii_e.pdf accessed 28 November 2018; Paragraph 2, Assembly/AU/Dec.546(XXIV): Decision on the Hissène Habré Case Doc. EX.CL/866(XXVI) (24th Ordinary Session 30 - 31 January 2015 Addis Ababa, ETHIOPIA), available at https://au.int/sites/default/files/decisions/9665-assembly_au_dec_546_-_568_xxiv_e.pdf accessed 28 November 2018; Paragraph 2(i), Assembly/AU/Dec.590(XXVI): Decision on the International Criminal Court Doc. EX.CL/952(XXVIII) (26th Ordinary Session 30 - 31 January 2016 Addis Ababa, ETHIOPIA), available at https://au.int/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf accessed 28 November 2018; Paragraph 2(i), Assembly/AU/Dec.616 (XXVII): Decision on the International Criminal Court Doc. EX.CL/987(XXIX) (27th Ordinary Session 17 – 18 July 2016 Kigali, Rwanda), available at https://au.int/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pd accessed 28 November 2018f; Paragraph 2(i), Assembly/AU/Dec.622(XXVIII): Decision on the International Criminal Court Doc. EX.CL/1006(XXX) (28th Ordinary Session 30 - 31 January 2017 Addis Ababa, ETHIOPIA), available at https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf accessed 28 November 2018; Paragraph 2(i), Assembly/AU/Dec.672(XXX): Decision on the International Criminal Court Doc. EX.CL/1068(XXXII) (30th Ordinary Session of the Assembly, 28- 29 January 2018, Addis Ababa, Ethiopia), available at https://au.int/sites/default/files/decisions/33908-assembly_decisions_665_-_689_e.pdf accessed 28 November 2018.

Consistent with the ICJ's judgment in the *Arrest Warrant* Case that immunity does not mean impunity[266] the AU has consistently held that its position on immunity for incumbent Heads of State does not mean it seeks impunity.[267] Neither the request for a Security Council deferral in the case of al Bashar, which was intended to give AU peace efforts in Darfur a chance to succeed,[268] nor the request for Security Council deferrals in the case of Ruto and Kenyatta,[269] which was eminently reasonable and conceivably necessary in the aftermath of terrorist attacks in Kenya,[270] even remotely suggest otherwise. Neither does the Security Council's failure to approve the deferral in either case.[271] In the latter case especially, the AU has insisted only that the prosecution of Kenyatta and Ruto "be suspended until they complete their terms of office."[272] The thrust of its representations and advocacy to the Security Council was not that the prosecutions be terminated but only that the prosecutions be *suspended* for the duration of their terms of office.[273]

The frequent declarations by the AU of its aversion to impunity for crimes committed by Heads of State and other high-ranking officials, is also borne out by the AU's stance on the prosecution of Heads of State post-incumbency. Illustrative of this point are the cases of *Habré*,[274] *Taylor*[275] and more recently Laurent Gbagbo.[276]

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266 See *Arrest Warrant* Case, Note 3 above at paragraph 60.

267 See Note 265 above.

268 See Edith Lederer, *African Union asks UN to Delay Al-Bashir Prosecution*, Mail & Guardian (25 September 2010), available at https://mg.co.za/article/2010-09-25-african-union-asks-un-to-delay-albashir-prosecution accessed 28 November 2018.

269 See UNSC Press Release SC/11176, Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining (15 November 2013), available at https://www.un.org/press/en/2013/sc11176.doc.htm accessed 28 November 2018. See also Michelle Nichols, *African Leaders Ask U.N. to Defer Kenya International Criminal Trials* Reuters (22 October 2013), available at https://www.reuters.com/article/us-kenya-icc-un-idUSBRE99L14O20131022 accessed 28 November 2018.

270 Jeffrey Gettleman and Nicholas Kulish, *Gunmen Kill Dozens in Terror Attack at Kenyan Mall* New York Times, Note 49 above.

271 Evelyne Asaala "Rule of law or realpolitik? The role of the United Nations Security Council in the International Criminal Court Processes in Africa" (2017) 17 *African Human Rights Law Journal* 266.

272 See Decision on Africa's Relationship with the International Criminal Court (ICC) at paragraph 10(ii), Note 51 above.

273 See Decision on Africa's Relationship with the International Criminal Court (ICC) at paragraph 10(ii), Note 51 above.

274 See *Ministère Publique contre Hissene Habré*, before the Extraordinary African Chambers in the Senegalese Courts. Trial Judgment available at http://www.chambresafricaines.org/pdf/Jugement_complet.pdf accessed 28 November 2018. See also Reed Brody, "Bringing a Dictator to Justice: The Case of Hissène Habré" (May 2015) 13(2) *Journal of International Criminal Justice* 209. See also Sarah Williams, "The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?" (1 December 2013) 11(5) *Journal of International Criminal Justice* 1139. See also Sofie A. E. Høgestøl, "The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity" (2016) 34(3) *Nordic Journal of Human Rights* 147.

275 See *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T, Special Court for Sierra Leone (26 April 2012), available at http://www.refworld.org/cases,SCSL,4f9a4c762.html accessed 28 November 2018.

276 See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ICC-02/11-01/15. Details of case may be accessed from Case Information Sheet ICC-PIDS-CIS-CI-04-03/16, available at https://www.icc-cpi.int/cdi/gbagbo-goude/Documents/gbagbo-goudeEng.pdf accessed 28 November 2018.

In the case of *Habré*, it was, as a matter of fact, the AU that convened the Committee of Eminent African Jurists who recommended that the AU request Senegal to prosecute *Habré*.[277] The seven-member Committee's terms of reference had been to consider "the specific case of Hissène Habré and to help design a mechanism for dealing with impunity and the future avoidance of impunity specifically in the African context."[278] Acting thereon, the Committee had proposed that "… the African Court of Justice and Human Rights be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of the Convention Against Torture," proclaiming that "there is room in the Rome Statute for such a development."[279]

In the cases of Taylor and Gbagbo – both of whom were no longer Heads of State at the time of their prosecution – the AU's silence, while inconclusive, stands in marked contrast to the more activist stance and loud objections against the indictment of Al Bashir and the prosecution of Kenyatta and Ruto. Such silence permits a reasonable conclusion to be drawn that the AU had no objections to the prosecutions of Taylor and Gbagbo respectively by the Special Court for Sierra Leone and the ICC.[280]

It would seem in the circumstances and on the basis of the foregoing that the AU has no objections to the prosecution of former Heads of State by international courts. The ouster from office on April 11, 2019 (by the military in a bloodless coup) of Omar al Bashir, whose indictment by the ICC set in motion the actions that have led to the AU's adoption of a Protocol to create an African Court with international criminal jurisdiction, will provide opportunity to test this theory.[281]

3.3 The AU Withdrawal Strategy.

The so-called AU Withdrawal Strategy, the title of which legitimately invokes concern within the international criminal justice community,[282] also falls far short of its titular pretensions.[283] While the limited utility of the document for its stated

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277 See AU Assembly, Decision on the Hissène Habré Case and the African Union, Assembly/AU/Dec.103 (VI) (Doc.Assembly/AU/8 (VI)) Add.9, available at https://au.int/sites/default/files/decisions/9554-assembly_en_23_24_january_2006_auc_sixth_ordinary_session_decisions_declarations.pdf accessed 2 September 2018.

278 See Paragraphs 8 and 9 of the *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré* [to the AU], available at https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf accessed 3 September 2018.

279 See Paragraph 35 of the *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, Note 17 above.

280 This is but a theory that remains unproven even if very plausible.

281 The question of whether the AU will oppose Omar al Bashir's surrender to the ICC is moot as the military has declined to surrender him to the ICC. See Maggie Michael, *Sudan army removes leader, rejects al-Bashir extradition* APNews (April 13, 2019). Available at https://www.apnews.com/47f23657c32b4c3c9c22c7c2bb174b51 (accessed 25 May, 2019).

282 See Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" Note 69 above.

283 See Elise Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye," Note 79 above. See also Mark Kersten "Not All It's Cracked Up to Be – The African Union's "ICC Withdrawal Strategy," Note 79 above.

purposes can hardly be said to count in the AU's favour, the fact that it was vehemently opposed by many African countries seems to affirm that leaving the ICC is not a common objective for African States.[284] Indeed the Foreign Minister of Nigeria, one of at least sixteen countries that, unusually, filed formal reservations to the Assembly Decision to adopt the Withdrawal Strategy[285] is quoted as saying that the ICC has "an important role to play in holding leaders accountable."[286]

The high tide of withdrawals that was feared following the announcements of Burundi, South Africa and the Gambia has also not materialized and, it even appears that the tide has turned. The Gambia has withdrawn its notice of withdrawal[287] and whilst South Africa appears resolute in its intention to withdraw,[288] there seem now to be various hurdles that the African National Congress (ANC) government must overcome, internally,[289] to realise its objectives.[290]

It bears noting also that even among the greatest champions for mass withdrawal of African States from the ICC,[291] action has not always matched the rhetoric.

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284 See Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" Note 69 above.

285 See Note 83 above.

286 See Mel Frykberg, *African Countries against AU Withdrawal from ICC – HRW*, IOL (2 February 2017), available at https://www.iol.co.za/news/africa/african-countries-against-au-withdrawal-from-icc-hrw-7584143 accessed 28 November 2018.

287 Elise Keppler, "Gambia Rejoins ICC," Human Rights Watch (17 February 2017), available at https://www.hrw.org/news/2017/02/17/gambia-rejoins-icc accessed 28 November 2018.

288 South Africa's Justice and Correctional Service Minister Michael Masutha informed a meeting of the ICC's Assembly of States Parties (ASP) in New York on 6 December 2017 that the Government would seek Parliamentary approval to withdrawal from the Rome Statute. He also announced that an International Crimes Bill would be laid before Parliament to repeal the Rome Statute Implementation Act (which renders the Rome Statute domestic law) and replace it with new legislation that would grant extra-territorial jurisdiction to South African courts for crimes similar to those in the Rome Statute. See *Opening Statement by Advocate Michael Masutha, MP, Minister of Justice and Correctional Services, Republic of South Africa*, General Debate: Sixteenth Session of the Assembly of States Parties of the International Criminal Court, New York, 4-14 December 2017, available at http://www.justice.gov.za/m_speeches/2017/20171206-ICC.html accessed 28 November 2018.

289 Such hurdles would include adopting an ANC position on the matter. While South Africa's Minister for Foreign Affairs, Lindiwe Sisulu, has stated that South Africa is revisiting its position on leaving the ICC [See Jean Jacques Cornish, *SA Revisiting Decision to Quit ICC*, Eye Witness News (4 July 2018), available at https://ewn.co.za/2018/07/04/sa-revisiting-decision-to-quit-icc accessed 28 November 2018], the Minister for Justice has insisted that the Government will withdraw from the Rome Statute (See Elise Keppler, *South Africa and the ICC: It's Not Too Late to Change Course*, Mail and Guardian (10 September 2018), available at https://mg.co.za/article/2018-09-10-south-africa-and-the-icc-its-not-too-late-to-change-course accessed 28 November 2018]. Given the degree of opposition by many respected ANC and former ANC stalwarts, it is unclear how this will end. [See Navi Pillay, Richard Goldstone, and Mark Kersten, *A Plan for South Africa to Stay in the ICC*, Mail and Guardian (10 September 2018), available at https://mg.co.za/article/2018-09-10-a-plan-for-south-africa-to-stay-in-the-icc - accessed 28 November 2018].

290 See *Democratic Alliance v. Minister of International Relations and Cooperation and Others*, High Court of South Africa (Gauteng Division, Pretoria), Case No. 83145/2016, available at http://www.saflii.org/za/cases/ZAGPPHC/2017/53.pdf accessed 28 November 2018. See also Karien du Plessis, *SA might flip-flop on decision to withdraw from ICC - Lindiwe Sisulu*, News24 (4 July 2018), available at https://www.news24.com/SouthAfrica/News/sa-might-flip-flop-on-icc-decision-lindiwe-silulu-20180704 accessed 28 November 2018.

291 Laurence R. Helfer and Anne E. Showalter, *Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC* (2017) *iCourts Working Paper Series, No. 83*, University of Copenhagen.

The Parliament of Kenya voted in September 2013 to withdraw from the Rome Statute[292] and yet, notwithstanding the fact that the President and Deputy President of Kenya were both indicted by the ICC and have appeared in the dock as accused international criminals – enduring prosecutions that were, at best, ill prepared by the Office of the Prosecutor[293] – Kenya remains party to the Rome Statute of the ICC. The easy step of withdrawing Kenya from the ICC, which the political economy of Kenya would permit,[294] has not been taken. Even though Kenya periodically hints at withdrawal,[295] the fact that it remains party to the Rome Statute is not consistent with the narrative about a quest for impunity for Africa's political classes.[296] This in marked contrast to the belligerent pronouncements of the USA against the ICC's decision to undertake preliminary investigations into war crimes in Afghanistan following the invasion of a US-led coalition of States in 2002.[297]

3.4 The Incompetence of the AU Commission.

While the institutional arrangements for the court, the breadth of its jurisdiction *ratione materiae* and the limited number of judges are respectively woeful, breath-taking and ludicrous, and permit reasonable conclusions to be drawn that the Expanded African Court is primed to fail, a less sinister explanation – than one which sees AU members as conniving co-conspirators intent on crippling the court even before it becomes operational[298] – is also plausible. This would be the incompetence of the AU Commission.

To its credit, the AU's Assembly of Heads of State and Government, on at least one occasion, as did the AU Executive Council, put the brakes on the adoption process for the Malabo Protocol in order to seek further and better particulars on the likely functionality of the Expanded African Court and how it would deliver on its mandate.

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292 Edmund Blair, *Kenya Parliament Votes to Withdraw from ICC* Reuters (5 September 2013), available at https://www.reuters.com/article/us-kenya-icc-vote/kenya-parliament-votes-to-withdraw-from-icc-idUSBRE9840PB20130905 accessed 28 November 2018.

293 Alastair Leithead, *Dismissal of Case Against Kenya's Ruto Huge Blow to ICC*, BBC News (5 April 2016), available at https://www.bbc.com/news/world-africa-35974172 accessed 28 November 2018.

294 Human Rights Watch, *Perceptions and Realities: Kenya and the International Criminal Court* (14 November 2013), available at https://www.hrw.org/news/2013/11/14/perceptions-and-realities-kenya-and-international-criminal-court accessed 28 November 2018.

295 Rael Ombuor, *Kenya Signals Possible ICC Withdrawal* VoA (13 December 2016), available at https://www.voanews.com/a/kenya-signals-possible-icc-withdrawal/3634365.html accessed 28 November 2018.

296 See Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 20 above.

297 See Mark Kersten, *The International Criminal Court is Set to Investigate Alleged U.S. War Crimes in Afghanistan*, Washington Post (8 December 2017), available at https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/08/the-icc-will-investigate-alleged-u-s-war-crimes-in-afghanistan/?noredirect=on&utm_term=.2b9649042262 accessed 28 November 2018. See also Matt Apuzzo and Marlise Simons, *U.S. Attack on I.C.C. Is Seen as Bolstering World's Despots*, New York Times (13 September 2018), available at https://www.nytimes.com/2018/09/13/world/europe/icc-burundi-bolton.html accessed 28 November 2018.

298 See Max du Plessis, "Implications of the AU Decision to give the African Court Jurisdiction over International Crimes," Note 149 above.

At the meeting of the Assembly of Heads of States and Governments in Addis Ababa, Ethiopia in July 2012, the Assembly requested the Commission, in collaboration with the African Court on Human and Peoples' Rights, to

> undertake a study on the financial and structural implications resulting from the expansion of the jurisdiction of the African Court and submit the study along with the Draft Protocol on Amendments to the Protocol to the Statute of the African Court of Justice and Human Rights for consideration by the policy organs.[299]

The Commission convened a two-day meeting of experts in Arusha, Tanzania in December 2012, which concluded and reported, amongst others, strikingly, that they anticipated only modest financial and structural impact from the expansion of the jurisdiction of the African Court.[300]

Early the next year, the AU's Executive Council, at its Twenty-Second Ordinary Session held in Addis Ababa from January 21 – 25, 2013, also requested the Commission to present

> a report on the structural and financial implications resulting from the expansion of the jurisdiction of the African Court of Justice and Human Rights to try international crimes, to the [Permanent Representative Council] PRC through its relevant sub-committees.[301]

Clearly, the AU Assembly had cause to be concerned so the fact that the AU Commission did not rise to the challenge or seize the opportunity offered is perplexing. A competent commission would have, under such invitations from both the AU's Assembly of Heads of State and its Executive Council for a more thorough reflection on the structural and financial implications of the expansion of the jurisdiction of the African Court of Justice and Human Rights to try international crimes, taken the time to do precisely that – undertake a thorough review that would have unearthed the various challenges since identified.[302] Guidance having been sought – seemingly in good faith – by the Assembly, the blame for the poor, even deceptive, advise rendered, which propelled the Assembly to adopt the Protocol, notwithstanding its glaring deficiencies, must surely be placed at the door of the AU Commission.

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299 See: Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.427(XIX), (Doc. Assembly/AU/13(XIX)a, available at http://www.au.int/en/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf accessed 10 July 2016.

300 See Ademola Abass, "The Proposed Criminal Jurisdiction for the African Court: Some Problematical Aspects," Note 85 above.

301 See Paragraphs 2 and 3 of Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (EX.CL/Dec.766(XXII)) Doc. PRC/Rpt(XXV), available at https://issafrica.s3.amazonaws.com/site/uploads/AU_summit_jurisdiction_African_Court.pdf accessed 28 November 2018.

302 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

3.5 Legitimate Scepticism of the ICC as a Paragon of International Criminal Justice.

Although the AU cannot be held completely blameless with respect to the various concerns highlighted above, the less than pure motives ascribed to it by the international criminal justice community are arguably a direct consequence of trenchant inequality in the international legal order. This is manifest in the characteristic efforts of the most powerful States to inoculate themselves from an equal application of the international criminal justice regime.[303]

While commentators may be right in assessing the AU's adoption of the Malabo Protocol and other allegedly impunity-cultivating conduct as likely to negatively impact (if not actively sabotage) the ICC, it should also be noted that beyond the ICC's undeniable political bent,[304] it can hardly be characterized as a paragon of competence[305] or of justice.[306] And this notwithstanding its noble objectives, the several hundreds of professionals who are committed to its ideals, a committed Assembly of State Parties and the hardworking international criminal justice NGOs who support its mandate.[307]

True enough, all new institutions suffer birthing challenges and given that the ICTY and the ICTR, each of which had primacy of jurisdiction and a smaller footprint than the ICC have each received criticisms about their effectiveness,[308] the ICC's task was always conceivably going to be a difficult one.[309] And yet, one cannot avoid the statistics.

In its seventeen years of existence, the ICC had, as of April 30, 2019, indicted forty-four persons,[310] amongst whom charges were discontinued against four because of their death.[311] Of the remaining forty indictees, four have been

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303 See William A. Schabas, "The Banality of International Justice." (2013) 11 *Journal of International Criminal Justice* 545, at 548.

304 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 21 above.

305 See Julie Flint and Alex de Waal "Case Closed: A Prosecutor without Borders" *World Affairs* (Spring 2009) available at http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders accessed 18 August 2018. See also Thomas Escritt, *ICC Judges Agree to Withdrawal of Kenyatta Charges* Reuters (13 March 2015), available at https://www.reuters.com/article/us-kenya-icc/icc-judges-agree-to-withdrawal-of-kenyatta-charges-idUSKBN0M91SH20150313 accessed 28 November 2018.

306 See Mark Kersten, *A Brutally Honest Confrontation with the ICC's Past: Thoughts on 'The Prosecutor and the President'* Justice in Conflict (23 June 2016) available at https://justiceinconflict.org/2016/06/23/a-brutally-honest-confrontation-with-the-iccs-past-thoughts-on-the-prosecutor-and-the-president, accessed 5 July 2016. See also William A. Schabas, "The Banality of International Justice," Note 303 above at 548.

307 See William A. Schabas, "The Banality of International Justice," Note 303 above at 547.

308 See William A. Schabas, "The Banality of International Justice," Note 303 above at 545 – 546.

309 See William A. Schabas, "The Banality of International Justice," Note 303 above at 547.

310 See ICC website at https://www.icc-cpi.int/Pages/cases.aspx accessed 28 November 2018.

311 Cases have been terminated against Muammar Mohammed Abu Minyar Gaddafi; Okot Odhiambo; Raska Lukwiya; and, Saleh Mohammed Jerbo Jamus. For further particulars see overview of ICC closed cases at https://www.icc-cpi.int/Pages/defendants-wip.aspx#Default=%7B%22k%22%3A%22%22%2C%22r%22%3A%5B%7B%22n%22%3A%22MngAccusedStatesEN%22%2C%22t%22%3A%5B%22%5C%22%C7%82%C7%824361736520636c6f736564%5C%22%22%5D%2C%22o%22%3A%22OR%22%2C%22k%22%3Afalse%2C%22m%22%3A%7B%22%5C%22%C7%82

acquitted[312] and eight have been convicted.[313] Five of the convicted persons were found guilty only of offences against the administration of justice in connection with the case *Prosecutor v. Jean Pierre Bemba Gombo,* for which sentences were variously six months in prison, eleven months in prison, two years in prison, thirty months in prison and a three hundred thousand Euro fine.[314]

Of the twenty-eight persons who have not been convicted or been relieved by death from earthly accountability, twelve are at large,[315] four are not in ICC custody for a range of reasons including admissibility challenges,[316] and five are

%C7%824361736520636c6f736564%5C%22%22%3A%22Case%20closed%22%7D%7D%5D%7D#c6cbd0da-cc12-4701-a455-cb691df92bfd=%7B%22k%22%3A%22%22%7D accessed 28 November 2018.

312 The acquitted persons are Mathieu Ngudjolo Chui (See Case Information Sheet ICC-PIDS-CIS-DRC2-06-006/15, available at https://www.icc-cpi.int/drc/ngudjolo/Documents/ChuiEng.pdf accessed 28 November 2018) Jean-Pierre Bemba Gombo (See Case Information Sheet ICC-PIDS-CIS-CAR-01-020/18, available at https://www.icc-cpi.int/car/bemba/Documents/bembaEng.pdf accessed 28 November 2018), Laurent Gbagbo and Charles Blé Goudé (See Case Information Sheet ICC-PIDS-CIS-CIV-04-02/19, available at https://www.icc-cpi.int/CaseInformationSheets/gbagbo-goudeEng.pdf, accessed 25 May, 2019).

313 The convicted persons are Thomas Lubanga Dylio (See Case Information Sheet ICC-PIDS-CIS-DRC-01-016/17, available at https://www.icc-cpi.int/drc/lubanga/Documents/lubangaEng.pdf accessed 28 November 2018); Ahmad Al Faqi Al Mahdi (See Case Information Sheet ICC-PIDS-CIS-MAL-01-08/16, available at https://www.icc-cpi.int/mali/al-mahdi/Documents/al-mahdiEng.pdf accessed 28 November 2018); Jean-Pierre Bemba Gombo (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 28 November 2018); Aimé Kilolo Musamba (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 28 November 2018); Jean-Jacques Mangenda Kabongo (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 28 November 2018); Fidèle Babala Wandu, (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 28 November 2018); Narcisse Arido (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 28 November 2018); and, Germain Katanga (See Case Information Sheet ICC-PIDS-CIS-DRC-03-014/18, available at https://www.icc-cpi.int/drc/katanga/Documents/katangaEng.pdf accessed 28 November 2018).

314 See *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (ICC-01/05-01/13). See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 28 November 2018.

315 Persons at large are Al Bashir (See Case Information Sheet ICC-PIDS-CIS-SUD-02-006/18, available at https://www.icc-cpi.int/darfur/albashir/Documents/albashirEng.pdf accessed 28 November 2018); Al-Werfalli (See Case Information Sheet ICC-PIOS-CIS-LIB-03-003/18, available at https://www.icc-cpi.int/libya/al-werfalli/Documents/al-werfalliEng.pdf accessed 28 November 2018); Banda (See Case Information Sheet ICC-PIDS-CIS-SUD-04-008/18, available at https://www.icc-cpi.int/darfur/banda/Documents/bandaEng.pdf accessed 28 November 2018); Barasa (Case No. ICC-01/09-01/13, available at https://www.icc-cpi.int/kenya/barasa accessed 28 November 2018); Gicheru and Bett (Case No. ICC-01/09-01/15, available at https://www.icc-cpi.int/kenya/gicheru-bett accessed 28 November 2018); Harun and Ali Kushayb (See Case Information Sheet ICC-PIDS-CIS-SUD-001-005/18, available at https://www.icc-cpi.int/darfur/harunkushayb/Documents/harunkushaybEng.pdf accessed 28 November 2018); Hussein (See Case Information Sheet ICC-PIDS-CIS-SUD-05-004/18, available at https://www.icc-cpi.int/darfur/banda/Documents/bandaEng.pdf accessed 28 November 2018); Kony and Otti (See Case Information Sheet ICC-PIDS-CIS-UGA-001-006/18, available at https://www.icc-cpi.int/uganda/kony/Documents/KonyEtAlEng.pdf accessed 28 November 2018); and, Mudacumura (See Case Information Sheet ICC-PIDS-CIS-DRC-05-006/18, available at https://www.icc-cpi.int/drc/mudacumura/Documents/mudacumuraEng.pdf accessed 28 November 2018).

316 Indictees not in ICC custody because of various jurisdictional challenges are Saif Al-Islam Gaddafi (See Case Information Sheet ICC-PIDS-CIS-LIB-01-013/18, available at https://www.icc-cpi.int/libya/gaddafi/Documents/gaddafiEng.pdf accessed 28 November 2018); Al Senussi (See Case Information Sheet ICC-PIDS-CIS-LIB-01-009/14, available at https://www.icc-cpi.int/iccdocs/PIDS/publications/SaifAlIslamSenussiEng.pdf accessed 28 November 2018) Khaled (See Case Information Sheet ICC-PIDS-CIS-LIB-02-002/18, available at https://www.icc-cpi.int/libya/khaled/Documents/khaledEng.pdf accessed 28 November 2018) and Simone Gbagbo (See Case

in ICC custody.[317] Four persons have been acquitted,[318] the indictments of four were not confirmed[319] and the cases against four were terminated by the court for successful "no case" challenges or the failure of the Prosecution's case.[320]

Presented differently, in seventeen years, the ICC has convicted 8 persons, five of them for non-core international crimes or relatively frivolous crimes related to the administration of justice and one of them for the more serious crime of blowing up mosques.[321] The Court has also in that time declined to confirm charges, terminated trials or acquitted twelve people, four more than the Court has actually convicted. Charitably included in the count of the convicted are the five persons who were convicted of crimes related to the administration of justice, without which the Court would have had only three convictions against the twelve cases terminated because the prosecution was unable to make a case. And all this for the price tag of USD1.5 billion since its inception.[322] Even for the most ardent of advocates for international criminal justice, the performance of the ICC has been a disappointment that is undoubtedly exacerbated by the staggering price tag it presents.[323]

Information Sheet ICC-PIDS-CIS-CI-02-005/16, available at https://www.icc-cpi.int/iccdocs/PIDS/publications/SimoneGbagboEng.pdf accessed 28 November 2018).

