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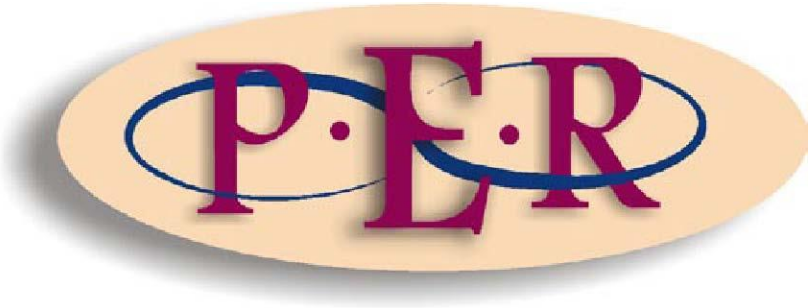

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THE UNIVERSAL JURISDICTION OF SOUTH AFRICAN CRIMINAL COURTS AND IMMUNITIES OF FOREIGN STATE OFFICIALS

E Kayitana*

The extent of immunity under international law is important for the international legal order, and for the maintenance of good relations between states. Failure to respect immunity and inviolability under international law is a breach of an international obligation, and the responsibility for this lies with the state. A court which issues a warrant, or brings proceedings against a person who is inviolable and entitled to immunity, is involving the responsibility of the state.[1]

1 Introduction

Existing records on international crimes indicate that it is State officials, and in particular senior officials, who often commit international crimes.[2] In order to avoid the impunity often caused by the failure of States to take action against their own officials and other persons acting on their behalf,[3] States adopted in 1998 the *Rome Statute of the International Criminal Court* (hereinafter referred to as the *Rome Statute*). The International Criminal Court (hereinafter referred to as the ICC) was given jurisdiction to try persons accused of genocide, crimes against humanity, war crimes and, under some conditions, the crime of aggression.[4] Most importantly, the principle that immunities do not apply to proceedings before international tribunals[5]

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1 Franey *Immunity* 27-28.

2 Cassese *International Criminal Law* 307. Also see Werle *International Criminal Law* 74: "Crimes under international law are typically crimes that occur on a large scale and systematic manner with the participation of state organs [...]".

3 Preamble to the *Rome Statute of the International Criminal Court* (1998) (hereinafter the *Rome Statute*) para 5.

4 ICCLR 2002 http://www.iccnow.org/documents/ICCLR-Checklist.pdf 3. The International Criminal Court (ICC) will have jurisdiction over the crime of "aggression" once at least 30 States Parties have ratified or accepted the amendments made by the 1st Review Conference of Rome Statute (held in Kampala, Uganda between 31 May and 11 June 2010); and a decision is taken by two-thirds of States Parties to activate the jurisdiction at any time after 1 January 2017. See in this regard *ICC Resolution: The Crime of Aggression* RC/Res 6 (2010).

5 The rule that the official position of a State agent, including an incumbent head of State, is not a bar to his prosecution before an international criminal tribunal is clearly established in the jurisprudence of various international criminal tribunals. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) indicted, respectively, Slobodan Milosevic (*The Prosecutor v Slobodan Milosevic Milan Milutinovic, Nikola*

was reaffirmed in this Statute. In this regard, article 27 of the *Rome Statute* provides as follows:

> 1. [T]his Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 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.

The above provision is a significant tool the ICC was equipped with in order for it to be able to effectively fight against the culture of impunity that has plagued the world in the past. It ensures that persons who commit certain gross human rights violations may, whatever their status in their countries, be brought to trial and be punished for those acts.

Nevertheless, under the so-called "complementarity" regime of the *Rome Statute*, the jurisdiction of the ICC is secondary to the jurisdiction of domestic courts.[6] States Parties, not the ICC, have the primary responsibility of investigating and prosecuting international crimes. The ICC acts only when States are "unable or unwilling" to prosecute.[7] Under this regime, the Rome Statute gives priority to any willing and

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Sainovic, Dragoljub Ojdanic and Vlajko Stojiljkovic Decision on Review of Indictment and Application for Consequential Orders ICTY IT-05-87-PT (24 May 1999)) and Charles Taylor (*Prosecutor v Charles Ghankay Taylor* Decision Approving the Indictment and Order for Non-Disclosure SCSL-2003-01-I (7 March 2003)) when they were still serving as heads of State. This rule was reaffirmed by the ICJ in the *Arrest Warrant* case (*Democratic Republic of the Congo v Belgium Case Concerning the Arrest Warrant of 11 April 2000* Judgement 2002 ICJ 3 (14 February 2002) para 61), stating that: "[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations and the future International Criminal Court created by the 1998 Rome Convention".

6 Van Sliedregt and Stoitchkova "International Criminal Law" 257.

7 To this end, art 17(1)(a) of the *Rome Statute* provides that a case shall be inadmissible before the ICC where "[T]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". It further provides that a case shall be inadmissible before the ICC if it "has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute" (art 17(1)(b) *Rome Statute*). With regard to completed trials, the

able State, without requiring any particular link to the crime, including States exercising universal jurisdiction.[8] As a State Party, in order to give effect to the complementarity regime of the *Rome Statute*, South Africa enacted the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 (hereafter the *Implementation Act*) which determines the modalities of prosecuting perpetrators of the crimes of genocide, crimes against humanity and war crimes (hereafter referred to as international crimes) in South African courts.

The *Implementation Act* also provides that South African courts will have jurisdiction over these crimes not only when they are committed on the territory of South Africa but also when they are committed outside the Republic.[9] By granting South African courts jurisdiction over a person who commits a crime outside the Republic when that person is later found on South African territory,[10] without regard to that person's nationality or the nationality of the victims, the *Implementation Act* empowers South African courts with universal jurisdiction over international crimes.

Rome Statute also provides that the ICC may not hear such cases if the person concerned has already been tried for the same conduct by a national court (art 20(2) *Rome Statute*), unless the national proceedings: "[W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or [o]therwise were not conducted independently or impartially in accordance with norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice". Art 20(3) *Rome Statute*.

8 Burke-White 2003 *ILSA J Int'l & Comp L* 203; Stigen *Principle of Complementarity* 477. Also see Demeyele, Verhoeven and Wouters "International Criminal Court's Office of the Prosecutor" 364.

9 Section 4(3) of the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 (hereinafter the *Implementation Act*) provides as follows:

"[...] any person who commits a crime contemplated in subsection (I) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-

that person is a South African citizen; or

that person is not a South African citizen but is ordinarily resident in the Republic;

that person, after the commission of the crime, is present in the territory of Republic; or

that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic."

10 Section 4(3)(c) *Implementation Act*.

This article seeks to determine whether and to what extent foreign State officials, such as foreign heads of State, heads of government and ministers of foreign affairs, can plead immunity when they are accused of international crimes before South African courts when exercising their universal jurisdiction in terms of the *Implementation Act* and in accordance with the complementarity regime of the *Rome Statute*. In other words, this paper endeavours to determine whether international law rules regarding immunities of State officials may or may not limit the ability of South African courts to exercise universal jurisdiction over international crimes committed in foreign States.

The article is based on the assumption that since, under the principle of complementarity, South African courts are required to try crimes which would otherwise have to be tried by the ICC, South African courts should have the same powers as those that States Parties gave to the ICC in order to allow it to effectively carry out its mandate. It is also assumed, however, that since the ICC is an international criminal tribunal, it may have some powers that international law does not grant to domestic courts. Hence the following question: do South African courts have the same powers, as the ICC has, to disregard the immunities of foreign State officials which, under international customary law, attach to their functions or status?

Section 4(2)(a) of the *Implementation Act* provides that:

> [D]espite any other law to the contrary, including customary and conventional international law, the fact that a person-
>
> (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official [...], is neither-
>
> (i) a defence to a crime; nor
>
> (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.[11]

Most of the South African scholars who have commented on the *Implementation Act* have interpreted this provision as removing whatever immunity (both functional and

11 Section 4(2) *Implementation Act*.

personal) foreign officials may have before South African courts.[12] Dugard and Abraham[13] argue that section 4(2)(a)(i) of the *Implementation Act* represents a choice by the legislature not to follow the "unfortunate" *Arrest Warrant* decision, "of which it must have been aware". It would be ridiculous, they say, to allow a foreign head of State or government responsible for committing international crimes in his own country to plead immunity before a South African court "when he could not do so before the ICC".[14] In support of this view, Du Plessis[15] says:

> In terms of the Act, South African courts, acting under the complementarity scheme, are accorded the same power to "trump" the immunities which usually attach to officials of government as the ICC is by virtue of Article 27 of the Statute.

The above interpretation has also received judicial endorsement in *Southern African Litigation Centre v National Director of Public Prosecutions*[16] where Fabricius J said:

> It must not be forgotten that the ICC Act itself denies explicitly diplomatic immunity to government officials accused of committing ICC Act crimes. (See s 4(2) (a)). The recent trial of Taylor, in the International Criminal Court in The Hague, is a case in point.[17]

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12 Du Plessis 2003 *SACJ* 6; Dugard and Abraham 2002 *Annual Survey* 166; and Chok 2013 http://works.bepress.com/brian_chok/1/ 14. Also see Kemp *et al Criminal Law* 102: "This is a significant and progressive provision, which is in line with the aim of international criminal law to end impunity for the serious crimes under international law. In practical terms, this means that a foreign government official or head of state, suspected of having committed war crimes, crimes against humanity or genocide (anywhere in the world) can, upon arrival in South Africa, be arrested and tried in a South African criminal court for these crimes".

13 Dugard and Abraham 2002 *Annual Survey* 166. Also see Du Plessis "International Criminal Courts" 211, where the author says that in terms of s 4(2)(a) of the *Implementation Act*, South African courts are "accorded the same power to 'trump' the immunities which usually attach to officials of government as the International Criminal Court is by virtue of article 27 of the Rome Statute".

