

Jurisdictional Problems of South African Courts in Respect of International Crimes

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DECLARATION

I, KAYITANA Evode, declare that: *Jurisdictional Problems of South African Courts in Respect of International Crimes* is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete and proper references. I also declare that this study has not been submitted to any institution of higher learning for the conferral of any degree.

KAYITANA Evode

30 April 2014

DEDICATION

To the memory of the victims of the 1994 genocide against Tutsis and all other victims of the war.

To the survivors and families, I dedicate to you these words:

But I do not believe that the genetic differences that are clear here are sufficient or necessary for genocide. This is famously illustrated by the Yugoslav conflicts of the 1990s, where very biologically similar groups engaged in wars based on their putative differences. Within Africa itself there is no shortage of genocide between groups which are much closer biologically than the Tutsi and the Hutu (e.g., the havoc wrought upon the Bantu Matabele in the early 1980s by the Bantu Shona-dominated movement led by Robert Mugabe). It is not the truth we have to fear, but the mythologies which humans distort from the fragments of the truth in furtherance of their own perverse aims.¹

1 Khan R 2011 Tutsi probably differ genetically from the Hutu
<http://blogs.discovermagazine.com/gnxp/2011/08/tutsi-differ-genetically-from-the-hutu/#.UyICgM7sW7A> [18 March 2014].

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EPIGRAPH

International crimes are often committed by state agents as part of state policy, and so governments do not routinely prosecute their own officials engaged in such action.²

[T]he International Criminal Court, like the *ad hoc* international tribunals, will not be able to deal with all crimes that come under its jurisdiction. The International Criminal Court will not have the capacity for that, and there will always be a need for States to investigate and prosecute core crimes.³

2 Akande 2011 *European Journal of International Law* 816.

3 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 37.

ABSTRACT

Because of its mandate and its enforcement powers, the ICC has been hailed as a major advance on the road towards individual accountability for the perpetration of the most heinous violations of human rights (international crimes) and thus as a major contribution to the prevention of such horrible crimes. However, with its limited resources in terms of human and financial means, the ICC will not be able to deal with all perpetrators of the crimes that come under its jurisdiction wherever such crimes are committed throughout the world. For this reason, in order to end impunity in the commission of international crimes, there will always be a need for combined efforts by the ICC and national courts. This reality is recognised by the Rome Statute which, in the preamble and article 1 of the Statute, provides that the jurisdiction of the ICC is “complementary” to national courts and that, therefore, States Parties retain the primary responsibility for the repression of international crimes. In legal literature, this is generally referred to as the “principle of complementarity” or the “complementarity regime of the Rome Statute”.

In order to give effect to the complementarity principle of the Rome Statute, South Africa passed 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 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 South African territory but also when they are committed outside the Republic, thus empowering South African courts to exercise “universal jurisdiction” over these three international crimes.

This thesis examines the extent to which South African courts, acting under the complementarity regime of the Rome Statute are, or are not, allowed to exercise universal jurisdiction over international crimes committed in foreign States. The study is based on two assumptions. First, it is assumed that since under the principle of complementarity South African courts are required to do the same job as the ICC, they should have the same powers as those States Parties gave to the ICC when they

adopted the Rome Statute. Secondly, it is assumed that, although having the same mandate as the ICC in terms of the complementarity principle, South African courts are nonetheless domestic courts as opposed to the ICC which is an international court and that, accordingly, the international law principle of State sovereignty may impose limitations on their ability to exercise universal jurisdiction over international crimes committed in foreign States.

In the light of the above assumptions, this study investigates three issues. Firstly, do South African courts have the same powers as the ICC has to disregard immunities of foreign States' officials which, under international customary law, attach to their functions or status? Secondly, are South African courts entitled, as the ICC is, to disregard amnesties granted by foreign States, either in the process of national reconciliation or as means to shield the criminals from prosecution by the ICC? Finally, are South African courts entitled, as the ICC is, to retry a case which has already been tried in a foreign country but with the aim of shielding the accused from criminal responsibility or where, for example, the sentence imposed was too lenient in comparison with the gravity of the crime?

OPSOMMING

Op grond van sy mandaat en sy afdwingbaarheidsmagte, word die ISH (Internasionale Strahof) beskou as 'n baie belangrike ontwikkeling op die weg na die individuele aanspreeklikheid vir die pleeg van die ergste oortredinge van menseregte (internasionale misdade) en dit word dus ook beskou as 'n hoofbydraer tot die voorkoming van sulke onuitspreeklike misdrywe. Dit is egter so dat die ISH, as gevolg van beperkte mense- en finansiële middele, nie in staat sal wees om te handel met al die oortreders in hierdie konteks wat misdade dwars oor die wêreld pleeg nie. Om hierdie rede het die stryd om straffeloosheid in die pleeg van internasionale misdade daarop uitgeloop dat daar 'n samewerking moet wees tussen die ISH en nasionale howe. Hierdie realiteit word onderstreep deur die Statuut van Rome wat, in die aanhef en Artikel 1 van die Statuut, voorsiening maak daarvoor dat die jurisdiksie van die ISH aanvullend is tot die van nasionale howe en dat Staatspartye daarom die primêre verantwoordelikheid behou vir die onderdrukking van internasionale misdade. In die regsliteratuur word hierna verwys as die beginsel van aanvullendheid of die aanvullendheidsregime van die Statuut van Rome.

Om uitdrukking te gee aan die aanvullendheidsbeginsel van die Statuut van Rome, het Suid-Afrika die *Wet op die Implementering van die Statuut van Rome oor die Internasionale Strafhof 27 van 2002* (hierna genoem die Implementeringswet) gepromulgeer, wat die modaliteite bepaal van die vervolging van oortreders in terme van die misdade van volksmoord, misdade teen die mensdom en oorlogsmisdade in die Suid-Afrikaanse howe. Hierdie Wet maak voorsiening daarvoor dat die Suid-Afrikaanse howe jurisdiksie sal hê oor hierdie misdade – nie net wanneer hulle in Suid-Afrika gepleeg word nie, maar ook wanneer hulle buite die grense van die Republic gepleeg word, en dit bemagtig die Suid-Afrikaanse howe om “universele jurisdiksie” uit te oefen oor hierdie drie internasionale misdade.

Hierdie proefskrif is daarop gemik om die mate waartoe Suid-Afrikaanse howe, wat onder die aanvullendheidsregime van die Statuut van Rome handel, toegelaat word om universele jurisdiksie uit te oefen oor internasionale misdade wat in buitelandse state

gepleeg word. Die studie gaan uit van twee aannames. In die eerste plek word aanvaar dat, aangesien onder die aanvullendheidsbeginsel Suid-Afrikaanse howe veronderstel is om dieselfde werk te doen as die ISH, hulle ook dieselfde magte moet hê wat deur die Staatspartye aan die ISH verleen is met die aanvaarding van die Statuut van Rome. In die tweede plek word aanvaar dat, hoewel hulle dieselfde mandaat het as die ISH in terme van die aanvullendheidsbeginsel, Suid-Afrikaanse howe nog altyd nasionale howe is, anders as die ISH wat 'n internasionale hof is, en dat die internasionale regsbeginsel van staatsoewereiniteit beperkinge mag plaas op die vermoë van die howe om internasionale jurisdiksie uit te oefen oor internasionale misdade gepleeg in buitelandse State.

In die lig van die bogenoemde aannames, ondersoek hierdie studie drie aangeleenthede. In die eerste plek, het die Suid-Afrikaanse howe dieselfde magte as die ISH in terme van die ignorering van immuniteite van buitelandse amptenare wat in terme van internasionale gemeenregtelike reg, gekoppel is aan hulle funksies of status? Tweedens, is Suid-Afrikaanse howe geregtig, soos die ISH, om immuniteit wat deur buitelandse state toegestaan is te negeer, as deel van 'n van proses van nasionale versoening, of as 'n maatreël om die oortreders te beskerm teen vervolging deur die ISH? In die finale instansie, het die Suid-Afrikaanse howe die reg, soos die ISH, om 'n saak te heropen en weer te vervolg wat reeds in 'n buitelandse hof vervolg is, maar dan met die doel om die aangeklaagde te beskerm teen misdadige aanspreeklikheid, of om op te tree in gevalle waar dit mag voorkom of die opgelegde vonnis nie toepaslik is in terme van die erns van die misdaad nie?

KEY WORDS

Rome Statute - complementarity – universal jurisdiction – State sovereignty – international crimes - immunity – amnesty – *ne bis in idem* – double jeopardy

TREFWOORDE

Statuut van Rome - aanvullendheidsbeginsel – universele jurisdiksie –
staatsoewereiniteit– internasionale misdade – immuniteit – amnestie – *ne bis in idem* –
dubbele gevaarstelling

LIST OF ACRONYMS AND ABBREVIATIONS

ACHR: American Convention on Human Rights

All ER: All England Law Reports

ANC: African National Congress

Art: Article

CIA: Central Intelligence Agency

CISA: Convention on the Implementation of the Schengen Agreement

DRC: Democratic Republic of the Congo

ECJ: European Court of Justice

ECPHR: European Convention for the Protection of Human Rights and Fundamental Freedoms

UN ESC: United Nations Economic and Social Council

EU: European Union

FIDH: *Fédération Internationale des Droits de l'Homme* (International Federation for Human Rights)

FIS: *Front Islamiste du Salut* (Islamic Salvation Front)

FSIA: Foreign Sovereign Immunities Act of 1976

GA: General Assembly

HRC: Human Rights Committee

Inter-American CHR: Inter-American Court of Human Rights

ICC: International Criminal Court

ICCLR: International Centre for Criminal Law Reform & Criminal Justice Policy

ICJ: International Court of Justice

ICCPR: International Covenant on Civil and Political Rights

ICRC: International Committee of the Red Cross

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

ILC: International Law Commission

ILDC: International Law in Domestic Courts

ILR: International Law Reports

ILM: International Legal Materials

LRA: Lord's Resistance Army

LRTWC: Law Reports of Trials of War Criminals

MDC: Movement for Democratic Change

NP: National Party

OAU: Organisation of African Unity

PCIJ: Permanent Court of International Justice

SC: Security Council

SCSL: Special Court for Sierra Leone

TRC: Truth and Reconciliation Commission

UN: United Nations

UNISA: University of South Africa

USC: United States Code

Vol: Volume

WLR: Weekly Law Reports

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CHAPTER 1

INTRODUCTION AND PROBLEM STATEMENT

[t]he stem and roots of international criminal law and justice draw nourishment from the soil of State sovereignty. This should not be ignored as the champions of the international criminal justice movement seek to extend and branch out the reach of substantive and personal jurisdiction for core international crimes.⁴

1.1 Introduction

1.1.1 Contextual background

Throughout the history of humankind, millions of men and women have perished as a result of atrocities of genocides, crimes against humanity and war crimes.⁵ Recognising that these crimes must no longer go unpunished, representatives of 148 States convened in Rome, Italy, on 17 July 1998 and by a vote of 120 to seven,⁶ with twenty-one abstentions, voted to adopt the Rome Statute of the International Criminal Court (hereafter referred to as the Rome Statute).⁷

The Rome Statute⁸ sets out the structure and powers of the first ever permanent international criminal tribunal whose aim is to put an end to impunity for the perpetrators of gross violations of human rights (hereafter referred to as international crimes) and thereby contribute to the prevention of such horrible crimes.⁹ The International Criminal Court (hereafter referred to as the ICC) has jurisdiction to try persons accused of

4 Bergsmo and Yan "On State Sovereignty and Individual Criminal Responsibility for Core International Crimes in International Law" 11.

5 Preamble to the Implementation Act.

6 The seven States which voted against the ICC are the United States, China, Israel, Qatar, Libya, Iraq and Yemen. Jessica "Human Rights" 280.

7 Newton 2001 *Military Law Review* 23 and Farbstein "The Issue of Complementarity" 7.

8 *Rome Statute of the International Criminal Court* (1998) (hereafter Rome Statute).

9 Preamble to the Rome Statute para 5: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

genocide, crimes against humanity, war crimes and, under some conditions, the crime of aggression.¹⁰

Because of its mandate and its enforcement powers, the ICC has been hailed as a major advance on the road towards individual accountability for the perpetration of the most heinous violations of human rights (international crimes) and thus as a major contribution to the prevention of such horrible crimes.¹¹ In particular, the ICC has been given three powers that may have a significant impact in the struggle against the culture of impunity that has plagued the world in the past. First, the Rome Statute provides that the ICC has the power to disregard immunities of any State officials, including heads of State and heads of governments.¹² It is pursuant to this provision that an arrest warrant has been issued against President Al Bashir of Sudan.¹³ It is also by virtue of this provision that a case has been opened against President Uhuru Kenyatta of Kenya,¹⁴ and his Vice-President, William Ruto.¹⁵ Secondly, in order to fight the culture of impunity for grave violations of human rights, the ICC can prosecute persons despite a domestic law granting them amnesty for the crimes over which it has jurisdiction.¹⁶ Thirdly, the ICC has the power to retry a case which has already been tried in a domestic court of a State, if it is established that the proceedings at the national level were undertaken “for the purpose of shielding the person concerned from criminal responsibility” or were otherwise conducted “in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”.¹⁷

The above provisions rejecting immunities, amnesties and “sham trials” are powerful instruments that States Parties have put in the hands of the ICC to allow it to eradicate impunity of perpetrators of the most serious violations of human rights and contribute to the creation of a world which is free from such atrocities. It is a sad fact to note,

10 ICCLR “International Criminal Court” 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 *Resolution RC/Res 6 The Crime of Aggression* (2010).

11 Cassese “From Nuremberg to Rome” 18.

12 Art 27 Rome Statute.

13 *The Prosecutor v Omar Hassan Ahmad Al Bashir* Second Decision on the Prosecution's Application for a Warrant of Arrest ICC-02/05-01/09-94 (12 July 2010).

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

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

16 See 4.4.1.2 hereunder.

17 Art 20(3) Rome Statute.

however, that with its limited resources in terms of human and financial means, the ICC will not be able to deal with all perpetrators of the crimes that come under its jurisdiction wherever such crimes are committed throughout the world.¹⁸ For this reason, the struggle to end impunity for international crimes will always need combined efforts by the ICC and national courts.¹⁹ This reality was recognised by the drafters of the Rome Statute who, in the preamble and article 1 of the Statute, stated that the jurisdiction of the ICC is “complementary” to national courts and that States Parties retain the primary responsibility for the repression of international crimes.²⁰

1.1.2 *The complementarity regime of the Rome Statute*

1.1.2.1 Meaning of “complementarity”

In terms of the complementarity regime of the Rome Statute, the primary responsibility for enforcing international criminal law rests with States Parties, not the ICC.²¹ The ICC was not intended to replace national courts; it will rather act alongside national courts which are primarily entrusted with the task of prosecuting international crimes.²² It was created as a “reserve court”²³ which acts only when States are “unable or unwilling” to prosecute.²⁴

18 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 37.

19 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 37.

20 Art 1 Rome Statute: “An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions”. The Preamble also recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” (para 6), and that the “International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions” (para 10).

21 Farbstain “The Issue of Complementarity” 52.

22 Kourula “Universal Jurisdiction for Core International Crimes” 132.

23 Wouters “The Obligation to Prosecute” 3.

24 To this end, article 17(1)(a) of the Rome Statute provides that a case shall be inadmissible before the Court 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 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

1.1.2.2 The rationale of the complementarity regime of the ICC

The complementarity provisions of the Rome Statute foster not only the responsibility but also the “priority” of States in initially prosecuting crimes under the jurisdiction of ICC.²⁵ This regime strikes a balance between two competing interests, namely State sovereignty and the need for ending impunity for serious crimes under international law.²⁶ By granting primacy to national courts, the principle of complementarity protects States Parties’ jurisdictional sovereignty.²⁷ It ensures that, when sovereignty is properly exercised, i.e. when States avail themselves genuinely of their sovereign right to investigate and prosecute, international judicial intervention is both unnecessary and unjustified.²⁸

The balance between the two interests (sovereignty and the fight against impunity) was crucial to the materialisation of the ICC.²⁹ In order to secure the agreement of States to establish the ICC, it was necessary to offer national courts of States Parties the primary responsibility over the prosecution of international crimes.³⁰ Only when sovereignty is “abused” the ICC is allowed to bridge the gap.³¹

1.1.2.3 Advantages of complementarity

The complementarity regime of the Rome Statute has a number of advantages. First, due to the fact that the ICC, a single court with only 18 judges, may have a very limited capacity to deal with mass violations of human rights throughout the world, national courts

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.

25 Carter 2010 *Santa Clara Journal of International Law* 168.

26 Ferencz 1998 *Pace International Law Review* 227 and Zeidy 2002 *Michigan Journal of International Law* 905.

27 Yang 2005 *Chinese Journal of International Law* 122; Benzing 2003 *Max Planck Yearbook of United Nations Law* 595; Stigen *The Principle of Complementarity* 16 and Newton 2001 *Military Law Review* 32.

28 Stigen *The Principle of Complementarity* 18.

29 Ferencz 1998 *Pace International Law Review* 227 and Philippe 2006 *International Review of the Red Cross* 381.

30 Bergsmo, Bekou and Annika 2010 *Goettingen Journal of International Law* 795 and Waynecaurt-Steele 2002 *South African Yearbook of International Law* 10. See also Pensky 2008 *Ethics and Global Politics* 16 and Ofei *The International Criminal Court* 11.

31 Stigen *The Principle of Complementarity* 17.

must be the primary method of enforcing the provisions of the Rome Statute.³² If the ICC had to deal with all the perpetrators of international crimes, it would be flooded with cases and would become ineffective as a result of an excessive and disproportionate workload.³³ Thus, complementarity eases the burden of the ICC's caseload.³⁴

Secondly, complementarity avoids unnecessary duplication of efforts at the national and international levels. By giving primacy to the national courts, the complementarity principle avoids simultaneous interventions by the ICC and domestic courts, thereby guaranteeing that all financial expenses and other efforts of the ICC will always be justified.³⁵

Thirdly, provided that the proceedings at the national level are conducted genuinely, national courts are the best suited to undertake prosecutions of international crimes since they are closer to the scene of the crime and, therefore, have greater access to evidence, both real and testimonial.³⁶

Finally, commentators believe that the complementarity principle will contribute to the eradication of the culture of impunity for international crimes.³⁷ Just as extradition treaties say "prosecute or extradite",³⁸ the Rome Statute is based on the rule "prosecute or risk international interference".³⁹ Thus, in order to pre-empt such interference, States must proceed genuinely.⁴⁰ This might contribute to the gradual development of a culture

32 Cassese 1999 *European Journal of International Criminal Law* 158; Waynecaurt-Steele 2002 *South African Yearbook of International Law* 21-22; Stigen *The Principle of Complementarity* 18; Steynberg *et al Criminal Law* 568 and Ofei *The International Criminal Court* 11.

33 Zeidy 2002 *Michigan Journal of International Law* 905.

34 Coalition for the International Criminal Court Date Unknown
http://www.iccnw.org/documents/FS_CICC_Implementation_Legislation_en.pdf

35 Stigen *The Principle of Complementarity* 17.

36 Acirokop *Accountability for Mass Atrocities* 92; Gioia 2006 *Leiden Journal of International Law* 1115 and Waynecaurt-Steele 2002 *South African Yearbook of International Law* 20.

37 Benzing 2003 *Max Planck Yearbook of United Nations Law* 596; Burke-White 2008 *Harvard International Law Journal* 58; Stigen *The Principle of Complementarity* 473 and Stahn 2008 *Criminal Law Forum* 92.

38 The Geneva Conventions require States to search for persons alleged to have committed, or ordered to have committed, grave breaches and to try or extradite them. Art 49 Geneva Convention (I); art 50 Geneva Convention (II); art 129 Geneva Convention (III) and art 146 Geneva Convention (IV).