317 Among the persons in custody are Al Hassan Ag Abdoul Aziz (Case Information Sheet available at https://www.icc-cpi.int/mali/al-hassan/Documents/al-hassanEng.pdf accessed 28 November 2018); Charles Blé Goudé (Case Information Sheet available at https://www.icc-cpi.int/cdi/gbagbo-goude/Documents/gbagbo-goudeEng.pdf accessed 28 November 2018); Laurent Gbagbo (Case Information Sheet available at https://www.icc-cpi.int/cdi/gbagbo-goude/Documents/gbagbo-goudeEng.pdf accessed 28 November 2018); Bosco Ntaganda (Case Information Sheet available at https://www.icc-cpi.int/drc/ntaganda/Documents/ntagandaEng.pdf accessed 28 November 2018) Dominic Ongwen (Case Information Sheet available at https://www.icc-cpi.int/darfur/hussein/Documents/husseinEng.pdf accessed 28 November 2018).

318 The persons acquitted by the Court are Ngudjolo Chui (See Case Information Sheet ICC-PIDS-CIS-DRC2-03-004/09, available at https://www.icc-cpi.int/iccdocs/PIDS/docs/KatangaAndChuiCisEng.pdf accessed 28 November 2018),Jean Pierre Bemba Gombo (See Case Information Sheet ICC-PIDS-CIS-SUD-04-008/18, available at https://www.icc-cpi.int/darfur/banda/Documents/bandaEng.pdf accessed 28 November 2018), Laurent Gbagbo and Charles Blé Goudé (See Case Information Sheet ICC-PIDS-CIS-CIV-04-02/19, available at https://www.icc-cpi.int/CaseInformationSheets/gbagbo-goudeEng.pdf, accessed 25 May, 2019)..

319 The four against whom the Pre-Trial Chamber declined to confirm charges are Abu Garda (See Case Information Sheet ICC-PIDS-CIS-SUD-03-002/12, available at https://www.icc-cpi.int/darfur/abugarda/Documents/abugardaEng.pdf accessed 28 November 2018); Hussein Ali (See Case Information Sheet ICC-PIDS-CIS-KEN-02-005/12, available at https://www.icc-cpi.int/iccdocs/PIDS/publications/MuthauraKenyattaAliEng.pdf accessed 28 November 2018) Mbarushimana (See Case Information Sheet ICC-PIDS-CIS-DRC-04-003/12, available at https://www.icc-cpi.int/drc/mbarushimana/Documents/mbarushimanaEng.pdf accessed 28 November 2018); and, Kosgey (See Case Information Sheet ICC-PIDS-CIS-KEN-01-012/13_Eng, available at https://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf accessed 28 November 2018).

320 The four whose cases have been terminated by the court, but without prejudice, are Kenyatta and Muthaura (See Case Information Sheet ICC-PIDS-CIS-KEN-02-005/12, available at https://www.icc-cpi.int/iccdocs/PIDS/publications/MuthauraKenyattaAliEng.pdf accessed 28 November 2018); and Ruto and Sang (See Case Information Sheet ICC-PIDS-CIS-KEN-01-012/14, available at https://www.icc-cpi.int/kenya/rutosang/Documents/rutosangEng.pdf accessed 28 November 2018).

321 Ahmad Al Faqi Al Mahdi (See Case Information Sheet ICC-PIDS-CIS-MAL-01-08/16), Note 313 above.

322 See also Rebecca Kheel and Morgan Chalfant, Five Things to Know about the International Criminal Court, The Hill (10 September 2014), available at https://thehill.com/policy/defense/405907-five-things-to-know-about-the-international-criminal-court accessed 28 November 2018. See also Moses Phooko, "How Effective the International Criminal Court has Been: Evaluating the Work and Progress of the International Criminal Court" (2011) 1(1) *Notre Dame Journal of International & Comparative Law*, Article 6.

323 See William A. Schabas, "The Banality of International Justice" Note 303 above at 546 – 547.

It is not intended here to equate convictions with justice, acquittals being themselves evidence of justice. Given however that international criminal trials are exceptionally expensive, one would expect that the pre-trial process of confirming charges would ensure the barest minimum, if any, of unsustainable charges being sent on to the trial phases. The fact that there have been three times more trial terminations and acquittals on the core crimes of the Rome Statute than convictions would suggest significant failures in pre-trial proceedings.[324]

While the Prosecutor has blamed witness tampering for the collapse of the cases arising from the Kenya situation,[325] and judicial overreach in the overturn of the conviction of Jean Pierre Bemba Gumbo,[326] the incompetence of the Office of the Prosecutor and the Court itself[327] – manifest in several other situations – provides little reason for taking the pronouncements of the OTP at face value. The fact that Laurent Gbagbo has been acquitted after seven years[328] – in respect of a situation where the OTP cannot plausibly accuse the Ivorian Government of non-cooperation[329] – suggests either incompetence on the part of the OTP or indifference to speedy trials. Neither possibility is edifying.[330]

Other instances of prosecutorial incompetence and/or misconduct abound. In the case for which the OTP secured its first conviction - *The Prosecutor v. Thomas*

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[324] See *The Prosecutor v. Uhuru Muigai Kenyatta*: Decision on Defence Application Pursuant to Article 64(4) and Related Requests, Concurring Opinion of Judge Christine Van den Wyngaert (ICC-01/09-02/11-728-Anx2) 26 April 2013, available at https://www.icc-cpi.int/RelatedRecords/CR2013_03280.PDF accessed 28 November 2018.

[325] See Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta (5 December 2014), available at https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2 accessed 28 November 2018. See also Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future (6 April 2016), available at https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406 accessed 28 November 2018.

[326] See Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo (13 June 2018), available at https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat accessed 28 November 2018.

[327] See Julie Flint and Alex de Waal "Case Closed: A Prosecutor without Borders," Note 305 above. See also Mark Kersten "A Brutally Honest Confrontation with the ICC's Past: Thoughts on 'The Prosecutor and the President," Note 306 above.

[328] See ICC Press Release of 15 January 2019: ICC Trial Chamber I acquits Laurent Gbagbo and Charles Blé Goudé from all charges (ICC-CPI-20190115-PR1427). Available at https://www.icc-cpi.int/Pages/item.aspx?name=pr1427. See however Judge Olga Carbuccia's Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019 (ICC-02/11-01/15-1234) See also Oscar Van Heerden, *The Hypocrisy of the ICC Laid Bare: Justice Delayed is Justice Denied*, The Daily Maverick (2 August 2017), available at https://www.dailymaverick.co.za/opinionista/2017-08-02-the-hypocrisy-of-the-icc-laid-bare-justice-delayed-is-justice-denied/ accessed 28 November 2018.

[329] See Nicoletta Fagiolo, *The Gbagbo case: When international Justice becomes Arbitrary*, ResetDOC (24 February 2016), available at https://www.resetdoc.org/story/the-gbagbo-case-when-international-justice-becomes-arbitrary/ accessed 28 November 2018. See also Alpha Sesay, *ICC Credibility and the Case against Laurent Gbagbo*, Open Society Foundations (19 February 2013), available at https://www.opensocietyfoundations.org/voices/icc-credibility-and-case-against-laurent-gbagbo accessed 28 November 2018.

[330] Wolfgang Schomburg, "The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights," (2009) *8 Northwestern Journal of International Human Rights* 1.

Lubanga Dyilo[331] – a finding by the Trial Chamber of prosecutorial misconduct almost resulted in a dismissal of the indictment and the release of the accused, by the Trial Chamber.[332] According to the Press Statement issued by the Court, a stay of proceedings was ordered because "the fair trial of the accused is no longer possible due to non-implementation of the Chamber's orders by the Prosecution."[333]

Breaches of fair trial rights were also alleged and substantiated in *The Prosecutor v. Kenyatta.*[334] In February 2013, Mr. Kenyatta's legal team had filed an application requesting that the "preliminary issue of the validity of the Confirmation Decision be referred to the Pre-Trial Chamber for reconsideration pursuant to Article 64(4) of the Rome Statute, and that the trial date be vacated.[335] While concurring in the decision to deny the motion, Judge Van den Wyngaert – an acknowledged champion of accountability[336] – was scathing in her commentary on the Prosecution and concluded as follows:

> I find that the Prosecution failed to properly investigate the case against the accused prior to confirmation in accordance with its statutory obligations under article 54(1)(a) of the Statute. In so doing, the Prosecution has also violated its obligation under article 54(1)(c) of the Statute to fully respect the rights of persons arising under the Statute. In particular, by the extremely late and piecemeal disclosure of an inordinate amount of totally new evidence, which was the immediate consequence of the Prosecution's failure to investigate properly prior to confirmation, the Prosecution has infringed upon the accused's rights under article 67(1)(a), (b) and (c) as well as article 67(2) of the Statute.[337]

As President of the Appeals Chamber that overturned Jean Pierre Bemba's conviction,[338] van den Wyngaert's separate opinion, in which Judge Morrison concurred[339] is evocative of her ruling in the Kenyatta case. She asserts that even though the third judge voting to acquit [Chile Eboe-Osuji] would prefer a re-trial in a newly composed Trial Chamber:

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331 *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06). See Case Information Sheet ICC-PIDS-CIS-DRC-01-016/17, available at https://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf, accessed 28 November 2018.

332 See *The Prosecutor v. Thomas Lubanga Dyilo*: Case Information Sheet (ICC-PIDS-CIS-DRC-01-016/17_Eng). Note 331 above.

333 See ICC Press Release of 8 July 2010, Trial Chamber I Orders Stay of Proceedings in the Trial of Thomas Lubanga Dyilo (ICC-CPI-20100708-PR555), available at https://www.icc-cpi.int/Pages/item.aspx?name=pr555 accessed 28 November 2018

334 See *The Prosecutor v. Uhuru Muigai Kenyatta*, Note 43 above.

335 See Defence Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration (ICC-01/09-02/11-622 05-02-2013) available at http://www.icc-cpi.int/iccdocs/doc/doc1548545.pdf accessed 28 November 2018.

336 World Peace through Law Laureate. Other Laureates include Richard Goldstone, Phillippe Kirsch and Cherif Bassiouni. See http://law.wustl.edu/harris/pages.aspx?id=7920 accessed 28 November 2018.

337 See *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, Paragraphs 5 and 6 of Concurring Opinion of Judge Christine Van den Wyngaert; Note 324 above.

338 See *The Prosecutor v. Jean-Pierre Bemba Gombo,* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" (ICC-01/05-01/08 A), available at https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF accessed 28 November 2018.

339 See Separate Opinion of Judge Van den Wyngaert and Judge Morrison (ICC-01/05-01/08-3636-Anx2), available at https://www.icc-cpi.int/RelatedRecords/CR2018_02989.PDF accessed 28 November 2018.

> … For us, this is not an option, given the fact that Mr Bemba, who now benefits from the presumption of innocence again, has already been in the Court's detention for over ten years. Ordering a retrial at this stage would inevitably prolong these proceedings by several more months, if not years. In light of the scope and nature of the charges, this would be excessive in our view. We are also concerned that ordering a retrial after such a long time would create a perverse incentive for the Trial Chamber to arrive at a conviction in order to 'justify' the extended detention. In addition, we would not find it fair to give the Prosecutor a "second chance" to prosecute this case, given the serious problems we have detected in the Prosecution case.[340]

While noting that some may find the reasons for the acquittal too demanding of the Prosecutor, Van den Wyngaert goes on to say that:

> Justice can only be done when the right person is held responsible for the right charges, after a fair trial and on the basis of robust evidence. Mr Bemba's acquittal simply means that we have found that the Conviction Decision failed to comply with one or more of these precepts. It is not excluded that if the Prosecutor had brought different charges or if she had found stronger evidence, it would have been possible to hold Mr Bemba criminally responsible for his failure as a commander in relation to some or all of the crimes that were committed by MLC soldiers in the CAR. However, it would be entirely inappropriate to speculate in this regard and we cannot turn back the clock.[341]

She concludes by acknowledging that victims' compensation claims would evaporate with the acquittal but asserts, in fealty to the rule of law that:

> Today's Judgment is thus neither a victory, nor a failure. It is the conclusion that a dispassionate application of the Statute compels us to accept. This does not mean that emotionally we do not empathise with the pain and loss of the victims. However even if Aristotle's dictum that law should be reason, free from passion, may strike us in the 21st century as somewhat inhuman, it remains true more than two thousand years later that, as humans, *we can only hope to establish the rule of law if we discipline ourselves to be guided by rationality and resist the urge to allow emotions to determine judicial decisions*.[342] (My emphasis)

Such counsel is useful for all actors in the drama that the hero villain contestation between the AU and the ICC represents.[343]

Beyond what has been described as the incompetence of the OTP, the conduct of the bench – Pre-trial, Trial and Appeals Chambers – has also contributed to dulling the judiciousness which the Court is deemed to be cloaked with. Key among the questionable judicial decisions that have played this role include the decision of the Pre-Trial Chamber to approve an Arrest Warrant for Omar al Bashir

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340 See Note 339 above at paragraph 73.

341 See Separate Opinion of Judge Van den Wyngaert and Judge Morrison (ICC-01/05-01/08-3636-Anx2), Note 339 above at paragraph 78.

342 See Separate Opinion of Judge Van den Wyngaert and Judge Morrison (ICC-01/05-01/08-3636-Anx2), Note 339 above at paragraph 79.

343 See also Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 21 above.

for the crime of genocide,[344] even though a UN Commission of Inquiry, led by Antonio Cassesse no less, had found no evidence of genocide;[345] the Article 87(7) rulings against Malawi[346] and Chad[347] which, in trying to manipulate established authority[348] and write Article 98 of the Rome Statute out of existence,[349] seemed to be bereft of any understanding of international law;[350] and, the Article 87(7) ruling by another Pre-Trial Chamber against DRC which completely reversed the reasoning of the *Chad* and *Malawi* decisions but without the intellectual honesty to admit to the manifest errors of the *Chad* and *Malawi* rulings.[351]

The Trial Chamber's acquittal of Laurent Gbagbo and Charles Blé Goudé without written reasons – a termination of a judicial process that had lasted more than seven years – also arguably attests to a capricious nonchalance that undermines judiciousness.[352]

Above all however it is the May 6, 2019 decision of the Appeals Chamber,[353] in an appeal by the Hashemite Kingdom of Jordan to an Article 87(7) finding by

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344 See ICC Press Release of 12 July 2010: *Pre-Trial Chamber I issues a second warrant of arrest against Omar Al Bashir for counts of genocide* (ICC-CPI-20100712-PR557). Available at https://www.icc-cpi.int/pages/item.aspx?name=pr557.

345 See Paragraph 12 of UN Security Council Resolution 1564 [S/RES/1564 (2004)] available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1564(2004) accessed 6 September 2018. See also Ewan Macaskill, *Sudan's Darfur crimes not genocide, says UN report*, The Guardian (February 1, 2005). Available at https://www.theguardian.com/world/2005/feb/01/sudan.unitednations. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf accessed 6 September 2018

346 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09-139), available at https://www.icc-cpi.int/pages/record.aspx?uri=1287184 accessed 10 December 2018.

347 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to the Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09-140-tENG), Pre-Trial Chamber I, 13 December 2011, available at https://www.icc-cpi.int/pages/record.aspx?uri=1384955 accessed 10 December 2018.

348 See Paragraph 33 of the Pre-Trial Chamber Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 12 December 2011.

349 See *AUC concerned over ICC decisions on Malawi and Chad*, available at https://europafrica.net/2012/01/17/8258/ accessed 27 September 2018.

350 See Dire Tladi "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199, at 205. See also Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But Gets the Law Wrong" *EJILTalk* (15 December 2011), available at http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 6 September 2018.

351 See *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* (April 9 2014), available at https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF accessed 6 September 2018. Although the Court changed its reasoning it still fails to provide a convincing interpretation of the relevant provisions. See also André de Hoogh and Abel Knottnerus "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again" EJILTalk (18 April 2014), available at http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/ accessed 27 September 2018.

352 See Kerstin Carlson, Gbagbo's acquittal suggests confusion and dysfunction at the ICC, The Conversation (January 23, 2019). Available at http://theconversation.com/gbagbos-acquittal-suggests-confusion-and-dysfunction-at-the-icc-110200.

353 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*: Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, available at https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF.

the pre-Trial Chamber[354] that it had violated its international obligations in not arresting al Bashir when he visited the Kingdom, that could do the greatest damage to the progressive development of international criminal law.[355] In an interestingly reasoned 98-page judgment (supplemented by a 190 page Joint Concurring Opinion from four of the five Judges),[356] the Appeals Chamber can arguably be described as aggressively pursuing a case for and grounding its decision on *lex ferenda* as opposed to *lex lata*.

The Appeals Chamber – which had canvassed expert opinions from multiple scholars[357] – inaccurately frames the principal appeals question;[358] exhibits a remarkable disregard for the drafting history of the Rome Statute and the negotiations that yielded both Articles 27 and 98 of the ICC's Constitutive Statute;[359] attempts to validate and render coherent the poorly reasoned *Malawi* and *Chad* decisions as well as the *DRC* decision. It also, stunningly, attempts to rewrite international law and the very foundations thereof by invalidating the absolute immunity *ratione personae* that Heads of State and other high-ranking officials enjoy in foreign States.[360] In setting aside the conclusions of the *DRC* decision, which effectively insulates veto-wielding Security Council members that decline to become party to the Rome Statute from ever being subject to the ICC, it reinstates the reasoning of the questionable *Malawi* and *Chad* decisions.[361] Probably intended to address the asymmetry of the global legal order that is partly responsible for the AU's decision to create a regional criminal court,[362] the Appeals Chamber's dubious reasoning is unlikely to assuage AU concerns.

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354 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: *Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir*, available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-309 accessed 28 September 2018.

355 See Dapo Akande, "ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals," *EJILTalk* (6 May 2019), available at https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/

356 See Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa, available at https://www.icc-cpi.int/RelatedRecords/CR2019_02595.PDF.

357 At least sixteen scholars in addition to counsel retained by the African Union and the Arab League appeared as amici curiae and no less than five members of the International Law Commission – Woods, Murphy, Tladi, Jalloh and Hmoud – appeared in support of Jordan's position.

358 See Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa, Note 356 above at para 3. According to the Appeals Chamber, "the ultimate question of substance to be answered in this appeal is whether, in the particular circumstances of this case, Mr Omar Al-Bashir, as the President of Sudan at the material times, enjoyed immunity before this Court [an international court], thus justifying Jordan's failure to comply with the Court's request for his arrest and surrender" rather than whether or not Bashir enjoyed immunity from foreign criminal process in Jordan.

359 For a comprehensive account of the legislative history of the Rome Statute, see Bassiouni (Ed) *The* Legislative *History of the International Criminal Court* Vols. I – III. See also Attila Bogdan, "The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98" (2008) *8 International Criminal Law Review* 1, at 18 – 21.

360 See *Arrest Warrant Case*, Note 3 above. See also Dov Jacobs, "You have just entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case" *Spreading the Jam* (May 6, 2019). Available at https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/

361 See Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa, Note 356 above

362 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 20 above

The effort to address comments on the judgment in the blogosphere through release by the Court of an unusual Question and Answer document on its judgment,[363] in which it pleads for circumspection – and even judicial deference – represents arguably, an unseemly abandonment of judicial detachment.[364] Same can be said of the extraordinary engagement of the official spokesperson of the Court with commentators on such academic blogs as EJILTalk,[365] The Court's defiant assertion in the Question and Answer document – in response to the clamour for the AU to seek an ICJ Advisory Opinion on the question of the immunity of Heads of State from foreign criminal jurisdiction[366] – that it would not be bound by ICJ jurisprudence,[367] is also a recipe for fundamental discord in the development of international criminal law.

It is reasonably deductible from the Court's posture that it sees itself as being on the right side of history irrespective of the current state of international law. The President of the Appeals Chamber's references, during oral submissions, to the US Supreme Court's *Dredd Scott* decision[368] – which characterised slaves as chattel – and to the moral rectitude and stoicism of the lone dissenter in that case (Justice Curtis) who was vindicated by subsequent legal developments that affirmed the clearly erroneous and morally reprehensible majority decision, seem to bear this out.[369]

If the statement of South Africa's Justice Minister[370] when he announced South Africa's withdrawal from the Rome Statute is anything to go by,[371] there is reason

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363 See Q&A Regarding Appeals Chamber's 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal, ICC-PIOS-Q&A-SUD-02-01/19 (19 May 2019). Available at https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf.

364 See Dapo Akande, "ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals," note 355 above. See comments of Marko Milanovich and James Sweeney in comment section. See also Dov Jacobs, "Q&A regarding the "Q&A Regarding Appeals Chamber's 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal" Spreading the Jam (May 17, 2019). Availabke at https://dovjacobs.com/2019/05/17/qa-regarding-the-qa-regarding-appeals-chambers-6-may-2019-judgment-in-the-jordan-referral-re-al-bashir-appeal/

365 See Dapo Akande, "ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals," note 355 above. See comments of Fadi El Abdallah in comment section.

366 See Theresa Reinold, "African Union v International Criminal Court: episode MLXIII (?)" *EJILTalk* (March 23, 2018). Available at https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/. See also Angela Mudukuti, "Immunity, Accountability and Politics – the AU's bid for an ICJ Advisory Opinion" (June 25, 2018) *GroJIL-blog*. Available at https://grojil.org/2018/06/25/immunity-accountability-and-politics-the-aus-bid-for-an-icj-advisory-opinion/.

367 See Q&A Regarding Appeals Chamber's 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal. Note 363 above on page 4.

368 *Dred Scott v. Sandford* (1857) 60 U.S. (19 How.) 393.

369 Notes on file with author (this author had the opportunity to be present during oral proceedings from September 10 to 14 2018). See also Transcripts of Oral Proceedings on September 11, 2018 (ICC-02/05-01/09-T-5-ENG ET WT 11-09-2018 1/139 SZ PT OA2), where Presideing Judge Chile Eboe Osuji makes said remarks at page 69, lines 17 – 22. Available at https://www.legal-tools.org/doc/7d7497/pdf/.

370 See *Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir* on 21 October 2016, available at http://www.dirco.gov.za/docs/speeches/2016/masu1021.htm accessed 28 September 2018.

371 South African courts have blocked South Africa's announced withdrawal from the Rome Statute but the significant overreach of the Appeals Chamber may cause a rethink within Government. See *Democratic Alliance v. Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017), available also at http://saflii.org/za/cases/ZAGPPHC/2017/53.pdf accessed 28 September 2018. See also James Macharia, *South African court blocks government's ICC withdrawal*

to believe that this overreaching judgment may portend the beginning of the end of times for the Court.[372]

4. Does the Malabo Protocol Undermine the Rome Statute?

The question as to whether the Malabo Protocol and the immunity provision therein undermine the International Criminal Court is answered in the affirmative by activists who argue that the immunity provision will insulate perpetrators of international crimes from accountability.[373] And yet this argument seems to disregard the fact that the Malabo Protocol, as a continental measure for accountability for international crimes, would be extending – not limiting – the reach of international criminal accountability.[374] The notion that by creating a court that mirrors the jurisdiction of the ICC, the AU is thereby limiting the reach of the ICC is also not borne out by any educated reading of the constitutive statutes of both the ICC and the Expanded African Court. [375]

For as long as AU member States remain States parties to the Rome Statute,[376] the ICC will not be constrained in any legal way from exercising jurisdiction over a Rome Statute State party that is also party to the Malabo Protocol. The foregoing notwithstanding, there is a legitimate risk that through overlapping mandates, definitions of crimes or through different standards for conducting trials, the Expanded African Court could – as in other instances of overlapping jurisdiction *ratione materiae* – compromise consistent and robust development of, or, contribute to incoherent development of international criminal jurisprudence across the various courts.[377]

4.1 Definitions of Crimes.

Likely difficulties arising from the breadth of the Expanded African Court's jurisdiction *ratione materiae* have been previewed in this Chapter and will not be

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bid Reuters World News (22 February 2017) available at https://www.reuters.com/article/us-safrica-icc/south-african-court-blocks-governments-icc-withdrawal-bid-idUSKBN1610RS accessed 28 September 2018. See also Gerhard Kemp, "South Africa's (Possible) Withdrawal from the ICC and the Future of the Criminalization and Prosecution of Crimes Against Humanity, War Crimes and Genocide Under Domestic Law: A Submission Informed by Historical, Normative and Policy Considerations, (2017) *16 Washington University Global Studies Law Review*, 411.

372 There may well come a time when other States come to the conclusion which the Minister came to when he said that "[t]he effect of withdrawal from the Rome Statute … thus completes the removal of all legal impediments inhibiting South Africa's ability to honour its obligations relating to the granting of diplomatic immunity under international law as provided for under our domestic legislation"

373 See Jemima Kariri Njeri, "Can the New African Court Truly Deliver Justice for Serious Crimes? The African Union's Decision to Support a Court that Provides Immunity to Heads of State Undermines Human Rights" (8 July 2014) *Institute for Security Studies.*

374 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 1 above at 215 – 216.

375 See Ademola Abass, "*Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*," Note 98 above. See also Dire Tladi, "Immunities (Article 46A *bis*)," Note 1 above at 215.

376 The ICC may exercise jurisdiction over former States parties to the Rome Statute for any situations that occurred during the period of their accession up until the Instrument of Withdrawal becomes effective a year after it is deposited. See Jina Moore, *Burundi Quits International Criminal Court*, New York Times (27 October 2017), available at https://www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html accessed 28 November 2018. See however ICC Press Release of 9 November 2017, ICC Judges Authorise Opening of an Investigation Regarding Burundi Situation (ICC-CPI-20171109-PR1342).

377 See Frans Viljoen and Evariste Baimu, "Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice," Note 140 above, at 252 – 255.

further elaborated upon. It bears noting however that because such crimes as Unconstitutional Change of Government,[378] Trafficking in Drugs[379] and Hazardous Waste[380] and Illicit Exploitation of Natural Resources[381] have not been typical of international prosecutions to date, their definitions may need to be sharpened to abide by the principle of legality in criminal law.[382]

Given the fears about lower standards in the definitions of the three core international crimes for which the ICC and the Expanded African Court may both exercise jurisdiction, it is useful to summarily review the said definitions:

4.1.1 Genocide.

The definition of genocide in the Malabo Protocol appears to differ from the definition in the Rome Statute in only one way – the inclusion by the Malabo Protocol of a paragraph (f) which renders "acts of rape or any other form of sexual violence" acts of genocide.[383] While this inclusion is considered by some scholars as superfluous and of no "added value,"[384] the fact that the drafters sought to explicitly reflect in the definition of genocide what jurisprudence from international criminal courts have acknowledged, may reasonably be described as progressive.[385] Of this, Amnesty International has stated that:

> The definition of genocide in the Malabo Protocol is slightly more progressive and reflective of recent jurisprudence than the definition in the Rome Statute… acts of rape or any other form of sexual violence committed with intent to destroy, in whole or in part, a national, racial or religious group, as such, constitutes genocide. A similar provision is not available in the Rome Statute.[386]

The view that the Malabo Protocol's intended enhancement of the definition of genocide was superfluous is neither helpful nor necessary. Given that the finding in *Akayesu*[387] – that rape, in the context,

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[378] See Article 28 E of the Malabo Protocol.

[379] See Article 28 K of the Malabo Protocol.

[380] See Article 28 L of the Malabo Protocol.

[381] See Article 28 L *Bis* of the Malabo Protocol.

[382] See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

[383] See Article 28B(f) of the Malabo Protocol. See also Article 6 of the Rome Statute of the ICC.