14 Dugard and Abraham 2002 *Annual Survey* 166.

15 Du Plessis 2007 *JICJ* 15. For a similar view, see Chok 2013 http://works.bepress.com/brian_chok/1/ 14: "[in] South Africa, head of state immunity can no longer serve as a bar to prosecution against foreign state officials regarding allegations of genocide, crimes against humanity and war crimes."

16 *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 JDR 0822 (GNP).

17 *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 JDR 0822 (GNP) 129. It must be noted that in the *Taylor* case referred to by Fabricius J, the accused, Charles Taylor, was prosecuted before the Special Court for Sierra Leone, not the ICC as mentioned by Fabricius J. It is also important to note that the Special Court for Sierra Leone is an international criminal tribunal, while the *Implementation Act* deals with the prosecution of international crimes in South African courts.

This article challenges this interpretation of section 4(2)(a)(i) of the *Implementation Act*. The present author argues that the *Implementation Act* must be interpreted as not addressing the question of the immunities of foreign State officials, both functional and personal. In the light of this interpretation, the article goes on to determine which law must be applied should a case involving the immunities of foreign State officials be brought before a South African court. In order to give a proper background to this discussion, it is necessary to first peruse the international law norms that govern this important aspect of international relations.

2 Immunities of State officials under international law

Under customary international law, two types of immunity may apply to State individual officials. First, there is immunity *ratione materiae,* which applies to acts performed in an official capacity.[18] This immunity is often referred to as subject-matter immunity or functional immunity and continues to apply even once the official has left office.[19] On the other hand, immunity *ratione personae*, or personal immunity, attaches to a limited category of officials by virtue of their particular role in representing the State abroad, for example heads of State or heads of government, ministers of foreign affairs and diplomats.[20]

For both types of immunity, the purpose is not to benefit the individual, but to protect official acts (functional immunity) or to facilitate international relations (personal immunity). It is the State which is the real beneficiary of the immunity and, for this reason, the State may waive[21] it, irrespective of the wishes of the person claiming the immunity.[22]

18 Dugard *International Law* 253.

19 Akande and Shah 2011 *EJIL* 827; Wickremasinghe "Immunities" 390; Markovich 2009 *Potentia* 59; and Cryer *et al International Criminal Law* 534.

20 Redress 2005 http://www.redress.org/downloads/publications/Immunity_v_Accountability.pdf 9.

21 A waiver is the permission given by a State whose official enjoys immunity *ratione personae,* authorising the State with enforcement jurisdiction to proceed with the investigation, arrest and trial of the official concerned. Yitiha *Immunity* 136. Also see *ILC Documents of the Thirty-first Session (Excluding the Report of the Commission to the General Assembly)* UN Doc A/CN.4/SER.A/1979/Add.l (1979) 240: "It is often stated that consent of States is the basis of international obligation and the foundation of jurisdiction for international settlement of disputes as well as for the exercise of foreign territorial jurisdiction. It is in the ultimate analysis the

The legal regime of immunities of State officials may seem complex.[23] However, if one keeps in mind the above-mentioned distinctions and the underlying rationales of the two types of immunities, one will find that a fairly consistent and coherent set of rules exists.

2.1 Immunity ratione materiae or functional immunity

Also known as functional immunity, immunity *ratione materiae* relates to conduct carried out on behalf of a State.[24] The rationale for this type of immunity is that actions against State agents in respect of their official acts are essentially proceedings against the State they represent.[25] As a British court once said:[26]

> [A] foreign sovereign government [...] 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.[27]

Functional immunity is grounded in the view that if one State would adjudicate upon the conduct of another State through proceeding against the official who carried out the act, that would conflict with the principle of state equality.[28] It thus prevents a

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source of the binding force of rules of international law. Consent is therefore an important element in the doctrine of State immunity. Once consent is given by the State entitled to immunity, the territorial authorities can exercise their normal jurisdiction".

22 Cryer *et al International Criminal Law* 534 and Bassiouni *International Criminal Law* 62-63. For a contrary view see Kemp *et al Criminal Law* 579, where the authors argue that immunity *ratione materiae* belongs to the individual, not the State and that, accordingly, this immunity cannot be waived by the State to which the official belongs. It is submitted that this view is not correct as it confuses the procedural defence of immunity *ratione materiae* with the substantive defence of "official capacity". While the latter belongs to the individual official, the former belongs to the State on behalf of which the individual performed the act that forms the basis of the litigation. See 3.2 hereunder.

23 Cryer *et al International Criminal Law* 533.

24 Kemp *et al Criminal Law* 579.

25 See Stewart 2011 *Vanderbilt J Transnat'l L* 1056.

26 *Zoernsch v Waldock* 1964 1 WLR 675 692. For a similar statement by a court see *Chuidian v Philippine National Bank* 912 F 2d 1095 1101 (29 August 1990): "it is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly".

27 Also see Cryer *et al International Criminal Law* 533: "If a State could bring criminal proceedings against the individual officials who carried out official functions of another State, the State would be doing indirectly what it cannot do directly, namely, acting as the arbiter of the conduct of another State".

28 Knushel 2011 *JIHR* 150 and Franey *Immunity* 16. Also see Cryer *et al International Criminal Law* 533: "Functional immunity protects conduct carried out on behalf of a State. It is linked to the maxim that a State may not sit in judgment on the policies and actions of another State, since

State's courts from indirectly exercising jurisdiction over acts of foreign States through instituting proceedings against State officials who carry out States' activities.[29] In other words, immunity *ratione materiae* functions as a jurisdictional or procedural defence by preventing the circumvention of the immunity of a State through proceedings brought against officials acting on its behalf.[30]

In so doing, some commentators have argued,[31] functional immunity serves at the same time as a "substantive defence"[32] for the State official by ensuring that the individual official "cannot"[33] be legally held responsible for acts that are in fact the acts of the State on whose behalf the official acted. It is submitted that this view is not correct. Immunity *ratione materiae* does not function as a substantive defence but only as a jurisdiction defence. This is so, because this immunity (just like immunity *ratione personae,* which will be discussed later in this article) belongs to the State, not the individual and, for this reason, can be waived by the State on behalf of which the individual acted, irrespective of the wishes of the official claiming the immunity.[34] Thus, the existence of functional (and personal) immunity does not mean that there is a lack of "substantive legal responsibility", but rather that a foreign State is "procedurally" prevented from bringing proceedings against the individual perpetrator.[35] If the State chooses to waive his immunity, the official cannot claim immunity himself.[36]

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they are both sovereign and equal".

29 Akande 2004 *AJIL* 427. Also see *ILC Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur* UN Doc A/CN 4/631 (2010) 58.

30 Bantekas and Nash *International Criminal Law* 168; Akande and Shah 2011 *EJIL* 827; Wickremasinghe "Immunities" 403 and Foakes 2011 http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf 8: "The main effect of such immunity is to prevent litigants from seeking to circumvent the rules on state immunity by taking action against the individuals carrying out the business of the state".

31 Swanepoel 2007 *JJS* 127 and Akande and Shah 2011 *EJIL* 826.

32 Akande and Shah 2011 *EJIL* 826. Also see Cassese 2002 *EJIL* 863 and Bantekas and Nash *International Criminal Law* 168.

33 Swanepoel 2007 *JJS* 127. Also see Zappalà 2001 *EJIL* 155*:* "The consequence is that a public official cannot be held accountable for acts performed in the exercise of an official capacity, as these are to be referred to the State itself".

34 Cryer *et al International Criminal Law* 534.

35 Cryer *et al International Criminal Law* 534.

36 Wickremasinghe "Immunities" 406: "None of the immunities which have been considered are for

Immunity *ratione materiae* is enjoyed by all foreign officials regardless of rank.[37] It may also be relied on by serving State officials as well as by former officials in respect of official acts performed while in office.[38] This is also not affected by the purpose of an official's presence in the territory of the State exercising jurisdiction. Irrespective of whether this person is abroad on an official visit or is staying there in a private capacity, he enjoys immunity from that State's courts in respect of acts performed in his official capacity in his home State.[39]

However, a survey of the literature and the decisions of national courts reveals that immunity *ratione materiae* applies only in civil cases. It does not apply before the criminal courts of foreign States which have jurisdiction over a crime.[40] Furthermore, State practice reveals that these crimes include not only those committed against a direct interest or citizen of the forum State[41] but also international crimes with no substantial link with the prosecuting State.[42]

A well-known case where State officials were prosecuted for acts committed on behalf of the State is the so-called *Lockerbie* case.[43] In this case, two members of the Libyan Intelligence Service were prosecuted for offences of terrorism which had been committed on behalf of the State of Libya. On 21 December 1988 Pan Am Flight 103 was en route from London to New York when it exploded in mid-air over

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the benefit of any particular individual or group of individuals, but rather are for the benefit of the State … which they represent. Thus the sending State […] can waive any of these immunities, thereby consenting to the jurisdiction of the courts of the receiving State over the official in question. This applies whether the immunity in question is granted *ratione personae* or *ratione materiae*".

37 Knushel 2011 *JIHR* 151 and *ILC Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur* UN Doc A/CN 4/631 (2010) 59.

38 Kemp *et al Criminal Law* 579; Akande and Shah 2011 *EJIL* 827; Wickremasinghe "Immunities" 390 and Markovich 2009 *Potentia* 59. Also see Cryer *et al International Criminal Law* 534: "[f]unctional immunity protects only conduct carried out in the course of the individual's duties, but does not drop away when a person's role comes to an end, since it protects the conduct, not the person".