39 Stigen *The Principle of Complementarity* 473. See also Stahn 2008 *Criminal Law Forum* 92.

40 Stahn 2008 *Criminal Law Forum* 97-98 and Stigen *The Principle of Complementarity* 473.

where genuine national trials become the norm and not the exception.⁴¹ As Burke-White⁴² says:

[B]efore the ICC, national courts had the choice of either prosecuting international crimes or allowing impunity. For a variety of political reasons, such courts often chose - or were forced to choose - impunity. With the creation of the ICC, however, the choice is very different. National courts can either prosecute the crimes themselves - ensuring some level of control over the proceedings and possibly greater acceptance by the local population - or the ICC may step in and prosecute. Many national courts would rather maintain control over the prosecution themselves. With these choices, national courts should be far more likely to act themselves and motivated, to clean up their own messes at home in order to avoid ICC action.⁴³

1.1.2.4 Abuse of sovereignty by territorial States, the ICC limited resources and the need for intervention by foreign States under the principle of universal jurisdiction

While the above views on the advantages of the complementarity regime of the Rome Statute are correct, however, it must also be kept in mind that international crimes are often committed by State agents as part of State policy, and so governments hardly ever prosecute their own officials engaged in such actions.⁴⁴ Even where trials are conducted, the accused persons are often acquitted through what is generally referred to as “sham trial”.⁴⁵ Moreover, states may grant amnesties to the perpetrators of

41 Stigen *The Principle of Complementarity* 18. See also Benzing 2003 *Max Planck Yearbook of United Nations Law* 596 and Burke-White 2008 *Harvard International Law Journal* 58.

42 Burke-White 2003 *ILSA Journal of International and Comparative Law* 201

43 Referring to this, Luis Moreno-Ocampo, the first ICC Prosecutor, once said: “[A]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success”. See Moreno-Ocampo “Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC” 2. See also Gioia 2006 *Leiden Journal of International Law* 1115.

44 Akande 2011 *European Journal of International Law* 816. See also Cassese *International Criminal Law* 2nd ed 307: “[T]oday, more so than in the past, it is state officials, and in particular senior officials, that commit international crimes. Most of the time they do not perpetrate crimes directly. They order, plan, instigate, organize, aid and abet, or culpably tolerate or acquiesce or willingly or negligently fail to prevent or punish international crimes”. See also Schabas *An Introduction* 1: “Prosecution for war crimes, however, was only conducted by national courts, and these were and remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated. Historically, the prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor’s army. National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases”.

45 Carter 2010 *Santa Clara Journal of International Law* 194; Finlay 2009 *University of California Davis Journal of International Law and Policy* 235; Calvo-Goller *The Trial Proceedings* 175; Spinellis 2002 *Revue Internationale de Droit Pénal* 1159; Van den Wyngaert and Ongena “Ne bis in idem Principle, including the issue of Amnesty” 724 and Macedo *et al* “Princeton Principles” 33.

international crimes, thereby ensuring that they will never be held accountable for their crimes in the domestic courts of their countries.

In view of the above realities, one should be cautious not to overstate the advantages of complementarity. Putting too much reliance on the states where international crimes are committed to punish perpetrators of such crimes may rather exacerbate the culture of impunity for gross violations of human rights and that would perpetuate the culture of impunity in which “human rights violations persist and are not deterred”.⁴⁶ In order to counter this culture of impunity, the ICC, pursuant to the principle of complementarity, would need to step in and take over the matters on its own. As stated above,⁴⁷ however, the ICC, with its limited resources, may not have the capacity to deal with all perpetrators of international crimes wherever such crimes are committed in the world. For this reason, enforcement of international criminal law must resort to the third avenue: the domestic courts of other (foreign) States.⁴⁸ The power that international law grants to States to exercise their criminal jurisdiction over international crimes committed abroad by foreigners and against foreigners, and without any other direct link with the prosecuting State is known as “universal jurisdiction”.⁴⁹

1.1.2.5 The complementarity regime of the Rome Statute and universal jurisdiction

When the courts of a State exercise universal jurisdiction, they are acting as agents of the international community in the prosecution of persons considered as enemies of all mankind in whose punishment the whole world has an interest.⁵⁰ Although not expressly referred to, the importance of universal jurisdiction in the fight against the culture of impunity for perpetrators of international crimes is impliedly recognised in the Rome Statute. Article 17(1) (a) of the Rome Statute provides that the ICC shall determine that a case is inadmissible 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.

46 Akande 2011 *European Journal of International Law* 816.

47 See 1.1.2.3 above.

48 Akande and Shah 2011 *European Journal of International Law* 816.

49 Philippe 2006 *International Review of the Red Cross* 377.

50 Dugard *International Law* 154.

Thus, the Rome Statute gives priority to any willing and able State, without requiring any particular link to the crime, including States exercising universal jurisdiction.⁵¹ This study seeks to determine the extent to which South African courts are able to make a contribution in this regard.

1.2 Statement of the problem

1.2.1 Introduction

In order to give effect to the complementarity principle of the Rome Statute, South Africa passed 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 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. Section 4(3) of the Act provides as follows:

[...] any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-

- (a) that person is a South African citizen; or
- (b) that person is not a South African citizen but is ordinarily resident in the Republic;
- (c) that person, after the commission of the crime, is present in the territory of Republic; or
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

By granting South African courts jurisdiction over a person who commits a crime outside the Republic and that person is later found on South African territory (paragraph c), 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 study seeks to determine the extent to which the international law principle of State sovereignty may or may not limit the ability of South African courts to exercise universal jurisdiction over international crimes committed in foreign States. Three issues will be investigated. Firstly, do South African courts have the same

51 Burke-White 2003 *ILSA Journal of International and Comparative Law* 203; Stigen *The Principle of Complementarity* 477. See also Demeyele, Verhoeven and Wouters "The International Criminal Court's Office of the Prosecutor" 364.

powers, as the ICC has, to disregard immunities of foreign States' officials which, under international customary law, attach to their functions or status? Secondly, are South African courts entitled, as the ICC is, to disregard amnesties granted by foreign States, either for the sake of national reconciliation or simply as a means to shield the criminals from prosecution by the ICC? Finally, are South African courts entitled, as the ICC is, to retry a case which has already been tried in a foreign country but only with the aim of shielding the accused from being tried by the ICC or where, for example, the sentence imposed was too lenient if the gravity of the crime is considered? These issues are explored in more detail hereunder.

1.2.2 *The problem of foreign immunities*

One of the fundamental principles on which international law and international relations rest is that of State sovereignty. The Charter of the United Nations⁵² (hereafter referred to as the UN Charter) reaffirms this principle, stating that the Organization is based on the principle of the "sovereign equality" of all its Members.⁵³ One of the consequences of this principle is the respect due by a State to the officials of another State. One way this respect is symbolised is by granting to state representatives, especially high-ranking officials such as heads of State and ministers of foreign affairs, immunity from the courts of foreign States.⁵⁴

The international law rule of immunity that State officials are accorded before the courts of foreign States was reaffirmed in *Democratic Republic of the Congo v Belgium*⁵⁵ (herein referred to as the *Arrest Warrant* case) which arose before the International Court of Justice (ICJ) between the Democratic Republic of the Congo (DRC) and Belgium over the legality of an international arrest warrant issued by Belgian authorities against Mr Abdulaye Yerodia Ndombasi, then the foreign affairs minister of the DRC. This warrant had been issued pursuant to a 1993 Belgium statute concerning the

52 *Charter of the United Nations* (1945).

53 Article 2(1) UN Charter.

54 Akande 2004 *American Journal of International Law* 407.

55 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Judgement 2002 ICJ 3 (14 February 2002). The case shall be referred to hereafter as the *Arrest Warrant* case.

punishment of grave breaches of international humanitarian law.⁵⁶ The warrant alleged that prior to becoming foreign affairs minister, Yerodia was the perpetrator or co-perpetrator of crimes against humanity and of war crimes under the Geneva Conventions of 1949 and Additional Protocols I and II. In particular, 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.⁵⁷ The ICJ ruled that, under customary international law, foreign ministers and other high-ranking officials such as the head of State, have immunity from prosecution in foreign national courts while in office,⁵⁸ and ordered Belgium to cancel the arrest warrant.⁵⁹

Immunity may relate either to conduct of State agents acting in their official capacity (functional immunity or immunity *ratione materiae*) or the protection of the private life and honour of a State official (personal immunity or immunity *ratione personae*).⁶⁰ Functional immunity is enjoyed by all foreign officials, regardless of rank,⁶¹ in regard to the acts performed in an official capacity.⁶² It is grounded in the notion that States must not interfere with the allegiance that a State official may owe to his State,⁶³ and, for that reason, this immunity does not cease even when the official leaves government service.⁶⁴ A question arises, however, whether this immunity also covers serious violations of human rights that constitute the crimes of genocide, crimes against

56 *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 05 August 1993).

57 Orakhelashvili 2002 *American Journal of International Law* 677.

58 The Court held (at 33) that: "the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law".

59 *Arrest Warrant* case 33.

60 Knushel 2011 *Northwestern Journal of International Human Rights* 151 and Murungu *Immunity of State Officials* 35.

61 Knushel 2011 *Northwestern Journal of International Human Rights* 151.

62 Dugard *International Law* 253.

63 Cassese *International Criminal Law* 302.

64 Knushel 2011 *Northwestern Journal of International Human Rights* 152; Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law* 612 and Murungu *Immunity of State Officials* 36. See also Foakes "Immunity for International Crimes?" 8: "All state officials, including those who do not enjoy personal immunity while in office, are entitled to immunity from the jurisdiction of other states in relation to acts performed in their official capacity. Such immunity attaches to the official act, not to the office of the individual concerned, and can therefore be relied upon by former officials as well as incumbent officials".

humanity and war crimes? May a person accused of such crimes successfully plead this immunity before South African courts exercising their universal jurisdiction in terms of the Implementation Act?

Personal immunity, on the other hand, is granted by international customary law to some categories of individuals on account of their functions and are intended to protect both their private and their public life or, in other words, to render them totally inviolable while in office.⁶⁵ Such individuals comprise heads of State, ministers of foreign affairs and diplomats.⁶⁶ The purpose of this immunity is to ensure that high-ranking officials may “act freely on the inter-state level without unwarranted interference”.⁶⁷ Conversely, since immunity *ratione personae* is connected with the position occupied by the official in government, it is of temporary character and ceases when he or she leaves that post.⁶⁸

The question that arises in regard to immunity *ratione personae* is whether or not such officials may be arrested and tried in the courts of foreign States while they are still in office when they are suspected of having committed serious violations of human rights which constitute international crimes over which all States have universal jurisdiction. The position before international criminal tribunals is that the official position of a state agent, including an incumbent head of State is not a bar to his prosecution.⁶⁹ This 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 Milosevic⁷⁰ and Charles

65 D' Argent “Immunity of State Officials and Obligation to Prosecute” 5.

66 Cassese *International Criminal Law* 2nd ed 302

67 Knushel 2011 *Northwestern Journal of International Human Rights* 151 and Foakes “Immunity for International Crimes?” 4.

68 Markovich 2009 *Potentia* 59; Wickremasinghe “Immunities” 390; Steynberg *et al Criminal Law* 579 and Bantekas and Nash *International Criminal Law* 169.

69 Dugard *International Law* 251; Steynberg *et al Criminal Law* 580; Jia 2012 *Journal of International Criminal Justice* 1318 and Shaw *International Law* 655-656.

70 *The Prosecutor v Slobodan Milosevic Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlatko Stojiljkovic* Decision on review of indictment and application for consequential orders ICTY IT-05-87-PT (24 May 1999).

Taylor⁷¹ when they were still serving as heads of State. This rule was also affirmed by the ICJ in the *Arrest Warrant* case,⁷² where the court stated 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.

This principle is also enshrined in article 27(2) of the Rome Statute which provides that:

immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The question which arises is whether South African courts, acting under the complementarity regime of the Rome Statute, are also entitled to prosecute those persons who, according to international customary law enjoy immunity *ratione personae* from the courts of foreign States, but whose immunity would be irrelevant if they were prosecuted before the ICC in terms of article 27(2) of the Rome Statute. Section 4(2) of the Implementation Act provides as follows:

Despite 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.

Some have interpreted this article as entitling South African courts to disregard immunities of foreign officials accused of international crimes. Du Plessis⁷³ says that South African courts, acting under the complementarity principle, “are accorded the same power to 'trump' the immunities which usually attach to officials of government”. This, he argues, signals South Africa's intention of “acting hand in hand” with the ICC in

71 *Prosecutor v Charles Ghankay Taylor* Decision Approving the Indictment and Order for Non-Disclosure SCSL-2003-01-I (7 March 2003). The case shall be referred to hereafter as the *Taylor* case.

72 *Arrest Warrant* case para 61.

73 Du Plessis 2003 *South African Journal Criminal Justice* 6.

bringing State officials, “whatever their standing”, to justice.⁷⁴ This interpretation has also received judicial endorsement in *Southern African Litigation Centre v National Director of Public Prosecutions*⁷⁵ 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.⁷⁶

It should be noted, however, that in the *Taylor* case referred to by Fabricius J, the accused, Charles Taylor, was in fact prosecuted before the Special Court for Sierra Leone (not the ICC as mentioned by Fabricius J) which is an international criminal tribunal,⁷⁷ while the Implementation Act deals with the prosecution of international crimes in South African courts.⁷⁸ In addition, the wording of Section 4(2) of the Implementation Act is not as unequivocal as article 27(2) of the Rome Statute. While the Rome Statute provides that the position of a person accused of international crimes before the ICC “shall not bar the Court from exercising its jurisdiction over such a person”, section 4(2) of the Implementation Act only provides that the official position of a person shall not be “a defence to a crime”. Does section 4(2) of the Implementation Act carry the same meaning as article 27(2) of the Rome Statute? If yes, would that be consistent with the principle of “sovereign equality” of states in international law? Would it also be consistent with the UN Charter’s aim of developing “friendly relations among nations based on respect for the principle of equal rights”, and to “strengthen universal peace”?⁷⁹ If no, which law should be applied should a case concerning immunity *ratione*

74 In support of the view that immunities (whether functional or personal) do not apply when a State official is accused of international crimes in foreign States, see Lee “Universal Jurisdiction” 24.

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

76 2012 JDR 0822 (GNP) 129.

77 The Special Court for Sierra Leone (hereafter SCSL) was set up jointly by the government of Sierra Leone and the United Nations (Security Council Resolution 1315 of 14 August 2000). By Resolution 1688 of 16 June 2006 the Security Council determined that the presence of Charles Taylor in Sierra Leone was an impediment to stability and a threat to the peace of Liberia, Sierra Leone and of the region in general, and then transferred the trial by the Special Court to the building of the ICC in The Hague.

78 In the *Taylor* case the accused had applied to the SCSL to quash his Indictment and set aside the warrant for his arrest on the grounds that he was immune from any exercise of the jurisdiction of the Court by virtue of the fact that at the time the indictment and the warrant of arrest were issued he was a sitting Head of State. The Appeals Chamber rejected Taylor’s application on the ground that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal. *Prosecutor v Charles Ghankay Taylor* Decision on Immunity from Jurisdiction SCSL-2003-01-AR72(E) (31 May 2004) para 52. See also Akande 2009 *Journal of International Criminal Justice* 335.

79 Art 1(2) UN Charter.

personae of a foreign State official arise before a South African court? If this immunity should be granted, which, apart from the head of State, ministers of foreign affairs and diplomats, are the other foreign State officials who are entitled to this immunity? Should this immunity also be granted when those officials are in South Africa on private visits?

1.2.3 *The issue of amnesties granted by foreign countries*

Equally important is the question of amnesties which may promote the culture of impunity and weaken the deterrent effect of international criminal law. The Rome Statute does not address the question of amnesties. No provision is made for lack of jurisdiction, or otherwise, by the ICC over a case in the event that a person has been granted amnesty under the domestic law of a State.⁸⁰ However, although the Rome Statute does not contain any express provision to this effect, the ICC has implied powers to disregard domestic amnesties when international crimes are concerned. This power can be implied from articles 20(2) and 17 (1)(a) of the Rome Statute which provide, respectively, that a case may be inadmissible before the ICC only if the person concerned has already been tried for the same crime by a national court or the case is being investigated or prosecuted by a State which has jurisdiction. Since amnesty laws preclude the possibility for national authorities to investigate a case for the purposes of trial and punishment, such amnesties cannot bar a case from being admissible before the ICC.⁸¹

The question that comes to the fore is whether South African courts are also able to make a contribution to the effort to combat impunity for international crimes by exercising their universal jurisdiction over persons accused of such crimes which have been the subject of amnesties in foreign States. There is no consensus among human rights organisations and scholars as to whether or not national amnesties for international crimes must be accorded recognition in foreign States by refraining from exercising universal jurisdiction over the persons who have been granted the amnesties

80 Dugard "Possible Conflicts with Truth Commissions" 700; Werle *International Criminal Law* 78 and Rakate *The Duty to Prosecute and the Status of Amnesties* 191.

81 Rakate *The Duty to Prosecute and the Status of Amnesties* 193; Robinson 2003 *European Journal of International Law* 485; Akande 2003 *Journal of International Criminal Justice* 643; Arsanjani 1999 *American Society of International Law* 67 and Hafner 1999 *European Journal of International Law* 108.

in question. Amnesty International,⁸² for example, argues that national amnesties or similar measures of impunity for crimes under international law are contrary to international law and that they cannot bind the ICC or the courts of other States. This human rights organisation says that States Parties should neither take such measures nor recognise them when they have been taken by other States.⁸³ At the other end of the spectrum, some argue that amnesties may “contribute to the achievement of peace and justice in a society in transition more effectively than mandatory prosecution”,⁸⁴ and that, for that reason, national amnesties for international crimes should receive some international recognition.⁸⁵ This argument is borne out in the South Africa’s own experience. South Africa resorted to amnesties in order to facilitate the transition from apartheid to the new constitutional era. As a matter of fact, the amnesties were negotiated by the Apartheid regime and were granted by the subsequent regime as a means to facilitate the transition process and achieve enduring peace. As Varushka⁸⁶ says, the process was a balancing exercise between a “painful past and a peaceful future”.

The need for balancing the requirements of retributive justice and the imperatives of peace and reconciliation was also judicially endorsed by the Constitutional Court which, in *AZAPO v President of the Republic of South Africa*,⁸⁷ noted that the amnesties in South Africa were a crucial component of the negotiated settlement itself, without which the Constitution would not have come into being. The Court reasoned as follows:

[b]ut for a mechanism providing for amnesty, the “historic bridge” itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a “democratic society based on freedom and equality”. If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that

82 Amnesty International “The International Criminal Court: Checklist for Effective Implementation” 6-7.
83 Amnesty International “The International Criminal Court: Checklist for Effective Implementation” 6-7.
84 Dugard 1999 *Leiden Journal of International Law* 1002.
85 Stigen *The Principle of Complementarity* 463-464; Trumbull 2007 *Berkeley Journal of International Law* 319 and Lubbe *Successive and Additional Measures* 32.
86 Varushka *The Truth and Reconciliation Commission* 1.
87 *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC).

those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.⁸⁸

However, unlike the TRC's amnesties, amnesties may also be used by regime dignitaries in order to shield themselves from criminal liability without promoting any legitimate political or social ends. For example, authoritarian governments who are on the verge of decline and whose members are concerned that they will be held accountable for human rights abuses that occurred during their reign often pass amnesty laws shortly before leaving office in an effort to prevent prosecution in the future.⁸⁹ A classical example of a self-awarded amnesty is the amnesty that Chilean president Augusto Pinochet passed by Decree 2191 of 1978 covering crimes committed during Pinochet's first five years of power, namely 1973 to 1977. The amnesty was passed by the Parliament in 1978 to prevent the prosecution of individuals implicated in a number of criminal acts committed between 11 September 1973 and 10 March 1978. This was the period of the state of siege during which systematic and widespread human rights violations, including torture, "disappearance" and extrajudicial executions were committed by the Chilean security forces.⁹⁰ For all purposes, the amnesty law was a legal manoeuvre by the military government to protect its members against future prosecutions for these crimes.⁹¹

Amnesties may also be granted in order to mark anniversaries, national holidays or elections,⁹² or to simply avoid overcrowding in prisons.⁹³ If these kinds of amnesties are granted to perpetrators of international crimes there is clearly a need for the ICC to step in and try the persons concerned. Since the ICC may not have the means to try all the persons involved, however, a question arises as to whether South African courts, acting under the principle of complementarity, are able to bring their contribution to the fight against impunity by exercising their universal jurisdiction over the persons who have been granted such amnesties in foreign countries. More specifically, the question is

88 1996 4 SA 685. In the light of this view, the Constitutional Court held that the amnesty was justified and, therefore, not unconstitutional (1996 4 SA 698).