[384] See Kai Ambos, "Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M) in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (Volume 10) International Criminal Justice Series (Asser Press, 2017) 31 – 55.

[385] See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

[386] See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*. Note 23 above at p 16.

[387] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at

constituted genocide – was delivered only in September 1998, after the Rome Statute of the ICC had been adopted,[388] the more charitable and less cynical view should be that the Malabo Protocol drafters sought to address an omission in the Rome Statute definition.

4.1.2 Crimes against Humanity.

The Malabo Protocol's definition of Crimes against Humanity[389] incorporates the more progressive definition in the Rome Statute[390] (as compared to the Statutes of the ICTY[391] and ICTR).[392] Beyond adding the Enforced Disappearance of Persons,[393] the Crime of Apartheid,[394] and extensive definitions of crimes against humanity[395] – as the Rome Statute also does – it also permits expansion of the range of perpetrators of crimes against humanity by incorporating into the definition of "attack" non-State actors or any parties pursuing an organizational policy to perpetrate crimes against humanity.[396] Somewhat provocatively however, Article 28C of the Malabo Protocol, in likely recognition of the Protocol establishing jurisdiction over corporate criminal activity differs from the Rome Statute definition by including "enterprise" in the chapeau of the definition:

> … 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack or enterprise directed against any civilian population, with knowledge of the attack or enterprise.[397]

While the word attack is defined and has benefitted from a jurisprudential expansion of its ambit,[398] the word enterprise is

http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf accessed 28 November 2018.

388 The Rome Statute of the ICC was adopted by the Conference of Plenipotentiaries on 17 July 1998. For further detail see United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court *(Rome, 15 June — 17 July 1998)*, available at http://legal.un.org/diplomaticconferences/1998_icc/ accessed 28 November 2018.

389 See Article 28C of the Malabo Protocol.

390 See Article 7 of the Rome Statute.

391 See Article 5 of the Statute of the ICTY.

392 See Article 3 of the Statute of the ICTR.

393 See Article 28C (1)(i).

394 See Article 28C (1)(j).

395 See Article 28C (2).

396 In the cases arising from the Kenya situation before the ICC, "organizational policy" was construed to permit reference to criminal gangs.

397 See Article 28C (1) of the Malabo Protocol.

398 *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), Note 387 above.

undefined and is likely to generate controversy.[399] Definitions of torture[400] and persecution[401] also go beyond the definitions in the Rome Statute and would permit easier establishment of culpability – even if it is not entirely clear that would be in the interests of justice.[402]

4.1.3 War Crimes.

As with the definition of genocide, the Malabo Protocol definition of War Crimes is significantly more expansive than the Rome Statute definition, incorporating thereinto the First Additional Protocol of the Geneva Conventions and an additional six acts that would constitute violations of the laws and customs applicable to international armed conflict.[403] These are: unjustifiably delaying the repatriation of prisoners of war or civilians, wilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, making non-defended localities and demilitarized zones the object of attack, slavery and deportation to slave labour, collective punishments and despoliation of the wounded, sick, shipwrecked or dead.[404]

The Malabo Protocol also adds to the list of acts that constitute violations in armed conflicts not of an international character, ten acts that the Rome Statute definition excludes. Such additions, including the use of nuclear weapons and other weapons of mass destruction, add up to a total of twenty-two acts whereas the Rome Statute has twelve.[405]

What can be said from the foregoing is that the concern about the Malabo Protocol watering down the definitions of core crimes has proven to be baseless. To the contrary the said definitions arguably establish higher standards by incorporating the jurisprudence from international criminal tribunals thereinto.[406]

A concern which arises from the broad ambit of Article 28 – unrelated to apprehensiveness about impunity for Heads of State and other high-ranking

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399 It is uncertain what would represent an 'enterprise' against a civilian population. See Kai Ambos, "Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)," Note 384 above.

400 See Article 28C (2)(e) of the Malabo Protocol.

401 See Article 28C (2)(g) of the Malabo Protocol.

402 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

403 See Article 28D (c).

404 See Article 28D (b).

405 See Article 28D (e), paras i – xxi of Malabo Protocol.

406 See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

officials' – is with the sub-optimal definitions of such crimes as terrorism,[407] which could potentially breach principles of legality for being vague and overly broad.[408]

4.2 Concurrent Jurisdiction over Crimes.

The question of concurrent jurisdiction by the Expanded African Court and the ICC has been cast also as a means by which the ICC may be undermined by the Malabo Protocol.[409] While there is authority from the ICTY and the ICTR that there may be conflict between the courts with respect to conducting investigations and sharing information and evidence, the concerns presented appear to be largely overblown.[410]

There will undoubtedly be a range of political economy issues where the Expanded African Court exercises jurisdiction over a situation that the ICC may institute proceedings in because complementarity and the procedural bar to the ICC's exercise of jurisdiction that it represents would apply only where the domestic courts of Rome Statute State parties with the requisite competence are able and willing, genuinely to assert jurisdiction.[411]

There is however no reason why the Courts may not arrive at a mutual accommodation on which Court would exercise jurisdiction and when or in what circumstances. As one of the architects of the Malabo Protocol has said, without acknowledging its deficiencies:

> The drafters and negotiators clearly envisage that, since multiple courts will share jurisdiction, these courts may opt to negotiate among themselves on how best to handle this shared jurisdiction so that the ends of justice are met in an effective, efficient, credible and fair manner. In this regard, it is left to the Courts themselves, once fully constituted, to negotiate how they will work together. The aim is to reduce the possibility of 'politics' or 'political considerations' playing a part in what should essentially be a judicial task.[412]

The ICC may be well served, as some scholars have proposed, in adopting a jurisdictional stance which makes it a court of last resort.[413]

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407 See Article 28G of the Malabo Protocol.

408 See Article 15 of the International Covenant on Civil and Political Rights (ICCPR).

409 See Jemima Kariri Njeri, "Can the New African Court Truly Deliver Justice for Serious Crimes? The African Union's Decision to Support a Court that Provides Immunity to Heads of State Undermines Human Rights," Note 373 above.

410 See Parusha Naidoo and Tim Murithi, "The African Court of Justice and Human Rights and the International Criminal Court: Unpacking the Political Dimensions of Concurrent Jurisdiction," Note 144 above.

411 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 375 above at 215 – 216.

412 See Don Deya, "Is the African Court Worth the Wait?" Open Society Initiative for Southern Africa, (6 March 2012), available at http://www.osisa.org/openspace/regional/african-courtworth-wait accessed 28 November 2018.

413 See Philippe Kirsch, "The Role of the International Criminal Court in Enforcing International Criminal Law," (2007) 4 *American University International Law Review* 539. See also Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Court* (Cambridge University Press: Cambridge, 2005)

4.3 Complementarity.

Per Article 46H (1) of the Malabo Protocol,

> The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.[414]

Article 46H (2) – (4) go on to set out the particulars of when a case would be inadmissible and instances where the Expanded African Court may exercise jurisdiction because a State, which would ordinarily have jurisdiction is unwilling to investigate or prosecute in a particular case.[415]

Although complementarity and the State sovereignty it recognizes were critical to the conclusion and adoption of the Rome Statute in 1998,[416] the ICC has not always adopted a stance that would suggest that it is conscious of the complementary role States parties sought to confer upon it.[417] This is particularly curious since a proactive engagement with States where they seek to exercise jurisdiction could serve not only to preserve its *raison d'être* but also to entrench accountability in many jurisdictions.[418]

The questionable wisdom of such a stance by the ICC was most obvious in the Kenya situations where Kenya's offer to set up a new special court to prosecute the perpetrators of the post-election violence for which the ICC's jurisdiction had been invoked was dismissed out of hand.[419] Based on the Prosecutor's submissions against the admissibility challenge by the Government of Kenya,[420] the ICC Pre-Trial Chamber ruled that the Kenyan Government was not

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414 See Article 46H (1) of the Malabo Protocol.

415 See Article 46H (2) – (4) of the Malabo Protocol.

416 Robert Cryer, "International Criminal Law vs State Sovereignty: Another Round?" (2005) *16 European Journal of International Law* 979.

417 See Bartram S. Brown, "The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit," (2017) 31 *Temple International and Comparative Law Journal* 145.

418 William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice (2008) 49 *Harvard International Law Journal* 53.

419 The Court even denied Kenya an opportunity to file additional papers and make oral submissions. See Bartram S. Brown, "The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit," Note 417 above.

420 The ICC Prosecutor argued that

(a) the interested party lodging an admissibility challenge bears the burden of proof and the GOK failed to show that it "has conducted or is conducting investigations or prosecutions in relation to the cases" before the Court;

(b) a State promising to conduct domestic proceedings is not sufficient to satisfy the admissibility requirements; and

(c) the cases must concern the individuals in the proceedings before the ICC and not other individuals.

Steven Kay QC, Complementarity and Kenya at the International Criminal Court – Lessons To Be Learnt Under Article 17 & 19(2)(B), available at http://www.internationallawbureau.com/wp-content/uploads/2011/10/COMPLEMENTARITY-AND-KENYA-AT-THE-INTERNATIONAL-CRIMINAL-COURT-%E2%80%93-LESSONS-TO-BE-LEARNT-UNDER-ARTICLE-17.pdf accessed 15 October 2016

investigating or prosecuting the same persons before the ICC, "but [only] those at the same level in the hierarchy."[421]

Given that the OTP's inability to sustain the prosecution was revealing of its ill-preparedness (even incompetence) and severely damaged its credibility, the alternative could hardly have yielded worse results. Indeed, there was no reason why the OTP could not have requested investigations of the subjects of the ICC prosecution as a condition for standing down. Judge Usacka's dissenting view on the admissibility question was quite telling of the surprisingly little thought that went into what should have been a momentous and carefully considered decision. Per Judge Usacka:

> … in exercising its discretion under rule 58 (2) of the Rules of Procedure and Evidence, the Pre-Trial Chamber did not completely account for the sovereign rights of Kenya and the principle of complementarity. Instead, the Chamber, on the basis of its understanding of what constitutes a 'case' in terms of article 17 (1) (a) of the Statute, gave too much weight to considerations of expeditiousness. Finally, despite the Appellant's requests and submissions, the Pre-Trial Chamber did not give sufficient weight to the fact that it was hearing the first challenge to admissibility brought by a State and that many legal issues had not been previously addressed in the Court's jurisprudence. The Pre-Trial Chamber therefore did not properly balance the various factors mentioned in determining the procedure under rule 58 (2) of the Rules of Procedure and Evidence. This failure led to an abuse of discretion.[422]

For the Expanded African Court, the complementarity rule would, in reality, apply only to national jurisdictions as there are no courts of Regional Economic Communities (RECs) that have international criminal jurisdiction. While the Malabo Protocol makes no mention of the ICC, and the Rome Statute neither makes mention of regional courts nor anticipates a complementary role in relation thereto, there is no reason why there cannot be such a complementary role – in practice – with each court playing an important part within the accountability framework. Without dwelling on this, the views of multiple scholars,[423] including PALU – at whose feet part of the blame for a sub-optimal Protocol may be laid[424] – confirm that the fact that the Malabo Protocol does not acknowledge the ICC or the fact that the Rome Statute did not anticipate the

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421 See Christopher Totten, Hina Asghar, and Ayomipo Ojutalayo, "The ICC Kenya Case: Implications and Impact for Propio Motu and Complementarity," (2014) 13 *Washington University Global Studies Law Review*, available at https://openscholarship.wustl.edu/law_globalstudies/vol13/iss4/7 accessed 28 November 2018.

422 See *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali:* Dissenting Opinion of Judge Anita Usacka to Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" at paragraph 30.

423 See Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya*, Springer Series in Transitional Justice (2015). See Chapter Two. See also Justine Tillier, "The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?" (2013) 13(3) *International Criminal Law Review* 507. See also Carsten Stahn, "Complementarity: A Tale of Two Notions," (2008) 19 *Criminal Law Forum* 87.

424 PALU was retained by the AU Commission and tasked to undertake a thorough study, present detailed recommendations and draft an instrument to amend the Protocol on the Statute of the African Court of Justice and Human Rights. See Don Deya, "Is the African Court Worth the Wait?" Open Society Initiative for Southern Africa, (6 March 2012), available at http://www.osisa.org/openspace/regional/african-courtworth-wait accessed 28 November 2018.

Expanded African Court does not pose any legal constraints to cooperation *inter se*.[425] Per PALU's Don Deya:

> The drafters and negotiators are acutely aware of the fact that the proposed Court will be complementary to national courts and will co-exist with other international courts, which will have similar mandates and jurisdictions to it. For instance, part of its general affairs mandate will be shared with the International Court of Justice (ICJ), and also the Courts of the African RECs. Similarly, its human and peoples' rights mandates will be shared with some (if not all) of the Courts of the RECs. Furthermore, its international criminal law mandate (at least in respect of the crimes of genocide, crimes against humanity and war crimes at the moment, and the crime of aggression in the future) will be shared with the ICC.[426]

It may be wise in the circumstances to support Kenya's proposal to amend the preambular paragraphs of the Rome Statute to permit deference of the ICC to regional courts under the complementarity principle and to go even further to amending the substance of Articles 17 – 19 of the Rome Statute which establish the complementarity regime.[427]

5. Conclusion.

Conclusions that may be drawn from the foregoing are that the AU has taken a number of steps that lead to reasonable conclusions that it seeks to avoid accountability – a notion that seems all the more believable because of the alleged motivations that led to the destruction of the SADC Tribunal by SADC Heads of State.[428] These include the AU's inconsistent stance on the rationale for objections to the ICC exercising jurisdiction over African Heads of State. While the stance in respect of Omar al Bashir was indeed a principled one founded on the Rome Statute of the ICC and the application of the treaty to non-State parties, the stance with respect to Kenyatta and Ruto portray clearly, a departure from those principles.[429] Recent acknowledgment by the AU of the import of Article 27 of the Rome Statute inspires little confidence about the AU's consistency.

Other reasons for the legitimate scepticism of the AU's motivations in setting up the Expanded African Court with international criminal jurisdiction lie in the AU's strategy – even if poorly crafted – to withdraw from the Rome Statute,[430] thereby being beholden only to an African criminal court that is primed to fail by reason of a crushing range of

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425 See Parusha Naidoo and Tim Murithi, "The African Court of Justice and Human Rights and the International Criminal Court: Unpacking the Political Dimensions of Concurrent Jurisdiction," Note 144 above.

426 See Don Deya, "Is the African Court Worth the Wait?" Open Society Initiative for Southern Africa, Note 424 above.

427 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 1 above at page 216 and footnote 50.

428 Sean Christie, *Killed off by Kings and Potentates*, Mail and Guardian (9 August 2011), Note 18 above. See also Baobab**,** *Beheading the Monster*, The Economist (22 August 2012), Note 19 above.

429 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 21 above at 16.

430 See Solomon Ayele Dersso, *The AU's ICC Summit: A Case of Elite Solidarity for Self-Preservation?* Note 47 above. See also Aaron Maasho, African Union leaders back mass exodus from International Criminal Court, Independent (1 February 2017), Note 81 above. See also Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" Note 69 above. See also Elise Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye" Human Rights Watch, Note 77 above.

jurisdiction,[431] a woefully lean bench across its three chambers,[432] and predictably few resources to execute its mandate.[433]

While the afore-described reasons for scepticism are legitimate, it is also true that the narrative about the AU's quest for impunity is not as simplistic as has been suggested. In the hero-villain contestation that has become all too familiar, such progressive and pioneering endeavours as the AU Treaty's approach to humanitarian intervention has been largely forgotten.[434]

And yet, the AU and its member States were not always sour on the ICC and could even be described, in the lead up to the birthing of the Court and in its immediate aftermath, as ardent supporters.[435] It would seem that AU antipathy towards the ICC and its quest to establish a court with international criminal jurisdiction, developed and has been sustained primarily by a lop-sidedness of the international legal order that inspires a sense of victimhood within the AU.[436] Other factors that have fuelled and exacerbated the antagonism between the AU and the ICC have been ICC incompetence[437] and what can even be described as bad faith,[438] the imperiousness of the ICC, its little regard for natural justice[439] and, a political calculation within the Office of the Prosecutor[440] that

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431 Max du Plessis, "Implications of the AU Decision to give the African Court Jurisdiction over International Crimes," Note 149 above.

432 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

433 Max du Plessis, "Implications of the AU Decision to give the African Court Jurisdiction over International Crimes," Note 149 above.

434 See Article 4(h) of the Constitutive Act of the African Union, Note 244 above. See also Dan Kuwali and Frans Viljoen (Eds), *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act*, Note 247 above.

435 See Charles Chernor Jalloh, "Regionalizing International Criminal Law?" Note 249 above. See also Strategic Plan of the Commission of the African Union Volume 3: 2004-2007 Plan of Action – Programmes to Speed up Integration of the Continent, at 67, Note 251 above.

436 William A. Schabas, "The Banality of International Justice," Note 303 above. See also Ovo Imoedheme, "Unpacking the Tension between the African Union and the International Criminal Court: The Way Forward" Note 30 above.

437 See Julie Flint and Alex de Waal "Case Closed: A Prosecutor without Borders," Note 305 above. See also Dire Tladi "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" Note 42 above. See also Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But Gets the Law Wrong," Note 42 above. See also André de Hoogh and Abel Knottnerus "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again," Note 42 above.

438 Although the ASP had agreed to the use of Rule 68 to permit the use of recanted testimony in certain circumstances, it had been expressly agreed that it would apply to future cases and not to ongoing cases as the OTP tried to do in the Ruto Case. See Times Correspondent, *Africa to Withdraw from ICC over Use of Recanted Testimony*, The Times Group, (29 January 2016), available at https://www.times.mw/africa-to-withdraw-from-icc-over-recanted-evidence-law/ accessed 28 November 2018. See also *Kenya's William Ruto Wins ICC Witness Ruling*, BBC News (12 February 2016), available at https://www.bbc.com/news/world-africa-35563556 accessed 28 November 2018.

439 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir: Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute*, available at https://www.icc-cpi.int/CourtRecords/CR2017_01350.PDF accessed 28 November 2018. The South African government was particularly incensed that its approach to the ICC for Article 97 consultations was treated as a quasi-judicial process (rather than a diplomatic/political process) without any applicable procedures to guide the process and in breach of basic principles of natural justice and due process.

440 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 21 above.

leads it down the course of least resistance in targeting situations in African countries[441] rather than situations in countries with powerful political patrons.[442]

From the evidence, the AU has not been averse to the prosecution of former Heads of State, providing thought leadership to the process that resulted in the creation of the Extraordinary African Chambers in the Judiciary of Senegal to try Hissène Habré.[443] Neither, it seems, is the AU averse to treaty restrictions that limit the customary international law ambit of immunity *ratione personae* and *ratione materiae*.[444] It is particularly noteworthy also that in spite of the rhetoric, a full thirty-three African countries remain States parties to the Rome Statute.[445] Even Kenya, which has led the charge for *en masse* withdrawal from the Rome Statute[446] - a charge which has been vociferously opposed by several other African countries[447] – remains, to this day, party to the Rome Statute. And this notwithstanding the vote in Kenya's parliament to withdraw,[448] notwithstanding a political economy within Kenya that would permit withdrawal[449] and notwithstanding the fact that both the President[450] and the Deputy President[451] have first-hand knowledge of ICC incompetence, having been the subjects of failed prosecutions.

As the AU has said, the business of international criminal justice is too important to be left to just one institution.[452] It is within this context that the bid for an African Court with international criminal jurisdiction is presented as a continental imperative which gives voice to the AU's commitment to accountability in a manner that preserves its dignity. While this may be projected by sceptics as merely a means to prepare the ground for AU member States' departure from the ICC or as a pretext for the impunity that an ineffective court (which the Expanded African Court is expected by some to

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441 See John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?" Note 6 above. See also Max du Plessis, "Universalising International Criminal Law: The ICC, Africa and the Problem of Political Perceptions," Note 6 above.

442 See Sarah Nouwen and Wouter Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan." Note 7 above. See also Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror*, Note 7 above.

443 See AU Assembly, Decision on the Hissène Habré Case and the African Union, Assembly/AU/Dec.103 (VI) (Doc.Assembly/AU/8 (VI)) Add.9, Note 277 above. See also Paragraphs 8, 9 and 35 of the *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, Note 17 above.

444 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 1 above.

445 As of 1 October 2018, the African membership of the ICC stands at 33. See list of African States parties at http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx accessed 28 November 2018.

446 See Solomon Dersso, "The AU's Extraordinary Summit decisions on Africa-ICC Relationship," Note 50 above.

447 See Decision on the International Criminal Court Doc. EX.CL/1006(XXX), Note 83 above. Among the countries vigorously opposing the withdrawal strategy are Benin, Botswana, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Lesotho, Liberia, Madagascar, Malawi, Mozambique, Nigeria, Senegal, Tanzania, Tunisia and Zambia.

448 Edmund Blair, *Kenya Parliament Votes to Withdraw from ICC*, Note 292 above.

449 Human Rights Watch, *Perceptions and Realities: Kenya and the International Criminal Court* (14 November 2013), Note 294 above.

450 See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta,* Case No. ICC-01/09-02/11.

451 See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* Case No. ICC-01/09-01/11.

452 See AU Press Release No. 002/2012, Note 38 above.

become), will permit,[453] what is clear from the foregoing, after all is said and done, is that in the AU-ICC contestation, neither side can be held blameless.[454]

As the summary review of the jurisdiction *ratione materiae*, the concurrent jurisdiction and the complementarity regimes of the Malabo Protocol and the Rome Statute have shown, the Malabo Protocol does not undermine, the Rome Statute. It may certainly be abused to undermine international criminal justice but what is clear from the foregoing also is that there are few, if any, reasons why the Expanded African Court and the ICC cannot work together to deliver on the shared commitment of both Courts and their founders to ensure respect [for] … the sanctity of human life, [condemn and reject] … impunity[455] and put an end to impunity for the perpetrators of … [grave crimes] that shock the conscience of humanity.[456]

So let it be. (Amen).

[453] See Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" Note 20 above. See also Sean Christie, *Killed off by Kings and Potentates*, Mail and Guardian, Note 18 above.

[454] See William A. Schabas, "The Banality of International Justice," Note 303 above. See also Dire Tladi "Immunities (Article 46A *bis*)," Note 1 above.

[455] See Preambular Paragraph 11 of the Malabo Protocol.

[456] See Preambular Paragraphs 3 and 5 of the Rome Statute.

Chapter 7

Conclusions: Triumph of Impunity over Accountability?

1. Introduction.

As of April 30, 2019, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol)[1] had received eleven signatures but no ratifications.[2] Five years after its adoption, the rather slow rate of accession by AU member States, in spite of active encouragement by the AU Commission and Assembly to do so,[3] makes it unclear whether the Malabo Protocol will ever come into force.[4]

The Protocol's expansion of the jurisdiction of the African Court of Justice and Human Rights to include international criminal jurisdiction[5] together with a provision cloaking a certain category of State officials ("any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions, during their tenure of office") with immunity from prosecution by the Expanded African Court[6] has predictably spawned widespread criticism. International criminal justice advocates have claimed that the AU seeks thereby to create a culture of, and perpetuate impunity.[7] The AU on the other hand has asserted not only that it is standing up for itself against neo-colonialist forces who have perverted the ICC and

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1 See African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Adopted on June 27, 2014 (Malabo Protocol), available at https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf accessed 20 November 2018.

2 See List of Countries which have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf accessed 20 November 2018.

3 See 'AU Urges Member States to Ratify Malabo Convention', *Ethiopian News Agency,* 17 October 2018, available at https://www.ena.et/en/2018/10/17/au-urges-member-states-to-ratify-malabo-convention/ accessed 20 November 2018.

4 Per Article 11 thereof, the Malabo Protocol, the Statute of the Expanded African Court shall enter into force thirty days after the deposit of instruments of ratification by fifteen Member States. See Eden Matiyas, 'What prospects for an African Court under the Malabo Protocol?' *Justice Info.Net,* 31 May 2018, available at https://www.justiceinfo.net/en/justice-reconciliation/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html accessed 20 November 2018.

5 See Preamble to Malabo Protocol, Note 1 above.

6 See Article 46A *bis* of the Malabo Protocol, Note 1 above.

7 See Jemima Kariri Njeri, "Can the New African Court Truly Deliver Justice for Serious Crimes? The African Union's Decision to Support a Court that Provides Immunity to Heads of State Undermines Human Rights" *Institute for Security Studies,* 8 July 2014. See also Human Rights Watch, Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights, 13 November 2014, available at https://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and accessed 20 November 2018. See also Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" *Institute for Security Studies, Paper 278,* November 2014.

international criminal justice and seek subjugation of African States[8] but also that it is a champion for the very soul of customary international law on immunities.[9]

This concluding Chapter reprises the essence of this dissertation's findings and analyses by summarily reviewing the content of each Chapter as a backdrop to making conclusions on the titular question. In the light of developments since the writing of this dissertation commenced in 2016, this final chapter will also relook at the central issue of the perceived ICC bias against African States that set into motion, the actions and reactions that have led the AU and the ICC to this point. It also summarily presents some recommendations for a sustainable basis for what each of the principal actors in this drama says it wants: *justice*.

2. Summary Overview of Chapters.

What this thesis set out to do and has sought to achieve has been to undertake a doctrinal study as to whether the immunity that Article 46A *bis* on the Malabo Protocol[10] confers on "Heads of State or Government, or anybody acting or entitled to act in such capacity" coheres with international law – *lex lata* – or represents a retrogression in international law norms that seek to prevent impunity for international crimes. In assessing the oft-made claim about the AU seeking or cultivating impunity thereby, the study has endeavoured to go beyond the self-serving rhetoric of each party in the hero-villain contestation that has characterized AU-ICC engagement over the past several years.[11] It has sought to determine the veracity on the one hand of the claim that the

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8 Speech of Kenyan President to Emergency Summit of Heads of States and Government, 13 October 2013. See http://allafrica.com/stories/201310130069.html accessed 20 November 2018. See Aggrey Mutambo, 'AU Defends Immunity Clause for Sitting Presidents' *Daily Nation* 25 August 2014, available at https://www.nation.co.ke/news/africa/AU-defends-immunity-clause/1066-2430376-doqvavz/index.html accessed 20 November 2018. See also Farai Kuvirimirwa, *ICC: agent of neo-colonialism,* The Herald, 29 May 2014, available at https://www.herald.co.zw/icc-agent-of-neo-colonialism/ accessed 20 November 2018.

9 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, International Criminal Justice Series (Asser Press, 2017) 203 at 213. See also *AUC concerned over ICC decisions on Malawi and Chad*, available at https://europafrica.net/2012/01/17/8258/ accessed 20 November 2018. The AU, in a scathing critique of Pre-Trial Chamber rulings on Malawi and Chad's failure to arrest Omar al Bashir when he visited those countries recorded:

> … its deep regret that the [Pre-Trial Chamber] decision has the effect of:
>
> i. Purporting to change customary international law in relation to immunity *ratione personae*;
>
> ii. Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless;
>
> iii. Failing to address the critical issue of removal or non-removal of immunities by the UN Security Council vide resolution 1593(2005), which referred the situation in Darfur to the ICC, and,
>
> iv. Making a decision *per incuriam* by referring to decisions of the African Union while grossly ignoring the provisions of Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States "to comply with the decisions and policies of the Union"

The AU Commission went on to assert forcefully that it would

> … oppose any ill-considered, self-serving decisions of the ICC, as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa.