39 *ILC Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur* UN Doc A/CN 4/631 (2010) 58.

40 See Kayitana *Jurisdictional Problems* 100-114.

41 See Kayitana *Jurisdictional Problems* 100-104.

42 See Kayitana *Jurisdictional Problems* 104-114.

43 *Her Majesty's Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhima* The High Court of Justiciary Case No 1475/99 (30 January 2001).

the village of Lockerbie in Scotland. Hundreds of people were killed. The investigation established that a bomb contained in a radio-cassette player had been detonated automatically and had caused the explosion.[44]

On 13 November 1991 warrants were issued for the arrest of two Libyans, Abdelbasset al-Megrahi and Ali Fhimah, on charges of conspiracy to murder, murder and breaches of the UK *Aircraft Security Act* 1982. The charges alleged that the conspiracy to blow up the aircraft and the actions performed in furtherance of that conspiracy were Libyan State policy and officially sanctioned. Investigations established that the two defendants committed the crimes as members of the Libyan Intelligence Services, and that their acts were official actions performed by State officials in the execution of State policy.[45]

The issue of immunity did not arise at all. The US and UK requested Libya to extradite the two suspects,[46] and the UN Security Council supported this request, saying that it was:

> Deeply concerned over the results of investigations, which implicate officials of the Libyan Government and […] Recalling the statement made on 30 December 1988 by the President of the Council on behalf of the members of the Council strongly condemning the destruction of Pan Am flight 103 and calling on all States to assist in the apprehension and prosecution of those responsible for this criminal act.[47]

More significantly, Libya could have claimed that neither the British nor the American courts had jurisdiction, on the basis that the allegations concerned actions of a sovereign State, which were immune from the jurisdiction of foreign States. But Libya did not do so. Instead it said that it would consider trying the men itself.[48] After years of negotiations a Scottish Court was convened in The Netherlands. At no stage in these proceedings did Libya assert that the court did not have jurisdiction to try the allegations because of State immunity and neither of the defendants raised as a defence that the actions alleged were the actions of the Libyan State, and that

44 Franey *Immunity* 208.
45 Franey *Immunity* 208.
46 Franey *Immunity* 208.
47 Paras 5 and 6 *UN SC Resolution on the Libyan Arab Jamahiriya* UN Doc S/RES/731 (1992).
48 Franey *Immunity* 208-209.

they were therefore entitled to be acquitted. On 31 January 2001 the court convicted Mr al-Megrahi of murder.[49]

The *Lockerbie* case is thus a clear example of a State agent's being accused and convicted of committing crimes on the orders of his State, and being held liable as an individual for the criminal conduct.[50]

With regard to international crimes in particular, the characterisation of such conduct as crimes under international law absolves them from the protection of immunity *ratione materiae*.[51] This immunity is justified on three grounds, of which none can apply to international crimes. First, immunity *ratione materiae* is based on the view that all States are equal, and for one State to judge the sovereign actions of another State would be an unacceptable act of interference by that State in the affairs of the other State.[52] Given the egregious nature of international crimes, however, these crimes cannot be considered as an internal matter of any country. These crimes are considered as being committed against the international community as a whole and as being subject to the universal jurisdiction of all States.[53]

Secondly, immunity *ratione materiae* is justified as necessary to protect States' dignity in that it prevents a foreign State from judging another State's conduct.[54] Nevertheless, since international crimes are prohibited by international law, prosecuting State officials who committed international crimes would not offend the dignity of the State on behalf of which they acted. Dignity would rather require States to refrain from engaging in such activities.[55]

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49 *Her Majesty's Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhima* The High Court of Justiciary Case No 1475/99 (30 January 2001) para 89. The second accused, Mr Fhima, was found not guilty and released. See para 85 of the same judgment.

50 Franey *Immunity* 210.

51 Also see Beanchi 1999 *EJIL* 265; Wirth 2002 *EJIL* 888 and Dugard *International Law* 253: "[s]uch immunity [*rationemateriae*] does not exist when a person is charged with an international crime either because such acts can never be 'official' or because they violate norms of *jus cogens* and such peremptory norms prevail over immunity".

52 Franey *Immunity* 195 and Kemp *et al Criminal Law* 579.

53 Cryer *et al International Criminal Law* 542-543. Also see Henrard 1999 *MSU-DCL J Int'l L* 612.

54 Wirth 2002 *EJIL* 888.

55 Wirth 2002 *EJIL* 888. Also see Cryer *et al International Criminal Law* 542: "[f]unctional immunity protects State conduct from scrutiny, but it would be incongruous for international law to protect

Thirdly, this type of immunity is justified as necessary to enable State officials to perform their functions without fear of subsequent prosecution.[56] This justification does not stand either. Far from being a function of a State, the perpetration of international crimes is the opposite of any of the State's functions. States must protect their citizens, not kill them or otherwise seriously violate their rights to the extent prohibited by international law.[57] State officials who commit international crimes are thus rightly held personally accountable by the courts of foreign States.[58] As the House of Lords said in the *Pinochet* case:

> ... international law has made plain that certain types of conduct [...] are not acceptable conduct on the part of anyone. That applies as much to heads of State, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.[59]

From the perspective of the perpetrator, the removal of immunity *ratione materiae* in case of serious crimes under international law is also justified because in this area "individuals have international duties which transcend the national obligations of obedience".[60] He who commits a serious crime under international law cannot obtain immunity while acting in pursuance of the authority of the State because the State in authorising action "moves outside its competence under International Law".[61]

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the very conduct which it criminalizes and for which it imposes duties to prosecute".

56 Franey *Immunity* 195.

57 Franey *Immunity* 195. Also see *UN ESC Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights: Preliminary Report by Mr Louis Joinet, Special Rapporteur* UN Doc E/CN 4/Sub 2/1985/16 (1985) 17.

58 Cryer *et al International Criminal Law* 543. Also see Murungu *Immunity of State Officials* 91.

59 *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* 1998 4 All ER 897 939-940. As a result of the ruling by the House of Lords, the Home Secretary authorised extradition, but then the House of Lords set aside its first decision because one of the judges, Lord Hoffman, had failed to disclose that his wife was an unpaid director of Amnesty International, which had been involved in a campaign against the applicant and had been a party in the proceedings, and that could infer either bias or a possible conflict of interest (*R v Bow Street Metropolitan Stipendiary Magistrate*, *ex parte Pinochet Ugarte (No 2)* 1999 1 All ER 577). In the third judgment of the House of Lords (*R v Bow Street Metropolitan Stipendiary Magistrate*, *ex parte Pinochet Ugarte (No 3)* 1999 2 All ER 97), the first judgment was confirmed. The Court found that: "If Senator Pinochet behaved as Spain alleged, then the entirety of his conduct was a violation of the norms of international law. He can have no immunity against prosecution for any crime that formed part of that campaign". *R v Bow Street Metropolitan Stipendiary Magistrate*, *ex parte Pinochet Ugarte (No 3)* 1999 2 All ER 97 190.

60 Trial of the German Major War Criminals before the International Military Tribunal Vol I (Nuremberg 1947) 56.

61 *Trial of the German Major War Criminals before the International Military Tribunal* Vol I

In the light of the above considerations, it is concluded that under customary international law, State officials do not enjoy immunity *ratione materiae* from the jurisdiction of foreign States, when they are accused of international crimes.[62] It follows from this conclusion that by denying this immunity in possible future cases, South African courts would not violate any of South Africa's obligation under international law. In the next section, the position of international law regarding the question of immunity *ratione personae* of current State officials, such as sitting heads of State and heads of government, will be considered.

2.2 Immunity ratione personae or personal immunity

2.2.1. Definition

International relations and international cooperation between States require an effective process of communication between States' representatives.[63] Accordingly, international law confers immunities on certain State officials in order to enable them to negotiate with one another freely and without harassment by other States.[64] This immunity is described as immunity *ratione personae* or personal immunity.[65]

In contrast to functional immunity, personal immunity is absolute.[66] It provides complete immunity of the person of certain office holders while they carry out representative functions.[67] It prohibits the exercise of jurisdiction not only in cases involving the acts of these individuals in their official capacity but also in cases involving private acts.[68] It also applies whether or not the act in question was carried

(Nuremberg 1947) 56.

62 Also see ILC 2009 http://www.justitiaetpace.org/idiE/resolutionsE/2009_naples_01_en.pdf art III(1): "No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes".

63 Akande and Shah 2011 *EJIL* 818.

64 Tunks 2002 *Duke LJ* 657 and Knushel 2011 *JIHR* 151.

65 Akande and Shah 2011 *EJIL* 818.

66 Gevers 2011 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975788&download=yes 3.

67 Cryer *et al International Criminal Law* 533.

68 Kemp *et al Criminal Law* 579; Akande and Shah 2011 *EJIL* 819 and Knushel 2011 *JIHR* 151. Also see Wickremasinghe "Immunities" 389: "These immunities are often wide enough to cover both the official and the private acts of such office-holders, since interference with the performance of the official functions of such a person can result from the subjection of either type of act to the jurisdiction of the receiving State (e.g., if a diplomat is arrested he is unlikely to be able to

out at a time when the official was in office or before entry to office.[69] Conversely, since this type of immunity is connected with the position occupied by the official in government service, it is of a temporary character and ceases when he or she leaves that post.[70]

A criminal case where this type of immunity was considered and recognised is the *Gaddafi* case,[71] which arose before the French Court of Cassation. In this case, it was held that the Libyan Head of State enjoyed immunity *ratione personae* in criminal proceedings for acts of international terrorism leading to murder and the destruction of an aircraft.[72] The Court held that international customary law does not allow that sitting heads of State be the subject of proceedings before criminal tribunals of a foreign State and accordingly quashed the proceedings against the Libyan leader.[73] Whether this immunity also applies in cases involving allegations of international crimes will be the subject of the heading below.