89 King 2010 *George Washington International Law Review* 583.

90 Amnesty International "Chile: Legal brief" 1.

91 Amnesty International "Chile: Legal brief" 2.

92 ESC "Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights" 9.

93 ESC "Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights" 8. See also O'Shea *Amnesty* 6.

whether the international law principle of “sovereign equality” allows courts of one State to disregard an amnesty law of another “sovereign”?

1.2.4 *Retrial of cases already tried in foreign countries*

Another controversial issue which may arise before South African courts hearing cases arising from international crimes committed in foreign countries, is whether they are entitled to retry a case which has been tried by the courts of a foreign State if it is established that the trial was just a means of shielding the accused from being tried by the ICC. A “sham” trial may take place in various ways: first, this may occur where “fraudulent proceedings” are conducted and the accused person is acquitted or, if convicted, no sentence is imposed or only a derisory sentence is imposed.⁹⁴

A situation of inadequate sentences for perpetrators of international crimes can be best illustrated by reference to the way the government of Rwanda handled the genocide cases through the so-called *Gacaca* courts. These courts, which started in June 2003 and closed on 18 June 2012,⁹⁵ imposed sentences as low as six months’ imprisonment plus six months of “community work” for those who committed murder during genocide but pleaded guilty and demanded pardon before the *Gacaca* courts.⁹⁶ The Rome Statute provides that the ICC would retry a case if the proceedings at the national level were undertaken “for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court”,⁹⁷ or were conducted in a manner which, in the circumstances, was “inconsistent with an intent to bring the person concerned to justice”.⁹⁸

Clearly, a sentence of six months’ imprisonment in a case of genocide is not consistent with an intent to “bring the person concerned to justice” as required in article 20(3) of the Rome Statute. The Government of Rwanda justified these lenient sentences on the grounds that reduced sentences would encourage people to confess and tell the truth about what happened during the genocide and that knowing the truth would be a main

94 These cases are discussed in detail in 5.7 hereunder.

95 Human Rights Watch “Country Summary: Rwanda” 2.

96 Art 73 para 2 (3^o) Organic Law n°16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed between 1 October 1990 and 31 December 1994 (Official Gazette N°special of 19/06/2004).

97 Art 17(2)(a) Rome Statute.

98 Art 20(3) Rome Statute.

tool for reconciliation in Rwandan society.⁹⁹ However, the Rome Statute does not recognise any exception to the obligation for States to impose punishments that are commensurate with the gravity of the crimes over which it has jurisdiction. If it is determined that a trial was “inconsistent with an intent to bring the person concerned to justice”, the concerned person may be retried by the ICC. As stated earlier,¹⁰⁰ however, the ICC with its limited resources may not have the means to remedy all sham trials conducted around the world. In the Rwandan situation alone, more than 1.2 million cases were tried through Gacaca.¹⁰¹ The ICC clearly lacks the necessary resources to retry these cases. Consequently, a need arises for the courts of foreign States, including South African courts, to exercise their universal jurisdiction and retry such case. But is that allowed under customary international law? In other words, does the international law principle of State sovereignty allow courts of one State to retry a case that has been already tried in a foreign country? Wouldn't that constitute interference in domestic matters of a State?¹⁰²

A related question is whether such retrial is actually allowed under South Africa's own law. While international law may permit courts of a State to retry a case which has already been tried in another country, it is the national laws of that State that actually authorize such retrial before its courts.¹⁰³ This question is particularly important in regard to South African law. Section 35(3) of the *Constitution of the Republic of South Africa*, 1996 provides that:

Every accused person has a right to a fair trial, which includes the right—

[...]

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.

Does the above provision also apply to the judgements of foreign courts, in which case South African courts would be barred, not by international law but by South Africa's own law, from contributing to the eradication of the culture of impunity in regard to international crimes which were the subject of “sham trials” in foreign States? If yes, would an exception to section 35(3)(m), allowing South African courts to retry such

99 Penal Reform International “Research Report on Gacaca Courts”.

100 See 1.1.2.3 above.

101 Human Rights Watch “Country Summary: Rwanda” 2.

102 Art 2(7) UN Charter.

103 Lamprecht *Adjudication of International Crimes* 259.

sham trials, be constitutionally justified? And if yes, to what extent should the exception be allowed to operate?

1.3 Objectives of the study

The purpose of this study is to determine the extent to which South African courts are, in the light of the international law principle of State sovereignty, empowered to exercise universal jurisdiction over persons accused of international crimes committed in foreign States. In order to achieve this primary objective, the following secondary objectives are set:

- (1) to determine whether South African courts are empowered to disregard immunities which international law ordinarily grants to officials of foreign States;¹⁰⁴
- (2) to critically analyse whether and to what extent South African courts can disregard amnesty laws passed by foreign States to persons accused of international crimes;¹⁰⁵
- (3) to determine whether South African courts are empowered to retry a case already tried in a foreign State if it is established that such a case falls under one of the situations defined in article 20(1)(c) of the Rome Statute and that the ICC would thus be called to step in and retry the case if the territorial State is willing and able to do so;¹⁰⁶
- (4) to make appropriate recommendations.¹⁰⁷

1.4 Research methodology

This study consists of a literature survey of international legal instruments, international and domestic case law, domestic legislations, text books, legal journals and internet sources.

104 See Chapter 3 hereunder.

105 See Chapter 4 hereunder.

106 See Chapter 5 hereunder.

107 See Chapter 6 hereunder.

1.5 Framework of the thesis

Apart from this introductory chapter, the study consists of a further five chapters. Chapter 2 traces the historical origins and development of international criminal law that culminated in the creation of the ICC in 1998 and defines the concepts of State sovereignty, complementarity and universal jurisdiction, which are central to this study. Chapters 3, 4 and 5 build on these theoretical foundations and critically analyse the extent to which immunities of foreign States' officials (chapter 3), foreign amnesty laws (chapter 4) and judgments of the criminal courts of foreign States (chapter 5) can be pleaded as bars to the exercise of universal jurisdiction of South African courts over international crimes committed in foreign States. Chapter 6 contains the conclusion of the study and recommendations.

CHAPTER 2

CONCEPTUAL AND THEORETICAL FRAMEWORK

International criminal law cannot operate outside the existing international framework.¹⁰⁸

2.1 Introduction

This study is concerned with the extent to which South African courts, acting under the complementarity regime of the Rome Statute, can exercise universal jurisdiction over international crimes committed in foreign States. Specifically, the study is about the relationship between the international law doctrine of State sovereignty, the principle of complementarity and the right to universal jurisdiction. In particular the study addresses issues concerning the immunities of foreign officials, the amnesty laws passed by foreign states and the judgements of foreign courts.

In order to put the study in context, it is imperative to clarify some concepts which will guide the substantive discussions in the next chapters. These concepts are the complementarity principle,¹⁰⁹ the doctrine of State sovereignty¹¹⁰ and principle of universal jurisdiction.¹¹¹ Before embarking on the discussion of these concepts, however, it is important to first discuss the historical developments that informed and led to the adoption of the Rome Statute.

2.2 Background and overview on the Rome Statute

2.2.1 Background

The history of the establishment of the ICC spans several decades.¹¹² The attainment of this goal has been slow and difficult.¹¹³ Without proceeding to an exhaustive

108 Yitiha *Immunity* 135.

109 See 2.3 hereunder.

110 See 2.4 hereunder.

111 See 2.5 hereunder.

112 Farbstain "The Issue of Complementarity" 7 and Coalition for the International Criminal Court Date Unknown <http://www.iccnw.org/?mod=icchistory>

presentation of this long history, this section will focus on the relevant stages in the development of international criminal law which culminated in the adoption of the Rome Statute in 1998.

2.2.1.1 Early attempts to create an international criminal tribunal after the First World War

The idea of setting up an international criminal tribunal to bring to justice persons accused of gross violations of human rights (which came to be known as “international crimes”) goes back to the aftermath of World War I.¹¹⁴ At the end of World War I, the Treaty of Versailles¹¹⁵ envisaged the establishment of an international criminal tribunal, composed of five judges from the Allied Powers (the United States, Great Britain, France, Italy and Japan) to try William II of Hohenzollern, the former Emperor of Germany,¹¹⁶ for a “supreme offence against international morality and the sanctity of treaties”,¹¹⁷ committed by initiating the war of aggression against other European countries.¹¹⁸ However, the tribunal could not be created as the Netherlands refused to extradite the Emperor.¹¹⁹

2.2.1.2 The inter-war period

During the period between the end of World War I and World War II, the idea of creating an international criminal tribunal resurged, this time in the form of a permanent one.¹²⁰ The proposal was to create a “High Court of International Justice” to try individuals for international crimes “constituting a breach of international public order or against the universal law of nations”.¹²¹ But, although the International Law Association (ILC)

113 O’Shea *Amnesty* 316; Cassese “From Nuremberg to Rome” 4 and Du Plessis “International Criminal Courts” 170.

114 Cassese “From Nuremberg to Rome” 4.

115 *Treaty of Peace between the Allied and Associated Powers and Germany* (1919).

116 Art 227(2) *Treaty of Peace between the Allied and Associated Powers and Germany* (1919).

117 Art 227(1) *Treaty of Peace between the Allied and Associated Powers and Germany* (1919).

118 Farbstain “The Issue of Complementarity” 8.

119 Farbstain “The Issue of Complementarity” 8. Articles 228 and 229 of the Treaty also provided for prosecution before Allied military tribunals of German military personnel accused of violating the laws and customs of war committed during the War. The German government promised to bring the alleged criminals to its own courts and eventually some 12 persons were tried before the *Reichsgericht* (Supreme Court) in Leipzig from 23 May to 16 July 1921 (Mullins *The Leipzig Trials* 23 and Zeidy 2002 *Michigan Journal of International Law* 872). For a more detailed discussion on these trials, see 5.7.1.4 hereunder.

120 Farbstain “The Issue of Complementarity” 9.

121 Marquardt 1995 *Columbia Journal of Transnational Law* 80.

debated proposals for the creation of this court, no final conclusions were ever reached until the time when the Second World War broke out,¹²² leading to the creation of the *ad hoc* international tribunals at Nuremberg and Tokyo.

2.2.1.3 The Nuremberg and Tokyo Tribunals after the Second World War

After World War II, for the first time in history, legal mechanisms were invoked to bring perpetrators of the most serious violations of human rights to justice using international tribunals established for that purpose.¹²³ In August 1945, the victorious Allied Powers (United Kingdom, France, United States and the Soviet Union) convened the London Conference to decide by which means they would punish the perpetrators of the most serious crimes committed by the officials and soldiers of the defeated Axis Powers (Germany, Italy, and Japan) during the war.¹²⁴ On 8 August 1945 an agreement¹²⁵ was reached to create an International Military Tribunal (IMT) for the trial and punishment of the major war criminals of the European axis.¹²⁶ In pursuance of this agreement, the Charter of the International Military Tribunal¹²⁷ was adopted as an annex to the agreement. The IMT judged twenty-two accused persons, of whom nineteen were found guilty and three were acquitted.¹²⁸ Among those convicted, a death sentence was

122 Farbstein "The Issue of Complementarity" 9.

123 Markovich 2009 *Potentia* 57.

124 Cassese "From Nuremberg to Rome" 7 and Lulu "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law" 23. See also Schabas *An Introduction* 5.

125 *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis* (1945).

126 Schabas *An Introduction* 5. This trial is popularly known as the "Trial of the Major War Criminals".

127 *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal* (1951).

128 Zeidy 2002 *Michigan Journal of International Law* 874. The Tribunal tried only "major criminals" and left the minor criminals to internal criminal jurisdictions. This task was undertaken by the Occupying Powers themselves, each within its own zone. In order to establish a minimum common basis for the trials to be conducted in the four zones of occupation, the Allied Control Council, acting as a legislative body for all of Germany, enacted Law No. 10 (Control Council Law N° 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity 20 December 1945 (Official Gazette of the Control Council for Germany N° 3, 31 of January 1946)), a somewhat modified version of the Charter of the International Military Tribunal. This law provided the legal basis for trials of a number of bureaucrats, doctors and soldiers before military tribunals that were run by the occupying regime, as well as for subsequent prosecutions by German courts that continued after the IMT had closed. Control Council Law No 10 largely borrowed the definition of crimes against humanity from the Charter of the Nuremberg Tribunal, but omitted the latter's element of linking crimes against humanity to the existence of a state of war, thereby facilitating prosecution for pre-1939 atrocities committed against German civilians, in particular the persecution of the Jews and euthanasia of the

imposed in twelve cases.¹²⁹ An imprisonment ranging from 10 years to life imprisonment was imposed in the remaining seven cases.¹³⁰

In the Far East (Pacific axis), on 19 January 1946, General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan, proclaimed by way of an executive order,¹³¹ the creation of the International Military Tribunal for the Far East (IMTFE). The Tokyo Charter,¹³² the charter of this tribunal, was issued on the same day. In contrast to the Nuremberg trial, where judges were appointed solely by the four major powers, the United States, the United Kingdom, France and the Soviet Union, at Tokyo, the bench was more cosmopolitan, consisting of judges from eleven countries, including India, China and the Philippines.¹³³

The Tokyo Tribunal was established by virtue of and to implement the Declaration of Potsdam of 26 July 1945,¹³⁴ the Instrument of Surrender of 2 September 1945,¹³⁵ and the Moscow Conference of 26 December 1945.¹³⁶ Paragraph 10 of the Potsdam Declaration provided that at the end of the war:

stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.

Paragraph 6 of the Instrument of Surrender provided for a duty for the Emperor of Japan, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration and to issue whatever orders and take whatever actions may

disabled. See in this regard Schabas *An Introduction* 7 and Zeidy 2002 *Michigan Journal of International Law* 876.

129 Schabas *An Introduction* 6.

130 See *Trial of the German Major War Criminals before the International Military Tribunal Vol I* (Nuremberg 1947) 365-366.

131 *Special Proclamation by the Supreme Commander for the Allied Powers, Establishment of an International Tribunal for the Far East* Annex No A-4 to the Judgment of the International Military Tribunal for the Far East (1946).

132 *Charter of the International Military Tribunal for the Far East* (1946). Before the opening of the Trial the Charter was amended in several respects. A copy of the Charter as amended is found in Annex No A-5 to the Judgment of the International Military Tribunal for the Far East.

133 Schabas *An Introduction* 7.

134 *Proclamation Defining Terms for Japanese Surrender* Annex No A-1 to the Judgment of the International Military Tribunal for the Far East (1945). This Proclamation was issued at Potsdam by the President of the United States of America, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain and later adhered to by the Union of Soviet Socialist Republics.

135 *Instrument of Surrender* Annex No A-2 to the Judgment of the International Military Tribunal for the Far East (1945).

136 *Report of the Meeting of the Ministers of Foreign Affairs of the Union of Soviet Socialist Republics, the United States of America and the United Kingdom* Annex No A-3 to the Judgment of the International Military Tribunal for the Far East (1945).

be required by the Supreme Commander for the Allied Powers for the purpose of giving effect to that Declaration. Paragraph 8 of the same Instrument also provided that the authority of the Emperor of Japan and the Japanese Government shall be subject to the Supreme Commander for the Allied Powers who had powers to take such steps as he deemed proper to effectuate the terms of surrender. By the Moscow Conference, it was agreed that:¹³⁷

[T]he Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan and directives supplementary thereto.

The “Tokyo trial” lasted two and a half years, from May 1946 to November 1948. Twenty-eight (28) men were brought to trial before the IMTFE, including nine civilians and nineteen professional military men.¹³⁸ Two of the twenty-eight defendants died of natural causes during the trial. One defendant suffered a mental breakdown on the first day of trial, was sent to a psychiatric ward and the charges against him were subsequently dropped. The remaining twenty-five were all found guilty of war crimes. Seven (7) were sentenced to death, sixteen to life imprisonment, one to twenty years imprisonment and one to seven years imprisonment.¹³⁹ Three of the sixteen sentenced to life imprisonment died in prison between 1949 and 1950. The remaining thirteen (13) were paroled between 1954 and 1956, after serving less than eight years in prison.¹⁴⁰

At Nuremberg and Tokyo, German and Japanese officials were prosecuted and punished for the newly-created crimes against peace (violations of *jus ad bellum*), war crimes, and crimes against humanity (violations of the laws of war).¹⁴¹ For this reason,

137 *Report of the Meeting of the Ministers of Foreign Affairs of the Union of Soviet Socialist Republics, the United States of America and the United Kingdom Annex No A-3 to the Judgment of the International Military Tribunal for the Far East (1945) para II(B)(5).*

138 China News Digest Date Unknown <http://www.cnd.org/mirror/nanjing/NMTT.html>

139 Cryer *Prosecuting International Crimes* 44.

140 China News Digest Date Unknown <http://www.cnd.org/mirror/nanjing/NMTT.html>

141 Art 6 Charter of the International Military Tribunal (*Charter of the International Military Tribunal Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (1945)*) provided as follows: “The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a. Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

b. War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or

the Nuremberg and Tokyo tribunals have been criticized as legally unjust because they punished the accused persons for wrongs that were “moral” but not “legal” crimes at the time of commission, thereby violating the prohibition against retroactive criminal prosecutions.¹⁴² The two tribunals have also been pilloried as “victor’s justice” because the crimes of the Allied governments escaped the scrutiny of the courts.¹⁴³

Nevertheless, the tribunals have been generally lauded, and represented an important step in the development of international criminal law by, for the first time in history, establishing the principle that individuals could be held directly legally responsible for gross violations of international law.¹⁴⁴ The precedent was set that:

[C]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced.¹⁴⁵

Thus, whatever criticisms may be expressed against the Nuremberg and Tokyo tribunals, these courts were a very important achievement in the history of international criminal justice. For the first time, international tribunals were established for prosecuting and punishing serious crimes that shock the conscience of mankind.¹⁴⁶ Whereas the post-World War I failure to establish an international tribunal showed the extent to which international criminal justice may be compromised by political interests, the post-World War II success in creating the Nuremberg and Tokyo tribunals revealed how effective international criminal justice could be if there is the political will to support it and the necessary resources to make it effective.¹⁴⁷

persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

c. Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”.

142 Schabas *An Introduction* 6 and Jessica “Human Rights” 278.

143 Jessica “Human Rights” 278.

144 Jessica “Human Rights” 278 and Farbstain “The Issue of Complementarity” 11.

145 *Trial of the German Major War Criminals before the International Military Tribunal Vol I* (Nuremberg 1947) 223.