10 See Article 46A *Bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at https://www.au.int/web/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf accessed 11 December 2018.

11 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", (2015) 13 *Journal of International Criminal Justice* 3. See also Dire Tladi, "Of Heroes

Malabo Protocol's immunity provision represents an illegal roll-back by the AU of normative gains in international criminal law to ensure accountability for egregious violations of human rights law.[12] It has also sought to determine the legitimacy of the AU's claims that it has been unfairly targeted by the ICC,[13] that there is no substance to the accusation that it seeks impunity for the category of officials covered by the immunity provision[14] and that its insistence on immunity is but a reflection of its fealty to current international law – *lex lata*[15]. As may be distilled from the foregoing chapters, the answer to the titular question of this dissertation, lies in shades of grey and somewhere in the middle of the respectively indignant and self-righteous stances of the AU and the ICC.

2.1 Chapter Two.

Chapter Two presents a review of critical background information for this dissertation such as African leaders' grievances in relation to what was perceived as the abuse of universal jurisdiction by Western States to bring African leaders to trial,[16] and the drivers of the fraught relationship between the AU and the ICC including accusations of unfair targeting of African countries[17] and instances of

and Villains, Angels and Demons: The ICC-AU Tension Revisited," (2017) 60 *German Yearbook of International Law* 43 – 71.

12 See Human Rights Watch, Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights (13 November 2014), available at https://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and accessed 20 November 2018.

13 See Dapo Akande, "The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?", *EJILTalk* (8 February 2012), available at http://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/ accessed 20 November 2018. See also Daisy Ngetich, "Mugabe accuses ICC of targeting Africans," *Citizen Digital (*16 June 2015), available at https://citizentv.co.ke/news/mugabe-accuses-icc-of-targeting-africans-89161/ accessed 20 November 2018. See also "Museveni calls for mass pull-out of African states from International Criminal Court," *Daily Nation* (12 December 2014), available at http://www.nation.co.ke/news/politics/African-states-quit-ICC-Museveni/1064-2554310-5qe0l2/index.html accessed 20 November 2018. See also *African Union Condemns 'Unfair' ICC*, BBC News (11 October 2013), available at https://www.bbc.com/news/world-africa-24489059 accessed 20 November 2018.

14 See "African Union Expresses Opposition to International Criminal Court Prosecutions and Seeks Postponement of Kenyatta Trial" *International Justice Resource Centre* (16 October 2013), available at https://ijrcenter.org/2013/10/16/african-union-expresses-opposition-to-international-criminal-court-prosecutions-and-seeks-postponement-of-kenyatta-trial/ accessed 20 November 2018.

15 See *AUC concerned over ICC decisions on Malawi and Chad*, Note 9 above.

16 See Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General (Ex.Cl/411(XIII)), available at http://archive.au.int/collect/oaucounc/import/English/EX%20CL%20411%20(XIII)%20_E.PDF accessed 3 September 2018.

17 See David Bosco *Why is the International Criminal Court picking only on Africa?* The Washington Post (29 March 2013) available at https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html?noredirect=on&utm_term=.9f10d6851591 accessed 5 September 2018.

overreach by the ICC's Prosecutor,[18] by the Court itself[19] and by international criminal justice advocates.[20] Chapter Two also recounts and provides a chronology of the steps leading up to the adoption in 2014 of the Malabo Protocol by the African Union and then assesses the place and status of the proposed Expanded African Court within the AU's judicial architecture.[21] This latter section reviews the structure and competence of the various courts that the AU has created and sets out the legal status of the Protocol (to add international criminal jurisdiction) amending the Protocol to merge the African Court of Justice and the African Court of Human Rights.

Some commentators have sought to argue not only that there is no legal basis for a continental court that has the same jurisdictional reach as the ICC but also that the Expanded African Court is being set up in a deliberate ploy to frustrate the ICC.[22] This Chapter concludes however, on the basis of the law, that any such conclusions are ill conceived. The notion that a court created by a multi-lateral treaty (the Expanded African Court) is somehow subordinate to another court created by a multi-lateral treaty (the ICC) or that AU member States that are party to the Rome Statute may not create another court with similar jurisdiction to the ICC is not consistent with any lucid reading of international law.[23]

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[18] See Luis Moreno Ocampo, "Now end this Darfur denial", *The Guardian* (15 July 2010), available at https://www.theguardian.com/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur accessed 20 November 2018. See also William Schabas, "Inappropriate Comments from the Prosecutor of the International Criminal Court," *PhD Studies in Human Rights* (16 July 2010), available at http://humanrightsdoctorate.blogspot.co.za/2010/07/inappropriate-comments-from-prosecutor.html accessed 20 November 2018. See also Dapo Akande, "ICC Prosecutor's Inaccurate Statements about the Bashir Arrest Warrant Decision," *EJILTalk* (19 July 2010), available at http://www.ejiltalk.org/icc-prosecutors-inaccurate-statements-about-the-bashir-arrest-warrant-decision/ accessed 20 November 2018. See also Flint and De Waal, *Case Closed: A Prosecutor without Borders*, World Affairs (2009) available at http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders accessed 20 November 2018. See also Mark Kersten, *A Brutally Honest Confrontation with the ICC's Past: Thoughts on 'The Prosecutor and the President*, Justice in Conflict (23 June 2016), available at https://justiceinconflict.org/2016/06/23/a-brutally-honest-confrontation-with-the-iccs-past-thoughts-on-the-prosecutor-and-the-president/ accessed 20 November 2018.

[19] See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199, at 205; See also Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (…At long Last …) But Gets the Law Wrong" *EJILTalk* (December 15, 2011), available at http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 20 November 2018; See also *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* (9 April 2014), available at https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF accessed 20 November 2018. Although the Court changed its reasoning, it still fails to provide a convincing interpretation of the relevant provisions. See also André de Hoogh and Abel Knottnerus**,** "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again" *EJILTalk* (April 18, 2014), available at http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/ accessed 20 November 2018.

[20] See *Minister of Justice and Constitutional Development and Others v. Southern African Litigation Centre and Others* [2016] 2 All SA 365 (SCA); See also *Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir* on 21 October 2016, available at http://www.dirco.gov.za/docs/speeches/2016/masu1021.htm accessed 20 November 2018.

[21] See Nsongurua J. Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late Than Never," (2000) 3(1) *Yale Human Rights and Development Journal*, Article 2, 1. See also Solomon Ebobrah, "The admissibility of cases before the African Court of Human and Peoples' Rights: Who should do what?" (2009) 3(1) *Malawi Law Journal* 87.

[22] See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," (2011) 9 *Journal of International Criminal Justice* 1067, at 1081.

[23] See Article 52 of the UN Charter, See also Ademola Abass, "*Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*" (2013) 24(3) *European Journal of International Law* 933, at 941. In Abass' words:

> First, why should a court created by a multilateral treaty require the approval of another multilateral treaty creating a similar court to justify its own existence? Secondly, under what rules of international

Accordingly, this dissertation makes common cause with Abass who argues grandiloquently that:

> an inquiry into the legality of the proposed international criminal jurisdiction in Africa with reference to the Rome Statute is fallacious, fundamentally mistaken and unscrupulous in international law.[24]

Chapter Two concludes by proposing an analytical framework, upon which the titular question of this dissertation hangs.

2.2 Chapter Three.

As a backdrop to the doctrinal study on the status of immunities in international law, Chapter Three examines the rationale for the doctrine of sovereign immunity and traces its evolution over time, identifying the exceptions thereto that it admits. It does this through a review of legal history, case law, State practice and academic expositions.[25] It also determines the scope of the doctrine of sovereign immunity's current application for natural persons and the distinctions it has yielded between personal immunity or immunity *ratione personae* and functional immunity or immunity *ratione materiae*.[26] It concludes on the basis of extensive authority from case law and doctrinal expositions that while immunity *ratione personae* attaches to an indeterminate but limited number of persons – based on their office and only during their incumbency[27] – immunity *ratione materiae* is co-extensive with and can even exceed the immunity of a State in order not to indirectly implead the State by going after its proxies or agents.[28]

2.3 Chapter Four.

The focus of Chapter Four is to examine the claim that recent strides in international human rights law, international humanitarian law and international criminal law have collectively served to vanquish any claims to immunity in foreign domestic courts for Heads of State and other high-ranking officials who commit international crimes.[29] This is presented as a necessary backdrop to

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law, based on treaty or general principles, do states ratify a treaty to the exclusion of all other treaties, even those governing the same subject as the pre-existing one? Thirdly, why should the African Union, being a non-signatory to the Rome Statute, seek the legality of its own court under that Statute?

[24] See Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," Note 23 above at 942.

[25] See George Pugh, "Historical Approach to the Doctrine of Sovereign Immunity" (1953) 13 (3) *Louisiana Law Review* 476; See Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," (1951) 28 *British Year Book of International Law* 220; See Schmitthoff and Wooldridge "The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading" (1972) 2 *Journal of International Law and Policy* 199.

[26] See Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014) at 7 – 11.

[27] Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21(4) *The European Journal of International Law* 815, at 819. See also Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest," (2009) 7 *Journal of International Criminal Justice* 315.

[28] See Joanne Foakes; *The Position of Heads of State and Senior Officials in International Law*, Note 26 above at 16.

[29] See Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case" (1999) 10 *European Journal of International Law* 237; See also Brian Man-Ho Chok "The Struggle between the Doctrines of Universal Jurisdiction

answering the purely doctrinal question as to whether in the face of breaches of *jus cogens* human rights norms, the immunity that Article 46A *bis* of the Malabo Protocol confers on "Heads of State or Government, or anybody acting or entitled to act in such capacity" coheres with international law.

Further to extensive analysis, Chapter Four comes to the conclusion that while the values-laden and elegantly articulated assertion of a *jus cogens* exception to sovereign immunity and immunity for Heads of States and other high-ranking officials has found favour with some scholars[30] and before a number of courts, most notably in *Voiotia*,[31] *Ferrini*[32] and *Pinochet*[33] the argument that such judgments evince a legal norm in international law is questionable. Not least of the reasons for this is that, almost without exception, the high-profile judgments that have found that there is a *jus cogens* human rights exception to immunity have been overturned by appellate courts or have had the rationale undergirding them traversed by authoritative international courts.[34]

More specifically of immunity *ratione personae*, Chapter Four finds that under customary international law, immunity *ratione personae* does avail the *troika* of senior government officials (Heads of State, Heads of Government and Foreign Ministers) and other officials of similar stature where they are accused of international crimes and that there are absolutely no exceptions for *jus cogens* or other crimes.[35] On this, State practice as evidenced by the rulings of domestic

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and Head of State Immunity" (2013 – 2014) 20 *University of California Davis Journal of International Law and Policy* 233.

30 See for instance Beth Stephens, "Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses" (2011) 44 *Vanderbilt Journal of Transnational Law* 1163, at 1172; See also Stacey Humes-Schulz, 'Limiting Sovereign Immunity in the Age of Human Rights' (2008) 21 *Harvard Human Rights Journal* 105.

31 See *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997, Court of First Instance of Leivadia, Greece, October 30, 1997; See also Ilias Bantekas, "Prefecture of Voiotia v. Federal Republic of Germany. Case No. 137/1997" (October 1998) 92(4) *The American Journal of International Law* 765, at 765. See also *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre Case)* (Case No 11/2000) *Greece, Court of Cassation (Areios Pagos)* Judgment of 4 *May* 2000, 129 *International Law Reports*, 513.

32 *Ferrini v. Federal Republic of Germany*, *Corte di Cassazione* (*Sezioni Unite*), Judgment No. 5044 of 6 Nov. 2003, registered 11 Mar. 2004, 87 *Rivista diritto internazionale* (2004) 539. See also Pasquale De Sena and Francesca De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case" (2005) 16(1) *The European Journal of International Law* 89. See also Andrea Bianchi, "Ferrini v. Federal Republic of Germany" (January 2005) 99(1) *The American Journal of International Law* 242.

33 See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147. See also Michael Byers, "The Law and Politics of the Pinochet Case" (2000) *Duke Journal of Comparative and International Law* 415, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1221&context=djcil accessed 20 November 2018.

34 See Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens,*" (2010-2011) *9 Northwestern University Journal of International Human Rights* 149. See also Brian Man-Ho Chok "Let the Responsible Be Responsible: Judicial Oversight and Over-optimism in the *Arrest Warrant* Case and the Fall of the Head of State Immunity Doctrine in International and Domestic Courts", (2015) 30 *American University International Law Review* 489. See also *Jurisdictional Immunities of the State, Germany v. Italy (Greece intervening)*, Judgment, ICGJ 434 (ICJ 2012), 3rd February 2012, International Court of Justice [ICJ], hereafter *Jurisdictional Immunities of the State Case*.

35 See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ), 14 February 2002 (2002) ICJ Reports 3 (hereafter *Arrest Warrant Case*) at paragraph 51. See also Salvatore Zappala, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation"* (2001) 13(3) *European Journal of International Law* 595, at 595; See also Hazel Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government' (2002) 51 *International & Comparative Law Quarterly* 119.

courts and international courts, is unanimous and there are no judicial authorities that support the claim that Heads of State and other high-ranking officials entitled to immunity *ratione personae* are subject to the jurisdiction of foreign courts where they are accused of international crimes.[36] Even scholars like Orakhelashvili, who have displayed a single-minded aversion to immunity are prepared to acknowledge this point – even if reluctantly.[37]

While the question of whether there is a *jus cogens* human rights exception to immunity *ratione personae* can be answered definitively in the negative,[38] the same cannot be said of immunity *ratione materiae*, on which consensus has eluded legal experts.[39] Various scholars have asserted, based on variations of the different grounds articulated in *Voiotia*, that such an exception does exist.[40] And yet, by definition and application, and as affirmed by academic literature, immunity *ratione materiae* under customary international law is not only co-extensive with but arguably wider than the immunity of the State itself.[41] Accordingly, a State functionary, would, upon a State's instance be capable of claiming immunity for both sovereign acts for which the State is immune but also for official but non-sovereign acts.[42]

The contention that there is an exception to immunity *ratione materiae* for international crimes appears to be borne of fears that recognition of immunity *ratione materiae* – which unlike immunity *ratione personae* is not time bound – would open the floodgates to impunity.[43] Such fears appear however to be overblown because the invocation of immunity *ratione materiae* for an international crime would necessarily not be a frivolous exercise but a consequential one.[44] For immunity *ratione materiae* to bar the exercise by the domestic courts of a foreign State of jurisdiction over a government official – high-ranking or otherwise – it would have to be asserted by the State whose

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36 See Michael Tunks, "Diplomats or Defendants? Defining the Future of Head of State Immunity," (2002) 52 *Duke Law Journal* 651. See also Dapo Akande, "International Law Immunities and the International Criminal Court," (2004) 98 *American Journal of International Law* 407. See also Antonio Cassese, "The Belgian Court of Cassation v. the International Court of Justice: The Sharon and Others Case," (2003) 1 *Journal of International Criminal Justice* 437, at 440.

37 See Alexander Orakhelashvili, "State Immunity and International Public Order" (2002) 45 *German Year Book of International Law* 227, at 265. See also Alexander Orakhelashvili, "State Immunity and International Public Order Revisited," (2006) 49 *German Year Book of International Law* 327.

38 See *Arrest Warrant Case*, Note 213 above.

39 See for instance Reports of Special Rapporteurs Kolodkin and Escobar Hernandez on Immunity of State officials from foreign criminal jurisdiction. More particular details can be obtained from the Analytical Guide to the Work of the International Law Commission, available at http://legal.un.org/ilc/guide/4_2.shtml accessed 20 November 2018.

40 See for instance Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 27 above.

41 See Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law*, Note 26 above at 16.

42 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 27 above at 827.

43 See Noah Benjamin Novogrodsky, "Immunity for Torture: Lessons from Bouzari v. Iran" (2007) 18(5) *The European Journal of International Law* 939.

44 See Third report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur (A/CN.4/646), presented at the Sixty-third session of the International Law Commission at Geneva, 26 April – 3 June and 4 July – 12 August 2011 at pages 7 – 20, available at http://legal.un.org/docs/?symbol=A/CN.4/646 accessed 20 November 2018.

official has committed the criminal acts in question.[45] Where the State whose official has committed an international crime declines to lift immunity of the official upon request of the injured State, it, by so doing, recognizes, accepts and affirms the official's actions as its own and thereby incurs liability for same.[46] The injured State may on that basis, institute proceedings that compel the injuring State to take responsibility for its actions and provide just reparations.[47]

Conceivably then, the killing by Saudi authorities of journalist Jamal Khashoggi in the Saudi Embassy in Ankara in October 2018,[48] if claimed as an act of State, would permit the invocation of immunity *ratione materiae* by the Government of Saudi Arabia. However barbaric inhuman and distasteful the actions of the Saudi government's officials, Saudi authorities may therefore deny Turkey's request for extradition of the perpetrators from Saudi Arabia,[49] claim it as an act of State thereby invoking State responsibility[50] and insulate the perpetrators who acted as agents of the Saudi kingdom.[51]

There certainly appears to be doctrinal support for limiting the scope of immunity *ratione materiae*.[52] This, the Institute for International Law and the International Law Commission have made abundantly clear even if, in the absence of State practice,[53] their views accord more with the progressive development of international law than with the codification parts of their mandates.[54]

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45 See Third report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin. Note 266 above at page 9.

46 See Draft Article 40 on State Responsibility adopted by the International Law Commission in 2001. International Law Commission, *Report on the work of its fifty-third session* (23 April–1 June and 2 July – 10 Aug. 2001), *General Assembly, Official Records, Fifty-Fifth Session*, Supp. No. 10 (A/56/10), at pages 282 – 286, available at http://www.un.org/documents/ga/docs/56/a5610.pdf accessed 20 November 2018.

47 See Third report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin, Note 266 above at page 35. See also Chapter II of International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. See *Yearbook of the International Law Commission, 2001,* vol. II (Part Two), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, accessed 20 November 2018.

48 See Martin Chulov, Patrick Wintour, and Bethan McKernan, Jamal Khashoggi killing: What We Know and What Will Happen Next, *The Guardian* (Saturday 27 October 2018), available at https://www.theguardian.com/world/2018/oct/27/jamal-khashoggi-killing-what-we-know-and-what-will-happen-next accessed 20 November 2018.

49 See Ezgi Erkoyun and Ali Kucukgocmen, *Turkey Demands Extradition of 18 Saudis in Khashoggi Case*, Reuters (26 October 26, 2018), available at https://www.reuters.com/article/us-saudi-khashoggi/turkey-demands-extradition-of-18-saudis-in-khashoggi-case-idUSKCN1N01DC accessed 20 November 2018.

50 See Noah Benjamin Novogrodsky, "Immunity for Torture: Lessons from Bouzari v. Iran," Note 43 above.

51 The Khashoggi case represents a curious one in international law. Jamal Khashoggi was a Saudi national who was killed on Saudi territory – the Embassy of the Kingdom of Saudi Arabia. While Turkey may have jurisdiction over the lesser crime of disposing of a body, it is not clear under what authority it would have jurisdiction over the murder of Khashoggi.

52 See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 27 above.

53 See Sean D Murphy, "Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is The State Practice in Support of Exceptions?" (2018) 112 *American Journal of International Law Unbound,* 4.

54 Contributions of Kolodkin, Murphy and Huang during debate in the International Law Commission reflect such a view. See Provisional summary record of the 3378th meeting (second part of the 69th session) held at the Palais des Nations, Geneva, on Thursday, 20 July 2017, at 10 a.m., available at http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3378.pdf&lang=EF accessed 20 November 2018.

On the question of State officials not being able to invoke immunity *ratione materiae* for international crimes (as proposed by Draft Article 7 presented by Special Rapporteur Escobar-Hernandez), the degree of acrimonious dissent in the ordinarily staid International Law Commission[55] suggests that the conclusions it reached to adopt the Draft Article on immunity *ratione materiae*, by vote,[56] may have been a bit premature.[57]

The logic of Special Rapporteur Kolodkin's position – that *"[t]here can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official"*[58] – and the case law that affirms it would seem therefore to be current law.[59] This is borne out by the ICJ in the *Arrest Warrant Case* where the court held that unless immunity is revoked or waived, a Minister of Foreign Affairs or other person entitled to immunity *ratione personae* may only be tried in foreign domestic courts for crimes committed *prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity*. It would seem from the ICJ's reasoning in the judgment that the Court sought to say that Heads of State and other high-ranking officials could not be tried for *official actions* taken *during* incumbency because immunity *ratione materiae* would avail such officials post-

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55 See Provisional summary record of the 3378th meeting (second part of the 69th session), Note 54 above.

56 The Commission duly considered the report and provisionally adopted, by a recorded vote – twenty-one in favour, eight against and one abstention – the footnotes to Part Two Immunity *ratione personae* and to Part Three Immunity *ratione materiae*, Draft Article 7 and the Annex, together with commentaries thereon. See Provisional summary record of the 3378th meeting (second part of the 69th session), Note 55 above.

57 See particularly comments explaining their votes from adoption, Kolodkin, Murphy, Huang and Wood, Provisional summary record of the 3378th meeting, Note 55 above.

58 See Roman Anatolevich Kolodkin, Special Rapporteur, Second report on immunity of State officials from foreign criminal jurisdiction [Document A/CN.4/631] at paragraphs 94(b) and (c), available at http://legal.un.org/docs/?symbol=A/CN.4/631 accessed 20 November 2018.

59 See *Prosecutor v. Blaškić* (Objection to the Issue of *Subpoena duces Tecum*) IT-95-14-AR108 (1997), 110 ILR (1997) 607, at 707, para. 38 where the ICTY held, in defense of immunity *ratione materiae* that:

> State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since

See also *Zoernsch v. Waldock* [1964] 1 WLR 675, at 692 where the English Court of Appeal *per* Diplock L.J. ruled thus:

> A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf.

See also *Jones (Respondent) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Jones (Appellant) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) (Conjoined Appeals), [2006] UKHL 26 (June 14, 2006) [hereinafter Jones]*, where Lord Hoffman states at paragraph 78 that:

> It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.

See also Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 27 above at 325 – 327. See also Eileen Denza, '*Ex Parte Pinochet*: Lacuna or Leap', (1999) *48 International and Comparative Law Quarterly* 949 at 952.

incumbency.[60] That would indeed be the very definition of immunity *ratione materiae*.

What is clear is that international law experts who oppose the notion that there is a *jus cogens* human rights exception to immunity are not unpersuaded that such an exception may be valuable in ensuring accountability for gross violations of human rights or even that international law should compel such accountability. Their position is simply that notwithstanding the values that are deemed worthy of protection, current international law does not establish a *jus cogens* human rights exception to sovereign immunity and its progeny.[61] The contestation then, revolves around what is current international law, *lex lata,* as opposed to what the law should be, *lex ferenda*.[62]

The endeavour to achieve normative progression in ensuring accountability by striking down the ability to invoke immunity for international crimes is hampered by the logic of why, if the *jus cogens* prohibition of international crimes compels accountability without exception, such accountability only applies to limit immunity *ratione materiae*. At the heart of the inability to convincingly make a case that immunity *ratione materiae* may not be invoked by States – at least not successfully – for international crimes perpetrated by their officials is the question why *jus cogens'* superiority would also not override the immunity *ratione personae* of incumbent officials.

Difficulties in understanding the stated limitations of immunity *ratione materiae* are also exacerbated by the question of why *jus cogens'* superiority would apply only in criminal and not civil cases.[63] If the overarching need to avoid impunity requires a single-mindedness in ensuring an accountability that overrides a State's acknowledgment of its agency then, surely, the absence of such exceptions must also apply to civil cases. In any case, a review of State practice does not substantiate the claim that the jurisdictional immunities a State may invoke, and by extension, immunity *ratione materiae* for its functionaries have suffered such profound attrition as to produce a new customary law rule removing functional immunity for international crimes from *all* State officials. To the contrary, caselaw presented as practice to support the contention that there are exceptions to immunity *ratione materiae* for *jus cogens* crimes – *Eichmann*,[64]

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60 See *Arrest Warrant Case,* Note 213 above, at paragraph 61. See also Sevrine Knuchel, "State Immunity and the Promise *of Jus Cogens,"* Note 34 above at 158.

61 See Sevrine Knuchel, "State Immunity and the Promise of *Jus Cogens*,*"* Note 34 above. See also Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 11 above. This was indeed the thrust of the debate in the International Law Commission when Special Rapporteur, Concepción Escobar Hernández, presented her Fifth report on immunity of State officials from foreign criminal jurisdiction.

62 See Larry Helfer and Tim Meyer, "Codifying Immunity or Fighting for Accountability? International Custom and the Battle Over Foreign Official Immunity in the United Nations" in Curtis Bradley & Ingrid Wuerth (Eds) *Custom in Crisis* (2015, Duke Law School) (Proceedings of Conference "Custom in Crisis: International Law in a Changing World," Duke Law School October 31, 2014) (2015). See also "The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence" (with Laurence R. Helfer) in Curtis Bradley (Ed) *Custom's Future* (2016).

63 See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgment 3 February 2012 ICJ Reports 2012 (hereafter *Jurisdictional Immunities of the State Case*).

64 *Attorney General of the Government of Israel v. Eichmann (Dist. Ct. Jerusalem),* Criminal Case No. 40/61 Supreme Court of Israel, available at https://www.legal-tools.org/doc/aceae7/pdf/, accessed 13 November 2018. See also *Attorney-General of the Government of Israel v. Eichmann* (Israel Supreme Court 1962), International Law Reports Vol. 36, p. 277, 1968 (English translation).

Barbie,[65] *Pinochet*[66] and *Scilingo*[67] – upon closer examination – cannot be said to support the proposition and are effectively countered by *Habré*[68] and *Rumsfeld*.[69]

2.4 Chapter Five.

Chapter Five examines the question of Head of State immunity before international tribunals and assesses the veracity of the bold claim that under customary international law there is no immunity before international courts[70] – a question that is fundamental to determining the coherence of the Malabo Protocol's immunity provision with international law. It then proceeds to present a textual analysis of Article 46A *bis* of the Malabo Protocol in order to determine its true meaning and assess its coherence or otherwise with international law.

Because the ICJ's *Arrest Warrant Case* identified *prosecutions before international criminal tribunals "where they have jurisdiction,"*[71]as one of four

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65 See *The Prosecutor v. Klaus Barbie*, Case No. 83-93194, Arrêt, (6 October 1983); *The Prosecutor v. Klaus Barbie*, Case No. 85-95166, Arrêt, (20 December 1985); *The Prosecutor v. Klaus Barbie*, 86-92714, Arrêt, (25 November 1986); *The Prosecutor v. Klaus Barbie*, Case No. 87-84240, Arrêt, (3 June 1988), available at http://www.internationalcrimesdatabase.org/Case/182 accessed 18 November 2018.

66 *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, 3 WLR 1,456 (H.L. 1998) available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1221&context=djcil accessed 14 November 2018. See also *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147.

67 See *Graciela P de L v. Scilingo*. Judgment 16/2005; Reference Aranzadi, JUR 2005/132318; ILDC 136. See also *Scilingo Manzorro (Adolfo Francisco) v. Spain*, Appeal judgment, No 798, ILDC 1430 (ES 2007), 1st October 2007, Spain; Supreme Court.