2.2.2. Immunity ratione personae and international crimes

Some commentators have argued that the granting of immunity *ratione personae* to State officials from criminal proceedings arising out of international crimes would be "artificial, unjust, and archaic".[74] It has also been said that such immunity would conflict with the *jus cogens* status of rules of international law prohibiting such crimes as genocide, crimes against humanity, war crimes and aggression.[75]

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perform his official functions whatever the reason for his arrest)".

69 *Arrest Warrant* case paras 54-55.

70 Markovich 2009 *Potentia* 59; Wickremasinghe "Immunities" 390; Kemp *et al Criminal Law* 579 and Bantekas and Nash *International Criminal Law* 169.

71 Gaddafi *Court of Appeal of Paris* 20 Oct 2000; *Court of Cassation* 13 March 2001 2004 125 ILR 490. The case originated from the bombing of a plane (DC 10) of the UTA airlines on 19 September 1989, in which 156 passengers and 15 members of crew, including French citizens were killed. For further details on the case, see Zappalà 2001 *EJIL* 151 and Markovich 2009 *Potentia* 64.

72 Gaddafi *Court of Appeal of Paris* 20 Oct 2000; *Court of Cassation* 13 March 2001 2004 125 ILR 490 509.

73 Gaddafi *Court of Appeal of Paris* 20 Oct 2000; *Court of Cassation* 13 March 2001 2004 125 ILR 490 510.

74 Knuchel 2011 *JIHR* 149.

75 See for example, Bassiouni 1996 *LCP* 63.

However, State practice indicates that personal immunity is respected "regardless of the nature of the charges".[76] As Akande[77]observes, judicial opinion and State practice on this point are unanimous. No case exists thus far in which it was held that a State official who would ordinarily enjoy immunity *ratione personae* can be subjected to the criminal jurisdiction of a foreign State on the ground that he is accused of an international crime.[78] This view has also been confirmed by the ICJ in a case brought by the DRC against Belgium in respect of a dispute concerning an international arrest warrant issued by a Belgian investigation judge against Mr Abdulaye Yerodia Ndombasi, then the foreign minister of the DRC. The warrant was issued pursuant to Belgium's 1993 statute concerning the punishment of grave breaches of international humanitarian law.[79] Yerodia was accused of inciting (through his speeches) racial hatred against the Tutsi population in the DRC, resulting in several hundred deaths and summary executions, arbitrary arrests, lynchings, and unfair trials.[80]

The DRC argued that Belgium had violated its right to conduct its foreign relations through being appropriately represented by its foreign minister.[81] The ICJ held that the absolute nature of the immunity from criminal proceedings in a foreign State accorded to a serving Foreign Minister *ratione personae* subsists even when it is alleged that he has committed a crime under international law.[82] Accordingly, the ICJ ruled that foreign ministers (and other high-ranking officials such as the Head of State or Head of Government) have immunity from prosecution in foreign national

76 Cryer *et al International Criminal Law* 545. Also see Kemp *et al Criminal Law* 587 and Bassiouni 2001 *Va J Int'l L* 84.
77 Akande 2004 *AJIL* 411.
78 Akande 2004 *AJIL* 411.
79 *Law of 16 June 1993 Relating to the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Protocol I and II of 8 June 1977* (Belgian Official Journal of 5 August 1993)
80 Orakhelashvili 2002 *AJIL* 677.
81 *Arrest Warrant* case paras 42-43.
82 *Arrest Warrant* case para 55. Also see Wickremasinghe "Immunities" 401.

courts while in office for official actions[83] and ordered Belgium to cancel the arrest warrant.[84]

The ICJ emphasised that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities, as jurisdiction does not imply absence of immunity.[85] It stated that although all States have (universal) jurisdiction over a range of international crimes, "extension of jurisdiction" in no way affects immunities under customary international law. The Court held that personal immunity remains opposable before the courts of foreign States, even in cases involving the crimes over which universal jurisdiction applies.[86]

The ICJ thus affirmed that customary international law precluded national courts from trying high-ranking officials of foreign States, including ministers of foreign affairs, who are required to travel abroad in the performance of their official duties.[87] Some scholars have expressed opposition to the ICJ decision in the *Arrest Warrant* case. Dugard[88] has described this decision as "controversial, and short-sighted". In particular, Dugard[89] argues that:

> ... it would be ridiculous to allow a foreign head of state or government responsible for committing genocide in his own country successfully to plead immunity before a South African court when he could not do so before the ICC.

It is submitted that the above argument is not correct because it overlooks the fundamental *rationale* behind immunity *ratione personae*. This immunity is necessary for the maintenance of a system of peaceful coexistence and cooperation among States. Without the guarantee that States' representatives will not be subjected to trial in foreign courts, they may simply choose to stay at home rather than to run the risks of engaging in international diplomacy.[90] As Yitiha[91] notes, the "lack of

83 *Arrest Warrant* case para 78 (2).
84 *Arrest Warrant* case para 78 (3).
85 *Arrest Warrant* case para 59
86 *Arrest Warrant* case para 59.
87 *Arrest Warrant* case para 58. Also see Aust *Handbook* 161 and Cassese 2003 *JICJ* 594.
88 Dugard and Abraham 2002 *Annual Survey* 165.
89 Dugard and Abraham 2002 *Annual Survey* 166.
90 Tunks 2002 *Duke LJ* 656.
91 Yitiha *Immunity* 136.

mobility" of such persons due to fear of arrest would seriously infringe upon the functioning of States. In the *Arrest Warrant* case, the ICJ inferred from this rationale of immunity *ratione personae* that any prejudice to the effective performance by State high-ranking officials of their duties as representatives of their States must be prevented.[92]

Immunity *ratione personae* also helps to avoid abuses and imprudent misuses of criminal jurisdiction. Universal jurisdiction can cause disruptions in world order when used in a politically motivated manner or for vexatious purposes.[93] Also, even with the best of intentions, universal jurisdiction can be used imprudently, and that could lead to friction between States if the targeted persons are high-ranking officials of a State. Thus, as Bassiouni says, without immunity *ratione personae*, universal jurisdiction may become a "wildfire" and "destructive of the international legal processes".[94] Immunity *ratione personae* of State officials is thus also mandated by the requirements of friendly foreign relations as enshrined in the *UN Charter*[95] and, accordingly, in order to maintain good relations between States and preserve international peace, immunity *ratione personae* in domestic courts must prevail even over the very important value which is addressed by criminal prosecution of international crimes, namely the protection and vindication of human rights.[96]

Now that the international law's position on the issue of immunities of State officials from the criminal jurisdiction of foreign courts has been made clear, the next discussion will focus on the provisions of South African laws relating to the question

92 Swanepoel 2007 *JJS* 134. Also see Wickremasinghe "Immunities" 409: "The reason for this is that the functions which these officials serve in maintaining international relations are such that they should not be endangered by the subjection of such officials (whilst they are in office) to the criminal jurisdiction of another State".

93 Bassiouni 2001 *Va J Int'l L* 82 and Macedo *et al* 2001 http://lapa.princeton.edu/hosteddocs/unive_jur.pdf 24-25. See also Cryer *et al International Criminal Law* 546: "Its [immunity *ratione personae*'s] purpose is to preclude any pretext for interference with a State representative, in order to allow international relations between potentially distrustful States". Also see Colangelo 2005 *Va J Int'l L* 3: [universal jurisdiction has been decried as] "a dangerously pliable tool for hostile states to damage international relations by initiating unfounded proceedings against each other's officials and citizens". See further HRW 2009 http://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction.

94 Bassiouni 2001 *Va J Int'l L* 154. Also see Zappalà 2001 *EJIL* 167.

95 Article 1(2) *Charter of the United Nations* (1945).

96 Wirth 2002 *EJIL* 888.

of immunities, both functional and personal, of foreign State officials accused of international crimes in South African courts.

3 Immunities of foreign State officials under South African law

3.1 The provision of section 4(2)(a)(i) of the Implementation Act

Section 4(2)(a)(i) of the *Implementation Act* provides, without any express and specific reference to either functional or personal immunity, that:

> [..] the fact that a person-
>
> (a)is or was a head of State or government, a member of a government or parliament, an elected representative or a government official [...], is neither-
>
> (i) a defence to a crime; nor
>
> (ii)a ground for any possible reduction of sentence once a person has been convicted of a crime.

As stated above,[97] a number of commentators have interpreted the above provision as removing both functional and personal immunity in respect of the prosecution of international crimes before South African courts.[98] Du Plessis[99] argues that "notwithstanding the contrary position under customary international law", immunity *ratione personae* does not apply in South African courts in case of international crimes. He argues that under section 4(2)(a)(i) of the *Implementation Act*, South African courts are "accorded the same powers (as the ICC) to 'trump'" any immunities which "usually attach to officials of government".[100] Thus, he says, because the customary rules according immunity *ratione personae* are contrary to an Act of Parliament (the *Implementation Act*), Du Plessis concludes that, in accordance

97 See para 1 above.

98 Du Plessis "International Criminal Courts" 211; Dugard and Abraham 2002 *Annual Survey* 165-166; Chok 2013 http://works.bepress.com/brian_chok/1/ 14 and Kemp *et al Criminal Law* 102. Also see Du Plessis 2007 *JICJ* 470 and Dugard *International Law* 257.

99 Du Plessis "International Criminal Courts" 211. Also see Du Plessis 2007 *JICJ* 470; Dugard and Abraham 2002 *Annual Survey* 165-66 and Chok 2013 http://works.bepress.com/brian_chok/1/ 14.

100 Du Plessis "International Criminal Courts" 211

with the provisions of section 232 of the *Constitution*,[101] such rules are not applicable in South Africa.