146 Cassese “From Nuremberg to Rome” 8.

147 Cassese “From Nuremberg to Rome” 8.

2.2.1.4 Adoption of the Genocide Convention and the idea of a permanent international criminal tribunal

On the heels of the Nuremberg and Tokyo Tribunals came the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in 1948,¹⁴⁸ which officially recognised genocide as a crime under international law.¹⁴⁹ The Convention also provided that persons accused of genocide would be tried by the courts of the State where the genocide was committed or before an “international penal tribunal”.¹⁵⁰ However, such a tribunal was never created until genocides were again committed in the former Yugoslavia and Rwanda in the 1990s.¹⁵¹ These tragic events sparked outrage in the international community and in response to calls for justice, the Security Council unanimously voted in 1993 to establish an International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1994.

2.2.1.5 The ICTY and ICTR

In 1993 and 1994, the ICTY and ICTR were created in reaction to the genocides and crimes against humanity committed in the former Yugoslavia¹⁵² and Rwanda,¹⁵³ respectively.¹⁵⁴ Contrary to the Nuremberg and Tokyo tribunals which were established through treaty, these two tribunals were established by resolutions of the Security Council as enforcement mechanisms to restore international peace and security under Chapter VII of the UN Charter.¹⁵⁵

148 *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

149 Schabas *An Introduction* 8.

150 Art VI Genocide Convention. In a resolution adopted on the same day as the Genocide Convention, (UN GA Resolution 216 B (III) of 9 December 1948), the General Assembly called upon the International Law Commission (ILC) to prepare the statute of the court proposed by Article VI of the Genocide Convention. This work took considerably longer, especially as a result of the cold war politics. The ILC submitted the final version of its Draft Statute for an International Criminal Court (ILC “Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May–22 July 1994” UN Doc A/49/10 *Yearbook of the International Law Commission* Vol II(2) (1994). For a full account of the history on the work of the ILC in this regard, see Schabas *An Introduction* 8-11.

151 Cassese “From Nuremberg to Rome” 9.

152 Security Council Resolution 827 of 25 May 1993.

153 Security Council Resolution 955 of 8 Nov 1994.

154 Cassese “From Nuremberg to Rome” 11.

155 Farbstain “The Issue of Complementarity” 13.

Despite charges of inefficiency and “glacial” slowness in completing trials,¹⁵⁶ the tribunals have made some noteworthy achievements, indicting for the first time in history a sitting head of State¹⁵⁷ and securing the first genocide conviction against a head of government.¹⁵⁸ The work of these two *ad hoc* tribunals also acquired a broad-based support in world public opinion and many governments, spurring further efforts to create a permanent international criminal tribunal that had been contemplated in the Genocide Convention.¹⁵⁹ As former-Secretary-General Kofi Annan once wrote:

[T]he ICTY and ICTR showed that there is such a thing as effective international justice. But these *ad hoc* tribunals were not enough. People the world over wanted to know that wherever and whenever the worst atrocities were committed – genocide, war crimes or crimes against humanity – there would be a court to bring to justice anyone in a government hierarchy or military chain of command who was responsible.¹⁶⁰

The resurgence of the idea of a permanent international criminal tribunal led to the convening of the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998 in which the Statute of the permanent International Criminal Court (ICC) was adopted.¹⁶¹

2.2.1.6 Establishment of the International Criminal Court

On 15 June 1998, delegates from all corners of the world gathered in Rome, Italy for a Diplomatic Conference on the establishment of the ICC.¹⁶² After weeks of negotiations, the Statute of the ICC was adopted on 17 July 1998.¹⁶³ The Rome Statute came into effect on 1 July 2002,¹⁶⁴ one month after the 60th day following the date of the deposit of the 60th instrument of ratification.¹⁶⁵ This date is important because the ICC cannot prosecute persons accused of crimes committed prior to its entry into force.¹⁶⁶

156 McKinley 1997 <http://www.nytimes.com/1997/11/21/world/on-1994-blood-bath-in-rwanda-tribunal-hews-to-a-glacial-pace.htm>

157 *The Prosecutor v Slobodan Milosevic Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlatko Stojiljkovic* Decision on review of indictment and application for consequential orders ICTY IT-05-87-PT (24 May 1999).

158 *The Prosecutor v Jean Kambanda* Judgment and Sentence ICTR 97-23-S (4 Sept 1998). See also McKinley 1998 <http://www.nytimes.com/1998/09/05/world/ex-rwandan-premier-gets-life-in-prison-on-charges-of-genocide-in-94-massacres.html>

159 Cassese “From Nuremberg to Rome” 16.

160 Annan 2009 http://www.nytimes.com/2009/06/30/opinion/30iht-edannan.html?_r=0

161 Cassese “From Nuremberg to Rome” 16.

162 Robinson and Kirsch “Reaching Agreement at the Rome Conference” 67.

163 Pellet “Entry into Force and Amendment of the Statute” 145.

164 Finlay 2009 *University of California Davis Journal of International Law and Policy* 221.

165 Art 126(1) Rome Statute: “This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance,

Now that the historical origins of the ICC have been traced, the following sections will discuss the main features of the ICC as well as its jurisdiction.

2.2.2 The international legal status of the ICC: an independent permanent international criminal tribunal

In accordance with article 4 of the Rome Statute,¹⁶⁷ the ICC is an independent international legal subject, outside the structure of the UN. As a consequence, the ICC is not formally bound by the rules of the UN Charter, has no institutional link with UN principal organs and is not financed through the regular budget of the UN.¹⁶⁸

2.2.3 The relationship between the ICC and the UN

Despite being established as a separate entity from the UN structure, the ICC is nonetheless linked with the UN system.¹⁶⁹ This is clearly stated in the Preamble to the Rome Statute, which provides that the ICC is established as “an independent permanent International Criminal Court in relationship with the United Nations system”.

The relationship between the ICC and the UN is intrinsic to the function of the ICC as an international judicial body which is inherently connected with the mandate of the UN, in particular the Security Council, namely the maintenance of international peace and security.¹⁷⁰ A certain level of coordination of the activities of the two institutions is thus necessary in order to enhance effectiveness and avoid, or at least minimise, crashes.¹⁷¹

Under this relationship, the UN can provide some administrative¹⁷² and financial¹⁷³ support to the ICC and, through the Security Council acting under Chapter VII, the UN

approval or accession with the Secretary-General of the United Nations”. Senegal was the first to ratify the Statute, on 2 February 1999, followed by Trinidad and Tobago two months later. Schabas *An Introduction* 23.

166 Schabas *An Introduction* 23.

167 Art 4(1) Rome Statute provides as follows: “The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

168 Villalpando and Condorelli “Relationship of the Court with the United Nations” 221.

169 Villalpando and Condorelli “Relationship of the Court with the United Nations” 221.

170 International Peace Institute “The Relationship between the ICC and the Security Council” 2 and Villalpando and Condorelli “Relationship of the Court with the United Nations” 221.

171 Villalpando and Condorelli “Relationship of the Court with the United Nations” 222.

172 For example, art 112(2) of the Rome Statute provides that the Assembly of States Parties may hold sessions at the Headquarters of the UN.

can refer a case to the ICC¹⁷⁴ or request the ICC to suspend an investigation or prosecution where such investigation or prosecution would jeopardise international peace and security.¹⁷⁵

The power of the Security Council to request the ICC not to proceed with an investigation or prosecution (for a period of 12 months),¹⁷⁶ is referred to as “deferral”.¹⁷⁷ According to Swanepoel,¹⁷⁸ while this role of the Security Council in relation to the ICC may be seen as a severe interference in the independence and the impartiality of the ICC, it should also be seen as a recognition by States Parties that difficult decisions may have to be made about the desirability of criminal prosecution when sensitive negotiations may be under way and that, in certain circumstances, any indiscreet action by the ICC may be viewed as a sabotage to measures which are aimed at promoting international peace and security. According to Dugard,¹⁷⁹ however, given the past practice of the Security Council, it is likely that situations where an ICC investigation will be characterised (under Chapter VII of the UN Charter) as jeopardising international peace and security will be very rare. The past practice by the Security Council suggests that the Security Council will be more inclined to find that investigations and prosecutions of international crimes are prerequisites for the maintenance and restoration of peace rather than as threats to it.¹⁸⁰ A manifestation of this is the establishment by Security Council of the ICTY and the ICTR in the wake of genocides in

173 Art 115 Rome Statute: “The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council”. Art 116 Rome Statute also provides as follows: “Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties”.

174 Art 13(b) Rome Statute.

175 Art 16 Rome Statute.

176 The request may be renewed under the same conditions. See in this regard art 16 Rome Statute.

177 Art 16 Rome Statute.

178 Swanepoel *The Emergence* 228-229.

179 Dugard “Possible Conflicts with Truth Commissions” 701: “This is difficult to accept however, as such a deferral must be made in a resolution under Chapter VII and it is hard, if not impossible, to contemplate a situation in which refusal to recognise a national amnesty could constitute a threat to international peace”.

180 Stigen *The Principle of Complementarity* 428.

Rwanda and the Former Yugoslavia, as well as its recent referral of the Darfur situation to the ICC¹⁸¹ and its disapproval of the amnesty clause in the Lomé Agreement between the Revolutionary United Front (RUF) leader Foday Sankoy and the government of Sierra Leone.¹⁸²

2.2.4 *The Jurisdiction of the ICC*

2.2.4.1 Subject-matter jurisdiction (or jurisdiction *ratione materiae*)

The ICC has jurisdiction over four crimes considered as “unimaginable atrocities that deeply shock the conscience of the humanity”.¹⁸³ They are genocide,¹⁸⁴ crimes against humanity,¹⁸⁵ war crimes¹⁸⁶ and the crime of aggression.¹⁸⁷ These four crimes are briefly defined below.

2.1.1.1.1 Genocide

Article 6 of the Rome Statute, just like article II of the 1948 Genocide Convention, defines genocide as consisting of five specific acts committed with the intent to destroy a national, ethnical, racial or religious group as such. The five acts are:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) imposing conditions on the group calculated to destroy it,¹⁸⁸
- (d) preventing births within the group;¹⁸⁹ and
- (e) forcibly transferring children from the group to another group.¹⁹⁰

In effect, the material element (*actus reus*) of the crime of genocide may be the same as for crimes against humanity and war crimes. For example, murder can constitute

181 Stigen *The Principle of Complementarity* 428.

182 Here, the Security Council stated that that “the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law”. See UN SC Resolution 1315 of 14 August 2000.

183 Preamble to the Rome Statute, para 2.

184 Art 5(1)(a) Rome Statute.

185 Art 5(1)(b) Rome Statute.

186 Art 5(1)(c) Rome Statute.

187 Art 5(1)(d) Rome Statute.

188 The acts in (a), (b) and (c) constitute “physical genocide”. Schabas *An Introduction* 102.

189 This is referred to as “biological genocide”. Schabas *An Introduction* 102.

190 This is referred to as “cultural genocide”. Schabas *An Introduction* 102.

genocide as well as a crime against humanity¹⁹¹ or a war crime.¹⁹² What sets genocide apart from these two crimes is that the killing (or any other act defined in Article 6), must be committed with the “intent to destroy in whole or in part a national, ethnic, racial or religious group as such”. If such specific intention is not proved, the murder may constitute a crime against humanity or a war crime, but not genocide.¹⁹³

In order to constitute genocide, the destructive act must also be directed at one of the four groups listed in the definition: national, ethnic, racial or religious group.¹⁹⁴ Killings directed at political (such as communists or republicans) and social groups (such as gays or lesbians) would therefore not constitute genocide even if they were committed with an intent to destroy such groups in total or in part.¹⁹⁵

2.1.1.1.2 Crimes against humanity

The following acts constitute crimes against humanity when they are committed as part of a “widespread or systematic attack” directed against any civilian population, with knowledge of the attack:¹⁹⁶

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

In the definition of crimes against humanity, the term “widespread” implies a relatively high number of victims while the word “systematic” means that single, isolated, or

191 See for example art 7(1)(a) Rome Statute.

192 See for example art 8(2)(a)(i) Rome Statute.

193 Schabas *An Introduction* 102.

194 Schabas *An Introduction* 102.

195 Schabas *An Introduction* 102.

196 Art 7(1) Rome Statute.

random acts do not constitute crimes against humanity.¹⁹⁷ The attack need not be a military attack, meaning that crimes against humanity may in some circumstances be committed by non-State actors.¹⁹⁸ Finally, it is not required that crimes against humanity be committed during an armed conflict. The attack (against a civilian population) may take place during an armed conflict as well during peace time.¹⁹⁹

2.1.1.1.3 War crimes

The provision²⁰⁰ defining war crimes in the Rome Statute is the lengthiest of all the provisions of the Statute.²⁰¹ It divides war crimes into two categories: war crimes committed during international armed conflicts²⁰² and war crimes committed during non-international armed conflicts.²⁰³

The distinguishing element of war crimes is that the prohibited acts must be committed during an “armed conflict”. This excludes crimes committed in all situations which fall short of an armed conflict such as “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.²⁰⁴

2.1.1.1.3.1 War crimes committed in international armed conflict

The term international armed conflict refers to an armed conflict between two or more States.²⁰⁵ The category of war crimes committed in international armed conflict is divided into two classes: first, the “grave breaches” of the Geneva Conventions of 12 August 1949, namely any of the following acts against protected persons or property: (i) wilful killing; (ii) torture or inhuman treatment, including biological experiments; (iii) wilfully causing great suffering, or serious injury to body or health; (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) wilfully depriving a prisoner of war or other

197 Ambos “Crimes against Humanity and the International Criminal Court” 284.

198 Schabas *An Introduction* 111.

199 Schabas *An Introduction* 109.

200 Art 8 Rome Statute.

201 Schabas *An Introduction* 122.

202 Art 8(2)(a) and(b).

203 Art 8(2)(c) and (e).

204 Art 8(2)(d) Rome Statute.

205 ICRC “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”

protected person of the rights of fair and regular trial; (vii) unlawful deportation or transfer or unlawful confinement and (viii) taking of hostages.²⁰⁶

The above list of crimes corresponds exactly to the grave breaches provisions of the 1949 Geneva Conventions, namely article 50 Geneva Convention I,²⁰⁷ article 51 Geneva Convention II,²⁰⁸ article 130 Geneva Convention III²⁰⁹ and article 147 Geneva Convention IV.²¹⁰ The second class of crimes committed during international armed conflict is drawn from various sources such as the 1907 Hague Convention Respecting the Laws and Customs of War on Land;²¹¹ the 1977 Protocol I additional to the Geneva Conventions;²¹² the 1899 Hague Declaration concerning Expanding Bullets²¹³ and the 1925 so-called Geneva Gas Protocol.²¹⁴ The crimes listed here are referred to as “other serious violations” of the laws and customs applicable in international armed conflicts. They are: (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) killing or wounding a combatant who, having laid

206 Art 8(2)(a) Rome Statute.

207 *Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field* (1949).

208 *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1949).

209 *Geneva Convention (III) Relative to the Treatment of Prisoners of War* (1949).

210 *Geneva Convention (IV) Relative to the Treatment of Prisoners of War* (1949).

211 *Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (1907).

212 *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (1977).

213 *Hague Declaration (IV,3) concerning Expanding Bullets* (1899).

214 *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* (1925).

down his arms or having no longer means of defence, has surrendered at discretion; (vii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; (viii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (ix) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (x) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xi) killing or wounding treacherously individuals belonging to the hostile nation or army; (xii) declaring that no quarter will be given; (xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (xiv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; (xv) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; (xvi) pillaging a town or place, even when taken by assault; (xvii) employing poison or poisoned weapons; (xviii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xix) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (xx) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, (xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment; (xxii) committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; (xxiii) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from

military operations; (xxiv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (xxv) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions and (xxvi) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

The distinction in the Rome Statute between grave breaches and other serious violations has no practical significance. In the context of the Geneva Conventions the grave breaches provisions create special rights and obligations for Member States. First, in articles 49, 50, 125 and 146 respectively, the four conventions authorise any Member State to exercise its criminal jurisdiction over a person accused of such grave crimes if that person is found on its territory, regardless of his nationality or the place where the crime was committed. Secondly, they create a duty for the State which has custody over a person accused of those crimes to either prosecute that person or extradite to another State which is willing to do so.²¹⁵ These rights and obligations do not exist in regard to the crimes not classified as grave breaches.²¹⁶ However, since the war crimes provisions of the Rome Statute relate solely to the prosecution of such crimes before the ICC, not before the national courts of States Parties, the distinction between grave breaches and other serious violations in the Rome Statute seems not to serve any practical purpose.

2.1.1.1.3.2 War crimes committed during non-international armed conflict

The term non-international armed conflict refers to armed conflicts that take place in the territory of a State “between governmental authorities and organized armed groups or between such groups”.²¹⁷ The crimes that fall in this category are almost the same as those committed in international armed conflicts and, accordingly, they will not be reproduced here. Only a few crimes that are found in the first category (international armed conflict) do not have equivalent crimes in the second. This is the case, for

215 Art 49(2) Geneva Convention (I); art 50(2) Geneva Convention (II); art 129(2) Geneva Convention (III) and art 146(2) Geneva Convention (IV).

216 Dormann 2003 *Max Planck Yearbook of United Nations Law* 344.

217 Art 8(2)(f) Rome Statute.

example, with the crime of damaging the natural environment²¹⁸ which can only be committed in the context of an international armed conflict.

2.1.1.1.4 Aggression

2.1.1.1.4.1 Definition of aggression

When the Rome Statute was adopted in 1998, States Parties failed to agree on a definition for the crime of aggression.²¹⁹ Consequently, the Rome Statute provided that the ICC would not be able to exercise jurisdiction over aggression until a provision was adopted “defining the crime and setting out the conditions under which the Court shall exercise jurisdiction” in respect to the crime.²²⁰

At the First Review Conference of the International Criminal Court held in Kampala on 11 June 2010, a definition of the crime of aggression was agreed on.²²¹ According to article 8*bis*(1) of the Rome Statute, which was adopted by the Kampala Resolution, the crime of aggression means: the “planning, preparation, initiation or execution, [...], of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”. Thus, stated in general terms, aggression means the unlawful and unjustified use of force by a State against another State.²²²

The following acts are listed as acts of aggression:²²³

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

218 Art (8)(2)(b)(iv) Rome Statute.

219 The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression Date Unknown <http://crimeofaggression.info/role-of-the-icc/>

220 Article 5(2) of the Rome Statute.

221 Resolution RC/Res 6 The Crime of Aggression (2010).

222 Dugard *International Law* 187

223 Article 8*bis*(2) Rome Statute.

- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

2.1.1.1.4.2 Aggression is a “leadership crime”

In order to constitute the crime of aggression, the prohibited act must be performed by “a person in a position effectively to exercise control over or to direct the political or military action of a State”.²²⁴ This requirement retains the notion, held at Nuremberg, that aggression is a “leadership crime” which cannot be committed by “minions and footsoldiers”.²²⁵

2.1.1.1.4.3 The determination by the Security Council that an act of aggression was committed

Article 15*bis*(6) of the Rome Statute provides that before proceeding with any investigation in respect of a crime of aggression, the Prosecutor shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no such determination is made within six months of the Prosecutor informing the UN Secretary-General of his intention to launch an investigation, the Prosecutor may proceed with such an investigation.²²⁶ *A contrario*, if the Security Council makes a determination that no aggression was committed, the Prosecutor will be barred from launching his investigations. Commentators have

224 Art 8*bis*(1) Rome Statute.

225 Dugard *International Law* 187. See also Lulu “Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law” 26-27: “Acts of aggression and wars of aggression are both acts of states, which both require national military forces, equipment and sources in order to be carried out. This means that having the opportunity to plan, prepare for, initiate or wage a war of aggression, and thus take part in the above-mentioned activities, does not reside in the common individual, but in a leader who is of a certain higher rank, and who has the capability, credentials and opportunity to control, command or influence the state’s decision or military forces”.