68 See *L'avis de la Cour d'appel de Dakar sur la demande d'extradition de Hissène Habré (extraits)* which translates as Opinion/Judgment of the Court of Appeal on the Request for Extradition of Hissène Habré (extracts) at paragraphs 5 and 6, available at http://www.asser.nl/upload/documents/20120419T034141-Habr%C3%A9_Cour_Appel_Avis_Extradition_25-11-2005(Extraits).pdf accessed 17 November 2018

69 See FIDH Press Release, France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint (27/11/2007), available at https://www.fidh.org/en/region/americas/usa/USA-Guantanamo-Abu-Ghraib/FRANCE-IN-VIOLATION-OF-LAW-GRANTS,4932 accessed 17 November 2018. In November 2007. See also *French prosecutors throw out Rumsfeld torture case,* Reuters, 23 November 2007, available at https://www.reuters.com/article/us-france-rights-rumsfeld/french-prosecutors-throw-out-rumsfeld-torture-case-idUSL23816952007112 3?feedType=RSS&feedName=politicsNews&rpc=22&sp=true accessed 18 November 2018

70 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Corrigendum to the Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir (ICC-02/05-01/09-139), available at https://www.icc-cpi.int/pages/record.aspx?uri=1287184 accessed 20 November 2018. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09: Decision Pursuant to the Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, (ICC-02/05-01/09-140-tENG), Pre-Trial Chamber I, 13 December 2011, available at https://www.icc-cpi.int/pages/record.aspx?uri=1384955 accessed 20 November 2018. See also *Prosecutor v. Charles Ghankay Taylor* (SCSL-03-01-I-059): Decision on motion made under protest and without waiving immunity accorded to a head of state requesting the Trial Chamber to quash the indictment and declare null and void the warrant of arrest and order for transfer of detention 23 July 2003 (Decision on immunity motion), (SCSL AC, May 31, 2004) at paragraphs 9 and 10, available at http://www.worldcourts.com/scsl/eng/decisions/2004.05.31_Prosecutor_v_Taylor.pdf accessed 20 November 2018. See also Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98," Note 19 above.

71 See *Arrest Warrant Case*, Note 213 above at paragraph 61.

exceptions to immunity of senior State officials,[72] some courts have concluded[73] that there is a progressive, if not definitive, subjugation of immunity of State officials to accountability before international tribunals.[74] This, some scholars have claimed, is borne out by the constitutive statutes of the International Military Tribunal for Nuremberg[75] and the more recent statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[76] and the International Criminal Tribunal for Rwanda (ICTR).[77] Various scholars have argued in support of the proposition that the classical or traditional rationales for upholding immunity – including the sovereign equality of States – do not hold true for international courts, which by exercising jurisdiction over persons who would otherwise be entitled to immunity, would not thereby be breaching such notional equality.[78]

Chapter Five finds however that the assertion that historical records going back to World War I establish a customary international law rendering immunity inoperative before international tribunals, is a myth. And this because notwithstanding the authorizing text of the legal instruments that birthed the post-World War I and World War II tribunals, no Heads of State were actually brought to trial. Indeed, the evidence from the International Military Tribunal for the Far East confirms that the failure to try Emperor Hirohito of Japan – upon whom untold atrocities in the Far-Eastern theatre of World War II can be hung – was a deliberate one that the constitutive statute of the International Military

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72 There is some confusion as to whether the ICJ meant immunity *ratione personae* or immunity *ratione materiae* or both. See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 27 above.

73 See *Prosecutor v. Charles Ghankay Taylor*, Judgment of Trial Chamber SCSL-03-01-T-1283, 26 April 2012, available at http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf accessed 20 November 2018. The conviction was upheld by the Appeals Chamber of the Special Court. See *Prosecutor v. Charles Ghankay Taylor*, Judgment of Appeals Chamber SCSL-03-01-A-1389, 26 September 2013, available at http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf accessed 20 November 2018. For further details about the performance of the Special Court see Charles Chernor Jalloh, "Special Court for Sierra Leone: Achieving Justice?" (2011) 32(3) *Michigan Journal of International Law* 395, available at: http://repository.law.umich.edu/mjil/vol32/iss3/1 accessed 20 November 2018. See also Charles C. Jalloh, "Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone" (2004) 8(21) *American Society for International Law (ASIL) Insight*, available at https://www.asil.org/insights/volume/8/issue/21/immunity-prosecution-international-crimes-case-charles-taylor-special accessed 20 November 2018.

74 See Geoffrey Robertson, "Ending Impunity: How International Criminal Law Can Put Tyrants on Trial" (2005) 38 *Cornell International Law Journal* 649, at 667, available at http://scholarship.law.cornell.edu/cilj/vol38/iss3/1 accessed 20 November 2018.

75 Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, 82 UNTS 279 (1945), available at http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf accessed 20 November 2018.

76 See Statute of the International Tribunal for the Former Yugoslavia, Adopted on 25 May 1993 by UN Security Council Resolution 827; available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf accessed 20 November 2018.

77 See Statute of the International Criminal Tribunal for Rwanda, Adopted on 8 November 1994 by UN Security Council Resolution 955, available at http://legal.un.org/avl/pdf/ha/ictr_EF.pdf accessed 20 November 2018.

78 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol*, Note 9 above at 212 – 213. See also Brief of Diane Orentlicher in *Prosecutor v. Charles Ghankay Taylor*: Decision on immunity motion, Note 3 above.

Tribunal for the Far East expressly permitted.[79] This thesis accordingly makes common cause with Penrose who asserts that:

> Intellectual honesty demands that scholars and judges confess that neither the Nuremberg Tribunal nor the Tokyo Tribunal provided any evidence that Head of State immunity had been legally eviscerated.[80]

Similarly lacking content as evidence of the absence of immunity for Heads of State and other high-ranking officials before international courts are UN Security Council Resolutions 827 of May 25, 1993[81] and 955 of November 8, 1994[82] which respectively created the legal frameworks for the International Criminal Court for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The provisions of the Statutes rendering irrelevant the official positions of accused persons in terms of culpability and sentencing[83] have been held to support the view that immunity may not be pleaded before international courts.[84] On the evidence however, this Chapter, concludes otherwise. The Security Council was entitled to adopt *lex specialis* and to contract out of non-*jus cogens* norms of international law in creating courts to address the peculiar challenges that warranted invocation of its Chapter VII powers.[85] The adoption of such *lex specialis* however does not of itself create a norm, especially in the absence of State practice that would be consistent with such a norm.

To be clear, because immunity is invoked as a matter of procedure preventing the exercise of jurisdiction, the irrelevance of status to the exercise of jurisdiction by the Court, as provided by Article 7(2) of the ICTY Statute and Article 6(2) of the ICTR Statute is not *per se* what invalidates the immunity *ratione personae*

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79 See Article 6 of the Statue of the International Military Tribunal for the Far East. See also Mary M Penrose, "The Emperor's Clothes: Evaluating Head of State Immunity Under International Law," (2010) 7 *Santa Clara Journal of International Law* 85. See also Neil Boister, "The Tokyo Trial" in William Schabas and Nadia Bernaz (Eds) *Routledge Handbook of International Criminal Law* (Oxford, 2013), 17 – 32. See also Herbert P Bix, *Hirohito and the Making of Modern Japan Paperbac*k (Harper Perennial, 2001).

80 See Mary M. Penrose, "The Emperor's Clothes: Evaluating Head of State Immunity Under International Law," Note 79 above at page 107.

81 See UN Security Council Resolution 827 of 1993, Note 76 above.

82 See UN Security Council Resolution 955 of 1994, Note 77 above.

83 See Article 7(2) of the ICTY Statute and Article 6(2) of the ICTR Statute, Notes 76 and 77 above respectively.

84 See Dire Tladi, "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98," Note 19 above.

85 The rejection by the UN Security Council, in its promulgation of the Statutes of the ICTY and ICTR, of the traditional immunities accorded to Heads of State and government officials was necessitated by non-international conflicts where incumbent governments were accused of inflicting terrible abuses against citizens. Such abuses were so gross that the Security Council endorsed military interventions for humanitarian purposes undertaken by concerned States. These were undertaken in the former Yugoslavia by NATO and in Rwanda by Uganda, in whose army most of the forces of the Rwanda Patriotic Front (RPF) had served. See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992) S/1994/674, available at http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf accessed 20 November 2018. See also Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994) S/1994/1125, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_1994_1125.pdf accessed 20 November 2018. See also Michael R Gordon, **"**Conflict in the Balkans: NATO; Modest Air Operation in Bosnia Crosses a Major Political Frontier" *New York Times* (11 April 1994), available at https://www.nytimes.com/1994/04/11/world/conflict-balkans-nato-modest-air-operation-bosnia-crosses-major-political.html accessed 20 November 2018; See also Roozbeh Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates" (2010) 21(1) *European Journal of International Law* 173, at 189.

that a person entitled to it may invoke.[86] It is rather the authorizing Security Council Chapter VII Resolution[87] in terms of which the Council compels all States to abide by the Resolution.[88]

Thus, does Dapo Akande argue that:

> The statement by the ICJ [in the *Arrest Warrant Case*] that international immunities may not be pleaded before certain international tribunals must be read subject to the condition (1) *that the instruments creating those tribunals expressly or implicitly remove the relevant immunity*, and (2) that the state of the official concerned is bound by the instrument removing the immunity. Therefore, a senior serving state official entitled to immunity ratione personae (for example, a head of state) is entitled to such immunity before an international tribunal that the state concerned has not consented to. (My emphasis).[89]

The consent in the case of the ICTY and the ICTR would be derived through a State's membership of the UN and acceptance of the powers conferred on the Security Council by Chapter VII of the UN Charter. In the case of the ICC, it would be accession to the Rome Statute and the acceptance of Article 27 thereof.[90]

On the subject of immunity before international tribunals, Chapter Five concludes that while there are no customary international law rules that expressly sustain immunities before international tribunals, there are no customary international law rules that strike down immunities either.[91] Whether or not immunity may be invoked by a Head of State or other high-ranking official before such tribunals will therefore be a function of the constitutive statutes of such tribunals.[92] On the evidence adduced, instances in which incumbent Heads of State have been unable to invoke immunity successfully have been demonstrably because of the special circumstances warranting and created by the constitutive instruments of the courts exercising jurisdiction[93] or because the court declined, *per incuriam,* to recognise immunity.[94]

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86 See Hazel Fox, *The Law of State Immunity* (2nd Ed) (Oxford University Press, 2008) at 525.

87 Cesare P.R. Romano and André Nollkaemper, **"**The Arrest Warrant Against the Liberian President, Charles Taylor," (20 June 2003) 16(8) *American Society for International Law Insights*, available at https://www.asil.org/insights/volume/8/issue/16/arrest-warrant-against-liberian-president-charles-taylor accessed 20 November 2018.

88 See Article 4 of UN Security Council Resolution 827, Note 78 above.

89 Dapo Akande, "International Law Immunities and the International Criminal Court" (2004) 98 *African Journal of International Law* 407, at 418.

90 See Article 27 of the Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9*), available at http://legal.un.org/icc/statute/english/rome_statute(e).pdf accessed 20 November 2018. The Rome Statute entered into force on July 1, 2002.

91 See Dire Tladi, "Immunities (Article 46A *bis*)" Note 9 above.

92 See Dire Tladi, "Immunities (Article 46A *bis*)." Note 9 above. See also Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," Note 27 above.

93 See Dapo Akande, "International Law Immunities and the International Criminal Court." Note 89 above at page 418.

94 See *Prosecutor v. Charles Ghankay Taylor* (SCSL-03-01-I-059): Decision on motion made under protest and without waiving immunity accorded to a head of state requesting the Trial Chamber to quash the indictment and declare null and void the warrant of arrest and order for transfer of detention 23 July 2003 (Decision on immunity motion), (SCSL AC, May. 31, 2004) at paragraphs 9 and 10, available at http://www.worldcourts.com/scsl/eng/decisions/2004.05.31_Prosecutor_v_Taylor.pdf accessed 20 November 2018. As Chapter 5 argues, the reasoning of the Appeals Chamber on the immunity question in the Taylor Case

It is important to note here that whether or not immunity may be invoked by Heads of State and other high-ranking officials before international courts is a different question than whether or not States may breach immunities in order to arrest Heads of State and other high-ranking officials for purposes of rendering them to international courts, which – without police forces – rely on the cooperation of States to gain access to accused and indicted persons.

The second and even more important part of Chapter Five is its inquiry into what the immunity provision in the Malabo Protocol actually means. The much-maligned provision of the Protocol, Article 46A *bis*, which has generated the extensive debate that this dissertation weighs in on, states as follows:

> No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

The textual analysis of Article 46A *bis*, yields a conclusion that because of its very poor drafting, the immunity provision is capable of multiple interpretations. One of such interpretations, because it would be inherently relative to a country's constitution, could serve potentially to extend immunities to all Ministers or even to all members of parliament in a country like South Africa.[95] Although it is unlikely that the AU intended such an outcome, and indeed most African constitutions have a fairly limited number of persons who can act as Head of State, the text of the provision would allow for such an expansive interpretation to pass muster.

A second difficulty with the provision is the lack of clarity on what type of immunity it seeks to cloak the subject with – immunity *ratione personae* or immunity *ratione materiae* or both. A purposive reading[96] of the impugned provision would appear to suggest that it seeks to invoke both types of immunities: immunity *ratione personae*, in respect of "Heads of State or Government" and in respect of persons "entitled to act in such capacity", and immunity *ratione materiae* in respect of "other senior officials based on their functions".[97]

Even if the words "based on their functions" apply only to "other senior officials" and not "Heads of State or Government, or anybody acting or entitled to act in such capacity" and even if it is indeed the case that the provision envisions both immunity *ratione personae* for Heads of State and Government and persons

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was demonstrably wrong. See James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone" (2007) 16 *Dalhousie Journal of Legal Studies* 21; See also Micaela Frulli, "The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities," (2004) 2 *Journal of International Criminal Justice* 1118.

95 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 11 above at 5. See also Section 90 of the 1996 South African Constitution.

96 See Edwin Kellaway, *Principles of Legal Interpretation of Statutes, Contracts and Wills* (Butterworths, 1995) at pages 66 – 68.

97 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff", Note 11 above at 5 – 8.

entitled to act on their behalf (presumably their deputies) and immunity *ratione materiae* for "other senior officials based on their functions" there would still be inconsistencies with both the work of the proponents of *lex lata* and the proponents of *lex ferenda*. The first would be the immunity provision's seeming exclusion of foreign ministers from the current ambit of immunity *ratione personae,* which – according to the ICJ in the *Arrest Warrant* Case – covers foreign ministers and other high-ranking officials of similar stature.[98] The second would be (against recent efforts of the Institute for International Law[99] and the work of the International Law Commission),[100] with the conferment of immunity on an indeterminate number of State officials.

The additional qualifier, "during their tenure of office," creates further confusion. If indeed the Protocol's drafters intended to provide for both immunity *ratione personae* and immunity *ratione materiae* and distinguish between "Head of State or Government, or anybody acting or entitled to act in such capacity" and "other senior State officials based on their functions" as being the categories of persons respectively entitled to claim immunity *ratione personae* and immunity *ratione materiae*, there would be a further difficulty as it would seem to suggest that immunity *ratione materiae* is time-bound. While immunity *ratione materiae* is, unlike immunity *ratione personae,* in fact not time bound under customary international law,[101] the Malabo Protocol could arguably have intended to create a treaty limitation or restriction to the customary international law ambit of immunity *ratione materiae*.

Another possible interpretation is that the provision seeks only to confer immunity *ratione personae* – with the words "based on their functions" not designating the type of immunity but rather describing the senior government officials who would qualify for and be eligible for such immunity *ratione personae*.[102] This interpretation would also appear to be borne out by the words "during their tenure of office" and by the fact that the AU has never as yet sought to distinguish between Head of State immunity and immunity for other senior government officials.[103] If it is indeed the case that the source of the Malabo

98 See *Arrest Warrant Case*, Note 213 above.

99 See Institute for International Law Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Vancouver, 2001) Rapporteur: Mr Joe Verhoeven, available at http://www.idi-iil.org/app/uploads/2017/06/2001_van_02_en.pdf accessed 20 November 2018. See also Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, *The Institute of International Law* (Napoli, 2009) Rapporteur: Lady Hazel Fox, available at http://www.idi-iil.org/app/uploads/2017/06/2009_naples_01_en.pdf accessed 20 November 2018.

100 See *Fifth report on immunity of State officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, Special Rapporteur [Document A/CN.4/701] available at http://legal.un.org/docs/?symbol=A/CN.4/701 accessed 20 November 2018.

101 See Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law*, Note 26 above at 7.

102 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff," Note 11 above at 7 – 8.

103 See Paragraph 9 of the AU Decision on Africa's Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1(Oct.2013), taken at the Extraordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia, on 12 October 2013**,** available at http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf accessed 20 November 2018.

Protocol's immunity clause is Kenya's 2010 Constitution,[104] the interpretation that the immunity clause intended only to confer immunity *ratione personae* will derive further support from the framers of Kenya's constitution who clearly intended the same.[105]

While the interpretation that the provision seeks only to confer immunity *ratione personae* could resolve the inconsistency between the authority of the *Arrest Warrant Case* and other incongruities with international law from the first interpretation of the immunity provision presented above, it could also – as framed – conceivably lead to a breath-taking expansion of the ambit of the immunity provision.[106] This latter interpretation, for being more coherent with authoritative sources of international law such as the International Court of Justice[107] (although inconsistent with the push for progressive expansion of accountability regimes for international crimes of such entities as the ILC)[108] is more persuasive.

It is not clear however whether the African Union sought to conform to precedent or to chart new territory through the treaty/protocol that will birth the expanded African Court. Indeed, the failure of the Malabo Protocol to acknowledge the existence of the International Criminal Court or the Rome Statute which conceived it[109] or the potential overlap of the jurisdiction of the ICC and the expanded African Court, have been widely seen – and not unjustifiably so – as the AU thumbing its nose at the inequities of the international legal order. In du Plessis' words, "a symbolic fist-shake in the face of the ICC."[110]

2.5 Chapter Six.

This penultimate chapter of the dissertation notes that although the AU, by its adoption of an immunity provision, may not have breached international law, the immunity provision lends credence to the notion that the AU seeks to avoid accountability for a certain class of officials. Legitimate cynicism for the AU's motives in creating the Expanded African Court is fuelled, among others, by the

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104 See Dire Tladi, "The Immunity Provision in the AU Amendment Protocol, Separating the (Doctrinal) Wheat from the (Normative) Chaff," Note 11 above at footnote 10.

105 See Article 147(3) of the 2010 Constitution of Kenya, by which the Deputy President shall "… when the President is absent or is temporarily incapacitated, and during any other period that the President decides … act as the President." See also Article 146 which requires the Speaker of the Legislature to act as President in the event of a vacancy in the Presidency "if the office of Deputy President is vacant, or the Deputy President is unable to assume the office of President"

106 It is true that the range of persons who may seek the cover of immunity is not entirely settled – the judgment in *The Arrest Warrant Case* being partly to blame for this state of affairs. The failure of the ICJ in the said case to distinguish between immunity *ratione personae* and immunity *ratione materiae* exacerbated the uncertainty. See however Dapo Akande and Sangeeta Shah, Note 27 above at 820 - 825, who argue that there are in fact two types of such immunity and that one type extends beyond senior officials such as the Head of State and Head of Government.

107 See for instance *Arrest Warrant Case,* Note 213 above.

108 See Reports of International Law Commission on *Immunity of State Officials from Foreign Criminal Jurisdiction*. See Analytical Guide to the Work of the International Law Commission, Note 39 above.

109 See Rome Statute of the International Criminal Court, Note 90 above.

110 The language of the Withdrawal Strategy certainly lends credence to this. See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 7 above at 2.

shifting rationale for the AU's objections to the exercise by ICC of its mandate when it comes to Heads of State. This has inspired the belief that the AU is untrustworthy.[111]

Although the AU's position in respect of al Bashir was founded on a reasonable interpretation of the Rome Statute and application of the principle of *pacta sunt servanda*, the same cannot be said of the AU's position in respect of the Kenyatta and Ruto cases before the ICC.[112] The AU's professed commitment to the content of the Rome Statute and its invocation of its provisions (Article 98) as reason not to surrender an official from a non-State party to the ICC, clearly does not extend to situations where the same Statute would compel accountability by rendering irrelevant and expressly invalidating "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law and the status or position of an accused person – as President or otherwise – in standing trial (Article 27). It is little wonder then that Tladi describes the AU as having abandoned principle.[113] That the AU has since acknowledged Article 27 of the Rome Statute as applying even to Heads of State of non-State parties to the Rome Statute suggests that the AU has little allegiance to consistency.[114]

Other reasons for the cynicism are the active engagement of the AU in the articulation and implementation of a multi-pronged strategy for African States' disengagement from the ICC which is intended to turn the trickle of African States' withdrawals from the ICC into a deluge,[115] and, the creation, in the Expanded African Court of an accountability mechanism for international criminal justice that, going by the AU's record on such institutions, has been described as being purposefully designed to fail.[116]

The AU's full-throated endorsement of the announced withdrawals by Burundi, South Africa and the Gambia from the ICC,[117] notwithstanding the arguable foundation of Burundi and Gambia's exit on self-serving calculations by

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111 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above.

112 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above at 14.

113 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above at 16.

114 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Supplementary African Union Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir" with Annex 1, Annex 2, Annex 3, Annex 4 and Annex 5 (ICC-02/05-01/09-389 28-09-2018 2/12 RH PT OA2, available at https://www.icc-cpi.int/CourtRecords/CR2018_04581.PDF accessed 20 November 2018.

115 Ludovica Iaccino**,** "African Union approves mass withdrawal from ICC over war crimes 'bias'" *International Business Times* (1 February 2017), available at https://www.ibtimes.co.uk/african-union-approves-mass-withdrawal-icc-over-war-crimes-bias-1604238 accessed 20 November 2018. See also *African Union backs mass withdrawal from ICC*, BBC News (1 February 2017), available at https://www.bbc.com/news/world-africa-38826073 accessed 20 November 2018.

116 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2016), available at https://www.amnesty.org/download/Documents/AFR0130632016ENGLISH.PDF accessed 20 November 2018.

117 See Assembly/AU/Dec.622(XXVIII), Decision on the International Criminal Court (Doc. EX.CL/1006(XXX)), at paragraph 6, available at https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf, accessed 20 November 2018.

Presidents Nkurunziza[118] and Jammeh[119] respectively to escape the clutches of the ICC for various transgressions,[120] heightens the mistrust.

Perhaps however, it is the breath-taking scope of jurisdiction of the Expanded African Court,[121] the ludicrously small size of the bench[122] and the predictably woeful resources that the Court will have at its disposal[123] that inspires the greatest concern. The fact that the AU proposes to create a tri-Chamber Court, combining the expansive jurisdictions of the African Court on Human Rights, the Court of justice of the African Union and an African version of the ICC,[124] with a total bench of sixteen,[125] when the statutes of the African Court on Human Rights[126] and the Court of Justice of the African Union[127] had each provided for eleven judges is a curiosity of inexplicable origin. The logic also of completely disregarding basic fair trial standards, including the need to avoid cross contamination of the bench,[128] is not obvious.

And yet, in spite of the foregoing, it is possible to draw conclusions that admit of less sinister motives than the simplistic narratives about AU leaders' quest for impunity that are frequently peddled by international criminal justice advocates.[129]

The AU's stance on the propriety of its member States declining to arrest al Bashir, even States parties to the Rome Statute, is unambiguously sustainable in law.[130] Indeed, it is the failure of the ICC to engage with Rome Statute State

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118 See *Political Crisis in Burundi*, Council on Foreign Relations, available at https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/political-crisis-in-burundi accessed 20 November 2018.

119 Christopher Sanchez, "Alternative Reasons for Gambia's Withdrawal from the International Criminal Court," *ICCForum* (15 November 2016), available at https://iccforum.com/forum/withdrawal accessed 20 November 2018.

120 Manisuli Ssenyonjo, "State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia," (2018) *Criminal Law Forum* 63, at 69 – 70, available at https://link.springer.com/content/pdf/10.1007%2Fs10609-017-9321-z.pdf accessed 20 November 2018.

121 See Article 28 of the Malabo Protocol. See also Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," Note 23 above at 940.

122 See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, (2016), available at https://www.amnesty.org/download/Documents/AFR0130632016ENGLISH.PDF accessed 20 November 2018.

123 See H.E. Paul Kagame, *The Imperative to Strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union*, African Union (29 January 2017), available at http://www.rci.uct.ac.za/sites/default/files/image_tool/images/78/News/FInal%20AU%20Reform%20Combined%20report_28012017.pdf accessed 20 November 2018.

124 See Malabo Protocol.

125 See Article 4 of the Malabo Protocol Annex.

126 See Article 11 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

127 See Article 3 of the Protocol of the Court of Justice of the African Union.

128 See Article 4(3) of the Malabo Protocol. See, for comparison, Article 39 of the Rome Statute of the ICC. See also Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 122 above.

129 See also Jemima Kariri Njeri, "Can the New African Court Truly Deliver Justice for Serious Crimes? The African Union's Decision to Support a Court that Provides Immunity to Heads of State Undermines Human Rights," Note 7 above.

130 See Dire Tladi "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" Note 19 above; See also Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But Gets the Law Wrong" *EJILTalk* 15 December 2011, available at http://www.ejiltalk.org/icc-issues-detailed-decision-

parties who have found themselves confronted by the dilemma which Article 98(1) of the Rome Statute was incorporated into the Rome Statute precisely to avoid,[131] that has led to Rome Statute State parties disregarding what is increasingly regarded as illegitimate ICC directives[132] when they play host to al Bashir.[133]

While the AU's rationale for opposing the prosecution of Kenyatta and Ruto was different from the rationale for opposing the arrest of al Bashir, there were clearly exigent circumstances that warranted such an approach.[134] Neither the request for a Security Council deferral in the case of al Bashar, which was intended to give AU peace efforts in Darfur a chance to succeed,[135] nor the request for Security Council deferrals in the case of Ruto and Kenyatta,[136] which was eminently reasonable and conceivably necessary in the aftermath of terrorist attacks in Kenya,[137] even remotely suggest that the AU seeks impunity for member States. The AU, in the former case, requested only a year's deferral to give the peace efforts in Darfur a chance to succeed,[138] and in the latter, the request was for the prosecution of Kenyatta and Ruto to "be suspended [not terminated] until they complete their terms of office."[139] Neither request can hardly be represented, reasonably, as seeking impunity.[140]

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on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 6 September 2018. See also André de Hoogh and Abel Knottnerus "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again" *EJILTalk* 18 April 2014, available at http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/ accessed 20 November 2018.

131 Dire Tladi, "Cooperation, Immunities, and Article 98 of the Rome Statute: The ICC, Interpretation, and Conflicting Norms." *Proceedings of the Annual Meeting-American Society of International Law* (2012).

132 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir: Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute*, available at https://www.icc-cpi.int/CourtRecords/CR2017_01350.PDF accessed 20 November 2018. The South African government was particularly incensed that its approach to the ICC for Article 97 consultations was treated as a quasi-judicial process (rather than a diplomatic/political process) without any applicable procedures to guide the process and in breach of basic principles of natural justice and due process.

133 Omar al Bashir, has by one count, made 75 trips to 22 countries between 2009 and 2016. See "An Indicted War Criminal's Travel at https://nubareports.org/bashir-travels/ accessed 20 November 2018. Among the AU States that are also Rome Statute State parties that have hosted al Bashir are Chad, Malawi, Nigeria, the DRC, Uganda, Djibouti and South Africa.