As will become clear in the discussion which follows, Du Plessis's argument is based on a wrong interpretation of section 4(2)(a)(i) of the *Implementation Act*. In the view of the present writer, by employing the words "defence to a crime", the *Implementation Act* removes only the defence of "official capacity", not immunity, whether functional or personal. This is the interpretation of this section which is consistent with a grammatical[102] approach to statutory interpretation. This argument is elaborated upon below.

3.2 The concept of "defence to a crime"

The words "defence to a crime" are found in various treatises on South African criminal law. Snyman[103] states that "every crime has different definitional elements" and that "defences" are "based upon the absence of a particular element", for example "premises" in housebreaking, "property" in theft, or "judicial proceedings" in perjury. Burchell[104] identifies three general elements of criminal liability as follows:

> [F]or criminal liability to result, the prosecution (the State) must prove, beyond reasonable doubt, that the accused has committed, (i) a voluntary act which is unlawful (sometimes referred to as *actus reus*) and that this conduct was accompanied by (ii) criminal capacity and (iii) fault (sometimes referred to as *mens rea*).[105]

Burchell[106] then goes to say, like Snyman, that:

> [S]outh African criminal law distinguishes between defences to criminal liability on the basis of the element of criminal liability that is excluded by the defence ie defences excluding the unlawfulness of the conduct (ie grounds of justification);

101 Section 232 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) provides that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

102 Grammatical interpretation tries to find the meaning of a statute from the language of the text. It is the use of the literal meaning of the statutory text. Woolman *et al Constitutional Law* 32-160.

103 Snyman *Criminal Law* 553.

104 Burchell *Criminal Law and Procedure* 45.

105 Burchell *Criminal Law and Procedure* 45.

106 Burchell *Criminal Law and Procedure* 47.

> defences excluding capacity and defences and putative defences excluding intention.

It follows from the above that to interpret the words "defence to a crime" contained in section 4(2)(a)(i) of the *Implementation Act* as referring both to the jurisdictional defences of immunity *ratione materiae* and immunity *ratione personae* is a misunderstanding of these concepts as they are ordinarily used in criminal law. Immunities (both functional and personal) do not constitute a "defence to a crime"; they prohibit "the exercise of criminal jurisdiction" altogether.[107] These immunities act as "procedural" bars to "prosecution"[108] rather than a "defence to a crime" which can be raised only in the course of the trial once the jurisdictional bar has been lifted. Thus, the only way that the official status of the accused can be pleaded as a "defence to a crime" is when the accused pleads the defence of "official capacity", ie that the act that would otherwise be unlawful is justified if the accused is entitled to perform it by virtue of the office he occupies.[109] For example, a police officer who searches a suspected criminal is not guilty of assault or *crimen iniuria*.[110] Likewise, a police officer who kills a suspected criminal in the course of effecting a lawful arrest is not guilty of murder if certain conditions provided for in the *Criminal Procedure Act* 51 of 1977 are met.[111] This defence is known as "official capacity"[112] or "public authority".[113]

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107 Akande and Shah 2011 *EJIL* 819.
108 Coracini "Evaluating Domestic Legislation" 729.
109 Snyman *Criminal Law* 129.
110 Snyman *Criminal Law* 130.
111 Kemp *et al Criminal Law* 104-105 and Snyman *Criminal Law* 130-131. The justification of using deadly force in effecting a lawful arrest is governed by s 49 of the *Criminal Procedure Act* 51 of 1977. In terms of this section, lethal force may be used if:
"(i) The arrestor is attempting to arrest the suspect (not merely to search or question him), and
(ii) Lethal force is immediately necessary for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm; or
(iii) There is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
(iv) The offence for which the arrest is sought is in progress and is of forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm."
112 Snyman *Criminal Law* 129.
113 Kemp *et al Criminal Law* 101.

Thus, according to the defence of official capacity (or public authority), State officials acting in the performance of their duties may commit acts that are "prima facie unlawful"[114] but are not liable for those acts because those acts are "justified".[115] This is not a procedural defence but a substantive defence, in other words, a "defence to a crime". It is this defence that the ILC[116] referred to when it drafted the so-called Nuremberg Principles in 1950, of which Principle III provides as follows:

> Principle III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

The same principle was inserted in article 27(1) of the *Rome Statute*, which provides that:

> […] official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, [nor shall it, in and of itself, constitute a ground for reduction of sentence.

Thus, article 27(1) of the *Rome Statute* clearly envisages the official status of the accused being invoked as a "substantive defence" rather than a "procedural defence", which is dealt with in 27(2).[117] The reference to "criminal responsibility" in article 27(1) bears a striking similarity to the words "defence to a crime" used in the *Implementation Act* and their corresponding use in Snyman and Burchell's works referred to above. It thus appears that the wording of section 4(2)(a)(i) of the *Implementation Act* is modelled on article 27(1) of the *Rome Statute*, which refers to the defence of official capacity, not immunity, *ratione materiae* and *ratione personae,* which is dealt with in a separate provision, ie article 27(2). This article (article 27(2)) provides that:

114 Kemp *et al Criminal Law* 101.
115 Snyman *Criminal Law* 129.
116 *ILC Report of the International Law Commission Covering Its Second Session* UN Doc A/1316 (1950) 375.
117 Art 27(2) of the *Rome Statute* reads as follows: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

> [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.

The *Rome Statute* therefore clearly distinguishes between the defence of official capacity on the one hand and the defence of immunity (both *ratione materiae* and immunity *ratione personae*) on the other. It is clear that section 4(2)(a)(i) of the *Implementation Act* was modelled on the first paragraph of article 27, not the second. It thus follows that the words "defence to a crime" contained in section 4(2)(a)(i) of the *Implementation Act* must be understood as referring to the official status of the accused being pleaded as a substantive defence to a crime (the defence of "official capacity"), rather than being a bar to the proceedings altogether (immunity *ratione materiae* or *ratione personae*). This interpretation of section 4(2)(a)(i) is clearly the only one which can be consistent with a grammatical approach to statutory interpretation.

Dugard[118] alludes to the above interpretation, but for reasons that are not correct, concludes that section 4(2)(a)(i) removes both functional and personal immunities. He says:

> This would seem to mean that a head of state or government will not be able to plead immunity in respect of the crimes recognised by the Rome Statute-genocide, crimes against humanity and war crimes-unless the word "defence" in s 4(a)(i) is interpreted narrowly to apply only to a substantive defence on the merits of the case and not to a plea to jurisdiction, which would be an untenable interpretation in the light of article 27 of the Rome Statute denying immunity.[119]

With respect, Dugard's argument does not hold. The fact that the *Rome Statute* does not recognise any type of immunity before the ICC does not entail the rejection of such immunities in domestic courts even when persons are accused of international crimes. These are different jurisdictions and different rules apply. As stated earlier,[120] it is a settled issue in international law that both immunity *ratione materiae* and immunity *ratione personae* do not apply before international criminal

118 Dugard *International Law* 257.
119 Dugard *International Law* 257.
120 See para 1 above.

tribunals. However, as stated before,[121] immunity *ratione personae* (not immunity *ratione materiae*) applies when international crimes are prosecuted in domestic courts. As the ICJ stated in the *Arrest Warrant* case,[122] in regard to the immunity *ratione personae* of a foreign minister:

> there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

In the light of the above holding of the ICJ, Dugard's argument that the interpretation that section 4(2)(a)(i) does not remove immunity *ratione personae* would be an "untenable interpretation in the light of article 27 of the *Rome Statute* denying immunity" cannot stand. Here, we are dealing with two legal systems: article 27 of the *Rome Statute* governs prosecutions before an international criminal tribunal, while section 4(2)(a)(i) of the *Implementation Act* governs prosecutions in South African courts. On this view, Dugard's argument that section4(2)(a)(i) may not be interpreted in a manner that gives it a different meaning from that found in the provisions of the *Rome Statute* is not warranted.

Dugard's interpretation of section 4(2)(a)(i) as removing all immunities, in particular personal immunity, is also inconsistent with the provisions of the *Constitution* on the interpretation of statutes. The *Constitution* provides that:

> [W]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[123]

Thus, since the *Constitution* seeks to ensure that South African law will evolve in accordance with international law,[124] Dugard's argument cannot be accepted.

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121 See para 2.2.2 above.

122 Para 58 of the *Arrest Warrant* case. Also see Dugard *International Law* 252.

123 Section 233 *Constitution*.

124 Dugard 1997 *EJIL* 92. Also see *Glenister v President of the RSA* 2011 3 SA 347 (CC) 376: "Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law [...] Firstly, s 233 requires legislation to be interpreted in compliance with international law [...]".

Official statements of the South African government also support the interpretation of section 4(2)(a)(i) as not removing the immunity *ratione personae* of foreign officials even when they are accused of international crimes. Subsequent to the ICC's arrest warrant against President Bashir[125] South Africa's government declared that if President Bashir were to visit South Africa, he would be arrested and surrendered to the ICC.[126] The Government never said that it would arrest Bashir and try him in South African courts in accordance with the complementarity regime of the *Rome Statute*. This Government's treatment of Bashir's case thus corroborates the present author's interpretation of section (2)(a)(i) of the *Implementation Act* as not affecting immunity *ratione personae*.

In the light of the above interpretation of section 4(2)(a)(i) of the *Implementation Act*, it is concluded that this Act is silent on the question of the immunities of foreign State officials accused of international crimes before South African courts.[127] This raises the question as to how South African courts would approach the issue of immunity, both functional and personal, should a case arise where such (jurisdictional) defences would be pleaded. The *Diplomatic Immunities and Privileges Act*[128] provides the answer to this question. This Act provides that in addition to diplomatic[129] and consular[130] immunities recognised in the 1961 and 1963 *Vienna Conventions*, foreign heads of State,[131]special envoys and certain representatives of

125 *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-3 (4 March 2009).