226 Art 15*bis*(8) Rome Statute.

referred to article 15*bis*(6) as providing an “internal filter” against “politicised” allegations of aggression before the ICC.²²⁷

2.1.1.1.4.4 Jurisdiction *ratione temporis* over the crime of aggression

Although the crime of aggression has been defined, the ICC is not yet able to exercise its jurisdiction over the crime of aggression. The ICC will only be able to exercise jurisdiction over this crime once at least 30 States Parties have ratified or accepted the amendments made by the 1st Review Conference of Rome Statute; and a decision is taken by two-thirds of States Parties to activate the jurisdiction at any time after 1 January 2017.²²⁸ Thus, as the provisions on aggression are not yet in force, the ICC currently has jurisdiction only over the other three crimes.²²⁹ The jurisdiction *ratione temporis* of the ICC over the other crimes is discussed hereunder.

2.2.4.2 Jurisdiction *ratione temporis*

The ICC’s jurisdiction is prospective;²³⁰ it only has jurisdiction in respect of crimes that were committed after its entry into force (on 1 July 2002).²³¹

For the States which become party to the Rome Statute after its entry into force, the ICC may exercise its jurisdiction only in respect of crimes that were committed after the entry into force of the Statute for the State in question.²³² In respect of these States, the Statute enters into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification or accession.²³³ For example, Colombia ratified the Rome Statute in August 2002, some weeks after its entry into force on 1 July 2002; in accordance with article 126(2) of the Rome Statute, the Statute entered into force for Colombia on 1 November 2002. Accordingly, the ICC cannot

227 Manson 2010 *Criminal Law Forum* 419.

228 The Crime of Aggression RC/Res 6 (2010).

229 Steynberg *et al Criminal Law* 573.

230 Bourgon “Jurisdiction *Ratione Temporis*” 543.

231 Art 11(1) Rome Statute. The ICC is therefore not a “remedy for crimes of the past, which must be addressed by national courts, or other international or mixed mechanisms”. Dugard *International Law* 187.

232 Art 11(2) Rome Statute.

233 Art 126(2) Rome Statute.

prosecute any cases that are based on the Colombian ratification for the period between 1 July and 1 November 2002.²³⁴

2.2.4.3 Jurisdiction based on territory, nationality and *ad hoc* jurisdictions

2.1.1.1.5 Jurisdiction based on territory and nationality

Unlike the States,²³⁵ the ICC does not have universal jurisdiction to prosecute crimes over which it has subject-matter (or *ratione materiae*) jurisdiction.²³⁶ In principle, the ICC only has jurisdiction when a crime has been committed in the territory of a State Party,²³⁷ or where the accused is a national of a State Party.²³⁸

2.1.1.1.6 *Ad hoc* jurisdictions

In addition to its normal jurisdiction based on territory and nationality, the ICC can also have jurisdiction if, on an *ad-hoc* basis, a non-party State consents to its jurisdiction over a particular situation,²³⁹ or, when the UN Security Council, acting under Chapter VII of the UN Charter, refers a case (falling outside the Court's normal jurisdiction) to the ICC Prosecutor.²⁴⁰

2.2.4.4 Jurisdiction *ratione personae*

The Rome Statute attributes to the ICC jurisdiction over natural persons of at least 18 years of age.²⁴¹ This means that the ICC does not have jurisdiction over juristic persons.²⁴²

234 Schabas *An Introduction* 71.

235 See 2.5 hereunder.

236 Dugard *International Law* 155 and Jessica "Human Rights" 282.

237 Art 12(2) Rome Statute. Under this jurisdictional basis, the ICC can exercise its jurisdiction even over nationals of a non-party state provided the crime was committed on the territory of a State Party. This jurisdiction is based on the so-called theory of "delegated territorial jurisdiction" according to which the ICC in such an instance exercises territorial jurisdiction that is delegated to it by the territorial state. Swanepoel *The Emergence* 271.

238 Art 12(2) Rome Statute.

239 Art 12(3) Rome Statute.

240 Art 13(b) Rome Statute. This point is discussed in detail in 2.2.5.2 hereunder.

241 Art 26 Rome Statute.

242 Frulli "Jurisdiction *Ratione Personae*" 532.

2.2.5 The “trigger” mechanisms

A case may be brought before the ICC in one of the following three ways:²⁴³ when a situation is referred to the Prosecutor by a State Party; when a situation is referred to the Prosecutor by the UN Security Council acting under Chapter VII of the Charter of the United Nations and when the Prosecutor has initiated an investigation *proprio motu* in respect of a crime.

2.2.5.1 Referral by a State Party

The first way the jurisdiction of the ICC may be triggered is when a State Party refers a case to the Prosecutor. Article 14 of the Rome Statute sets out the terms for referral of a “situation” by a State Party as follows:

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

The first referral by a State Party to the ICC Prosecutor was formulated by the Government of Uganda on 16 December 2003, in relation to the situation concerning the Lord’s Resistance Army in northern and western Uganda.²⁴⁴ The second referral was made by DRC on 3 March 2004, concerning crimes allegedly committed during various wars in the eastern and northern parts of the country.²⁴⁵ The third referral came from the Central African Republic on 22 December 2004 concerning war crimes

243 Art 13 Rome Statute.

244 *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.

245 In this situation, five cases have been brought before the relevant Chambers: *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06; *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06; *The Prosecutor v Germain Katanga* ICC-01/04-01/07; *The Prosecutor v Mathieu Ngudjolo Chui* ICC-01/04-02/12; *The Prosecutor v Callixte Mbarushimana* ICC-01/04-01/10 and *The Prosecutor v Sylvestre Mudacumura* ICC-01/04-01/12. In the case of *The Prosecutor v Callixte Mbarushimana*, Pre-Trial Chamber I declined to confirm the charges against Mr Mbarushimana. He was then released from the ICC’s custody on 23 December 2011. Thomas Lubanga Dyilo and Germain Katanga were found guilty and sentenced to imprisonment. Mathieu Ngudjolo Chui was acquitted on all charges of war crimes and crimes against humanity and has been released from ICC custody. The remaining cases are ongoing. All the accused are in ICC custody, except Mudacumura Sylvestre who remains at large. See in this regard ICC Date Unknown http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx

committed on the territory of the Central African Republic since 1 July 2002.²⁴⁶ The fourth referral was made by Mali on 13 July 2012 concerning alleged crimes committed on the territory of Mali since January 2012.²⁴⁷

2.2.5.2 Referral by the Security Council

The second means by which the jurisdiction of the ICC can be triggered is when a situation is referred to the Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter.²⁴⁸ Chapter VII of the UN Charter provides that:

[T]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.²⁴⁹

It is in accordance with the above provision that the Security Council established the *ad hoc* tribunals for the former Yugoslavia and Rwanda.²⁵⁰ With respect to future atrocities, it was agreed at Rome that the Security Council, instead of creating *ad hoc* tribunals, may refer situations to the ICC.²⁵¹

The modalities of referring a situation by the Security Council to the ICC as well as those relating to co-operation between the ICC the Security Council are detailed in the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*.²⁵² For instance, article 17 of the Agreement provides that:

[W]hen the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.

Although the Security Council has the power to refer situations to the ICC, it cannot extend the jurisdiction of the Court beyond what is stipulated in the Rome Statute. For

246 *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05 -01/08.

247 *Situation in the Republic of Mali Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II* ICC-01/12-1 (19 July 2012).

248 Art 13(b) Rome Statute.

249 Art 39 UN Charter.

250 Schabas *An Introduction* 168.

251 Schabas *An Introduction* 168-170.

252 *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (2004).

example, it cannot request the ICC to prosecute perpetrators of the atrocities committed by the Khmer Rouge in Cambodia during the late 1970s because in accordance with article 11 of the Statute, the ICC cannot judge crimes committed prior to the entry into force of the Statute (in 2002).²⁵³ In such cases, the Council would be required to set up a distinct *ad hoc* tribunal.²⁵⁴

As of 30 March 2014, the Security Council has referred only two situations to the ICC: the situation in Darfur, Sudan,²⁵⁵ and the situation in Libya.²⁵⁶ Both countries are not party to the Rome Statute.²⁵⁷

The Security Council referral of the Darfur situation has been received with negative responses from the African Union (AU). The AU is of the view that the ICC warrant for the arrest²⁵⁸ of President Omar Bashir was inconsistent with article 98(1) of the Rome Statute in terms of which the ICC may not proceed with a request to surrender a suspect if that would require a State to:

act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

In the light of the above provision, the AU views the ICC arrest warrant against Bashir as an attempt “to change customary international law in relation to immunity *ratione personae*” and as rendering “Article 98 of the Rome Statute redundant, non-operational and meaningless”.²⁵⁹ Accordingly, in a resolution²⁶⁰ adopted at the 13th Ordinary

253 Schabas *An Introduction* 169. On the jurisdiction *ratione temporis* of the ICC, see 2.2.4.2 above.

254 Schabas *An Introduction* 169.

255 UN SC Resolution 1593 of 31 March 2005.

256 UN SC Resolution 1970 of 26 February 2011.

257 ICC Date Unknown http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx

258 On 4 March 2009, the ICC issued a warrant for the arrest of President Omar Hassan Al Bashir to stand trial in the ICC on several charges based on crimes against humanity (murder, extermination, rape, torture and forcible transfer) and war crimes (intentionally directing attacks against the civilian population or individual civilians, and pillage) committed in Darfur. See *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 CC-02/05-01/09-3 (4 March 2009). On 12 July 2010 charges based on the crime of genocide were subsequently included in the warrant for his arrest. See *The Prosecutor v Omar Hassan Ahmad Al Bashir* Second Decision on the Prosecution's Application for a Warrant of Arrest ICC-02/05-01/09-94 (12 July 2010).

259 AU Press Release n° 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan (9 January 2012) 1.

Session of the Assembly of Heads of State and Government in July 2009, the AU decided that:

the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.²⁶¹

When later in 2010 the ICC informed the Security Council that the government of Chad²⁶² had failed to arrest President Bashir when he visited that country, and that he was expected to visit Kenya,²⁶³ requesting the Security Council and the Assembly of States Parties “to take any measure they may deem appropriate”, the AU issued a press release²⁶⁴ stating that its decisions (referring to the decision not to arrest Bashir) are binding on Chad and Kenya as Member States and that it would be wrong to “coerce” them to violate or disregard their obligations towards the African Union.²⁶⁵

It is submitted that the views expressed by the AU regarding the immunity of President Bashir from arrest and surrender to the ICC are not correct. In terms of article 27(2) of the Rome Statute, immunities which may attach to the official capacity of a person, may not bar the Court from exercising its jurisdiction over such person. In accordance with this article President Bashir may thus stand trial before the ICC. The only question is whether President Bashir can be arrested in a foreign country for the purposes of surrendering him to the ICC. Although article 98(2) of the Rome Statute could have been better drafted to avoid ambiguities, it does not grant to heads of State (and other senior State officials) immunity from being arrested by foreign States for the purposes of surrendering them to the Court. According to Du Plessis,²⁶⁶ the Rome Statute creates a “two-tier” immunity structure for State officials accused of crimes before the ICC: one for

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

261 Para 10.

262 *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad* ICC-02/05-01/09 (27 August 2010).

263 *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya* ICC-02/05-01/09 (27 August 2010).

264 AU *Press Release n° 119/2010 on the Decision of the Pre-Trial Chamber of the ICC Informing the UN Security Council and the Assembly of the States Parties to the Rome Statute About the Presence of President Omar Hassan Al-Bashir of The Sudan in the Territories of the Republic of Chad and the Republic of Kenya* (29 August 2010).

265 At 2.

266 Du Plessis “The International Criminal Court that Africa Wants” 78. See also Akande 2009 *Journal of International Criminal Justice* 339.

officials from States Parties and one for officials from non-States parties. He argues that by signing the Rome Statute, which provides that personal immunities (immunity *ratione personae*)²⁶⁷ may not bar the ICC from exercising its jurisdiction, States Parties waived such immunities for their officials and, accordingly, such officials may be arrested in foreign States and be surrendered to the ICC.²⁶⁸ However, Du Plessis²⁶⁹ argues, since the ICC is a treaty-based court, as a matter of treaty law,²⁷⁰ the Rome Statute does not bind States that are not party to it. Accordingly, article 27(2) of the Rome Statute does not remove personal immunities of officials of non-States parties. In this later case, therefore, the ICC must secure from a non-State party the waiver of that State's official's immunity before another State can be requested to hand the concerned individual over to the ICC for trial.²⁷¹

With regard to the Darfur referral, however, the AU opinion was not correct. This is so because when a situation is referred to the ICC jurisdiction by the Security Council, States are no longer dealing with the ICC as a treaty-based tribunal, but now as an institution that is acting with a Security Council's mandate.²⁷² In accordance with article 25 of the UN Charter²⁷³ all Member States are obliged to implement the decisions of the Security Council. Consequently, since President Bashir's case was referred to the ICC by the Security Council,²⁷⁴ all States are allowed and obliged to enforce the ICC's arrest warrant for the purposes of enabling the ICC to fulfil the mandate which it was given by

267 Immunity *ratione materiae* is also not a defence before the ICC in terms of art 27(1) which provides as follows: "The 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".

268 Du Plessis "The International Criminal Court that Africa Wants" 78.

269 Du Plessis "The International Criminal Court that Africa Wants" 78.

270 Art 34 Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third State without its consent".

271 Du Plessis "The International Criminal Court that Africa Wants" 78. On this point, the AU was correct to assert that "states cannot contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal". See AU Press Release n° 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan (9 January 2012) 2.

272 Du Plessis "The International Criminal Court that Africa Wants" 79.

273 Art 25 UN Charter: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

274 UN SC Resolution 1593 of 31 March 2005.

the Security Council.²⁷⁵ This interpretation of the provisions of the Rome Statute and the UN Charter is not only logical but also warranted as a matter of practicability. The ICC has no police powers to enforce its arrest warrants; it must always rely on national authorities to do so. Thus, without States being required to enforce the ICC arrest warrant, the Security Council's referral of the Sudan's case would in substance be meaningless.²⁷⁶

The AU's general claim that "the immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals",²⁷⁷ is also not correct. As it was stated earlier in this study,²⁷⁸ customary international law does not provide any immunity whatsoever (whether *ratione materiae* or *ratione personae*) when State officials, including heads of State, are tried before an international criminal tribunal. The reference by the AU to the statement by the ICJ in the *Arrest Warrant* case that the Court had been "unable to deduce" that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction to incumbent Ministers for Foreign Affairs, where they are suspected of having committed international crimes, is also misleading because in that case the ICJ was referring to immunity *ratione personae*, not before international criminal tribunals, but before the domestic courts of foreign States. This issue is discussed in detail in Chapter three of this study.

2.2.5.3 The initiation of investigations *proprio motu*

The Prosecutor may initiate investigations *proprio motu* (by his own motion) on the basis of information on crimes within the Court's jurisdiction.²⁷⁹ In this regard, the Rome

275 Du Plessis "The International Criminal Court that Africa Wants" 79.

276 Akande 2009 *Journal of International Criminal Justice* 338: "[...] This would confine Article 27 to the rare case where a person entitled to immunity surrendered voluntarily, in which case the person is unlikely to claim immunity. The effect of the argument would be to make an important provision directed at combating impunity inoperable for most practical purposes".

277 AU Press Release n° 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan 2.

278 See 1.2.1 above.

279 Art 15(1). The fact that the prosecutor after his own initial investigation decides not to proceed with the investigation of a situation does not mean that he/she will be precluded from considering further information regarding the same situation that may be submitted (art 15(6) Rome Statute).

Statute provides that when the Prosecutor is of the view that there is “a reasonable basis” to proceed with an investigation, he must request the Pre-Trial Chamber of the ICC to grant authorisation to proceed with the investigation.²⁸⁰ Should the Pre-Trial Chamber decide that there is a reasonable basis to proceed with an investigation and that the case appears to fall within its jurisdiction, it will then authorise the commencement of the investigation.²⁸¹

The power of the Prosecutor to initiate investigations *proprio motu* was one of the topics which were hotly debated during the Rome Conference. On the one hand, some States (and a number of NGO’s) were of the view that a Prosecutor without *proprio motu* investigative powers risked becoming a “lame duck” if the authorisation to initiate investigation would need to come solely from the States Parties and the Security Council, both of which are political actors which sometimes compromise the need for prosecuting perpetrators of human rights violations with other political and security interests, thereby perpetuating *de facto* impunity.²⁸² With regard to Security Council’s referrals, it was also feared that the possibility of a veto by one of its permanent members could thwart efforts by the Security Council to refer a situation to the ICC, not only in situations in which a permanent member is involved, but also in situations in which its allies are involved.²⁸³ On the other hand, opponents of an independent Prosecutor cited the danger of a too powerful and politically unaccountable Prosecutor who would be inappropriately targeting nationals of a given State for political reasons.²⁸⁴

As a result of these arguments and fears, Germany and Argentina made a proposal that intended to take into account the legitimate concerns of both sides.²⁸⁵ The compromise

280 Art 15(3).

281 Art 15(4). The refusal of the Pre-Trial Chamber to authorise an investigation shall not preclude a subsequent request to the Chamber by the prosecutor based on new facts or evidence regarding the same situation. Art 15(5).

282 Wouters, Verhoeven and Demeyere “The International Criminal Court’s Office of the Prosecutor” 349.

283 Wouters, Verhoeven and Demeyere “The International Criminal Court’s Office of the Prosecutor” 349.

284 Wouters, Verhoeven and Demeyere “The International Criminal Court’s Office of the Prosecutor” 350.

285 Jurdi *The International Criminal Court* 98 and Wouters, Verhoeven and Demeyere “The International Criminal Court’s Office of the Prosecutor” 350.

which was finally agreed on granted the Prosecutor *proprio motu* powers, subject to supervision by the Pre-Trial Chamber.²⁸⁶

Another concern with an independent Prosecutor with *proprio motu* powers to initiate investigations was that such powers risked having negative consequences for the protection of international peace and security. Specifically, it was feared, and rightly so,²⁸⁷ that a Prosecutor desirous to prosecute war crimes committed during a civil war which is being handled through negotiations, can undermine the efforts of the mediators and hence become a threat to peace and security in that country or in the region generally.²⁸⁸ In view of this concern, it was agreed that if it is determined that a Prosecutor's decision to initiate investigations may jeopardize international peace and security, the UN Security Council may, in a resolution adopted under Chapter VII, request the ICC not to proceed with an investigation or prosecution for a period of 12 months,²⁸⁹ and that such request may be renewed annually under the same conditions.²⁹⁰

To date, the Prosecutor has used his *pro prio* powers to initiate investigations only in two situations: Kenya and Côte d'Ivoire.²⁹¹ The case of Cote d'Ivoire concerns alleged crimes against humanity and war crimes committed in the Republic of Côte d'Ivoire during the post-election violence following 28 November 2010.²⁹² Three persons are accused in this case: Laurent Gbagbo, the former President of Cote d'Ivoire;²⁹³ Simone Gbagbo, his wife,²⁹⁴ and Charles Blé Goudé, a former minister in Gbagbo's government.²⁹⁵

The case of Kenya concerns the allegations of crimes against humanity of murder, rape and other forms of sexual violence, deportation or forcible transfer of population and

286 Jurdi *The International Criminal Court* 98. See also article 15 of the Rome Statute.

287 See 4.2; 4.6 and 4.7 hereunder.

288 Wouters, Verhoeven and Demeyere "The International Criminal Court's Office of the Prosecutor" 350.

289 Art 16 Rome Statute.

290 Art 16 Rome Statute. For a more detailed discussion on this point see 2.2.3 above and 4.5 hereunder.

291 ICC Date Unknown http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx

292 *Situation in the Republic of Côte d'Ivoire Request for authorisation of an investigation pursuant to article 15 ICC-02/11* (23 June 2011).

293 *The Prosecutor v Laurent Gbagbo* ICC-02/11-01.

294 *The Prosecutor v Simone Gbagbo* ICC-02/11-01/12.