134 Evelyn Asaala 'Rule of law or realpolitik? The role of the United Nations Security Council in the International Criminal Court processes in Africa' (2017) 17 *African Human Rights Law Journal* 266.

135 See Edith Lederer, 'African Union asks UN to Delay Al-Bashir Prosecution', *Mail & Guardian* (25 September 2010), available at https://mg.co.za/article/2010-09-25-african-union-asks-un-to-delay-albashir-prosecution accessed 20 November 2018.

136 See UNSC Press Release SC/11176, Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining (15 November 2013), available at https://www.un.org/press/en/2013/sc11176.doc.htm accessed 20 November 2018. See also Michelle Nichols, 'African Leaders Ask U.N. to Defer Kenya International Criminal Trials' *Reuters* (22 October 2013), available at https://www.reuters.com/article/us-kenya-icc-un-idUSBRE99L14O20131022 accessed 20 November 2018.

137 Jeffrey Gettleman and Nicholas Kulish, 'Gunmen Kill Dozens in Terror Attack at Kenyan Mall' *New York Times* (21 September 2013), available at https://www.nytimes.com/2013/09/22/world/africa/nairobi-mall-shooting.html accessed 20 November 2018.

138 Edith Lederer, 'African Union Asks UN to Delay al-Bashir Prosecution', *Mail and Guardian* (25 September 2010), available at https://mg.co.za/article/2010-09-25-african-union-asks-un-to-delay-albashir-prosecution accessed 20 November 2018.

139 See Ext/Assembly/AU/Dec.1, Decision on Africa's Relationship with the International Criminal Court (ICC) at paragraph 10(ii), Note 103 above.

140 Jennifer Trahan, "The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices," (2013) 24 *Criminal Law Forum* 417.

Because of a deliberate AU policy for early accession of AU member States to the Rome Statute,[141] and, notwithstanding the so-called withdrawal strategy,[142] a full thirty-three AU member States – including Kenya – remain party to the Rome Statute.[143] This is more than can be said of UN Security Council members such as the US[144] and Russia,[145] who while ostensibly preserving the conscience of human kind by referring situations to the ICC,[146] have wielded their veto powers as shields to protect persons who destroy the very conscience of humankind that they profess to hold dear.[147] US National Security Advisor, John Bolton's threat to prevent ICC officials from entering the US, to arrest such officials if found in the US and to impose sanctions against any State that cooperates with the ICC to prosecute US and Israeli citizens,[148] would be risible if they were not so tragically evocative of third world dictatorships.

The AU policy for early accession of AU member States to the Rome Statute was also not a flash in the pan, but arguably continuation of a trend of accountability measures that have not only seen AU member States commit to "[p]romote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments"[149] but also and even more profoundly, "to intervene in a Member State … in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[150]

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141 See Strategic Plan of the Commission of the African Union (Volume 3) 2004-2007 Plan of Action – Programmes to Speed up Integration of the Continent, at 67, available at https://www.issafrica.org/uploads/ACTPLAN.PDF accessed 20 November 2018.

142 See Assembly/AU/Dec.622(XXVIII), Decision on the International Criminal Court, Note 117 above at paragraph 8. See also *AU Withdrawal Strategy Document* (2017), available at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf accessed 20 November 2018. See also Elise Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye" Human Rights Watch (17 February 2017), available at https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye accessed 20 November 2018. For context see also Human Rights Watch, "South Africa: Continent Wide Outcry at ICC Withdrawal" (October 22, 2016), available at https://www.hrw.org/news/2016/10/22/south-africa-continent-wide-outcry-icc-withdrawal accessed 20 November 2018.

143 As of 31 October 2018, the African membership of the ICC stands at 33. See list of African States parties at https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx accessed 20 November 2018.

144 See 'US says ICC 'dead' as it Moves to 'Protect' Israel' *Middle East Monitor* (10 September 2018), available at https://www.middleeastmonitor.com/20180910-us-says-icc-dead-as-it-moves-to-protect-israel/ accessed 20 November 2018.

145 Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, The Guardian (10 May 2014), available at https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court accessed 20 November 2018. See also Lizzie Dearden, *Russia to Withdraw from International Criminal Court Amid Calls for Syria Air Strikes Investigation*, The Independent (16 November 2016) available at https://www.independent.co.uk/news/world/europe/russia-international-criminal-court-icc-leaves-pulls-out-withdraws-putin-assad-syria-war-aleppo-a7420676.html accessed 20 November 2018.

146 See UN Security Council Resolution 1593, S/RES/1593 (2005), Adopted by the Security Council at its 5158th meeting, on 31 March 2005, available at https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf accessed 20 November 2018.

147 See UN Security Council Resolution 1593 S/RES/1593 (2005), Note 146 above.

148 Owen Bowcott, Oliver Holmes, and Erin Durkin, *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, The Guardian (10 September 2018), available at https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech accessed 20 November 2018.

149 See Article 3(h) of the Constitutive Act of the African Union.

150 See Article 4(h) of the Constitutive Act of the African Union.

As noted in previous Chapters, the creation by treaty of grounds to fulfil a responsibility to protect,[151] and to allow for humanitarian intervention where warranted, is unprecedented in international law.[152] It would be within such a context that the Malabo Protocol's adoption of restrictions to the customary international law ambits of immunities *ratione personae* and *ratione materiae*, is not just possible but entirely plausible – "likely" being too strong a word.

Further grounds for not giving short shrift to the AU's much-professed rejection of impunity lie in its indifference to prosecutions of Heads of State post incumbency. This is reflected not only in the request for a deferral of the prosecution of Kenyatta and Ruto until they leave office but also in the cases of *Habré*,[153] *Taylor*[154] and Laurent Gbagbo.[155] Omar al Bashir's case, following his ouster, will provide opportunity to test the theory.

In the case of *Habré*, it was the AU that convened the Committee of Eminent African Jurists who recommended that the AU request Senegal to prosecute *Habré*.[156] Acting on the mandate "… to help design a mechanism for dealing with impunity and the future avoidance of impunity specifically in the African context,"[157] it was the Committee that had proposed that "… the African Court of Justice and Human Rights be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention Against Torture," declaring that "there is room in the Rome Statute for such a development"[158]

In the cases of Taylor and Gbagbo – both of whom were no longer Heads of State at the time of their prosecution – the AU's silence, while inconclusive, stands in

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151 Dan Kuwali and Frans Viljoen (Eds), *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (Routledge, 2014).

152 Ben Kioko, "The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention" (December 2003) *International Committee for the Red Cross,* available at http://www.operationspaix.net/DATA/DOCUMENT/5868~v~The_right_of_intervention_under_the_African_Union_8217s_Constitutive_Act__From_non-interference_to_non-intervention.pdf accessed 20 November 2018.

153 See *Ministère Publique contre Hissene Habré*, before the Extraordinary African Chambers in the Senegalese Courts. Trial Judgment available at http://www.chambresafricaines.org/pdf/Jugement_complet.pdf accessed 22 November 2018. See also Reed Brody, "Bringing a Dictator to Justice: The Case of Hissène Habré," (May 2015) 13(2) *Journal of International Criminal Justice* 209. See also Sarah Williams, "The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?" (1 December 2013) 11(5) *Journal of International Criminal Justice* 1139. See also Sofie A. E. Høgestøl, "The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity" (2016) 34(3) *Nordic Journal of Human Rights* 147.

154 See *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T, Special Court for Sierra Leone, 26 April 2012, available at http://www.refworld.org/cases,SCSL,4f9a4c762.html accessed 22 November 2018.

155 See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ICC-02/11-01/15. Details of case may be accessed from Case Information Sheet ICC-PIDS-CIS-CI-04-03/16, available at https://www.icc-cpi.int/cdi/gbagbo-goude/Documents/gbagbo-goudeEng.pdf accessed 22 November 2018.

156 See AU Assembly, Decision on the Hissène Habré Case and the African Union, Assembly/AU/Dec.103 (VI) (Doc.Assembly/AU/8 (VI)) Add.9, available at https://au.int/sites/default/files/decisions/9554-assembly_en_23_24_january_2006_auc_sixth_ordinary_session_decisions_declarations.pdf accessed 2 September 2018.

157 See Paragraphs 8 and 9 of the *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré* [to the AU], available at https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf accessed 3 September 2018.

158 See Paragraph 35 of the *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, Note 17 above.

marked contrast to the more activist stance and loud objections against the indictment of al Bashir and the prosecution of Kenyatta and Ruto. Such silence permits a reasonable conclusion to be drawn that the AU had no objections to the prosecutions of Taylor and Gbagbo respectively by the Special Court for Sierra Leone and the ICC,[159] or more generally to prosecutions of Heads of State post-incumbency.

3. ICC Anti-African Bias, AU Impunity or a Comedy of Unintended Consequences?

In an article titled *The Banality of International Justice*,[160] Schabas, with more than a little hint of his frustration with the geo-political machinations and ham-fistedness of the ICC that seem likely to torpedo the progress made in international criminal law during the late 1990s and the first decade of the twenty-first century, explains that:

> It is important to understand why, contrary to predictions at Rome, African states were so keen on the Court. Frustrated by the inability of other international organizations to address the concerns of their troubled continent, they turned to a new experiment in global justice that did not seem to be characterized by the traditional dialectic of north and south, rich and poor, first world and third world, Great Powers and everyone else. The Court appeared genuinely egalitarian in structure and profoundly fair in conception.[161]

He goes on to provide some historical context for the current disillusionment:

> One of the great and defining moments of international justice in recent times was the arrest of Augusto Pinochet in London in October 1998. Occurring only a few months after the adoption of the Rome Statute, it sent a message that even the friends of the most powerful could be brought to book if a genuinely independent and impartial justice system was in operation. Pinochet was not some obscure African tyrant. He was an intimate friend of Margaret Thatcher, having seized power in a coup d'état and then held it for many years with the complicity of Washington. Fifteen years later, international criminal justice is focused on global pariahs like Charles Taylor, Saif Gaddafi and Hissene Habré. The friends of the rich and powerful are nowhere to be seen. There are no more Pinochets in the dock. The ICC finds technical and unconvincing pretexts to avoid tackling hard cases like British atrocities in Iraq, Operation Cast Lead and the ongoing construction of settlements in the West Bank.[162]

The two-year lapse between the present and the start of this dissertation warrants a second look at the bias and impunity paradigm:

3.1 A Second Look at the anti-African Bias.

While the claim that the ICC has targeted African countries as a neo-colonialist project is not borne out by the facts in evidence,[163] there is little doubt that the

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159 This is but a theory that remains unproven even if very plausible.

160 See William A. Schabas, "The Banality of International Justice," (2013) 11 *Journal of International Criminal Justice* 545.

161 See William A. Schabas, "The Banality of International Justice," Note 160 above at 548.

162 See William A. Schabas, "The Banality of International Justice," Note 160 above at 550.

163 See Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholders* (Volume 13) International Criminal Justice Series (Asser Press, 2017). See however David Bosco, *Why is the International Criminal Court picking only on Africa?* Washington

ICC has focused on African countries[164] and has done so because of a mix of reasons, none of which clothe the AU or the ICC in glory.[165] These may be summarily described as the dynamics of the architecture of the international legal order and the relative weakness of African States in that legal order.[166] The fact that the ICC has declined to move beyond a preliminary investigation into Afghanistan citing as reason, "subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute)"[167] is a testament to this. That the Court could cite *political* considerations – undoubtedly arising from the United States' open hostility to the Court and threats to judges and staff of the Court[168] – as well as likely budgetary constraints[169] in order to decline the OTP's request to proceed with the investigations admits to a subjective selectivity in exercising jurisdiction over cases that, while always known, is shocking nonetheless. The jarring lack of awareness by the Court of the egregious double standards manifest in how it has treated "non-cooperation" from States with less power than the United States[170] can only be described as remarkable. To be fair though, the focus by the ICC on Africa can be attributed also to the cynical willingness of African States to sign up to the ICC's jurisdiction as a means to quell political opposition and the forces of domestic insurrectionists.[171]

The derisory excuses and counter-arguments offered by the ICC's Prosecutor that the ICC is indeed seized with matters outside of Africa;[172] that the majority of

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Post (29 March 2013), available at http: //www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/ accessed 22 November 2018. The author explains the perceived targeting as a phenomenon of global power dynamics rather than a concerted attempt to subjugate African countries. Per the author:

> great-power politics are the key here. China has a veto over Security Council action and wants the court to stay well away from North Korea, for instance. Russia will not permit an ICC investigation in Syria. And when violence in Iraq was at its most intense, the United States would have blocked any move to give the court jurisdiction there. A stray comment by an Iraqi minister in 2005 suggesting that the country might join the ICC produced nervous phone calls from U.S. diplomats. They got the assurances they wanted: Baghdad would not become a member.

164 As of 31 October 2018, the ICC is seized with eleven situations. With the exception of Georgia, all the situations are from Africa. All of the 26 cases and 42 accused persons before the ICC are also African.

165 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above.

166 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 7 above.

167 See *Situation in the Islamic Republic of Afghanistan: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, at Para 94 (12 April 2019). Available at https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF

168 See *John Bolton Threatens ICC with US Sanctions*, BBC (11 September 2018). Available at https://www.bbc.com/news/world-us-canada-45474864. See also Human Rights Watch, *US Threatens International Criminal Court – Visa Bans on ICC Staff* (15 March 2019). Available at https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court

169 See *Situation in the Islamic Republic of Afghanistan: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, note 167 above at Para 95.

170 See Kenya Situation.

171 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above.

172 See Fatou Bensouda, *Critics don't understand the ICC,* Interview with DW, available at https://www.dw.com/en/fatou-bensouda-critics-dont-understand-the-icc/a-38372198 accessed 22 November 2018. See also "Is the ICC racist? Fatou Bensouda says that the reality on the ground is different," Video interview with France 24, available at https://www.youtube.com/watch?v=ibJsshk5_yQ accessed 22 November 2018.

African cases were self-referrals by African countries themselves;[173] and, that the ICC is limited by the jurisdictional reach of the Rome Statute[174] are while notionally true, easily contested – charitably – as inaccurate and less charitably as disingenuous.

3.1.1 ICC engagement with Situations Beyond Africa.

Particularly trivializing of AU concerns is the ICC's claim to be seized of other matters beyond Africa. Although it is true that the ICC is also preliminarily investigating jurisdiction-invoking situations in Afghanistan,[175] Colombia,[176] Iraq,[177] Palestine,[178] Philippines,[179]

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[173] See Max du Plessis, "The International Criminal Court and its work in Africa: Confronting the Myths" (November 2008) *Institute for Security Studies, Paper 173* 1, at 2, available at https://issafrica.s3.amazonaws.com/site/uploads/Paper173.pdf accessed 22 November 2018.

[174] See Ray Murphy, *Many Criticisms of International Criminal Court have Validity: Avoidance of difficult cases creates risk of perceived double standards*, Irish Times (6 June 2013), available at https://www.irishtimes.com/opinion/many-criticisms-of-international-criminal-court-have-validity-1.1418128 accessed 22 November 2018. See also Adam Taylor, *Why so many African leaders hate the International Criminal Court*, Washington Post (15 June 2015), available at https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?noredirect=on accessed 22 November 2018.

[175] On 20 November 2017, the Prosecutor of the International Criminal Court ("ICC"), Fatou Bensouda, requested authorisation from Pre-Trial Chamber III to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in the Islamic Republic of Afghanistan since 1 May 2003. This was some ten years after the preliminary examination of the situation in Afghanistan was made public in 2007. For further detail see https://www.icc-cpi.int/afghanistan accessed 22 November 2018.

[176] The situation in Colombia has been under preliminary examination since June 2004. The preliminary examination focusses on alleged crimes against humanity and war crimes committed in the context of the armed conflict between and among government forces, paramilitary armed groups and rebel armed groups, including the crimes against humanity of murder; forcible transfer of population; imprisonment or other severe deprivation of physical liberty; torture; the war crimes of murder; intentional attacks against civilians; torture; other cruel treatment; outrages on personal dignity; taking of hostages; rape and other forms of sexual violence; and using children to participate actively in hostilities. For further detail see https://www.icc-cpi.int/colombia accessed 22 November 2018.

[177] The preliminary examination of the situation in Iraq, initially terminated on 9 February 2006, was re-opened on 13 May 2014 upon receipt of new information. The preliminary examination focuses on alleged crimes committed by United Kingdom nationals in the context of the Iraq conflict and occupation from 2003 to 2008, including murder, torture, and other forms of ill-treatment. For further detail see https://www.icc-cpi.int/iraq accessed 22 November 2018. See also Statement terminating preliminary examination by Ocampo in 2006, available at https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf accessed 22 November 2018.

[178] On 16 January 2015, the Prosecutor announced the opening of a preliminary examination into the situation in Palestine in order to establish whether the Rome Statute criteria for opening an investigation are met. Specifically, under article 53(1) of the Rome Statute, the Prosecutor shall consider issues of jurisdiction, admissibility and the interests of justice in making this determination. For further detail see https://www.icc-cpi.int/palestine accessed 22 November 2018. See also Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine (22 May 2018), available at https://www.icc-cpi.int//Pages/item.aspx?name=180522-otp-stat accessed 22 November 2018.

[179] On 8 February 2018, the Prosecutor announced the opening of a preliminary examination into the situation in the Philippines since at least 1 July 2016, where the "war on drugs" campaign launched by the Government of the Philippines has been alleged to have resulted in thousands of extra-judicial killings. For further detail see https://www.icc-cpi.int/philippines accessed 22 November 2018. Philippines has since withdrawn from the Rome Statute. See ICC-CPI-20180320-PR1371, ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law (Press Release of 20 March 2018), available at https://www.icc-cpi.int/Pages/item.aspx?name=pr1371 accessed 22 November 2018.

Ukraine[180] and Venezuela,[181] Colombia is an inactive situation where the "ongoing" preliminary investigations have, as of October 31, 2018, been "ongoing" for almost fifteen years and are unlikely to yield active cases. Another three of the situations – Afghanistan, Iraq and Palestine – for which active investigations are only about to begin because of the unsafe "security situation on the ground"[182] or because "new information came to light"[183] are "coincidentally" also the cases for which the ICC has received the most trenchant criticism of bias.[184] The last three are recent cases for which accusations of an ICC Africa bias may also be thanked.[185] Clearly however in declining to authorise the OTP to go beyond a preliminary investigation to an actual investigation into the Afghanistan situation, the ICC has proven that the accusations about an Africa bias are less than effective in prompting changes in attitude.

Notwithstanding the protestations of the ICC and recent effort to diversify its focus, the fact remains that the non-African cases that are under preliminary investigation are only just that – under preliminary

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180 On 25 April 2014, the Prosecutor announced the opening of a preliminary examination into the situation in the Ukraine. Although Ukraine is not a party to the Rome Statute, it has accepted the ICC's jurisdiction over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014 and beyond. The preliminary examination initially focussed on alleged crimes against humanity committed in the context of the "Maidan" protests which took place in Kyiv and other regions of Ukraine between 21 November 2013 and 22 February 2014, including murder, torture and/or other inhumane acts. For further detail see https://www.icc-cpi.int/ukraine accessed 22 November 2018.

181 The preliminary examination of the situation in Venezuela, which will examine crimes allegedly committed in Venezuela during political unrest since April 2017, was announced on 8 February 2017. State security forces are alleged to have frequently used excessive force to disperse and put down demonstrations, and arrested and detained thousands of actual or perceived members of the opposition, a number of whom would have been allegedly subjected to serious abuse and ill-treatment in detention. The actions of some protesters are alleged also to have led to the deaths and injury of some members of security forces. For further detail see https://www.icc-cpi.int/venezuela accessed 22 November 2018.

182 See Public redacted version of OTP "Request for authorisation of an investigation pursuant to article 15", ICC-02/17-7-Conf-Exp (ICC-02/17-7-Red), 20 November 2017, available at https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF accessed 22 November 2018. See also ICC Press Statement: The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan (20 November 2017), available at https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh accessed 22 November 2018.

183 ICC Press Statement: Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq (13 May 2014), available at https://www.icc-cpi.int//Pages/item.aspx?name=otp-statement-iraq-13-05-2014 accessed 22 November 2018. See also Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine (22 May 2018), available at https://www.icc-cpi.int//Pages/item.aspx?name=180522-otp-stat accessed 22 November 2018.

184 John Dugard, 'Palestine and the International Criminal Court: Institutional Failure or Bias?' (2013) 11(3) *Journal of International Criminal Justice* 563. See also Max du Plessis, "Universalising International Criminal Law: The ICC, Africa and the Problem of Political Perceptions," (December 2013) *Institute for Security Studies, Paper 249*, at 2. See also Fatou Bensouda, 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine' Statement of the Prosecutor of the International Criminal Court on Palestine, available at https://www.icc-cpi.int//Pages/item.aspx?name=otp-st-14-09-02 accessed 22 November 2018.

185 See Mwangi S. Kimenyi, 'Can the International Criminal Court Play Fair in Africa?' *Brookings* (Thursday, 17 October 2013), available at https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa/ accessed 22 November 2018. See also Dan Steinbock 'The Real Story Behind the ICC' *Manila Times* (19 March 2018), available at http://www.manilatimes.net/the-real-story-behind-the-icc/387141/ accessed 22 November 2018. See also Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, available at https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat accessed 22 November 2018.

investigation. The only active cases before the ICC – all twenty-seven of them as of April 30, 2019 – are from Africa.[186] As one scholar puts it,

> "[i]t is thus disingenuous to suggest that these preliminary analyses can be equated with the Court being seized with a situation."[187]

The fact however that the ICC's Chief Prosecutor continues to make this claim[188] suggests either blatant and unapologetic dissembling or a disengagement with reality. Both are troubling.

3.1.2 Self-Referrals by African States, Not ICC Targeting.

It is also true that most cases from Africa before the ICC have been the result of self-referrals. Indeed, the cases arising from the situations in Uganda,[189] the Democratic Republic of Congo,[190] the Central African Republic,[191] Mali[192] and most recently the Central African Republic again,[193] were so instituted.[194] So was the situation in Côte d'Ivoire, which not being party to the Rome Statute at the time,[195] recognized

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186 For further detail on active cases see ICC website at https://www.icc-cpi.int/cases accessed 22 November 2018.

187 Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above.

188 See Fatou Bensouda, *Critics don't understand the ICC* Interview with DW, Note 172 above.

189 In December 2003, President Museveni referred the Lords' Resistance Army to the ICC and in July 2004, Uganda's legislature confirmed as correct Mr. Ocampo's interpretation of the referral as permitting jurisdictions over all Rome Statute crimes committed in Northern Uganda. See Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague (14 October 2005), available at https://www.icc-cpi.int/nr/rdonlyres/3255817D-fd00-4072-9F58-fdb869F9B7cf/143834/lmo_20051014_English1.pdf accessed 22 November 2018.

190 On 3 March 2004, President Kabila of the Democratic Republic of the Congo ("the DRC") invoked the jurisdiction of the ICC in a referral letter to the Prosecutor. See Press Release of 19 April 2004, *Prosecutor receives referral of the situation in the Democratic Republic of Congo* (ICC-OTP-20040419-50), available at https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor+receives+referral+of+the+situation+in+the+democratic+republic+of+congo accessed 22 November 2018.

191 The Central African Republic (CAR) government referred itself to the International Criminal Court (ICC) on 22 December 2004. This was the third self-referral by an ICC State party, following Uganda and the Democratic Republic of Congo (DRC). See 11 January 2005 Press Release of the Coalition for the International Criminal Court: ICC State Referral from Central African Republic, available at http://www.scoop.co.nz/stories/WO0501/S00082/icc-state-referral-from-central-african-republic.htm accessed 22 November 2018.

192 See referral letter from Malian Minister of Justice, Malick Coulibali to Fatou Bensouda dated 13 July 2012, available at https://www.legal-tools.org/doc/06f0bf/pdf/ accessed 22 November 2018.

193 See referral letter from Catherine Samba Panza, Transitional Head of State of the Central African Republic to Fatou Bensouda dated 30 May 2014, available at https://www.icc-cpi.int/iccdocs/otp/2014-05-30-CAR-referral.pdf accessed 22 November 2018.

194 Unlike other self-referrals which invoked Article 14 of the Rome Statute, President's Ouattara's letter to the ICC Prosecutor, dated 4 May 2011, invoked Article 15 of the Rome Statute under which the Prosecutor may initiate an investigation *proprio motu*. See Blogpost by Rob Currie, *Côte d'Ivoire and the ICC: A New Kind of "Self-Referral"?* available at http://rjcurrie.typepad.com/international-and-transna/2011/05/c%C3%B4te-divoire-and-the-icc-a-new-kind-of-self-referral.html accessed 22 November 2018. See also OTP Weekly Briefing (11 – 16 May 2011), Issue No. 87, available at https://www.icc-cpi.int/NR/rdonlyres/3836B9AF-B0DC-4F94-A4A8-4115E95AE76E/283329/OTPWeeklyBriefing_1116May201187.pdf accessed 22 November 2018.

195 Côte d'Ivoire deposited its instrument of ratification of the Rome Statute on 15 February 2013. For further detail see https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/Cote_d_Ivoire.aspx accessed 22 November 2018.

the Court's jurisdiction in 2003 and more recently in 2010 and 2011 for the purposes of subjecting to trial, Laurent and Simone Gbagbo and Charles Blé Goudé.[196]

And yet, the self-referrals by which the Court commenced the investigations that led to the first trials from the situations in Uganda and the DRC were the result of extensive encouragement by Moreno Ocampo[197] and a source of considerable disquiet about what Ocampo had offered as inducements to African States willing to do so.[198] The fact that Ocampo, unwisely,[199] chose to announce investigations in the situation in Uganda while standing next to President Museveni, a party to the conflict in Northern Uganda served to validate the disquiet.[200] The Uganda People's Defence Forces, over which Museveni has command authority as commander in chief of Uganda's armed forces had itself been accused of egregious human rights violations in Northern Uganda in the pursuit of the Lord's Resistance Army (LRA).[201] Admittedly inconclusive as evidence, in Ocampo announcing the investigations in

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196 Although not party to the Rome Statute of the ICC, Côte d'Ivoire accepted the jurisdiction of the ICC on 18 April 2003; and on both 14 December 2010 and 3 May 2011, the Presidency of Côte d'Ivoire reconfirmed the country's acceptance of this jurisdiction. The 2003 acceptance of jurisdiction was under the authority of President Gbagbo. See *Declaration de la Reconnaissance de la Competence de la Cour Pénale Internationale*, available at https://www.icc-cpi.int/NR/rdonlyres/FF9939C2-8E97-4463-934C-BC8F351BA013/279779/ICDE1.pdf accessed 22 November 2018. The 2010 and 2011 affirmations were under President Ouattara. See Oscar van Heerden, *The hypocrisy of the ICC laid bare: Justice delayed is justice denied*, The Daily Maverick (2 August 2017), available at https://www.dailymaverick.co.za/opinionista/2017-08-02-the-hypocrisy-of-the-icc-laid-bare-justice-delayed-is-justice-denied/ accessed 22 November 2018.

197 See Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," (2005) *99*(2) *American Journal of International Law* 403. See also Phil Clark, "Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda" in Stahn and El Zeidy (Eds), *The International Criminal Court and Complementarity: From Theory to Practice.* (Cambridge University Press, 2011).