126 Sudan Tribune 2010 http://www.sudantribune.com/spip.php?article35817.

127 Gevers and Kemp *et al* interpret the words "defence to a crime" contained in s 4(2)(a)(i) of the *Implementation Act* as referring to immunity *ratione materiae*. See Gevers 2011 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975788&download=yes 17 and Kemp *et al Criminal Law* 588. This, however, is not correct. As stated above, immunity *ratione materiae*, just as immunity *ratione personae*, is a procedural defence, not a defence to a crime. It is also worth reminding that immunities (both functional and personal) can be waived by the state to which the official belongs (see para 2.1 above). This is not applicable to the defence of official capacity which belongs to the individual official, not the state.

128 *Diplomatic Immunities and Privileges Act* 37 of 2001.

129 Section 3(1) *Diplomatic Immunities and Privileges Act* 37 of 2001.

130 Section 3(2) *Diplomatic Immunities and Privileges Act* 37 of 2001.

131 Section 4(1)(a) *Diplomatic Immunities and Privileges Act* 37 of 2001.

foreign States are immune from the criminal (and civil) jurisdiction of the South African courts "in accordance with the rules of customary international law".[132]

As stated above,[133] under customary international law, immunity *ratione materiae* does not apply when a State official (or a former State official) is accused of international crimes before the courts of foreign States. With regard to immunity *ratione personae*, however, it was found that, under customary international law this immunity applies even when a foreign State official is accused of international crimes. In accordance with the provisions of the *Diplomatic Immunities and Privileges Act,* therefore, this immunity must be afforded to foreign State officials accused of international crimes before South African courts. As to which officials qualify for this immunity, customary international law extends it to heads of State, heads of government, ministers, diplomats and officials on special missions.[134]

3.3 Does immunity ratione personae apply when a foreign State official is in South Africa on a private visit?

Another question that needs particular attention is whether or not immunity *ratione personae* also applies to foreign State officials who might be in South African not on official missions but on private visits. The *Diplomatic Immunities and Privileges Act* does not contain an express provision on this question. However, this Act seems to make a distinction between the immunity of foreign heads of State on the one hand and, on the other hand, the immunity of special envoys and other State "representatives". In regard to heads of State, the *Diplomatic Immunities and Privileges Act* simply provides that they enjoy immunity "in accordance with the rules of customary international law".[135] With regard to the special envoys and other "representatives", however, this Act adds a proviso that their immunities are subject to the Minister (of Foreign Affairs)[136] making a notice in the *Gazette* recognising a

132 Section 4(2)(a) *Diplomatic Immunities and Privileges Act* 37 of 2001.
133 See para 2.1 above.
134 For a detailed discussion on this point see Kayitana *Jurisdictional Problems* 136-147 and Franey *Immunity* 77-132.
135 Section 4(1)(a) *Diplomatic Immunities and Privileges Act* 37 of 2001.
136 Section 1 *Diplomatic Immunities and Privileges Act* 37 of 2001.

special envoy or representative.[137] What this means is that special envoys and other State representatives enjoy immunity *ratione personae* before South African courts only when their presence has been consented to by the Minister of Foreign Affairs prior to their arrival by way of notice in the *Gazette*. In the other words, all foreign officials apart from the head of State don't enjoy immunity *ratione personae* before South African courts if they are in the Republic on private visits, because such visits may not be the subject of any notice in the *Gazette*. As for heads of State, the question must be answered by reference to customary international law.

With regard to heads of State, scholars advance two arguments in support of the view that customary international law extends immunity *ratione personae* to them even when they are abroad on private visits. Firstly, it is argued that a head of State is accorded immunity *ratione personae* not only because of the functions he performs, but also because of what he symbolises: the sovereign State.[138] The immunity accorded to the head of State is in part due to the respect for the dignity of the State which that office represents.[139] This idea is echoed in the following statement by the House of Lords in the *Pinochet* case:

> Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him.[140]

Secondly, the immunity of heads of State, including when they are abroad on private visits, can be justified by the principle of non-intervention, which is the "corollary of the principle of sovereign equality of States".[141] The principle of the sovereign equality of States is enunciated in the *UN Charter*, where it is provided that the "Organisation is based on the principle of the sovereign equality of all its members".[142] To arrest and detain a head of State is effectively to change the

137 Section 4(3) *Diplomatic Immunities and Privileges Act* 37 of 2001.
138 Akande and Shah 2011 *EJIL* 824.
139 Franey *Immunity* 59.
140 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* 1999 2 All ER 97.
141 *Nicaragua v United States* Military and Para-military Activities in and against Nicaragua 1986 ICJ 14 (27 June 1986) para 202.
142 Article 2(1) *Charter of the United Nations* (1945).

government of that State, which would be a gross interference with the autonomy and independence of that State and hence a serious infringement of the State's sovereignty.[143] It thus seems that the immunity *ratione personae* of foreign heads of State is absolute and that it would protect them even when they are in South Africa on private visits. The view that the immunity of a head of State extends to private visits in foreign States was also endorsed, albeit *obiter*, by the ICJ in the *Arrest Warrant* case.[144]

A question that arises here is whether foreign heads of government should also not be granted immunity *ratione personae* when they are on private visits in South Africa. As stated above, the *Diplomatic Immunities and Privileges Act* only distinguishes between the head of State on the one hand, and, on the other, special envoys and other State representatives. Thus, for the purposes of immunity *ratione personae* of foreign officials on private visits in South Africa, foreign heads of government must be treated according to the rules applicable to special envoys and other representatives. This means that they are not accorded immunity when they are in South Africa on private visits because, as stated above, such immunity is only accorded when the presence of the official in question was consented to by the Minister of Foreign Affairs by way of notice in the *Gazette*, prior to their arrival in the Republic.

In the *Arrest Warrant* case,[145] the ICJ took the view that the immunity *ratione personae* of heads of government also extends to their private visits abroad. Although the ICJ did not provide any State practice to support its argument, it seems that there are good reasons for extending the immunity of heads of government to their private visits. Although they may not be considered as having the same "majestic dignity" as heads of State, it is the heads of government who in a number of States are the effective leaders of their countries.[146] In some States, when a head of government resigns or is removed from office, the entire government is deemed

143 Akande and Shah 2011 *EJIL* 823.
144 *Arrest Warrant* case para 55.
145 *Arrest Warrant* case para 55.
146 Akande and Shah 2011 *EJIL* 824.

to have resigned and a new government must be formed.[147] To arrest and detain in a foreign country a head of government would bring about the same result and would thus amount to a change of the government of his or her State, which would be an impermissible infringement of that State's sovereignty. Therefore, the reasoning of the ICJ in the A*rrest Warrant* case[148] that heads of government, just like heads of State, also enjoy immunity *ratione personae* on private visits abroad is quite apposite. On this view, it is suggested that South Africa should amend the *Diplomatic Immunities and Privileges Act* to provide that foreign heads of government are accorded the same immunity as heads of State, including when they are in South Africa on private visits.

It is submitted, however, that the ICJ's view in the *Arrest Warrant* case[149] that ministers of foreign affairs also enjoy immunity *ratione personae* even when they are in foreign countries on private visits is not correct. Ministers, including the minister of foreign affairs, may represent the State but do not embody "the supreme authority of the State".[150] Consequently, their arrest on private visits does not significantly offend the dignity of their State and their removal does not signify a change in government of the State.[151] Thus, the ICJ's view in regard to the immunity *ratione personae* of ministers of foreign affairs seems to be exaggerative. As Cryer[152] notes, there is no state practice, and the ICJ itself did not refer to any, to support such a "sweeping rule". In fact, if one draws an analogy from the law and practice of diplomatic immunities, one must arrive at the conclusion that foreign ministers should not be accorded immunity *ratione personae* when on holiday or private visit in foreign States.[153] In the area of diplomatic law personal immunity is not accorded to diplomats during holidays in third countries, but only when *en poste* and during

147 Examples of such legal systems include Japan (see for instance the case of Prime Minister Yoshihita Noda and his cabinet at NDTV.com 2012 http://www.ndtv.com/article/world/japan-s-cabinet-resigns-to-make-way-for-new-prime-minister-309796), and Holland (see the case of Prime Minister Mark Rutte and his cabinet at Preuschat 2012 http://online.wsj.com/article/SB10001424052702303459004577361451277633774.html).
148 *Arrest Warrant* case para 55.
149 *Arrest Warrant* case para 55.
150 Akande and Shah 2011 *EJIL* 825.
151 Akande and Shah 2011 *EJIL* 825.
152 Cryer *et al International Criminal Law* 548.
153 Cryer *et al International Criminal Law* 548.

transit between the home country and the host country.[154] There appears to be no reason why ministers of foreign affairs, and all ministers in general, should be subject to a more favourable regime than diplomats. On this note, it must be concluded that the provision of the *Diplomatic Immunities and Privileges Act* that denies immunity *ratione personae* to foreign ministers and other low-ranking officials of foreign States who are in South Africa on a private visit does not violate international law. In fact, it must also be noted that the extension of full immunity to private visits is not consistent with the rationale on which the ICJ founded its decision, which was that exposure of a foreign minister to proceedings:

> ... could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.[155]

This reasoning is inapplicable to private travel.[156] Thus, as Yitiha[157] says, extending the immunity *ratione personae* of the minister of foreign affairs (and other ministers in general) to cover them even when they are abroad on private visits would be "erroneous and unjustified". By restricting this immunity to heads of State and heads of government, a balance is struck between the requirements of the sovereign equality and dignity of States on the one hand and the imperatives of respect for human rights on the other.[158]

4 Conclusion

This article has been concerned with the extent to which officials of foreign States can be accorded or denied immunity before South African courts when charged with international crimes committed in foreign States. Two types of immunities have been considered. First, the article has dealt with immunity *ratione materiae* (or functional immunity), which is immunity granted to people for acts performed on behalf of States. Secondly, there is immunity *ratione personae* (or personal immunity) which

154 Cryer *et al International Criminal Law* 548.
155 *Arrest Warrant* case para 55.
156 Cryer *et al International Criminal Law* 549.
157 Yitiha *Immunity* 125. Also see Akande and Shah 2011 *EJIL* 825.
158 Akande and Shah 2011 *EJIL* 825.

protects certain foreign (in general high ranking) officials because of their status or the office they hold.