295 *The Prosecutor v Charles Blé Goudé* ICC-02/11-02/11.

other inhumane acts committed in Kenya during the period following the December 2007 presidential elections.²⁹⁶ In this case three persons are accused: Uhuru Muigai Kenyatta, the current President of Kenya;²⁹⁷ William Samoei Ruto, the current Deputy President of Kenya,²⁹⁸ and Joshua Arap Sang, a radio presenter.²⁹⁹

As in the case of President Bashir of Sudan, the ICC case against the Kenyan President has infuriated the AU. In regard to this case, the AU lamented that it was “the first time in history” that a sitting Head of State and his deputy were tried in an international court and that such a situation could undermine the country’s sovereignty, stability, and peace.³⁰⁰ It noted that the proceedings against the President and his Deputy were dangerous and prejudicial for the Republic of Kenya and the region in general because they will distract and prevent them from fulfilling their governmental responsibilities, including national and regional security affairs.³⁰¹ In view of these considerations, the AU requested the ICC to suspend its proceedings against the Kenyan President and his Deputy, “until they complete their terms of office”.³⁰² In a letter dated 13 September 2013,³⁰³ the ICC responded that the AU request had not been “properly raised in front of the relevant Chamber in accordance with applicable legal procedures” and that, accordingly, the President of the Court had no legal powers to consider the AU concerns. Accordingly, the proceedings against the Kenyan President and his Deputy have continued.

The AU also reiterated its claim of head of State immunity.³⁰⁴ However, it is submitted, since Kenya is party to the Rome Statute, and since the Statute clearly states that

296 *Situation in the Republic of Kenya Request for authorisation of an investigation pursuant to Article 15 ICC-01/09-3* (26 November 2009).

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

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

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

300 *AU Decision on Africa’s Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec 1*(12 Oct 2013) para 5.

301 *AU Decision on Africa’s Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec 1*(12 October 2013) para 6.

302 *AU Decision on Africa’s Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1*(12 October 2013) para 10. See also the Letter of the African Union to the President of the ICC BCU/U/1657 09 13 (10 September 2013).

303 *Letter by Second Vice-President Judge Cuno Tarfusser to the AU 2013/Press/00295-4/VPT/MH* (13 Sept 2013).

304 “REAFFIRMS the principles deriving from national laws and international customary law by which sitting Heads of State and other senior state officials are granted immunities during their tenure of office”. See *AU Decision on Africa’s Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec 1*(12 October 2013) para 9.

immunities of State officials do not apply before the ICC,³⁰⁵ it seems clear that the AU has no capacity to claim the immunity which, by signing and ratifying the Rome Statute, Kenya has voluntarily waived.

2.2.6 *The admissibility requirements of the Rome Statute*

The mere fact that the ICC has jurisdiction over a crime, on one of the bases discussed above, does not necessarily mean that it will always find a case admissible. The issue of jurisdiction is different from that of admissibility.³⁰⁶ There are three grounds upon which an admissibility challenge can be raised.

First, a challenge might be raised under article 17(1)(d) which provides that a case is not admissible before the ICC where it “is not of sufficient gravity”. In determining whether a case is of sufficient gravity to warrant action by the ICC, the following factors may be decisive:³⁰⁷ whether the persons suspected of crimes include those who may bear the greatest responsibility for the alleged crimes and the gravity of the alleged crimes.

Secondly, a case may not be admissible before the ICC if “the person concerned has already been tried for conduct which is the subject of the complaint”.³⁰⁸ Thirdly, a case is not admissible before the ICC if it is being investigated or prosecuted by a State which has jurisdiction over it.³⁰⁹

The two last inadmissibility grounds give effect to the principle of complementarity which is immediately discussed hereunder.

305 Art 27 Rome Statute.

306 Steynberg *et al Criminal Law* 574.

307 *Situation in the Republic of Kenya Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* ICC-01/09-19-Corr 73 (31 March 2010).

308 Art 17(1)(c) Rome Statute. This inadmissibility ground gives effect to the general principle of criminal justice that a person may not be tried twice for the same offence, which will be discussed in detail in chapter 5 of this study.

309 Article 17(1)(a) of the Rome Statute.

2.3 The concept of complementarity

2.3.1 Introduction

The relationship between an international criminal tribunal and national tribunals may take two main forms: exclusive or concurrent jurisdiction.³¹⁰ When it is exclusive, States will not have jurisdiction over crimes that fall under the international court's jurisdiction and, in that case, there is no collision of jurisdictions.³¹¹ This was the case with the Special Panels for Serious Crimes (SPSC)³¹² in East Timor whose statutes provided as follows:

[...] there shall be established panels of judges (hereinafter: "panels") within the District Court in Dili with exclusive jurisdiction to deal with serious criminal offences.³¹³

On the other hand, when the international jurisdiction is concurrent with national jurisdictions, the international court and national courts of States have jurisdiction over the same crimes. For instance, the Statute of the ICTR provided that:

[T]he International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.³¹⁴

In the case of concurrent jurisdiction between an international criminal tribunal and national courts, an allocation mechanism will be needed for determining which court shall have priority in a given case.³¹⁵ In this regard, the international jurisdiction may be "primary" or "complementary". When it is primary, it has priority over national jurisdictions, and can request deferral even when a State is diligently undertaking an impartial and genuine investigation or prosecution.³¹⁶ Primacy thus compromises

310 For other possible forms of relationships between international and national courts, see Stigen *The Principle of Complementarity* 5.

311 Stigen *The Principle of Complementarity* 5.

312 *Regulation n° 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* (6 June 2000).

313 Section 1(1) *Regulation no 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* (6 June 2000).

314 Art 8(1) ICTR Statute. See also art 9(1) of the ICTY Statute: "The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1 January 1991".

315 Stigen *The Principle of Complementarity* 5.

316 Waynecaurt-Steele 2002 *South African Yearbook of International Law* 8; Ofei *The International Criminal Court* 7; Stigen *The Principle of Complementarity* 5 and Zeidy 2002 *Michigan Journal of International Law* 882.

States' sovereign prerogatives by requiring them to defer to an international tribunal.³¹⁷

For instance, the ICTR Statute provides that:

[T]he International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.³¹⁸

Under a primacy relationship, international jurisdiction and domestic jurisdiction are presented as competing forums of justice.³¹⁹ This thinking is well captured in the ICTY's famous Appeals Chamber decision on jurisdiction in the *Tadic* case, where the Chamber stated that when an international tribunal (such as the ICTY) is created, "it must be endowed with primacy over national courts", otherwise:

human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes", or proceedings being "designed to shield the accused", or cases not being diligently prosecuted.

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.³²⁰

Thus, in the view of the ICTY Appeals Chamber, the reason for endowing an international tribunal with primacy lies in the scepticism about the very readiness of national courts genuinely and effectively to exercise their jurisdiction over persons responsible for serious violations of human rights. In other words, the universal objective of putting an end to impunity for the most serious crimes can only be effectively pursued by endowing an international criminal tribunal with primacy.³²¹ This reasoning contrasts with the one underlying a system of complementarity between an international criminal jurisdiction and national jurisdictions. Under this model, an international tribunal may take over a case only when the national jurisdiction is not exercised or when the exercise does not meet a certain standard defined in the

317 Brown 1998 *Yale Journal of International Law* 386.

318 Art 8(2) ICTR Statute. See also art 9(2) of the ICTY Statute: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal".

319 Stahn 2008 *Criminal Law Forum* 95.

320 *Prosecutor v Dusko Tadic aka "Dule" Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* ICTY IT-94-1 (2 Octobre 1995) para 58.

321 Gioia 2006 *Leiden Journal of International Law* 1100.

instrument creating such international tribunal.³²² Thus, complementarity entails a conditional national primacy in the sense that investigations and prosecutions at the national level have to meet certain requirements in order to pre-empt international jurisdiction.³²³

In 1998, the ICC was established with concurrent and complementary international jurisdiction. This point is elaborated upon below.

2.3.2 *The complementarity regime of the ICC*

The Preamble to the Rome Statute and article 1 provide that the ICC “shall be complementary to national criminal jurisdiction”. Under this regime, the jurisdiction of the ICC is only secondary to domestic courts.³²⁴ States retain their right to investigate and prosecute offences over which they have jurisdiction;³²⁵ only where the national investigation or prosecution is clearly not genuine, can the ICC intervene and takeover a case.³²⁶ To this effect, article 17(1)(a) provides that a case shall not be admissible before the ICC if:

[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.

This means that if a State has initiated investigations with regard to a person sought by the ICC, that State has the right to ask the ICC Prosecutor to restrain his competence in favour of the jurisdiction of the State.³²⁷

With regard to completed trials, it is also provided that the ICC may not hear such cases where the person concerned has already been tried for the same conduct by a national court,³²⁸ unless the national proceedings.³²⁹

322 Stigen *The Principle of Complementarity* 5 and Zeidy 2002 *Michigan Journal of International Law* 870

323 Stigen *The Principle of Complementarity* 5.

324 Van Sliedregt and Stoitchkova “International criminal law” 257.

325 Dugard *International Law* 192.

326 Schoenbaum *International Relations* 294.

327 Radosavljevic 2007 *Review of International Law and Politics* 98; Burke-White 2005 *Leiden Journal of International Law* 557; Cassese 1999 *European Journal of International Criminal Law* 158 and Farbstain “The Issue of Complementarity” 52. Investigation in this context signifies “the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”. *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-02/11-96* (30 May 2011) para I (1).

- (a) [W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) [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.

The rules governing complementarity with regard to ongoing investigations (and prosecutions) and complementarity with respect to completed trials are discussed in greater detail below.

2.3.2.1 Complementarity and ongoing investigations and prosecutions

Under article 17(1) a case is not admissible before the ICC, if the 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 is therefore important to define and clarify the concepts of unwillingness and inability to genuinely investigate and prosecute.

2.1.1.1.7 Unwillingness to investigate and prosecute

The Rome Statute³³⁰ lists three factors for the determination of an “unwillingness” to investigate or prosecute: shielding a person from criminal responsibility, unjustified delay in the proceedings which is inconsistent with the intent to bring the person to justice and proceedings not conducted independently or impartially and in a manner inconsistent with bringing the person concerned to justice.

All the above criteria to determine unwillingness are subjective; they all refer to situations where a country is purposely “shielding” a suspect from responsibility for a crime over which the ICC has jurisdiction.³³¹ This may be the result of the fact that government officials or their allies are involved in the crimes.³³² For example, the situation in the former Yugoslavia following the ethnic cleansing in the early 1990s was

328 Art 20(2) Rome Statute.

329 Art 20(3) Rome Statute.

330 Article 17(2) Rome Statute.

331 Dugard *International Law* 192; Gioia 2006 *Leiden Journal of International Law* 1110 and Philippe 2006 *International Review of the Red Cross* 383: “Unwillingness [means] a state’s lack of a positive attitude towards prosecuting and trying perpetrators of international crimes”.

332 Stigen *The Principle of Complementarity* 1.

that although the Yugoslav government of that time had the necessary legislation as well as a functioning police and judiciary, it lacked the will to prosecute the criminals.³³³

Unwillingness would also be asserted when criminal leaders grant amnesty for themselves or their political allies.³³⁴ The amnesty law in Chile³³⁵ under the regime of Augusto Pinochet is a good example of this scenario. This amnesty law was intended to block prosecution of all persons, including President Pinochet himself, who took part in politically motivated criminal acts committed during the period between 1973 and 1978.³³⁶

However, being unwilling does not necessarily imply that the actors are motivated by self-interest. The criterion would also cover situations where the State seeks to shield the perpetrators of international crimes for motives that are morally acceptable.³³⁷ For example, the State might reasonably fear that a genuine prosecution will cause instability.³³⁸ Likewise, a new democratic regime may shy away from prosecuting members of the former regime in an attempt to ensure a non-violent transfer of power.³³⁹ A practical situation that features prominently in this later case is the South African TRC's amnesty process: without amnesties, the Apartheid government would not have accepted to relinquish power and, consequently, the present constitutional State would not have been in place.³⁴⁰ A question that arises in situations such as this, however, is whether such amnesties should or should not be recognised by foreign States when they relate to gross violations of human rights, over which all States have universal jurisdiction? This question will be discussed in chapter four of this study.

2.1.1.1.8 *Inability to investigate and prosecute*

Even if a State is willing to bring a perpetrator of crimes to justice and in good faith initiates criminal proceedings against him, the State might lack the ability to proceed in

333 Stigen *The Principle of Complementarity* 1.

334 Naqvi 2003 *International Review of the Red Cross* 593; Philippe 2006 *International Review of the Red Cross* 383 and Zeidy 2002 *Michigan Journal of International Law* 940.

335 Decree Law N° 2191 (Official Gazette N° 30 042 of 19 April 1978).

336 Snyder 1995 <http://cyber.law.harvard.edu/evidence99/pinochet/HistoryGeneralArticle.htm>

337 Stigen *The Principle of Complementarity* 251.

338 Stigen *The Principle of Complementarity* 251.

339 Stigen *The Principle of Complementarity* 1.

340 Varushka *The Truth and Reconciliation Commission* 1.

an adequate manner.³⁴¹ According to the Rome Statute, in order to determine inability in a particular case, the Court must consider whether:

due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.³⁴²

The concept of inability is thus a fact-driven situation.³⁴³ It may entail the physical collapse of the judicial system (no more structures) or the intellectual collapse thereof (lack of sufficient judicial personnel), for example, as the result of a devastating conflict.³⁴⁴ It may also entail a situation in which, owing to the large number of suspects, the conduct and conclusion of all the trials is impossible.³⁴⁵

A country will thus be seen as “unable” if its judicial system has collapsed to the extent that it cannot adequately investigate and prosecute gross violations of human rights.³⁴⁶ For instance, the situation in Rwanda after the 1994 genocide was that the new government was willing to prosecute the persons responsible of the genocide, but the genocide had led to a collapse of the judicial machinery, rendering the new government unable to proceed adequately.³⁴⁷

Furthermore, a State will be seen as unable if the domestic law does not allow for the prosecution of the ICC crimes in its courts. For example, some of the ICC crimes are very specific to the Rome Statute and might not have corresponding provisions at all in ordinary criminal law without a specific legislation implementing the Statute in the internal legal system. In this case the legal system of the relevant State will be seen as “unavailable”.³⁴⁸ This may be the case, for instance, with the prohibition of “imposing measures intended to prevent births”.³⁴⁹ It is highly unlikely that a seminal crime can be found in an ordinary law of a State which is not related to international criminal law. In addition, even if a State has criminalized a conduct as such, other legal provisions such

341 Stigen *The Principle of Complementarity* 313 and Philippe 2006 *International Review of the Red Cross* 383.

342 Art 17(3) Rome Statute.

343 Philippe 2006 *International Review of the Red Cross* 383 and Gioia 2006 *Leiden Journal of International Law* 1106.

344 Stigen *The Principle of Complementarity* 1.

345 Philippe 2006 *International Review of the Red Cross* 383.

346 Dugard *International Law* 192. See also Ofei *The International Criminal Court* 10.

347 Gioia 2006 *Leiden Journal of International Law* 1116 and Stigen *The Principle of Complementarity* 1.

348 Stigen *The Principle of Complementarity* 322.

349 Article 6(d) Rome Statute.

as statutes of limitation, or provisions granting immunity might well hinder the exercise of jurisdiction.³⁵⁰ In that case the result would be the “unavailability” of the national judicial system for the purpose of article 17(3): although the relevant law exists, it cannot be applied.³⁵¹

2.3.2.2 Complementarity and completed trials: the *ne bis in idem* rule

The complementarity regime of the Rome Statute is also intertwined with the *ne bis in idem* rule which is found in many domestic laws.³⁵² The Statute recognises that when a person has already been tried by a national court he may not be tried for a second time for the same crime before the ICC.³⁵³

However, in order to ensure that national trials should not be used as a means to shield perpetrators of international crimes from being tried by the ICC,³⁵⁴ the Rome Statute provides that a person who has been tried by a national court for a crime under the jurisdiction of the ICC may be retried by the Court with respect to the same conduct, if it is established that the proceedings at the national level.³⁵⁵

[W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

[...] were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Thus, in accordance with the principle of complementarity, a judgment of a national court bars a prosecution by the ICC except in the case of sham proceedings.³⁵⁶ In contrast to the parallel “unwilling” or “unable” standard applicable to ongoing investigations or prosecutions by States, the provisions on completed trials relate solely to the “unwilling” criterion.³⁵⁷ Here, the domestic courts were able to handle the trial but deliberately conducted sham trials to circumvent the ends of justice.³⁵⁸

350 Stigen *The Principle of Complementarity* 322.

351 Ofei *The International Criminal Court* 11 and Stigen *The Principle of Complementarity* 322.

352 Khen Date Unknown <http://www.alma-ihl.org/opeds/hillyme-nonbisinidem>

353 Zeidy 2002 *Michigan Journal of International Law* 930-931.

354 Philippe 2006 *International Review of the Red Cross* 384.

355 Art 20(3) Rome Statute.

356 Zeidy 2002 *Michigan Journal of International Law* 931.

357 Zeidy 2002 *Michigan Journal of International Law* 931.

358 Newton 2001 *Military Law Review* 59 and Zeidy 2002 *Michigan Journal of International Law* 931.

As stated earlier,³⁵⁹ the complementarity provisions of the Rome Statute reflect a balance between the requirements of international criminal justice and the sovereignty of States. If any national proceeding were to pre-empt ICC interference, States could too easily circumvent justice by conducting sham trials.³⁶⁰ On the other hand, if the ICC were authorised to interfere *vis-à-vis* any national proceedings, regardless of whether such proceedings were genuine or not, sovereignty would have been unduly impaired.³⁶¹ The concept of State sovereignty is discussed immediately hereunder.

2.4 The doctrine of State sovereignty

2.4.1 Definition and attributes of State sovereignty

As a consequence of modern means of communication, the world is increasingly being transformed into a “global village”.³⁶² Despite that, however, the world is still primarily organized in a State-centric way in which the State continues to be the “supreme form of political organization”.³⁶³ This is a reflection of the concept of “State sovereignty”.³⁶⁴

Nevertheless, although State sovereignty is a fundamental and important principle of international law,³⁶⁵ the precise meaning of the term “sovereignty” is not clearly defined.³⁶⁶ The concept remains a notion about which “much speculation has been

359 See 1.1.2.2 above.

360 Cassese 1999 *European Journal of International Law* 159: “complementarity might lend itself to abuse. It might amount to a shield used by states to thwart international justice. This might happen with regard to those crimes (genocide, crimes against humanity) which are normally perpetuated with the help and assistance, or the connivance or acquiescence, of national authorities. In these cases, state authorities may pretend to investigate and try crimes, and may even conduct proceedings, but only for the purpose of actually protecting the allegedly responsible persons”. See also Stigen *The Principle of Complementarity* 215.

361 Stigen *The Principle of Complementarity* 215.

362 Schermers and Blokker *Institutional Law* 2.

363 Schermers and Blokker *Institutional Law* 2.

364 Schermers and Blokker *Institutional Law* 2.

365 Forcese 2007 *McGill Law Journal* 130. The doctrine of sovereignty has been a source of stability for more than two centuries. As Haass once noted, this doctrine “has fostered world order by establishing legal protections against external intervention and by offering a diplomatic foundation for the negotiation of international treaties, the formation of international organizations, and the development of international law. It has also provided a stable framework within which representative government and market economies could emerge in many nations. At the beginning of the twenty-first century, sovereignty remains an essential foundation for peace, democracy, and prosperity”. See Haass 2003 <http://2001-2009.state.gov/s/p/rem/2003/16648.htm>

366 Ferreira-Snyman 2006 *Fundamina* 1.

made and yet which remains mysterious in its very content”.³⁶⁷ Haass³⁶⁸ gives the following four attributes to the concept of State sovereignty:

First, a sovereign state is one that enjoys supreme political authority and a monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognised by other governments as an independent entity entitled to freedom from external intervention.