198 See Patrick Wegner, "Self-Referrals and Lack of Transparency at the ICC – The Case of Northern Uganda" *Justice in Conflict* (4 October 2011), available at https://justiceinconflict.org/2011/10/04/self-referrals-and-lack-of-transparency-at-the-icc-%e2%80%93-the-case-of-northern-uganda/. See also Andreas Th. Müller, Ignaz Stegmiller, "Self-Referrals on Trial: From Panacea to Patient," (1 November 2010) 8(5) *Journal of International Criminal Justice* 1267.

199 See Flint and De Waal, "Case Closed: A Prosecutor without Borders" (2009) *World Affairs* available at http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders accessed 22 November 2018. See also Luis Moreno Ocampo, *Let Sudan's President Come to New York. Then Arrest Him*, New York Times (24 August 2015) available at http://www.nytimes.com/2015/08/24/opinion/let-sudans-president-come-to-new-york-then-arrest-him.html?emc=edit_th_20150824&nl=todaysheadlines&nlid=38974186 accessed 22 November 2018. See also Mark Kersten, "A Brutally Honest Confrontation with the ICC's Past: Thoughts on 'The Prosecutor and the President" June 23, 2016, *Justice in Conflict*, available at https://justiceinconflict.org/2016/06/23/a-brutally-honest-confrontation-with-the-iccs-past-thoughts-on-the-prosecutor-and-the-president/ accessed 5 July 2016.

200 See William Schabas, "Complementarity in Practice": Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forum* 5 at 22. See also Darryl Robinson, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse" (2011) 9 *Journal of International Criminal Justice* 355.

201 See Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, (Human Rights Watch, 2005). See also Human Rights Watch Press Statement of 20 September 2005, *Uganda: Army and Rebels Commit Atrocities in the North – International Criminal Court must Investigate Abuses on Both Sides*, available at https://www.hrw.org/news/2005/09/20/uganda-army-and-rebels-commit-atrocities-north accessed 22 November 2018.

the Uganda Situation with Museveni, who seemed oblivious to the possibility of legal jeopardy, it seemed a deal had been struck.[202]

3.1.3 Rome Statute Limitations and Jurisdictional Constraints of ICC.

It is true also, as various defenders and apologists for the ICC have argued, that the basis of the ICC's jurisdiction is not universal jurisdiction[203] and that the instances in which the ICC may exercise jurisdiction are circumscribed by the text of the Rome Statute. Barring referrals from the UN Security Council,[204] the Rome Statute permits the Court to exercise jurisdiction only over crimes committed on the territory of a State Party, or by a national of a State Party.[205]

And yet, there have been instances of egregious crimes that would fall within the jurisdiction of the Court but to which the Prosecutor has turned a blind eye. Afghanistan, Iraq and Palestine are cases in point.

In Afghanistan, which is a State party to the Rome Statute,[206] the actions of US forces in the "war on terror" instituted by the Bush-led government[207] in retaliation for Al Qaeda's September 11, 2001 terrorist attacks on US soil,[208] have yielded several substantiated accusations of war crimes perpetrated against alleged "Islamist terrorists" and civilian populations.[209] The failure of the Prosecutor to initiate a *proprio motu* investigation is therefore incapable of being explained by anything other than a wilful blindness. As one scholar notes:

> [g]iven the clear jurisdictional competence and the undeniable commission of war crimes, it is unclear why, in more than ten years, the

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202 See Mark Kersten**,** "Why the ICC Won't Prosecute Museveni," *Justice in Conflict* (19 March 2015), available at https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/ accessed 22 November 2018.

203 See Cherif Bassiouni and Douglass Hansen, "The Inevitable Practice of the Office of the Prosecutor" as invited experts on a Debate on the Africa Question (March 2013 – January 2014) - Is the International Criminal Court (ICC) targeting Africa inappropriately? Available at https://iccforum.com/africa accessed 22 November 2018.

204 See Article 13(b) of the Rome Statute of the ICC, Note 90 above.

205 See Article 12(2) of the Rome Statute of the ICC, Note 90 above.

206 Afghanistan deposited its instrument of accession to the Rome Statute on 10 February 2003. For further detail see https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en accessed 22 November 2018.

207 For further details see website of US Council for Foreign Relations at https://www.cfr.org/timeline/us-war-afghanistan accessed 22 November 2018.

208 See 'The 9/11 terrorist attacks' *BBC History* (11 September 2001), available at http://www.bbc.co.uk/history/events/the_september_11th_terrorist_attacks accessed 22 November 2018.

209 See Human Rights Watch, "Enduring Freedom:" Abuses by U.S. Forces in Afghanistan (7 March 2004), available at https://www.hrw.org/report/2004/03/07/enduring-freedom/abuses-us-forces-afghanistan accessed 22 November 2018. See also Investigation Report of US Senate Armed Services Committee, "Inquiry into the Treatment of Detainees in U.S. Custody," available at www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf accessed 22 November 2018. See also James Schlesinger (Chair), Final Report of the Independent Panel to Review Department of Defense Detention Operations (August 2004), available at http://www.dtic.mil/dtic/tr/fulltext/u2/a428743.pdf accessed 22 November 2018. See also Katherine Gallagher, "Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture," (2009) 7 *Journal of International Criminal Justice* 1087.

> ICC has not opened investigations, let alone cases, in the situation in Afghanistan.[210]

The expressed intention by the OTP in 2017 to open actual, as opposed to preliminary investigations,[211] over fifteen years after some of the atrocities occurred,[212] has proven to be a mirage following the Pre-Trial Chamber's decision not to permit the launch of such investigations for a range of reasons that endorse a subjective selectivity and appeasement as a means of self-preservation.[213] None of the proffered reasons inspire confidence in the protestations of even-handedness.[214]

The case of Iraq is a little different but has yielded the same lethargy from the ICC as has been the case of Afghanistan. Although Iraq is not party to the Rome Statute, at least thirty of the forty States that participated in the US-led coalition are parties to the ICC, for which reason the conduct of their troops could invoke ICC jurisdiction.[215]

Various inquiries undertaken into the lead-up to, and the conduct of the war in Iraq[216] have found definitively that not only was the war or aggression, which has yielded over 400,000 civilian deaths and

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210 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above at page 8.

211 See Statement of ICC Prosecutor, Fatou Bensouda, regarding her decision to request judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan (3 November 2017), available at https://www.icc-cpi.int/pages/item.aspx?name=171103_otp_statement accessed 22 November 2018.

212 Average number of years between the launch of investigations and commencement of trial. In some cases it has been longer as in the case of Gbagbo who has been in ICC custody since 2011. See Oscar van Heerden, 'The hypocrisy of the ICC laid bare: Justice delayed is justice denied,' Note 196 above.

213 See *Situation in the Islamic Republic of Afghanistan: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, note … above. See also Human Rights Watch, *US Threatens International Criminal Court – Visa Bans on ICC Staff*, note 168 above.

214 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above.

215 Members of the international US-led coalition that are States parties to the Rome Statute are the United Kingdom, Australia, Romania, El Salvador, Estonia, Bulgaria, Albania, Denmark, Bosnia and Herzegovina, Macedonia, Latvia, Poland, Mongolia, Georgia, Slovakia, Lithuania, Italy, Norway, Japan, Hungary, Netherlands, Portugal, New Zealand, Philippines, Honduras, Dominican Republic, Spain and Iceland. For further particulars, see Iraq War (2003 – 2011) at https://www.britannica.com/event/Iraq-War accessed 22 November 2018.

216 See HC264, *Report of the Iraq Inquiry: Report of a Committee of Privy Counsellors (Chaired by Sir John Chilcott)* (July 2016) House of Commons, available at http://webarchive.nationalarchives.gov.uk/20171123124621/http://www.iraqinquiry.org.uk/media/247921/the-report-of-the-iraq-inquiry_executive-summary.pdf accessed 22 November 2018. See also HC819, The Report of the Al Sweady Inquiry by Sir Thayne Forbes (17 December 2014) House of Commons, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388295/Volume_2_Al_Sweady_Inquiry.pdf accessed 22 November 2018.

casualties by some counts,[217] commenced on spurious grounds[218] but also that there have been instances of torture and other egregious abuses of human rights perpetrated by UK forces.[219] Ocampo's refusal to launch an investigation on the grounds that the abuses in Iraq did not meet a gravity threshold[220] was therefore cynical at best.[221] The ICC's willingness to reconsider its stance after release of the report of the Chilcot Inquiry is encouraging but hardly inspiring.[222]

The case of Palestine, which has been the clearest cut case of the Prosecutor moving the goal posts, is the case that appears to have most riled some former defenders of the ICC.[223] From late December 2008 until mid-January 2009, Israeli Defence Forces (IDF) launched an attack on Gaza ostensibly to stop what it called indiscriminate Palestinian rocket fire into Israel as well as the smuggling of weapons into Gaza by Palestinians.[224]

In what was known as Operation Cast Lead, (Israeli sea and air bombing attacks and a ground invasion targeted at such densely populated areas as Gaza, Khan Yunis and Rafah, a refugee camp), over 3,000 Palestinian homes – deliberately targeted – were destroyed, as were civilian facilities such as hospitals, schools and mosques.[225] Of the over 1,400 Palestinians who lost their lives in the 3-week battering, at least 850 were civilians, of whom 300 were children and 110 were women. Over 5,000 Palestinians were also wounded.[226] The casualty count on the

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217 See *Iraq study estimates war-related deaths at 461,000*, BBC News (16 October 2013), available at https://www.bbc.com/news/world-middle-east-24547256 accessed 22 November 2018. See also Patrick Cockburn, *Counting the cost of war: Nearly 500,000 Iraqis have been killed according to new survey: Study estimates 460,800 died between 2003 and 2011 as a direct or indirect result of the conflict*, Independent (16 October 2013), available at https://www.independent.co.uk/news/world/middle-east/counting-the-cost-of-war-nearly-500000-iraqis-have-been-killed-according-to-new-survey-8883439.html accessed 11 December 2018.

218 See also *Chilcot, Tony Blair was not 'straight with the nation' over Iraq war,* The Guardian (6 July 2017), available at https://www.theguardian.com/politics/2017/jul/06/chilcot-tony-blair-was-not-straight-with-the-nation-over-iraq-war accessed 22 November 2018.

219 See HC819, Report of the Al Sweady Inquiry, Note 216 above. While the Al Sweady inquiry in 2014, dismissed allegations of deliberate murder of detainees in a 2004 incident, it found that UK interrogators had committed serious abuses against Iraqis constituting torture. Other allegations of abuse of detainees by UK forces have been presented to various courts, including the ICC.

220 See Ocampo letter of 9 February 2006 to Coalition for the International Criminal Court, available at http://www.iccnow.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf accessed 22 November 2018.

221 See William A. Schabas, "The Banality of International Justice," Note 160 above.

222 See Press Statement from the Office of the ICC Prosecutor: *Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq* (13 May 2014), available at https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014 accessed 22 November 2018.

223 John Dugard, 'Palestine and the International Criminal Court: Institutional Failure or Bias?' Note 184 above. See also Max du Plessis, "Universalising International Criminal Law: The ICC, Africa and the Problem of Political Perceptions," Note 184 above, at 2.

224 See Chris McGreal, *Why Israel Went to War in Gaza*, The Guardian (3 January 2009), available at https://www.theguardian.com/world/2009/jan/04/israel-gaza-hamas-hidden-agenda accessed 22 November 2018.

225 For particulars on war casualties see website of Institute for Middle East Understanding (IMEU) at https://imeu.org/article/operation-cast-lead accessed 22 November 2018.

226 See Note 225 above.

Israeli side was fourteen dead, of whom four were civilians, and 320 wounded.[227] The League of Arab States appointed a fact-finding mission chaired by Professor Dugard, which meticulously documented abuses that had resulted from the war.[228] Human Rights Watch,[229] Amnesty International[230] and the UN[231] also undertook fact finding missions and generated reports, which confirmed the commission of ICC jurisdiction-invoking crimes.

Four days after the cease-fire, Palestine's Government made a Declaration in terms of Article 12(3) of the ICC Statute recognizing the jurisdiction of the ICC 'for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed in the territory of Palestine since 1 July 2002.'[232] To its credit, and as grounds for believing a commitment to truth and justice, the Palestinian government made the referral without distinguishing between the conduct of the IDF or Hamas.[233] The opportunity thereby presented to the Prosecutor to show commitment to international criminal justice beyond the continent of Africa was declined when after much dithering and on the eve of his retirement three years later, Ocampo announced that he was unable to proceed because Palestine was not a State in terms of Article 12(3) of the Rome Statute.[234] He 'generously' offered that the proper forum for

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227 See Note 225 above.

228 See *No Safe Place: Report of the Independent Fact-Finding Committee on Gaza.* Presented to the League of Arab States (30 April 2009), available at http://www.tromso-gaza.no/090501ReportGaza.pdf accessed 22 November 2018.

229 See Human Rights Watch, *Rain of Fire: Israel's Unlawful Use of White Phosphorous in Gaza* (March 2009), available at https://www.hrw.org/sites/default/files/reports/iopt0309web.pdf accessed 22 November 2018; See also Human Rights Watch, *"I Lost Everything": Israel's Unlawful Destruction of Property during Operation Cast Lead* (May 2009), available at https://www.hrw.org/report/2010/05/13/i-lost-everything/israels-unlawful-destruction-property-during-operation-cast-lead accessed 22 November 2018; See also Human Rights Watch, *Under Cover of War Hamas Political Violence in Gaza* (April 2009), available at https://www.hrw.org/sites/default/files/reports/iopt0409webwcover.pdf accessed 22 November 2018; See also Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles* (June 2009), available at https://www.hrw.org/sites/default/files/reports/iopt0609webwcover_0.pdf; See also Human Rights Watch, *White Death Flags: Killings of Palestinian Civilians during Operation Cast Lead* (August 2009), available at https://www.hrw.org/report/2009/08/13/white-flag-deaths/killings-palestinian-civilians-during-operation-cast-lead accessed 22 November 2018.

230 See Amnesty International*, Israel/Gaza, Operation Cast Lead: 22 Days of Death and Destruction* (July 2009), available at https://www.amnesty.org/download/Documents/48000/mde150152009en.pdf accessed 22 November 2018.

231 See United Nations, Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48, 25 September 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf accessed 22 November 2018.

232 Palestinian National Authority - Minister of Justice, Declaration Recognizing the Jurisdiction of the International Criminal Court, 21 January 2009, available at https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf accessed 22 November 2018.

233 See Palestinian National Authority - Minister of Justice, Declaration Recognizing the Jurisdiction of the International Criminal Court, 21 January 2009, Note 232 above. See also Alain Pellet, "The Palestinian Declaration and the Jurisdiction of the International Criminal Court" (2010) 8 *Journal of International Criminal Justice* 981.

234 See Press Statement of the Office of the Prosecutor: Situation in Palestine (3 April 2012), available at https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf accessed 22 November 2018. See also *ICC*

designating it as such would be "relevant bodies at the United Nations or the Assembly of States Parties."[235]

Why it would take three years to come to such a conclusion – which could have been arrived at in short order – has been viewed by less charitable observers as an effort to slow-walk the referral and frustrate an investigation.[236] The allegation that the President of the Assembly of States Parties (ASP), Ms. Tiina Intelmann of Estonia,[237] suppressed a letter written by William Schabas and signed by thirty eminent international lawyers requesting placement of the question of Palestine's statehood before the ASP[238] (Ocampo had suggested this as one of the means to bring Palestine within Article 12(3) of the Rome Statute), would – if proven – suggest trenchant bad faith unbecoming of anyone, let alone the primary stakeholders for a judicial body.[239]

In November 2012, upon application by Palestine, the UN General Assembly voted to bestow upon it 'non-member observer State status',[240] thereby settling the question of whether or not Palestine is a State in terms of Article 12(3) of the Rome Statute. Palestine has since gone even further and acceded to the Rome Statute[241] and yet, more than five years after its accession, the crimes so publicly perpetrated and carefully documented in Gaza and elsewhere in Palestine and over which the ICC clearly has jurisdiction, have received no more than a preliminary investigation.[242]

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prosecutor rejects Palestinian recognition, BBC News (4 April 2012), available at https://www.bbc.com/news/world-middle-east-17602425 accessed 22 November 2018.

235 See Press Statement of the Office of the Prosecutor: Situation in Palestine (3 April 2012), Note 234 above.

236 See John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?" Note 184 above.

237 See Official Record of the Eleventh Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague (14 – 22 November 2012), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/OR/ICC-ASP-11-20-VolI-ENG.pdf accessed 22 November 2018.

238 See John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?" Note 184 above at 568. See also Dapo Akande, "ICC Assembly of States Parties Urged to Decide on Status of Palestine," *EJILTalk,* (12 September 2012), available at https://www.ejiltalk.org/icc-assembly-of-states-parties-urged-to-decide-on-status-of-palestine accessed 22 November 2018. See however Kevin Jon Heller, "Was the Expert Letter on Palestine Buried by the President of the ASP?" *Opinio Juris* (28 June 2013), available at http://opiniojuris.org/2013/06/28/was-an-expert-letter-on-palestine-buried-by-the-bureau-of-the-asp/ accessed 22 November 2018.

239 John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?" Note 184 above at 567.

240 See Ewen MacAskill and Chris McGreal, *UN General Assembly Makes Resounding Vote in Favour of Palestinian Statehood,* The Guardian (29 November 2012), available at https://www.theguardian.com/world/2012/nov/29/united-nations-vote-palestine-state accessed 22 November 2018.

241 See Depositary notification of Accession to the Rome Statute by the State of Palestine dated 6 January 2015 (C.N.13.2015.TREATIES-XVIII.10), available at https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf accessed 22 November 2018. Ocampo's blog post on Palestine's accession providing "friendly advise" to Israel on how to avoid ICC prosecution provides further reason to doubt his *bona fides* with respect to launching investigations in the aftermath of Operation Cast Lead. See Luis Moreno Ocampo, 'Palestine's Two Cards: A Commitment to Legality and an Invitation to Stop Crimes' *Just Security* (12 January 2015), available at https://www.justsecurity.org/19046/palestines-cards-commitment-legality-invitation-stop-crimes/ accessed 22 November 2018.

242 See status of Preliminary Investigations at https://www.icc-cpi.int/pages/pe.aspx accessed 22 November 2018.

The above-described instances clearly show that the jurisdictional barriers alluded to by ICC defenders are incapable of explaining the exclusively African caseload of the ICC. What may perhaps be even more galling for the AU, is the speed with which the Prosecutor completed preliminary investigations and initiated investigations into situations in Libya and Cote d'Ivoire: a mere five days after the Security Council referral in the case of Libya[243] – even while a civil war continued to rage[244] – and only fifty days after Ouattara's invitation to the ICC to undertake a *proprio motu* investigation in the case of Cote d'Ivoire.[245]

3.2 The AU's Witting or Unwitting Dance with Impunity.

It is true that the current case load of the ICC and trials that have commenced, been terminated or remain active, as of April 30, 2019, are exclusively African and that, even before the ICC came into existence, there had been a long record of abusive use of universal jurisdiction against African leaders. These facts have indeed earned the AU and African States significant mileage from various commentators who see therefrom, a pattern of African leaders – no others – being targeted through the selective dispensation of international criminal justice.[246]

The AU's accusations that African States have been victims of unfair targeting by the ICC have also served to generate some empathy for the AU's opposition to the ICC.[247] Although ICC defenders' argument that the African hue of the ICC's case load is fundamentally because of African States' self-referrals,[248] the empathy is sustained in the face of further detail that the self-referrals were heavily influenced by Ocampo – even if it suggests a lack of agency by African States.

And yet, while it is true that heavily influenced or coerced self-referrals are not self-referrals at all, such an argument cannot be made of the more recent self-

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243 See Case Information Sheet: Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi,* (ICC-PIDS-CIS-LIB-01-013/18_Eng), available at https://www.icc-cpi.int/libya/gaddafi/documents/gaddafieng.pdf accessed 22 November 2018.

244 See 'A timeline of the conflict in Libya' *CNN* (24 August 2011), available at http://edition.cnn.com/2011/WORLD/africa/08/18/libya.timeline/index.html accessed 22 November 2018.

245 See Case Information Sheet: Situation in Cote d'Ivoire, *The Prosecutor v. Laurent Gbagbo,* (ICC-PIDS-CIS-CI-01-008/13_Eng), available at https://www.icc-cpi.int/iccdocs/PIDS/publications/GbagboEng.pdf accessed 22 November 2018.

246 See John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?" Note 184 above. See also William A. Schabas, "The Banality of International Justice," Note 160 above. See also Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above.

247 See John Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?" Note 184 above.

248 See Charles Jalloh, Dapo Akande and Max du Plessis, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court" (2011) 4 *African Journal of Legal Studies* 5.

referrals from Cote d'Ivoire in 2011,[249] Mali in 2012[250] and the Central African Republic in 2014.[251] The fact that these self-referrals were made by the said countries after the sustained AU vilification of Ocampo and the ICC;[252] after the AU's condemnation of the "neo-colonialist project" by Western States to subjugate former colonies;[253] and, after the AU's frequent assertions of Africans' capacity and competence to deal with their own challenges, suggests that African States did not really need Ocampo to herd them towards the ICC – especially if the prosecutions could be reasonably expected to focus on their political rivals.[254]

Ensnared as it is in a self-pitying web of victimhood, arguably because of the indignities it, and member States have endured[255] and because of a lop-sidedness to the international legal order that perpetuates the indignities,[256] the AU has – unwittingly or otherwise – taken steps which provide legitimate bases to question its stated commitment to accountability. It can be argued, in a sense, that the AU has been so fixated on the paradigm of victimhood that it fails to acknowledge that its actions actively challenge its stated fealty to accountability. There is good reason then, to make common cause with Gumede who calls out the self-serving rhetoric of the AU by saying that:

> … African leaders do like to point to … Western hypocrisy to deflect their own crimes, corruption and mismanagement. The fact is that African countries are unequal in international law. The reality is, that almost all African leaders criticizing the ICC do so, not necessarily because of the lopsided global power in

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249 Unlike other self-referrals which invoked Article 14 of the Rome Statute, President's Ouattara's letter to the ICC Prosecutor, dated 4 May 2011 requested the Prosecutor to commence investigations under its *proprio motu* powers. See Note 194 above.

250 See referral letter from Malian Minister of Justice, Malick Coulibali to Fatou Bensouda dated 13 July 2012. Note 192 above. See also OTP Press Release of 18 July 2012, ICC Prosecutor Fatou Bensouda on the Malian State referral of the situation in Mali since January 2012, available at https://www.icc-cpi.int/Pages/item.aspx?name=pr829 accessed 22 November 2018.

251 See referral letter from Catherine Samba Panza, Transitional Head of State of the Central African Republic to Fatou Bensouda dated 30 May 2014, Note 193 above.

252 See Paragraph 9 of the Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/Au/Dec.270(Xiv) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) (Assembly/AU/Dec.296(XV)) in the Report of the Fifteenth Ordinary Session of the Assembly of the African Union held in Kampala, Uganda from 25 – 27 July 2010; available at http://www.au.int/en/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf accessed 22 November 2018. The fact that an AU Resolution made specific mention of the Prosecutor provides a window into the depth of the AU's antipathy for the Prosecutor.

253 See Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholder*, Note 163 above. See also Peter Fabricius, *Avoiding ICC Neo-Colonialism* IOL (29 April 2014), available at https://www.iol.co.za/dailynews/opinion/avoiding-icc-neo-colonialism-1681411 accessed 22 November 2018.

254 See Alana Tiemessen, "The International Criminal Court and the Politics of Prosecutions," (2014) *The International Journal of Human Rights* 444.

255 See Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General. Note 16 above. See also David Bosco, *Why is the International Criminal Court picking only on Africa?* The Washington Post (29 March 2013), Note 17 above.

256 See for instance *Is the International Criminal Court (ICC) targeting Africa inappropriately?* Discussion of invited experts – Bassiouni, Clarke, de Guzman and Cole amongst others on Africa question, available at http://iccforum.com/africa accessed 4 September 2018. See also Res Schuerch "The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim made by African Stakeholders" in Gerhard Werle and Moritz Vormbaum (Eds) *International Criminal Justice Series* (13 ed) (2017, Asser Press).

> international law, governance and economic, market and political architecture; but because they fear they will be prosecuted for their crimes against their own people.[257]

The shifting rationale for the AU's objections to the exercise by ICC of its mandate when it comes to Heads of State,[258] the active engagement of the AU in the articulation and implementation of a multi-pronged strategy to open the flood gates for African States' disengagement from the ICC,[259] and, the creation, in the Expanded African Court of an accountability mechanism that is arguably primed to fail[260] inform such questions about the AU's commitment to accountability.[261] And this, even more so because few things in the AU's history would permit it to hold itself out as an exemplar for international criminal accountability.[262] There is also precedent for AU member States conniving to render other accountability mechanisms ineffective.[263]

4. Whither International Criminal Justice?

While commentators may be right in assessing Article 46A *bis* of the Malabo Protocol and the AU's conduct in adopting it as likely to negatively impact the ICC, it should also be noted that even beyond the political calculations of the Office of the Prosecutor (OTP) in avoiding powerful States and focusing instead on weak States without strong political patrons,[264] the ICC has not been without blemish.[265] And this notwithstanding its noble objectives or the valiant endeavours of the several hundreds of professionals who are committed to its ideals.[266]

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257 See William Gumede, *The International Criminal Court and Accountability in Africa*, Wits School of Governance (31 January 2018), available at https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html accessed 22 November 2018.

258 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above.

259 Ludovica Iaccino**,** *African Union approves mass withdrawal from ICC over war crimes 'bias'*, International Business Times (1 February 2017), available at https://www.ibtimes.co.uk/african-union-approves-mass-withdrawal-icc-over-war-crimes-bias-1604238 accessed 22 November 2018. See also *African Union backs mass withdrawal from ICC*, BBC News (1 February 2017), available at https://www.bbc.com/news/world-africa-38826073 accessed 22 November 2018.

260 Max du Plessis, "Implications of the AU Decision to give the African Court Jurisdiction over International Crimes," (June 2012) *Institute for Security Studies* Paper 235.

261 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, (2016), available at https://www.amnesty.org/download/Documents/AFR0130632016ENGLISH.PDF accessed 22 November 2018.

262 William Gumede, *The International Criminal Court and Accountability in Africa*, Note 257 above.

263 See Jeremy Sarkin, A Critique of the Decision of the African Commission on Human and People's Rights Permitting the Demolition of the SADC Tribunal: Politics versus Economics and Human Rights, (2016) 24 *African Journal of International and Comparative Law* 215 at 221. See also Sean Christie, *Killed off by Kings and Potentates*, Mail and Guardian (9 August 2011), available at https://mg.co.za/article/2011-08-19-killed-off-by-kings-and-potentates accessed 22 November 2018.

264 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above.

265 See Julie Flint and Alex de Waal, 'Case Closed: A Prosecutor without Borders' (Spring 2009) *World Affairs* available at http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders, accessed 18 August 2018. See also Thomas Escritt, 'ICC Judges Agree to Withdrawal of Kenyatta Charges' *Reuters* (13 March 2015), available at https://www.reuters.com/article/us-kenya-icc/icc-judges-agree-to-withdrawal-of-kenyatta-charges-idUSKBN0M91SH20150313 accessed 22 November 2018. See also William A. Schabas, "The Banality of International Justice," Note 160 above at 548.