With regard to immunity *ratione materiae* it was found that under customary international law this immunity applies only in civil cases, not in criminal cases, in particular international crimes.[159] Regarding immunity *ratione personae* it was found that, as a matter of customary international law, it still applies even when a State official is accused of international crimes.[160]

The provisions of the *Implementation Act* were also considered. Contrary to the views advanced by most commentators, this article has argued that the *Implementation Act* does not address the question of the immunity, both *ratione materiae and ratione personae*, of foreign officials accused of international crimes before South African courts. This argument has led to the following question: if the *Implementation Act* is silent on the question of the immunities of foreign officials accused of international crimes before South African courts, how should these courts approach this issue should a case arise where immunity, either *ratione materiae* or *ratione personae*, is pleaded? It was argued that the answer to this question must be found in the *Diplomatic Immunities and Privileges Act,* which provides that the representatives of foreign States are immune from the criminal (and civil) jurisdiction of the South African courts "in accordance with the rules of customary international law".[161]

Thus, as this paper has argued,[162] since under customary international law immunity *ratione materiae* does not apply when a State official (or a former State official) is accused of international crimes before the courts of foreign States, immunity *ratione materiae* may not be a bar to the universal jurisdiction of South African courts when trying a case arising from an international crime committed in a foreign State. With regard to immunity *ratione personae*, however, it was stated that under customary

159 See para 2.1 above.
160 See para 2.2.2 above.
161 Sections 4(1)(a) and 4(2)(a) *Diplomatic Immunities and Privileges Act 37* of 2001.
162 See para 2.1 above.

international law this immunity applies even when a foreign State official is accused of international crimes before the domestic courts of a foreign State.[163] In accordance with the provisions of the *Diplomatic Immunities and Privileges Act*, therefore, this immunity must be accorded to foreign State officials accused of international crimes before South African courts.[164] As to whether this immunity should be extended to foreign officials on private visits in South Africa, it was found that the *Diplomatic Immunities and Privileges Act* adopts a restrictive approach granting this immunity only to foreign heads of State and denying it to all other foreign officials on private visits, including heads of government. On this point, it was argued that South African law is not in line with customary international law. It was found that, in addition to the head of State, customary international law also grants immunity *ratione personae* to heads of government on private visits in foreign countries. Accordingly, it was suggested that the *Diplomatic Immunities and Privileges Act* should be amended to extend immunity *ratione personae* to foreign heads of government on private visits in South Africa.

Ultimately, it is important to emphasise that if section 4(2)(a)(i) of the *Implementation Act* did in fact negate both immunities *ratione materiae* and *ratione personae*, as suggested by some commentators, South Africa would risk exposing itself to proceedings before the ICJ for breaching its international law obligations towards other States, just as Belgium did when it circulated an international arrest warrant against the minister of foreign affairs of the DRC.[165] This is an interpretation of the law which clearly should be avoided and which, in fact, is contrary to the spirit of the *Constitution,* which accords high regard to international law.[166]

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163 See para 2.2.2 above. In support of this conclusion, also see Cassese *International Criminal Law* 12.

164 See para 3.2 above.

165 In support of this conclusion, see also Council of the European Union 2009 http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf 42: "Those national criminal justice authorities considering exercising universal jurisdiction over persons suspected of serious crimes of international concern are legally bound to take into account all the immunities to which foreign state officials may be entitled under international law and are consequently obliged to refrain from prosecuting those officials entitled to such immunities".

166 See para 3.2 above.

BIBLIOGRAPHY

Literature

Akande 2004 *AJIL*

Akande D "International Law Immunities and the International Criminal Court" 2004 *AJIL* 407-433

Akande and Shah 2011 *EJIL*

Akande D and Shah S "Immunities of State Officials, International Crimes and Foreign Domestic Courts" 2011 *EJIL* 815-852

Aust *Handbook*

Aust A *Handbook of International Law* (Cambridge University Press Cambridge 2005)

Bantekas and Nash *International Criminal Law*

Bantekas I and Nash S *International Criminal Law* 2nd ed (Cavendish London 2003)

Bassiouni *International Criminal Law*

Bassiouni MC (ed) *International Criminal Law Vol III* (Martinus Nijhoff Leiden 2008)

Bassiouni 1996 *LCP*

Bassiouni MC "Searching for Peace and Achieving Justice: The Need for Accountability" 1996 *LCP* 9-28

Bassiouni 2001 *Va J Int'l L*

Bassiouni MC "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" 2001 *Va J Int'l L* 81-162

Bianchi 1999 *EJIL*

Bianchi A "Immunity versus Human Rights: The Pinochet Case" 1999 *EJIL* 237-277

Burchell *Criminal Law and Procedure*

Burchell J *South African Criminal Law and Procedure* 4th ed (Juta Cape Town 2011)

Burke-White 2003 *ILSA J Int'l & Comp L*

Burke-White WW "The International Criminal Court and the Future of Legal Accountability" 2003 *ILSA J Int'l & Comp L* 195-205

Cassese 2002 *EJIL*

Cassese A "When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case" 2002 *EJIL* 853-875

Cassese 2003 *JICJ*

Cassese A "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" 2003 *JICJ* 589-595

Colangelo 2005 *Va J Int'l L*

Colangelo A "The Legal Limits of Universal Jurisdiction" 2005 *Va J Int'l L* 1-51

Cassese *International Criminal Law*

Cassese A *International Criminal Law* 2nd ed (Oxford University Press Oxford 2008)

Coracini "Evaluating Domestic Legislation"

Coracini AR "Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime" in Carsten S and Göran S (eds) *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Leiden 2009) 725-754

Cryer *et al International Criminal Law*

Cryer R *et al An Introduction to International Criminal Law and Procedure 2nd ed* (Cambridge University Press Cambridge 2010)

Demeyele, Verhoeven and Wouters "International Criminal Court's Office of the Prosecutor"

Demeyele B, Verhoeven S and Wouters J "The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability" in Bassiouni MC, Gasser H and Doria J (eds) *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Leiden 2009) 345-38

Du Plessis "International Criminal Courts"

Du Plessis M "International Criminal Courts, the International Criminal Court, and South Africa's Implementation of the Rome Statute" in Dugard J *International Law: A South African Perspective* 4th ed (Juta Cape Town 2011) 170-213

Du Plessis 2003 *SACJ*

Du Plessis M "Bringing the International Criminal Court Home - The Implementation of the Rome Statute of the International Criminal Court Act 2002" 2003 *SACJ* 1-6

Du Plessis 2007 *JICJ*

Du Plessis M "South Africa's Implementation of the ICC Statute: An African Example" 2007 *JICJ* 460-479

Dugard *International Law*

Dugard J *International Law: A South African Perspective* 4th ed (Juta Cape Town 2011)

Dugard 1997 *EJIL*

Dugard J "International Law and the South African Constitution" 1997 *EJIL* 77-92

Dugard and Abraham 2002 *Annual Survey*

Dugard J and Abraham G "Public International Law" 2002 *Annual Survey* 140-192

Franey *Immunity*

Franey EH *Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of National Courts under International Law?* (PhD-thesis London School of Economics 2009)

Henrard 1999 *MSU-DCL J Int'l L*

Henrard K "The Viability of National Amnesties in view of the Increasing Recognition of Individual Criminal Responsibility at International Law" 1999 *MSU-DCL J Int'l L* 595-649

Kayitana *Jurisdictional Problems*

Kayitana E *Jurisdictional Problems of South African Courts in Respect of International Crimes* (LLD-thesis North West University Potchefstroom Campus 2014)

Kemp *et al Criminal Law*

Kemp G *et al Criminal Law in South Africa* (Oxford University Press Cape Town 2012)

Knushel 2011 *JIHR*

Knushel S "State Immunity and the Promise of Jus Cogens" 2011 *JIHR* 149-183

Markovich 2009 *Potentia*

Markovich S "Balancing State Sovereignty and Human Rights: Are There Exceptions in International Law to the Immunity Rules for State Officials?" 2009 *Potentia* 57-74

Murungu Immunity of State Officials

Murungu CB *Immunity of State Officials and Prosecution of International Crimes of International Crimes in Africa* (LLD-thesis University of Pretoria 2011)

Orakhelashvili 2002 *AJIL*

Orakhelashvili A "International Decisions" 2002 *AJIL* 677-684

Snyman *Criminal Law*

Snyman *Criminal Law* 5th ed (LexisNexis Durban 2008)

Stewart 2011 *Vanderbilt J Transnat'l L*

Stewart DP "The Immunity of State Officials under the UN Convention on Jurisdictional Immunities of States and Their Property" 2011 *Vanderbilt J Transnat'l L* 1047-1071

Stigen *Principle of Complementarity*

Stigen J *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Leiden 2008)

Swanepoel 2007 *JJS*

Swanepoel CF "Universal Jurisdiction as Procedural Tool to Institute Prosecutions for International Core Crimes" 2007 *JJS* 118-143