Haass’s definition of State sovereignty accurately reflects the two features which international law scholars commonly attribute to sovereignty: internal sovereignty and external sovereignty.³⁶⁹ Internal sovereignty may be described as the competence by a State to exercise jurisdiction over people, events, and things found or occurring within the territory of that State.³⁷⁰ In other words, sovereignty entails the right to exercise the functions of a State within national borders and to regulate internal matters freely; that is independently of other States.³⁷¹ This principle is traditionally expressed in the maxim *rex est imperator in regno suo* (the king is emperor in his own realm).³⁷²

With regard to the question as to what constitutes an “internal matter”, the Permanent Court of International Justice (PCIJ) stated that these are matters which “are not, in principle, regulated by international law” and with respect to which, therefore, “each State is sole judge”.³⁷³ Thus, for example, a State may not interfere in the relations between a foreign government and its own nationals.³⁷⁴ Furthermore, one State cannot demand that another State take or do not take any particular internal action.³⁷⁵ For instance, a State may not ask another State to halt its plan of turning a large section of its rainforest into an amusement park. Such demand would be barred by the other State’s sovereignty.³⁷⁶

367 Cannizzaro “Fragmented Sovereignty? 36.

368 Haass 2003 <http://2001-2009.state.gov/s/p/rem/2003/16648.htm>

369 De Lupis *International Law* 3.

370 Forcese 2007 *McGill Law Journal* 130.

371 Forcese 2007 *McGill Law Journal* 130-131 and Ferreira-Snyman 2006 *Fundamina* 4.

372 Jackson *Sovereignty* 7.

373 *National Decrees in Tunis and Morocco Advisory Opinion N° 4* 1923 PCIJ Series B04 24 (7 February 1923).

374 Cassese *International Law* 53.

375 The Levin Institute - The State University of New York 2014 <http://www.globalization101.org/the-issue-of-sovereignty/>

376 The Levin Institute - The State University of New York 2014 <http://www.globalization101.org/the-issue-of-sovereignty/>

On the other hand, external sovereignty means that States are equal and independent from each other in the conduct of their international relations.³⁷⁷ In other words, a State is entitled to conduct its international relations freely and independently from other States.³⁷⁸ Thus, a State is free to choose with whom it will establish diplomatic relations or with whom it enters into commercial agreements, without authorisation or approval from any other State.³⁷⁹ This is an important concept in international law. During the 1800s, Great Britain was locked in a protracted and bitter conflict with France. On 11 November 1807, in an attempt to economically weaken France, Great Britain issued a decree which required neutral countries to obtain a license from British authorities before trading with France or its colonies!³⁸⁰ In retaliation, Napoleon Bonaparte of France issued a decree in Milan, in Italy, on the 17th of December the same year, forbidding all nations on earth to trade with England and her colonies!³⁸¹ If such orders were to be passed today, to the extent that they forbid States to freely conduct international trade, they would clearly constitute a violation by the UK and France of the external sovereignty of other States.

2.4.2 *The historical origins and development of the doctrine of State sovereignty*

The doctrine of State sovereignty has, for the past several hundred years, been the defining principle of interstate relations,³⁸² and remains one of the cardinal principles in international law and plays a pivotal role in the maintenance of international peace and order.³⁸³ However, as will be revealed in the discussion which will follow, sovereignty is neither “natural” nor static. Ideas and views about this concept have varied from time to time, as changing times necessitated different approaches.³⁸⁴ The doctrine has evolved from an absolute principle to one with various limits.

377 Ankita Date Unknown <http://www.preservearticles.com/201106248492/what-are-the-implications-of-internal-and-external-sovereignty.html>

378 Jackson *Sovereignty* 12.

379 Ankita Date Unknown <http://www.preservearticles.com/201106248492/what-are-the-implications-of-internal-and-external-sovereignty.html>

380 Hill *Napoleon's Troublesome Americans* 35.

381 Hill *Napoleon's Troublesome Americans* 36.

382 Adjei *Humanitarian Intervention* 1.

383 Adjei *Humanitarian Intervention* 1.

384 Ferreira-Snyman 2006 *Fundamina* 2.

2.4.2.1 Absolute or Westphalian sovereignty

The traditional understanding of State sovereignty is generally traced back to the Peace of Westphalia signed in 1648,³⁸⁵ which ended the Thirty Years War in Europe.³⁸⁶ No provision of the Peace of Westphalia specifically talks about sovereignty. According to Jackson,³⁸⁷ however,

as a “Peace Treaty between the Holy Roman Emperor and the King of France and Their Respective Allies”, the compact represented the passing of some power from the emperor with his claim of holy predominance, to many kings and lords who then treasured their own local predominance. As time passed, this developed into notions of the absolute right of the sovereign, and what we call “Westphalian sovereignty”.

The essence of the norms of Westphalian sovereignty was thus about defining the prerogatives of sovereign and independent States and facilitating diplomacy between them.³⁸⁸ An example of this is the doctrine that the ruler’s religion determines the religion of his subjects (*cujus region ejus religio*),³⁸⁹ which, to use Buchanan’s³⁹⁰ words, was primarily “designed to prohibit religious imperialism with its inevitable destruction and instability”, but in the end:

helped to nurture a much more general principle prohibiting intervention against sovereign states that has come to be a central tenet of the international system that grew out of the Peace of Westphalia.

Under the Westphalian view of sovereignty as absolute, the internal order of the individual State was both shielded from intervention by other States and all forms of intrusion by international law.³⁹¹ There could be no “higher power” than the nation-State and, consequently, no international law norm is valid unless the State has consented to it.³⁹² Here, only States have rights and duties. Individuals are entitled to those rights guaranteed by their political systems and there is no international standard of rights to which they could appeal.³⁹³

385 Hessler “State Sovereignty as an Obstacle to International Law” 44.

386 The Peace of Westphalia was concluded in two different treaties, namely the Treaty of Münster and the Treaty of Osnabrück. Ferreira-Snyman *State Sovereignty* 42.

387 Jackson 2003 *American Journal of International Law* 786.

388 Rodman 2006 *Ethics and International Affairs* 26-27; Hessler “State Sovereignty as an Obstacle to International Law” 45 and Ferreira-Snyman *State Sovereignty* 43.

389 Hessler “State Sovereignty as an Obstacle to International Law” 45.

390 Buchanan 2000 *Ethics* 703.

391 See Ferreira-Snyman *State Sovereignty* 45.

392 Hessler “State Sovereignty as an Obstacle to International Law” 45.

393 Rodman 2006 *Ethics and International Affairs* 26: [I]ndividuals are entitled to those rights guaranteed by their political systems and there is no international standard of rights to which

In accordance with this view (of State sovereignty as absolute), international prosecutions for human rights violations committed in a State's borders would not be possible without the will of the State's government. In the modern world, however, this view of sovereignty as absolute has become archaic and unrealistic.³⁹⁴ The modern concept of State sovereignty is more limited in scope than it may have been in the past.

2.4.2.2 Limited State sovereignty

Over the past few decades, the international community has redefined the theory of sovereignty. The Westphalian notion of sovereignty, in which States were permitted to handle their internal affairs free from international interference, has largely been discarded.³⁹⁵ Various reasons in international law are at the root of these developments. These are the recognition of the supremacy of international law over domestic law, the increasing awareness of the need for co-operation and inter-dependence between states, the adoption by States of treaties aimed at the protection of the rights of individuals and the integration of States in international or regional bodies such as the United Nations or the African Union, which have some supervisor powers over member States.

2.4.2.2.1 The supremacy of international law over national law

The first question which arose in connection with the doctrine of absolute State sovereignty was whether a sovereign State, with no authority above it, could be bound by international law.³⁹⁶ Legal writers defended the supremacy of international law over national law by applying a monistic³⁹⁷ view to the relationship between international law

they could appeal. Nor are individuals subject to international criminal liability since they are under the exclusive jurisdiction of the State on whose territory they live".

394 Swanepoel *The Emergence* 225.

395 Trumbull 2007 *Berkeley Journal of International Law* 317.

396 Ferreira-Snyman *State Sovereignty* 46.

397 Monism is opposed to "dualism". Dualism contends that international and domestic law are two distinct legal systems. According to dualist theorists, the subjects of international law are States, while the subjects of domestic law are individuals. In terms of this view, there is a fundamental difference between international law and domestic law. Accordingly, each system has competence within its own sphere and there ought to be no intrusion by one in the sphere of the other. If the national law incorporates international law into the legal system, it does so in terms of its domestic competence and not because international law imposes this obligation on it (Motala 1995 *Comparative and International Law Journal of Southern Africa* 342). The argument that international law is concerned only with the conduct of States is, however, not valid. Under modern international law, individuals have rights (for example the right not to be tortured which can be claimed against a State) as well as duties (for example, individuals can engage their individual responsibilities by committing some acts defined as crimes against in

and municipal law.³⁹⁸ They argued that a system of law is based on a *Grundnorm* or ground rule from which flows the validity of other statements of law in the system.³⁹⁹ They then argued that since in practice nations recognise the equality of each other's legal orders, the doctrine of equality must mean that they recognise a *Grundnorm* (or basic norm) higher than the *Grundnormen* of their own legal orders which bestows that equality.⁴⁰⁰ From this perspective, international law is considered to be above national law and State sovereignty can be limited by proscriptions of international law from which it derives and to which it must, therefore, conform.

To sum up, under modern international law, although a State is still sovereign, its sovereignty is limited by the norms of international law. For example, under modern international law, it is acknowledged that where a rule of international law has evolved to the status of *jus cogens* (or a peremptory norm of international law), all States are bound to refrain from any actions prohibited by that peremptory norm.⁴⁰¹ Furthermore, international law may impose positive obligations (as opposed to restrictions) on States. For example, international law obliges States to either prosecute or extradite to another State which is willing to prosecute persons who are suspected of having committed international crimes who are present on their territories.⁴⁰² This obligation (generally referred to as *aut dedere aut judicare*)⁴⁰³ contradicts the notion that a sovereign State is completely free to decide whether or not to prosecute a particular person.⁴⁰⁴ The implication of all of this is that part of States' sovereignty has been eroded.⁴⁰⁵

2.4.2.2.2 The need for co-operation and inter-dependence

During the period between the First and Second World Wars, States increasingly became aware of the need for co-operation between themselves in order to achieve the

international law, for example genocide). For this reason, the monist approach to international law has gained more acceptance in legal literature (Motala 1995 *Comparative and International Law Journal of Southern Africa* 342).

398 See Ferreira-Snyman *State Sovereignty* 46-51 and the authorities cited therein.

399 Swarup Date unknown www.manupatra.com/roundup/330/Articles/Article%201.pdf

400 Ferreira-Snyman *State Sovereignty* 49, citing Kelsen *Pure Theory of Law* (translation by Max Knight in 1970).

401 Motala 1995 *Comparative and International Law Journal of Southern Africa* 344.

402 Sunga "Reconciling Truth Commissions and Criminal Prosecutions" 1095.

403 The *aut dedere aut judicare* principle is further discussed in 2.5.3 hereunder.

404 Sunga "Reconciling Truth Commissions and Criminal Prosecutions" 1095.

405 Ferreira-Snyman *State Sovereignty* 27.

advancement of common goals.⁴⁰⁶ This gave rise to an increasing awareness of the existence of an “international community” of States,⁴⁰⁷ in which sovereign nations are joined, not as competitors in the pursuit of self interests, but as interdependent components of a global community,⁴⁰⁸ and that, accordingly, all members of the international community must take into account the valid interests of the other members when exercising their sovereignty.⁴⁰⁹

2.4.2.2.3 The adoption of human rights treaties

At the end of WWII, the protection of the rights of the individual has become an important aspect of international relations.⁴¹⁰ This shift led to the adoption of a number of various human rights instruments and the creation of supervisory human rights bodies which effectively limited the absolute powers of States over their citizens.⁴¹¹ For example, when all local remedies have been exhausted, victims of human rights violations are allowed to bring complaints against States to the UN Economic and Social Security Council.⁴¹²

The above example highlights an instance where States have established limitations to their own sovereignties by accepting that an external institution can scrutinise what they are doing in regard to human rights.

2.4.2.2.4 The integration of States in supra-national or international bodies

States may also limit their sovereignty by creating and joining supranational organisations, such as the United Nations and the African Union, that have the authority to make decisions that are binding on member States.⁴¹³ For example, in terms of article 25 of the UN Charter, the Security Council is empowered to decide to use military force against a member State when it determines that an internal situation in that State

406 Ferreira-Snyman 2006 *Fundamina* 48.

407 Ferreira-Snyman 2006 *Fundamina* 48.

408 Newton 2001 *Military Law Review* 27-28.

409 Ferreira-Snyman *State Sovereignty* 52.

410 Rakate *The Duty to Prosecute and the Status of Amnesties* 48.

411 Roht-Arriaza 1990 *California Law Review* 462: “Due to widespread revulsion for the crimes committed immediately before and during the Second World War, nations finally began to accept limits on their absolute sovereignty regarding the human rights of those residing within their jurisdictions”. See also Rakate *The Duty to Prosecute and the Status of Amnesties* 48.

412 The procedure for the ECOSOC’s dealings with communications relating to violations of human rights and fundamental freedoms is set out in the ECOSOC’s Resolution 1503-(XLVIII) of 27 May 1970.

413 Ferreira-Snyman *State Sovereignty* 246.

constitutes a “threat to the peace or breach to the peace”. For instance, in resolution 1973 of 17 March 2011 on Libya, deploring violations of human rights by the Ghaddafi regime and the use of force against civilians, the Security Council imposed a “no fly zone” over Libya and authorised States to take “all necessary measures” to protect civilians.⁴¹⁴ This is a clear example of intrusion by the Security Council into the internal matters of a State. The situation in Libya did not pose any threat to the peace in any other State, yet the Security Council seized itself of the matter and decided on the measures to be taken in order to put an end to the human rights violations in that country.⁴¹⁵

The Security Council’s involvement in conflicts that are essentially internal is further illustrated by the Security Council referral of the situation in Darfur, Sudan to the ICC.⁴¹⁶ Sudan is not a member of the ICC, and therefore the ICC could not have jurisdiction over crimes committed in Sudan, by and against Sudanese citizens. However, in accordance with article the 13(b) of the Rome Statute (to which Sudan is not party), the Security Council used its power under Chapter 7 of the UN Charter to refer the atrocities in Darfur to the ICC.

Another example is the Constitutive Act of the African Union⁴¹⁷ that limits the sovereignty of States by allowing intervention by the Union when there are large-scale violations of human rights which can be characterised as genocide, war crimes or crimes against humanity.⁴¹⁸ This power of the AU to intervene in internal matters of Member States has even been expanded by the Protocol on Amendments to the Constitutive Act⁴¹⁹ adopted in July 2003. In accordance with this Protocol (which is not yet into force), the AU will be allowed to intervene, in addition to the three situations of

414 UN SC Resolution 1973 of 17 March 2011 para 4: “*Authorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council”.

415 Dugard *International Law* 484.

416 UN Security Council Resolution 1593 of 31 March 2005,

417 OAU *Constitutive Act of the African Union* OAU Doc CAB/LEG/23.15 (2001).

418 Art 4(h) and 4(j) *Constitutive Act of the African Union*. For an excellent and detailed discussion of this topic see Ferreira-Snyman *State Sovereignty* 247-255.

419 AU *Protocol on Amendment to the Constitutive Act of the African Union* (2003).

genocide, crimes against humanity and war crimes, in the case of a “serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council”.⁴²⁰ If this amendment enters into force, the AU will have extensive intervention powers akin of those of the UN Security Council discussed above.⁴²¹

It follows from the above that the idea of absolute sovereignty has become an outdated concept in modern international law.⁴²² However, although no longer absolute, State sovereignty and the principle of non-intervention are not obsolete concepts but remain influential components of international law and, in fact, central to the UN system itself. Article 2(1) of the UN Charter provides that the United Nations is based on the "principle of the sovereign equality of all its Members". The Charter thus recognises that the principle of State sovereignty remains one of the fundamentals of international law and international relations.⁴²³ By this, the Charter to some extent reaffirms the Westphalian principle that, under international law, all States, irrespective of their size or economy, should be treated as equal,⁴²⁴ and that any infringement or intrusion into the sovereignty of a State by another State is therefore strictly prohibited.⁴²⁵

2.4.3 Sovereignty and jurisdiction

2.4.3.1 The concept of jurisdiction

Under international law, jurisdiction is the power of a State to regulate affairs pursuant to its laws.⁴²⁶ Jurisdiction is therefore an important aspect of sovereignty.⁴²⁷ As Shaw⁴²⁸ says:

[T]he concept of jurisdiction revolves around the principles of state sovereignty, equality and non-interference. Domestic jurisdiction as a notion attempts to define an area in which the actions of the organs of government and administration are supreme, free from international legal principles and interference.

420 Art 1 *Protocol on Amendment to the Constitutive Act of the African Union*.

421 For a detailed discussion of this topic, see Muhire *Intervention* 185-249.

422 Ferreira-Snyman 2006 *Fundamina* 1.

423 Adjei *Humanitarian Intervention* 5.

424 Ferreira-Snyman 2006 *Fundamina* 21.

425 Jackson *Sovereignty* 2.

426 Cryer *et al An Introduction* 43; Bantekas and Nash *International Criminal Law* 143; O'Keefe 2004 *Journal of International Criminal Justice* 736, Joyner 1996 *Law and Contemporary Problems* 163 and Shaw *International Law* 572.

427 Brownlie *Principles* 299; Colangelo 2005 *Virginia Journal of International Law* 9 Werle *International Criminal Law* 66 and Cryer *et al An Introduction* 43.

428 Shaw *International Law* 621.

Jurisdiction thus describes the power or authority of States to make (legislative jurisdiction), apply (judicial jurisdiction), and enforce law (executive jurisdiction).⁴²⁹ It can be civil or criminal.⁴³⁰ Since this study is solely concerned with the prosecution of international crimes in South African courts, the remaining discussion of jurisdiction will only be focused on jurisdiction in criminal matters.

2.4.3.2 Legislative jurisdiction in criminal matters

Legislative jurisdiction, sometimes called prescriptive jurisdiction, refers to the competence to enact and prescribe the ambit of national laws.⁴³¹ In the criminal context, legislative jurisdiction relates to a State's authority under international law to assert the applicability of its criminal law to given conduct.⁴³²

Prescriptive jurisdiction is the most important part of States' jurisdiction in international law because both the jurisdiction to enforce (executive jurisdiction) and the jurisdiction to adjudicate (judicial jurisdiction) are dependent on jurisdiction to prescribe.⁴³³ In other words, a State has no authority to subject persons to its judicial process if that State has no lawmaking authority over those persons to begin with.⁴³⁴

Primarily, legislative jurisdiction is territorial.⁴³⁵ In principle, a State may apply its prescriptive jurisdiction only to persons and things within its territory.⁴³⁶ For example, a State may not prescribe that drivers must drive on the left hand side of the road in the territory of foreign States; such legislation plainly would be contrary to international law.⁴³⁷ However, international law also allows States to exercise legislative jurisdiction

429 Colangelo 2005 *Virginia Journal of International Law* 9; Cassese *International Law* 49 and Bassiouni 2001 *Virginia Journal of International Law* 89; Dugard *International Law* 146. See also Swanepoel *The Emergence* 35: "Jurisdiction of a state with reference to its sovereignty refers to that state's sovereign right to exercise legislative, executive, administrative and judicial authority within a particular territory".