266 See William A. Schabas, "The Banality of International Justice," Note 160 above at 547.

Although it is true that all new institutions suffer early challenges, trenchant criticism of the ICTR and the ICTY for having had serious teething difficulties being familiar, the ICC's record has been particularly woeful.[267] In seventeen years, the ICC has only convicted 8 persons,[268] five of them for non-core international crimes or relatively frivolous crimes relating to the administration of justice[269] and one of them for the more serious crime of blowing up mosques.[270] The Court has also in that time declined to confirm charges,[271] terminated trials[272] or acquitted twelve people, four more than the Court has actually convicted. And all this for the price tag of USD1.5 billion since its inception.[273] Even for the most ardent of advocates for international criminal justice, the performance of the ICC has been a disappointment that is undoubtedly exacerbated by its stupendously high cover charge.[274]

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267 See William A. Schabas, "The Banality of International Justice," Note 160 above at 546. See also Carsten Stahn, "Between Faith and Facts: By What Standards Should We Assess International Criminal Justice (2012) 25 *Leiden Journal of International Law* 251.

268 The convicted persons are Thomas Lubanga Dylio (See Case Information Sheet ICC-PIDS-CIS-DRC-01-016/17, available at https://www.icc-cpi.int/drc/lubanga/Documents/lubangaEng.pdf accessed 22 November 2018); Ahmad Al Faqi Al Mahdi (See Case Information Sheet ICC-PIDS-CIS-MAL-01-08/16, available at https://www.icc-cpi.int/mali/al-mahdi/Documents/al-mahdiEng.pdf accessed 22 November 2018); Jean-Pierre Bemba Gombo (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 22 November 2018); Aimé Kilolo Musamba (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 22 November 2018); Jean-Jacques Mangenda Kabongo (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 22 November 2018); Fidèle Babala Wandu, (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 22 November 2018); Narcisse Arido (See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 22 November 2018); and, Germain Katanga (See Case Information Sheet ICC-PIDS-CIS-DRC-03-014/18, available at https://www.icc-cpi.int/drc/katanga/Documents/katangaEng.pdf accessed 22 November 2018).

269 See *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (ICC-01/05-01/13). See Case Information Sheet ICC-PIDS-CIS-CAR-02-014/18, available at https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf accessed 22 November 2018.

270 Ahmad Al Faqi Al Mahdi (See Case Information Sheet ICC-PIDS-CIS-MAL-01-08/16, available at https://www.icc-cpi.int/mali/al-mahdi/Documents/al-mahdiEng.pdf accessed 22 November 2018).

271 The four against whom the Pre-Trial Chamber declined to confirm charges are Abu Garda (See Case Information Sheet ICC-PIDS-CIS-SUD-03-002/12, available at https://www.icc-cpi.int/darfur/abugarda/Documents/abugardaEng.pdf accessed 22 November 2018); Hussein Ali (See Case Information Sheet ICC-PIDS-CIS-KEN-02-005/12., available at https://www.icc-cpi.int/iccdocs/PIDS/publications/MuthauraKenyattaAliEng.pdf accessed 22 November 2018) Mbarushimana (See Case Information Sheet ICC-PIDS-CIS-DRC-04-003/12, available at https://www.icc-cpi.int/drc/mbarushimana/Documents/mbarushimanaEng.pdf accessed 22 November 2018); and, Kosgey (See Case Information Sheet ICC-PIDS-CIS-KEN-01-012/13_Eng, available at https://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf accessed 22 November 2018).

272 The four whose cases have been terminated by the court, but without prejudice, are Kenyatta and Muthaura (See Case Information Sheet ICC-PIDS-CIS-KEN-02-005/12, available at https://www.icc-cpi.int/iccdocs/PIDS/publications/MuthauraKenyattaAliEng.pdf accessed 22 November 2018); and Ruto and Sang (See Case Information Sheet ICC-PIDS-CIS-KEN-01-012/14, available at https://www.icc-cpi.int/kenya/rutosang/Documents/rutosangEng.pdf accessed 22 November 2018)

273 See also Rebecca Kheel and Morgan Chalfant, *Five Things to Know about the International Criminal Court*, The Hill (10 September 2014), available at https://thehill.com/policy/defense/405907-five-things-to-know-about-the-international-criminal-court. See also Moses Phooko, "How Effective the International Criminal Court has Been: Evaluating the Work and Progress of the International Criminal Court" (2011) 1(1) *Notre Dame Journal of International & Comparative Law*, Article 6, available at http://scholarship.law.nd.edu/ndjicl/vol1/iss1/6 accessed 22 November 2018.

274 See William A. Schabas, "The Banality of International Justice" Note 160 above at 546 – 547.

It is true that convictions do not equate justice, acquittals being themselves evidence of justice but given that international criminal trials are exceptionally expensive, it is not unreasonable to expect that the pre-trial process of confirming charges would actually play its intended role and ensure the barest minimum, if any, of unsustainable charges being sent on to the trial phases. The fact that there have been more trial terminations and acquittals on the core crimes of the Rome Statute than convictions would suggest significant failures in pre-trial proceedings.[275]

The Prosecutor's protestations and efforts to blame witness tampering for the collapse of the cases arising from the Kenya situation, and judicial overreach in the overturn of the conviction of Jean Pierre Bemba Gombo, ring hollow in the face of the incompetence and prosecutorial misconduct of the OTP in other situations[276] – incompetence and misconduct that have earned the OTP stiff rebukes from a bench,[277] which is itself hardly without blemish.[278]

The notion also that in creating an African Court with jurisdiction over international crimes, the AU is undermining a bastion for international criminal justice is simply therefore not borne out by the evidence.[279] That various global political forces seem bent on destroying the ICC[280] or rendering it capable only of delivering selective justice while

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275 See *The Prosecutor v. Uhuru Muigai Kenyatta*: Decision on Defence Application Pursuant to Article 64(4) and Related Requests, Concurring Opinion of Judge Christine Van den Wyngaert (ICC-01/09-02/11-728-Anx2) 26 April 2013, available at https://www.icc-cpi.int/RelatedRecords/CR2013_03280.PDF accessed 22 November 2018.

276 See *The Prosecutor v. Thomas Lubanga Dyilo*: Case Information Sheet (ICC-PIDS-CIS-DRC-01-016/17_Eng) available at https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf accessed 22 November 2018.

277 See *The Prosecutor v. Jean-Pierre Bemba Gombo:* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" (ICC-01/05-01/08 A) available at https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF accessed 22 November 2018. See Separate Opinion of Judge Van den Wyngaert and Judge Morrison (ICC-01/05-01/08-3636-Anx2), available at https://www.icc-cpi.int/RelatedRecords/CR2018_02989.PDF accessed 22 November 2018. See Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/09-02/11-728-Anx2 26-04-2013 at http://www.icc-cpi.int/iccdocs/doc/doc1585626.pdf, accessed 22 November 2018, in Defense Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration (ICC-01/09-02/11-622 05-02-2013) at http://www.icc-cpi.int/iccdocs/doc/doc1548545.pdf accessed 22 November 2018.

278 See *AUC concerned over ICC decisions on Malawi and Chad*, available at https://europafrica.net/2012/01/17/8258/ accessed 27 September 2018; See also Dire Tladi "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) 11 *Journal of International Criminal Justice* 199, at 205. See also Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But Gets the Law Wrong" *EJILTalk* (15 December 2011), available at http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ accessed 6 September 2018; See also See Kerstin Carlson, Gbagbo's acquittal suggests confusion and dysfunction at the ICC, The Conversation (January 23, 2019). Available at http://theconversation.com/gbagbos-acquittal-suggests-confusion-and-dysfunction-at-the-icc-110200; See also Dapo Akande, "ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals," *EJILTalk* (6 May 2019), available at https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/

279 See Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights, Note 22 above. See also Max du Plessis, "Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes" Note 260 above.

280 See Owen Bowcott, Oliver Holmes, and Erin Durkin, *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, Note 148 above.

unabashedly insulating certain countries[281] may be reason enough for the AU to pursue additional, if not alternative accountability platforms.

5. Some Thoughts on Operationalizing the Expanded African Court.

Notwithstanding the various issues identified in Chapter 6 with the Malabo Protocol's Expanded African Court, the degree of antipathy for the ICC by the AU may prove potent enough to render impossible an abandonment of an African Court with international criminal jurisdiction. Indeed, AU hostility shows little sign of abatement in the face of what the AU has called further provocations such as an attempt to use recanted testimony in a manner inconsistent with the stated intention of the ASP for such testimony to be used only in future cases and not in any ongoing cases.[282] In any case there is legitimate reason to establish an African Court with criminal jurisdiction[283] and one with a substantial number, even if not all, of the subject matter jurisdiction that the Malabo Protocol proposes.[284]

The key would be to ensure that the court meets the AU's stated objectives of eschewing impunity and embracing accountability – an endeavour which will require further refinement of the Malabo Protocol and the development of yet another Protocol or of Court rules to address lapses of the Malabo Protocol. Developing key benchmarks against which the credibility and effectiveness of the Expanded African Court can be assessed will be a critical factor for this endeavour. Some key (non-exhaustive) elements to consider for operationalizing the Expanded African Court would include the following:

5.1 Jurisdiction *Ratione Materiae.*

The concerns that the Malabo Protocol's definitions of the core crimes for which the Expanded African Court will have concurrent jurisdiction with the ICC may be watered down in the former and create inconsistent jurisprudence from the two

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281 See *US says ICC 'dead' as it Moves to 'Protect' Israel*, Middle East Monitor (10 September 2018), Note 144 above. See also Somini Sengupta, *China and Russia Block Referral of Syria to Court*, New York Times (22 May 2014), available at https://www.nytimes.com/2014/05/23/world/middleeast/syria-vote-in-security-council.html accessed 22 November 2018.

282 See *The Prosecutor v. William Samoei Ruto And Joshua Arap Sang*: The African Union's *Amicus Curiae* Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties (19 October 2015, submitted by Professor Jalloh) available at https://www.icc-cpi.int/CourtRecords/CR2015_19745.PDF accessed 22 November 2018. See Bernard Namunane, *AU urges Hague court to overturn ruling on recanted evidence*, Daily Nation (20 October, 2015), available at https://www.nation.co.ke/news/AU-urges-Hague-court-to-overturn-ruling-on-recanted-evidence/1056-2922042-3b1ogw/index.html accessed 22 November 2018. See also Laura Marschner, "Recent Jurisprudential Developments at the ICC on Retroactivity and the Admissibility of Evidence in the Case against William Ruto and Joshua Sang" *WSD HANDA Center for Human Rights and International Justice*, available at https://handacenter.stanford.edu/sites/default/files/publications/download-2.pdf accessed 22 November 2018.

283 See also Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," Note 23 above at 940 where the author says that:

> Without conferring on its court jurisdiction to prosecute international crimes, the AU will permanently face a rather absurd situation in which its member States recognize the existence of a crime in their region – a crime that they regard as very serious, as their practice dating back at least two decades shows – but one that the Union's court cannot prosecute.

284 See Article 28 of the Malabo Protocol. See also Max du Plessis, "Implications of the AU decision to give the African Court jurisdiction over international crimes" Note 279 above.

courts have not materialized. Neither is there reason for the fear that a failure to incorporate and apply Rome Statute definitions could result in a single defendant's simultaneous trials before the ICC and the Expanded African Court with similar (though not identical) charges permitting invocation of *ne bis in idem*[285]

In fact, the Malabo Protocol definitions of genocide,[286] crimes against humanity[287] and war crimes[288] have proven to be even more progressive that the Rome Statute definitions by incorporating the jurisprudence from international criminal tribunals thereinto.[289] In the face however of trenchant obstruction from the US and other parties in the process of defining the crime of aggression,[290] the AU has an opportunity to develop a definition that may apply to or be adopted by the ASP at the next review date.

A concern which arises from the broad ambit of Article 28 – unrelated to apprehensiveness about Heads of State and other high-ranking officials' alleged quest for impunity – is with the sub-optimal definitions of such crimes as terrorism,[291] which could potentially breach principles of legality for being vague and overly broad.[292] Addressing these would ensure that the Malabo Protocol does not run afoul of the principle of legality.

5.2 The Complementarity Question: Achieving Positive Complementarity.

The case for complementarity by both the expanded African Court and the ICC cannot be overemphasized as the best opportunity to entrench fidelity to international criminal justice. Notwithstanding the Malabo Protocol's failure to acknowledge the existence of the ICC, there is more than ample opportunity for cooperation between the Expanded African Court and the ICC in the Malabo Protocol's encouragement for the Expanded African Court to

> … seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and … conclude Agreements for that purpose.[293]

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285 Miles Jackson, "Regional Complementarity: The Rome Statute and Public International Law," (2016) 14(5) *Journal of International Criminal Justice* 1061.

286 See Article 28B(f) of the Malabo Protocol. See also Article 6 of the Rome Statute of the ICC.

287 See Article 28C of the Malabo Protocol.

288 See Article 28D of the Malabo Protocol.

289 See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above.

290 Harold Hongju Koh, "The Crime of Aggression: The United States Perspective" (2015) *Faculty Scholarship Series, Paper 5006*, available at http://digitalcommons.law.yale.edu/fss_papers/5006 accessed 22 November 2018.

291 See Article 28G of the Malabo Protocol.

292 See Article 15 of the International Covenant on Civil and Political Rights (ICCPR).

293 See Article 46 L(3) of the Malabo Protocol.

Such cooperation should refine and provide granularity to the instances in which either Court would exercise jurisdiction.

5.3 Applying Fair Trial Standards.

Yet another critical factor that the Expanded African Court may ignore only upon risk of peril to its credibility are fair trial standards. The manpower currently assigned to the Bench of the International Criminal Section of the Court,[294] which is guaranteed to result in cross contamination of judges for every prosecution that goes beyond the trial phase does not portend well.[295]

Fair trial standards, which the Expanded African Court should ensure include all that are enumerated in the International Covenant on Civil and Political Rights, Article 14 of which sets out the elements of a fair trial.[296] These include, equality before the law, access to a fair and public hearing before an independent and impartial tribunal,[297] the presumption of innocence until guilt is established beyond a reasonable doubt,[298] the opportunity to be tried without undue delay,[299] the opportunity to prepare a fair defence (including being able to understand the charges against an accused person, having adequate time to prepare a defines, having opportunity to consult counsel of one's choosing, being tried in one's presence and in a language one understands – or being given assistance to this end – being able to examine witnesses against one, and, being able to call witnesses in his own defence.[300] Other standards include the right to an appeal,[301] to compensation in the event of a miscarriage of justice that results in acquittal upon appeal[302] and to be free of further prosecution for a crime for which one has already been acquitted or convicted.[303]

The ICC's failures on two key standards – ensuring speedy trials[304] and compensation in the event of acquittals[305] represent two opportunities in which the Expanded African Court may distinguish itself.

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294 See Article 4 of the Malabo Protocol.

295 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, (2016), available at https://www.amnesty.org/download/Documents/AFR0130632016ENGLISH.PDF accessed 22 November 2018.

296 See UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966), United Nations Treaty Series (Vol. 999), at page 171. Entered into force on 23 March 1976 (hereafter ICCPR), available at https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf accessed 22 November 2018.

297 See Article 14(1) of ICCPR.

298 See Article 14(2) of ICCPR.

299 See Article 14(3)(c) of ICCPR.

300 See Article 14(3) of ICCPR.

301 See Article 14(5) of ICCPR.

302 See Article 14(1) of ICCPR.

303 See Article 14(7) of ICCPR.

304 See Article 14(3)(c) of ICCPR.

305 See Article 14(6) of ICCPR.

5.4 Ensuring Capacity for the Court.

The success or failure of the International Criminal Section of the Expanded African Court will ultimately be a function of the human capacity and other resources that the AU is prepared to put behind it. Because of the more exacting standards for establishing culpability, and the need to fund international investigations,[306] defence counsel,[307] ultra-secure detention facilities[308] and expansive witness protection programs,[309] amongst others, international criminal courts are even more resource intensive than human rights courts.

Comparator courts such as the ICTY and the ICTY have had annual budgets in the region of a hundred million dollars and even the shoe-string court[310] – as the Special Court for Sierra Leone was nicknamed – had an average annual budget of USD30 million.[311] The fact that the AU and member States have been less than generous in generating the resources needed to fund the AU itself,[312] and its institutions is a notorious fact that portends ill for the Expanded African Court.[313] It can only be hoped however that the AU will take its own commitments to the imperative to "ensure predictable and sustainable funding"[314] for the Expanded African Court seriously.

6. A Final Word.

The modest contributions of this thesis and the conclusions that arise from the foregoing are not about to put an end to the debate that the conflict between the AU and the ICC has spawned, of which there are two principal parts: whether there are *jus cogens*

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306 See David Wippman, "The Costs of International Justice," (Oct. 2006) 100(4) *The American Journal of International Law* 861. See also Rupert Skilbeck, "Funding Justice: The Price of War Crimes Trials" (2008) 15(3) *Human Rights Brief* 6. See also Stuart Ford, "Complexity and Efficiency at International Criminal Courts" (2004) 29 *Emory International Law Review* 1.

307 Mark S. Ellis, "Achieving Justice before the International War Crimes Tribunal: Challenges for the Defense Counsel," (1997) 7 *Duke Journal of Comparative and International Law* 519. Ellis argues that the very low rates paid to defense counsel could compromise justice.

308 See Doreen Carvajal, *Accused of War Crimes and Living with Perks*, New York Times (3 June 2010), available at https://www.nytimes.com/2010/06/04/world/europe/04iht-hague.html accessed 22 November 2018.

309 Markus Eikel, "Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice," (2012) 23 *Criminal Law Forum* 97.

310 See Avril McDonald, "Sierra Leone's shoestring Special Court," *IRRC* (March 2002) Vol. 84 No 845, at 121 – 143, available at https://www.icrc.org/eng/assets/files/other/121-144-mcdonald.pdf accessed 22 November 2018.

311 See Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots (2017) at 9, available at http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/amnesty_international-africa-malabo_protocol-2017.pdf accessed 22 November 2018. See also Mary Kimani, *Expensive Justice: Cost of Running the Rwanda Tribunal,* AllAfrica (5 April 2002), available at https://allafrica.com/stories/200204050232.html accessed 22 November 2018.

312 H.E. Paul Kagame, *The Imperative to Strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union*, African Union (29 January 2017), available at http://www.rci.uct.ac.za/sites/default/files/image_tool/images/78/News/FInal%20AU%20Reform%20Combined%20report_28012017.pdf accessed 22 November 2018.

313 Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Note 23 above at 30.

314 See Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) (EX.CL/Dec.868(XXVI)), at paragraph xii.

exceptions under customary international law to immunity for Heads of State and other high-ranking officials (as the Malabo Protocol proposes to confer) of the one part; and, whether the AU and member States thereof seek to evade accountability for international crimes of the other part.

A definitive answer to the first part rests on whether, the normative progression on accountability for *jus cogens* crimes sought by the International Law Commission, the Institute for International Law, various States and a plethora of scholars and international criminal justice advocates is borne out by customary international law and the conclusive State practice and *opinio juris* which validates it. While seeking to avoid distinctions between *lex lata* and *lex ferenda*[315] for being ultimately prejudicial to the development of international law and the progression of *lex ferenda* to *lex lata*,[316] Tladi acknowledges that the law on immunities is in flux. *A luta continua* therefore because as the author also notes:

> The issue [whether there exist exceptions to immunity for serious crimes under international law] is emotive because it is a microcosm for the long-standing battle for the soul of international law: will international law – at its core – protect sovereignty and the immunity implied by it or will it pursue a brave new world by promoting accountability and justice for the victims of atrocity crimes.[317]

While endorsing the sentiment, it is useful also to acknowledge, for purposes of reflecting on the second part of the debate as to whether the AU seeks impunity, that the architecture of the international legal order and the injustice it yields is also a highly emotive issue.[318]

It is this international legal order which has seen, amongst others, former exploitative colonial powers actively destabilize African countries through proxies,[319] stoke civil conflict, maintain relevance through and benefit from the civil conflict that such destabilization yields, and seek to prosecute African leaders in Western courts for atrocities committed during the civil conflict ostensibly to preserve the conscience of mankind.[320] It is this international legal order that sees Western powers disassemble the legal regimes for global accountability that have been used to prosecute African leaders, as soon as such regimes ensnare their own.[321] It is this international legal order that

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315 See Provisional summary record of the 3361st meeting (A/CN.4/SR.3361) at page 6.

316 On this point Tladi notes that beyond the fact that it has not been the practice of the Commission to make such distinctions of draft articles, to specifically designate Draft Article 7 as a product of progressive development of international law rather than codification of *lex lata* would have the unwitting consequence of stunting its growth as international lawyers would be dismissive of it. Discussion of December 18, 2017. Notes on file with author.

317 See Dire Tladi, Dire Tladi, "The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?" (2018) 32 *Leiden Journal of International Law*, 169 – 187, 1

318 John Dugard, 'Palestine and the International Criminal Court: Institutional Failure or Bias?' Note 184 above.

319 Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Mariner Books, 1999).

320 See Separate Opinion of Judge ad-hoc Bula in *Arrest Warrant Case* at 100 – 137 but particularly from 102 – 112.

321 *Loi Modifiant la Loi du 16 Juin 1993 Relative de la Ripression des Violations Graves du Droit International Humanitaire et l'article 144 ter du Code judiciaire,* Law No. S-C-2003/09412, F. 2003 - 1786, No. 167, 248 - 24853, art.5, *(7* May 2003), available at www.eiustice.iust.fov.be/mopdff2oogfos/o7_2.pdf accessed 22 November 2018. The 1993 law had permitted Belgian courts to exercise jurisdiction over offenses without regard to the place of commission. In the face however of the risk of losing the Head Quarters of NATO as US Defence

sees a limited number of countries with veto power, not parties to the Rome Statute themselves, able to refer situations in African countries – no others – to the ICC, while insulating themselves, their proxies and State beneficiaries of their patronage, from accountability for even worse atrocities.[322]

As Lord Denning has said, "even the devil himself knows not the intentions of man."[323] It is difficult therefore to definitively say that the AU's intentions have been to perpetuate impunity. While it is unclear – in the absence of *travaux préparatoires* – whether the AU intended to introduce the restrictions to the customary international law ambits of immunity *ratione personae* and *ratione materiae* that Article 46A *bis* arguably presents,[324] or whether same was an unintended consequence of poor drafting, the fact that thirty-three African countries remain party to the Rome Statute is not consistent with a narrative of the AU pursuing impunity.[325] Neither is being party to two treaties that create international criminal courts rather than one. What is clear is that by adopting the immunity provision of the Malabo Protocol, the AU did not breach international law and arguably even advanced the course of accountability by introducing treaty restrictions on the customary international law scope of both strands of immunity – *ratione personae* and *ratione materiae*.[326]

There is from the evidence, little basis – after all is said and done – to permit definitive conclusions to be drawn that the reason why the AU has created a court with international criminal jurisdiction, before which incumbent Heads of State and persons acting in their stead shall benefit from immunity, is to pursue impunity for African Heads of State and other "big men." The justifiable cynicism[327] (because of the likely institutional challenges of the Expanded African Court)[328] notwithstanding, there is little on which to hang definitive conclusions or to permit conclusive findings that the reasons for which the AU has acted as it has are attributable to a quest for impunity rather than

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Secretary Donald Rumsfeld (one of the persons accused of command responsibility for various atrocities in the Iraq War), Belgium capitulated. See also Law 1/2009 of November 3 in Article 23.4 of the Organic Law of the Judicial Power art. 1 (Ley Organica 1/2009, de 3 Noviembre, del Poder Judicial, Articulo primero, Apartados 4 del articulo 23 de la Ley Organica del Poder Judicial) modified Section 4 of Article 23 of the Law 6/1985 of July 1 of the Judicial Power (Ley Orginica 6/1985, de 1 de Julio, del Poder Judicial).

322 See *US says ICC 'dead' as it Moves to 'Protect' Israel*, Middle East Monitor (10 September 2018), Note 144 above. See also Somini Sengupta, 'China and Russia Block Referral of Syria to Court' *New York Times* (22 May 2014), available at https://www.nytimes.com/2014/05/23/world/middleeast/syria-vote-in-security-council.html accessed 22 November 2018.

323 Hugh Collins, *The Law of Contract* (4th Ed) (Butterworths, 2003) at 165.

324 See Dire Tladi, "Immunities (Article 46A *bis*)" in Gerhard Werle and Moritz Vormbaum (Eds) *The African Criminal Court: A Commentary on the Malabo Protocol,* Note 9 above.

325 See Max du Plessis "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders" Note 7 above. See also Jemima Kariri Njeri, "Can the New African Court Truly Deliver Justice for Serious Crimes? The African Union's Decision to Support a Court that Provides Immunity to Heads of State Undermines Human Rights," Note 7 above.

326 See Dire Tladi, "Immunities (Article 46A *bis*)," Note 324 above.

327 See Human Rights Watch, Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights (13 November 2014), Note 7 above. See also Opinion Editorial by Desmond Tutu, *In Africa, Seeking a License to Kill*, New York Times 10 October 2013 available at http://www.nytimes.com/2013/10/11/opinion/in-africa-seeking-a-license-to-kill.html accessed 8 August 2018.

328 See Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," Note 7 above.

an effort to ensure a continental accountability platform;[329] a quest for impunity rather than a protest – a symbolic fist shake – against an international legal order which insulates powerful States, their friends and proxies, from accountability;[330] a quest for impunity rather than the incompetence of officials in the AU Commission;[331] or, a quest for impunity rather than an effort to deny validation to an arguably incompetent ICC that has had little success in fulfilling its mandate and pursues the course of least resistance in actively avoiding confrontation with powerful States.[332]

In its indignant press release after the ICC Pre-Trial Chamber rendered its *Malawi* and *Chad* decisions, the AU noted that "the African Union believes that the fight against impunity is too important to be left to the ICC alone."[333] It went on to say that:

> The African Union believes that issues of peace and justice should be addressed comprehensively and in a holistic manner and will continue to pursue in respect of The Sudan the interconnected, mutually interdependent and equally desirable objectives of peace, justice and reconciliation.[334]

If the AU does indeed demonstrably commit to such ideals then, in answer to the titular question, impunity will *not* triumph over but will yield to accountability. It will be possible then, as the Psalmist says, for *kindness and truth to meet and justice and peace to kiss*.[335]

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329 See Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," Note 23 above at 942.

330 See Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," Note 11 above. See also William A. Schabas, "The Banality of International Justice," Note 160 above at 10 – 11.

331 See Ademola Abass, "The Proposed Criminal Jurisdiction for the African Court: Some Problematical Aspects," (2013) 60 *Netherlands International Law Review* 27. See also Max du Plessis and Lee Stone, "A Court Not Found" (2007) 7 *Africa Human Rights Law Journal* 522.

332 See William A. Schabas, "The Banality of International Justice," Note 160 above at 548.

333 See AU Press Release No. 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan al Bashir of the Republic of the Sudan (January 9, 2012), available at http://www.iccnow.org/documents/PR-_002-_ICC_English_2012.pdf accessed 22 November 2018.

334 See Note 333 above.

335 Psalm 85:10, King James Bible. The author would like to acknowledge Professor Kofi Kumado, formerly of the Law Faculty, University of Ghana, who has adopted, to poignant effect, writings of the Psalmist in academic publications.

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