Tunks 2002 *Duke LJ*

Tunks MA "Diplomats or Defendants? Defining the Future of Head-of-State Immunity" 2002 *Duke LJ* 651-682

Van Sliedregt and Stoitchkova "International Criminal Law"

Van Sliedregt E and Stoitchkova D "International Criminal Law" in Joseph S and McBeth A (eds) *A Research Handbook on International Human Rights Law* (Edward Elgar Cheltenham 2010) 241-271

Werle *International Criminal Law*

Werle G *Principles of International Criminal Law* (Asser Press The Hague 2009)

Wickremasinghe "Immunities"

Wickremasinghe C "Immunities Enjoyed by Officials of States and International Organizations" in Evans MD (ed) *International Law* (Oxford University Press Oxford 2003) 387-413

Wirth 2002 *EJIL*

Wirth S "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v Belgium* Case" 2002 *EJIL* 877-893

Woolman *et al Constitutional Law*

Woolman S *et al* (eds) *Constitutional Law of South Africa* 2nd ed (Juta Cape Town 2005)

Yitiha *Immunity*

Yitiha S *Immunity and International Criminal Law* (Ashgate Aldershot 2004)

Zappalà 2001 *EJIL*

Zappalà S "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes: The Ghaddafi Case before the French Court of Cassation" 2001 *EJIL* 595-612

Case law

England

Gaddafi *Court of Appeal of Paris* 20 Oct 2000; *Court of Cassation* 13 March 2001 2004 125 ILR 490

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) 1999 1 All ER 577

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) 1999 2 All ER 97

R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte 1998 4 All ER 897

Zoernsch v Waldock 1964 1 WLR 675

International Court of Justice

Democratic Republic of the Congo v Belgium Case Concerning the Arrest Warrant of 11 April 2000 Judgement 2002 ICJ 3 (14 February 2002)

Nicaragua v United States Military and Para-military Activities in and against Nicaragua 1986 ICJ 14 (27 June 1986)

International Criminal Court

The Prosecutor v Omar Hassan Ahmad Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3 (4 March 2009)

International Criminal Tribunal for the Former Yugoslavia

The Prosecutor v Slobodan Milosevic Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlajko Stojiljkovic Decision on Review of Indictment and Application for Consequential Orders ICTY IT-05-87-PT (24 May 1999)

International Military Tribunal (Nuremberg)

Trial of the German Major War Criminals before the International Military Tribunal Vol I (Nuremberg 1947)

Netherlands

Her Majesty's Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhima The High Court of Justiciary Case No 1475/99 (30 January 2001)

South Africa

Southern African Litigation Centre v National Director of Public Prosecutions 2012 JDR 0822 (GNP)

Glenister v President of the RSA 2011 3 SA 347 (CC)

Special Court for Sierra Leone

Prosecutor v Charles Ghankay Taylor Decision Approving the Indictment and Order for Non-Disclosure SCSL-2003-01-I (7 March 2003)

USA

Chuidian v Philippine National Bank 912 F 2d 1095 (29 August 1990)

Legislation

South Africa

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Diplomatic Immunities and Privileges Act 37 of 2001

Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

Belgium

Law of 16 June 1993 Relating to the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Protocol I and II of 8 June 1977 (Belgian Official Journal of 5 August 1993)

International instruments

Charter of the United Nations (1945)

ICC Resolution: The Crime of Aggression RC/Res 6 (2010)

ILC Documents of the Thirty-first Session (Excluding the Report of the Commission to the General Assembly) UN Doc A/CN.4/SER.A/1979/Add.l (1979)

ILC Report of the International Law Commission Covering Its Second Session UN Doc A/1316 (1950)

ILC Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur UN Doc A/CN 4/631 (2010)

Rome Statute of the International Criminal Court (1998)

UN ESC Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights: Preliminary Report by Mr Louis Joinet, Special Rapporteur UN Doc E/CN 4/Sub 2/1985/16 (1985)

UN SC Resolution on the Libyan Arab Jamahiriya UN Doc S/RES/731 (1992)

Internet sources

Chok 2013 http://works.bepress.com/brian_chok/1/

Chok BM 2013 *The Struggle between the Doctrines of Universal Jurisdiction and Head of State Immunity* http://works.bepress.com/brian_chok/1/ accessed 2 October 2013

Council of the European Union 2009 http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf

Council of the European Union 2009 *The AU-EU Expert Report on the Principle of Universal Jurisdiction* http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf accessed 2 October 2013

Foakes 2011 http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf

Foakes J 2011 *Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts* http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf accessed 13 September 2013

Gevers 2011 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975788&download=yes

Gevers C 2011 *Immunity and the Implementation Legislation in South Africa, Kenya and Uganda* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975788&download=yes accesed 5 November 2013

HRW 2009 http://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction
Human Rights Watch 2009 *Basic Facts on Universal Jurisdiction* http://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction accessed 30 October 2012

ICCLR 2002 http://www.iccnow.org/documents/ICCLR-Checklist.pdf
International Centre for Criminal Law Reform and Criminal Justice Policy 2002 *International Criminal Court: Checklist of Implementation Considerations and Examples Relating to the Rome Statute and the Rules of Procedure and Evidence - A Supplement to the "Manual for the Ratification and Implementation of the Rome Statute"* http://www.iccnow.org/documents/ICCLR-Checklist.pdf accessed 7 October 2013

ILC 2009 http://www.justitiaetpace.org/idiE/resolutionsE/2009_naples_01_en.pdf
International Law Commission 2009 *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes* http://www.justitiaetpace.org/idiE/resolutionsE/2009_naples_01_en.pdf accessed 15 October 2013

Macedo et al 2001 http://lapa.princeton.edu/hosteddocs/unive_jur.pdf
Macedo S et al 2001 *The Princeton Principles on Universal Jurisdiction* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf accessed 15 October 2013

NDTV.com 2012 http://www.ndtv.com/article/world/japan-s-cabinet-resigns-to-make-way-for-new-prime-minister-309796
NDTV.com 2012 *Japan's Cabinet Resigns to Make Way for New Prime Minister* http://www.ndtv.com/article/world/japan-s-cabinet-resigns-to-make-way-for-new-prime-minister-309796 accessed 15 October 2015

Preuschat 2012 http://online.wsj.com/article/SB10001424052702303459004577361451277633774.html

Preuschat A 2012 *Dutch Prime Minister Resigns* http://online.wsj.com/article/SB10001424052702303459004577361451277633774.html accessed 31 January 2013

Redress 2005 http://www.redress.org/downloads/publications/Immunity_v_Accountability.pdf

Redress 2005 *Immunity v Accountability: Considering the Relationship between State Immunity and Accountability for Torture and Other Serious International Crimes* http://www.redress.org/downloads/publications/Immunity_v_Accountability.pdf accessed 20 November 2012

Sudan Tribune 2010 http://www.sudantribune.com/spip.php?article35817

Sudan Tribune 2010 *South Africa Says It Will Arrest Sudan's Bashir Despite AU Resolution* http://www.sudantribune.com/spip.php?article35817 accessed 31 January 2013

LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
Annual Survey	Annual Survey of South African Law
Duke LJ	Duke Law Journal
EJIL	European Journal of International Law
HRW	Human Rights Watch
ICC	International Criminal Court
ICCLR	International Centre for Criminal Law Reform and Criminal Justice Policy
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission

ILSA J Int'l & Comp L	ILSA Journal of International and Comparative Law
JICJ	Journal of International Criminal Justice
JIHR	Northwestern Journal of International Human Rights
JJS	Journal for Juridical Science
LCP	Law and Contemporary Problems
MSU-DCL J Int'l L	Michigan State University Detroit College of Law Journal of International Law
SACJ	South African Journal of Criminal Justice
SCSL	Special Court for Sierra Leone
UN ESC	United Nations Economic and Social Council
UN SC	United Nations Security Council
Va J Int'l L	Virginia Journal of International Law
Vanderbilt J Transnat'l L	Vanderbilt Journal of Transnational Law

THE UNIVERSAL JURISDICTION OF SOUTH AFRICAN CRIMINAL COURTS AND IMMUNITIES OF FOREIGN STATE OFFICIALS

E Kayitana*

SUMMARY

Under the "complementarity" regime of the *Rome Statute of the International Criminal Court* (ICC), the jurisdiction of the ICC is secondary to the jurisdiction of domestic courts. States Parties, not the ICC, have the primary responsibility of investigating and prosecuting international crimes. The ICC acts only when States are "unable" or "unwilling" to prosecute. As a State Party, in order to give effect to the complementarity principle, South Africa enacted the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002, which determines the modalities of prosecuting perpetrators of the crimes of genocide, crimes against humanity and war crimes in South African courts.

The *Implementation Act* also provides that South African courts will have jurisdiction over these crimes not only when they are committed on the territory of South Africa but also when they are committed outside the Republic. By granting South African courts jurisdiction over a person who commits a crime outside the Republic when that person is later found on South African territory, without regard to that person's nationality or the nationality of the victims, the *Implementation Act* empowers South African courts with universal jurisdiction over international crimes.

This paper seeks to determine whether and to what extent foreign State officials, such as foreign heads of State, heads of government and ministers of foreign affairs, can plead immunity when they are accused of international crimes before South African courts when exercising their universal jurisdiction in terms of the *Implementation Act* and in accordance with the complementarity regime of the Rome Statute. In other words, the article endeavours to determine whether

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international law rules regarding immunities of State officials may or may not limit the ability of South African courts to exercise universal jurisdiction over international crimes committed in foreign States.

KEYWORDS: universal jurisdiction; complementarity; *Rome Statute*; *Implementation Act*; immunity *ratione personae*; immunity *ratione materiae*; international crimes.