430 O'Keefe 2004 *Journal of International Criminal Justice* 736.

431 Bantekas and Nash *International Criminal Law* 143. See also Geneuss 2009 *Journal of International Criminal Justice* 949: "Legislative or prescriptive jurisdiction refers to a state's authority under international law to make its substantive criminal law applicable to particular persons and occurrences, i.e., to determine the geographical reach of a state's law".

432 O'Keefe 2004 *Journal of International Criminal Justice* 736.

433 Colangelo 2005 *Virginia Journal of International Law* 10.

434 Colangelo 2005 *Virginia Journal of International Law* 10.

435 Abdulrahim Date Unknown <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/7-state-jurisdiction>

436 Colangelo 2005 *Virginia Journal of International Law* 12.

437 Colangelo 2005 *Virginia Journal of International Law* 12.

beyond national territories.⁴³⁸ This power is reflected in the concepts of extraterritorial and universal jurisdiction which will be discussed in detail later in this chapter, in relation to judicial jurisdiction.⁴³⁹ In a nutshell, extraterritorial legislative jurisdiction refers to a State's competence to criminalise conduct occurring in foreign States, when there is a direct and substantial link between the conduct in question and the State criminalising it.⁴⁴⁰ For example, the Rwandan Penal Code provides that a "Rwandan" citizen who commits a felony or a misdemeanour, outside Rwandan territory, may be prosecuted and tried by Rwandan courts in accordance with the Rwandan law if such an offence is punishable by Rwandan law.⁴⁴¹

On the other hand, universal legislative jurisdiction, or universal jurisdiction to prescribe, is, in criminal matters, the competence of a State under international law to criminalise a certain conduct that takes place abroad when, at the time of the commission of the offence, there is no direct link between the prescribing State and the crime.⁴⁴² For example, all States are free to enact laws that criminalise genocide wherever and by whoever it may be committed.⁴⁴³

2.4.3.3 Executive jurisdiction in criminal matters

Executive, or enforcement jurisdiction, refers to the ability of States to enforce laws and judicial decisions.⁴⁴⁴ In the criminal context, executive jurisdiction refers to a State's authority under international law to enforce its criminal law through police and other executive action.⁴⁴⁵

While jurisdiction to prescribe (legislative jurisdiction) can be extraterritorial and universal, enforcement jurisdiction is strictly territorial.⁴⁴⁶ This means that it is not permissible for a State to exercise any form of extraterritorial police powers without the foreign State's consent.⁴⁴⁷ For example, the police of one State may not investigate

438 O'Keefe 2004 *Journal of International Criminal Justice* 740.

439 See 3.4.3.4 hereunder.

440 Colangelo 2005 *Virginia Journal of International Law* 12.

441 Art 13 *Organic Law n° 01/2012 of 02/05/2012 Instituting the Penal Code* (Official Gazette n° Special of 14 June 2012).

442 O'Keefe 2004 *Journal of International Criminal Justice* 756.

443 Colangelo 2005 *Virginia Journal of International Law* 13.

444 Bantekas and Nash *International Criminal Law* 143.

445 O'Keefe 2004 *Journal of International Criminal Justice* 736.

446 O'Keefe 2004 *Journal of International Criminal Justice* 740 and Cassese *International Law* 49.

447 Brownlie *Principles* 309 and O'Keefe 2004 *Journal of International Criminal Justice* 740.

crimes and arrest suspects in the territory of another State without that other State's consent.⁴⁴⁸ However, the territorial nature of enforcement jurisdiction does not entail that the exercise of police powers *in absentia*, that is, when the suspect is not on the territory of the State in question; is prohibited. For instance, international law does not prohibit the issuing of an arrest warrant for a suspect who is on the territory of a foreign State.⁴⁴⁹

A question of enforcement jurisdiction *in absentia* arose in the South African case of *Southern African Litigation Centre v National Director of Public Prosecutions*⁴⁵⁰ concerning an application brought in terms of section 6 of the *Promotion of Administrative Justice Act* 3 of 2000 and the Implementation Act, in relation to the allegations of serious violations of human rights (torture constituting crimes against humanity) committed in Zimbabwe in 2007.

The application concerned the events alleged to have taken place in Harare, Zimbabwe, on 27 March 2007. It was alleged that on that day the Zimbabwean police, under orders from the ruling party, the Zanu-PF, raided the headquarters of the opposition Movement for Democratic Change ("MDC") and that during that raid, over one hundred people were arrested and taken into custody where they were continuously and severely tortured.⁴⁵¹ In response to these acts, the applicants (the Southern African Litigation Centre) compiled evidence relating to the said events and submitted it to the South African authorities for investigation.⁴⁵² The respondents (South African authorities) argued that they lacked the power to investigate such crimes on the ground that section 4(3) does not provide universal jurisdiction *in absentia* (in the absence of suspects). Section 4(3) of the Implementation Act provides as follows:

448 Poels 2005 *Netherlands Quarterly of Human Rights* 67-68: "[a] State cannot violate the sovereignty of another State, and thus overstep the limits dictated by international law, by exercising physical constraint on the latter's territory, without permission, by arresting or removing an individual by virtue of its own government agents".⁴⁴⁸ See also Reydam's *Universal Jurisdiction* 3: "[a] State cannot perform outside its territory acts auxiliary to the prosecution and trial of an offence (eg arrest of a suspect, collection of evidence, site inspection, or deposition of witnesses), unless explicitly authorized by the territorial State".

449 O'Keefe 2004 *Journal of International Criminal Justice* 740-741.

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

451 2012 JDR 0822 (GNP) 6.

452 The docket was hand-delivered to the Priority Claims Litigation Unit (PCLU), being the entity responsible for the investigation and prosecution of crimes contemplated in the ICC Act, as part of the National Prosecuting Authority (the NPA). *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 JDR 0822 (GNP) 7.

In order to secure the jurisdiction of a South African court for purposes of this chapter, any person who commits a crime contemplated in ss (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if –

[...]

c. that person, after the omission of the crime, is present in the territory of the Republic;[...]

The applicants disagreed on this interpretation of section 4(3) of the Implementation Act and sought a court order directing the respondents to reconsider their request to initiate an investigation into the alleged crimes. They believed that South African authorities were legally entitled to investigate the allegations in the absence of the suspects on South African territory.

The court agreed with the applicants that the respondents' argument was "absurd", holding that such argument:

would mean that if a suspect was physically present in South Africa then an investigation could continue. If they then left, even for a short period, the jurisdiction would then be lost. If they then re-entered South Africa, an investigation would continue. I agree that this does amount to an absurdity.⁴⁵³

The court declared that section 4(3) of the Implementation Act was concerned with a trial, not an investigation and declared the decision to refuse to initiate investigations was unlawful and invalid,⁴⁵⁴ a view which was confirmed by the Supreme Court of Appeal.⁴⁵⁵

It is submitted that the court's decision was a correct one. The territorial character of enforcement jurisdiction does not prevent a State from investigating a case and subsequently requesting the extradition of a suspect from the territory of a foreign State in which he is present.⁴⁵⁶ The *Pinochet* case⁴⁵⁷ in England is a case in point: Spain investigated the allegations against General Pinochet without him being present on Spanish territory and requested the United Kingdom to extradite him to Spain for trial.⁴⁵⁸ The provisions of the Implementation Act that permit investigations of international crimes without a suspect being present on South African territory are therefore consistent with international law.

453 2012 JDR 0822 (GNP)91.

454 2012 JDR 0822 (GNP)93.

455 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2014 2 SA 42 (SCA).

456 O'Keefe 2004 *Journal of International Criminal Justice* 740-741.

457 *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] 4 All ER 897.

458 O'Keefe 2004 *Journal of International Criminal Justice* 752.

2.4.3.4 Judicial jurisdiction in criminal matters

2.4.3.4.1 Definition

Judicial jurisdiction, also called jurisdiction to adjudicate or curial jurisdiction,⁴⁵⁹ relates to the competence of courts to apply national laws.⁴⁶⁰ In the criminal context, judicial jurisdiction refers to a municipal court's competence to try a person or persons alleged to have committed an offence.⁴⁶¹

In international law, judicial jurisdiction is dependent on legislative jurisdiction. National courts cannot exercise judicial jurisdiction over conducts which have not been criminalised by the State's legislature in the first place.⁴⁶² Thus, where judicial jurisdiction is asserted, legislative jurisdiction is implied.⁴⁶³

2.4.3.4.2 Jurisdictional bases

The criminal jurisdiction of a State's courts under international law is primarily territorial.⁴⁶⁴ Only under exceptional conditions can national courts also assert extraterritorial jurisdiction and even, under more stringent and narrower conditions, universal jurisdiction.⁴⁶⁵

459 O'Keefe 2004 *Journal of International Criminal Justice* 736

460 Bantekas and Nash *International Criminal Law* 143. See also Colangelo 2005 *Virginia Journal of International Law* 10: "[a]djudicative jurisdiction is [the state's] authority to subject persons or things to its judicial process".

461 O'Keefe 2004 *Journal of International Criminal Justice* 737.

462 O'Keefe 2004 *Journal of International Criminal Justice* 737 and Akehurst 1973 *British Yearbook of International Law* 179.

463 O'Keefe 2004 *Journal of International Criminal Justice* 737. See also Akehurst 1973 *British Yearbook of International Law* 179: "In criminal law legislative jurisdiction and judicial jurisdiction are one and the same. States do not apply foreign criminal law; even in those few cases where criminality under the *lex loci* is made a condition precedent for the extraterritorial application of the criminal law of the forum, the accused is acquitted or convicted of an offence under the *lex fori*. If the court has jurisdiction, it applies its own law; if the *lex fori* applies, then the court has jurisdiction (apart from cases of immunity, statutes of limitation, etc.)".

464 *Bankovic v Belgium* (2002) 123 ILR 94 para 59. See also Schabas "International Crimes" 274: "The exercise of jurisdiction over crimes is a facet of national sovereignty. Pursuant to principles of international law, as a general rule states have only exercised jurisdiction over crimes when they could demonstrate an appropriate link or interest. Normally, this consisted of a territorial connection, either because the crime was committed on the state's territory or because it had significant effects on that territory".

465 *Bankovic v Belgium* (2002) 123 ILR 94 para 59.

2.4.3.4.2.1 Territorial jurisdiction

International law grants to States the right to exercise criminal jurisdiction over all acts that occur within its territory and over all persons responsible for such criminal acts, whatever their nationality.⁴⁶⁶ This jurisdiction extends to a crime which was commenced within the State's territory but completed on the territory of another State (subjective territoriality),⁴⁶⁷ or which was commenced on the territory of a foreign State but completed within its territory (objective territoriality).⁴⁶⁸

An example of objective and subjective territoriality in international law would be where a rocket is fired from one State at a civilian object in another.⁴⁶⁹ The State in which the rocket was fired would assert jurisdiction over the crime on the basis of subjective territoriality, while the State in which the rocket landed would have jurisdiction over it on the basis of objective territoriality.⁴⁷⁰

2.4.3.4.2.2 Extra-territorial jurisdiction

International law also permits States to exercise criminal jurisdiction over crimes committed on foreign soil where there is a "direct and substantial connection between the State exercising jurisdiction and the matter in question".⁴⁷¹ The commonly accepted bases for extraterritorial criminal jurisdiction are the nationality principle and the protective principle.

2.4.3.4.2.2.1 Nationality

States are entitled under international law to legislate and adjudicate with respect to the conduct of their nationals abroad (known as active nationality or active personality).⁴⁷²

466 Cryer *International Criminal Law* 46. See also Swanepoel *The Emergence* 264-265; Brownlie *Principles* 301; Schabas *Introduction* 73; Joyner 1996 *Law and Contemporary Problems* 164; Zeidy 2002 *Michigan Journal of International Law* 870; Blakesley "Extraterritorial Jurisdiction" 5 and Council of the European Union "The AU-EU Expert Report" para 12.

467 Brownlie *Principles* 301 and Dugard *International Law* 149-150.

468 Dugard *International Law* 149-150; Brownlie *Principles* 301 and O'Keefe 2004 *Journal of International Criminal Justice* 739.

469 Cryer *International Criminal Law* 47.

470 Cryer *International Criminal Law* 47.

471 Dugard *International Law* 148.

472 Dugard *International Law* 152. See also Swanepoel *The Emergence* 264; Blakesley "Extraterritorial Jurisdiction" 5; Lee 1999 *Virginia Journal of International Law* 432; Council of the European Union "The AU-EU Expert Report" para 12 and Cryer *International Criminal Law* 47. It is worth noting that in case of criminal participation, the nationality of each accused is

In *Mharapara*⁴⁷³, a trial of an ex-Zimbabwean diplomat on charges of theft from the Zimbabwean government committed while he was in the Zimbabwean diplomatic mission in Belgium, the court exercised jurisdiction on the ground of nationality, holding that:

a state has jurisdiction with respect to any crime committed outside its territory by a person or persons who is or they are its nationals at the time when the offence was committed [...].⁴⁷⁴

Some States also extend their criminal jurisdiction over the activities of their permanent residents when they are abroad.⁴⁷⁵ This is an extended form of the nationality principle.⁴⁷⁶ This form of jurisdiction is also acceptable under international law since those who have chosen to establish their permanent residency in a particular State are clearly analogous to its citizens.⁴⁷⁷

Under the nationality heading, States are also permitted to exercise criminal jurisdiction over a person who commits an offence abroad against a national of that State (passive personality).⁴⁷⁸ In *United States v Tunis* (n° 2),⁴⁷⁹ a United States District Court invoked passive personality as a basis for exercising jurisdiction over a Lebanese national who hijacked a Jordanian aircraft with United States nationals on board. Likewise, a

considered separately; jurisdiction over an accused national does not carry with it jurisdiction over his alien accomplices. Akehurst 1973 *British Yearbook of International Law* 156.

473 1985 4 SA 42 (ZH).

474 1985 4 SA 47. The Implementation Act also empowers South African courts to assert jurisdiction over South African citizens who commit international crimes abroad. Section 4(3) of the Implementation Act provides that: “[...] any person who commits a crime contemplated in subsection (l) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if- (a) that person is a South African citizen”.

475 Du Toit *et al Commentary* 16-13.

476 Brownlie *Principles* 303 and Cryer *et al International Criminal Law* 48.

477 Cryer *et al International Criminal Law* 48. “[...] any person who commits a crime contemplated in subsection (l) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if- [...] (b) that person is not a South African citizen but is ordinarily resident in the Republic”.

478 Dugard *International Law* 153; Brownlie *Principles* 304; Du Toit *et al Commentary* 16-13 ; Blakesley “Extraterritorial Jurisdiction” 5 and Council of the European Union “The AU-EU Expert Report” para 12. In this regard, section 4(3) of the Implementation Act also grants South African courts with jurisdiction over international crimes committed abroad against South African citizens, but also those committed against those who have a permanent residency in South Africa. The section reads as follows: “[...] any person who commits a crime contemplated in subsection (l) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if- [...] (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic”.

479 681 F Supp 896 (1988) 82 ILR 344.

Japanese national was prosecuted by a Netherlands Court Martial for forcing a Dutch woman into prostitution in Batavia, Indonesia from 1943 to 1945.⁴⁸⁰

2.4.3.4.2.2 The protective principle

It is accepted under international law that every country is competent to take any measures compatible with the law of nations, in order to safeguard its national interests.⁴⁸¹ A state may thus exercise jurisdiction over aliens who have committed acts abroad that are considered prejudicial to its safety and security,⁴⁸² such as counterfeiting of the national currency⁴⁸³ and treason.⁴⁸⁴ The rationale of the protective principle is that since other States will normally not be interested in protecting the security of the affected State, it is legitimate for the State in question to take appropriate measures, including by exercising its criminal jurisdiction, against the perpetrators of the offending acts.⁴⁸⁵

Under the protective principle, a State may also assert jurisdiction over crimes that, although committed on foreign soil, create “effects” upon the territory of the State.⁴⁸⁶ Thus, a State may exercise jurisdiction on such crimes such as conspiracy to commit a crime which is perpetrated on the territory of that State, even if the conspiracy took place outside the territory of the State in question.⁴⁸⁷

2.4.3.4.2.3 Universal jurisdiction

As pointed out earlier,⁴⁸⁸ jurisdiction is regarded as an important aspect of State sovereignty.⁴⁸⁹ In accordance with this principle, the primary methods of judicial enforcement of the provisions protecting human rights should be the domestic courts of

480 *Trial of Washio Awochi* Netherlands Temporary Court-Martial at Batavia (25 October 1946) 1997 LRTWC 122-125.

481 Bantekas and Nash *International Criminal Law* 154; Du Toit *et al Commentary* 16-13 and Joyner 1996 *Law and Contemporary Problems* 164.

482 Dugard *International Law* 150 and Blakesley “Extraterritorial Jurisdiction” 5.

483 Council of the European Union “The AU-EU Expert Report” para 12.

484 Du Toit *et al Commentary* 16-13. See also *R v Neumann* 1949 3 SA 1238 (SCC).

485 Du Toit *et al Commentary* 16-13.

486 Schabas *Introduction* 82. Other crimes which may fall under this type of jurisdiction are the selling of a State’s secrets, spying and the counterfeiting of its currency or official seal. Cryer *International Criminal Law* 250.

487 Schabas *Introduction* 82.

488 See 2.4.3.1 above.

489 Dugard *International Law* 146.

the State where the crime occurred (principle of territoriality).⁴⁹⁰ However, as pointed out in the previous chapter,⁴⁹¹ since international crimes are often committed by State agents as part of State policy, this method of enforcement of human rights often fails.⁴⁹² In order to counter this “culture of impunity”, there are two other possible avenues where judicial enforcement of human rights norms may take place. First, such enforcement may take place in international courts, such as the ICC. However, enforcement of human rights norms by such courts is limited, *inter alia*, by the fact that an international court may not have the necessary means (in terms of financial and human resources) to prosecute the violators of the large-scale violations of human rights.⁴⁹³ For this reason, enforcement of international criminal law must resort to the second avenue: the domestic courts of other States.⁴⁹⁴

For a domestic court of a foreign State to serve as a forum for the enforcement of international criminal law, however, it must first be established whether such a State has jurisdiction, as a matter of international law, to subject the issue to adjudication in its courts. This question relates to the legal concept known as “universal jurisdiction”. In a nutshell, a court is said to have universal jurisdiction when it has jurisdiction over persons suspected of having committed certain grave crimes under international law, independent of where these crimes were committed and independent of the nationality of the victims or alleged perpetrators, and even if these crimes did not pose a direct threat to the prosecuting State's security or particular interests.⁴⁹⁵ The concept of universal jurisdiction is discussed in detail in the next point.

490 See 2.4.3.4.2.1 above.

491 See 1.1.2.4 above.

492 See also Akande 2011 *European Journal of International Law* 816 and Cassese *International Criminal Law* 2nd ed 307.

493 Werle *International Criminal Law* 67. See also Coalition for the International Criminal Court Date Unknown http://www.iccnw.org/documents/FS_CICC_Implementation_Legislation_en.pdf

494 Akande and Shah 2011 *European Journal of International Law* 816.

495 Poels 2005 *Netherlands Quarterly of Human Rights* 67; Bassiouni 2001 *Virginia Journal of International Law* 88; Joyner 1996 *Law and Contemporary Problems* 165; Swanepoel *The Emergence* 36; Meron 1995 *American Journal of International Law* 576; Colangelo 2005 *Virginia Journal of International Law* 2; Philippe 2006 *International Review of the Red Cross* 377; Hurwitz “Universal Jurisdiction” 271; Yee 2011 *Chinese Journal of International Law* 505; Macedo *et al* “Princeton Principles” 28; Institute of International Law “Universal Criminal Jurisdiction” para 1 and Lee 1999 *Virginia Journal of International Law* 433-434.

2.5 The concept of universal jurisdiction

2.5.1 Definition, rationale and examples of universal jurisdiction

As stated above,⁴⁹⁶ a state's extraterritorial jurisdiction is limited to instances where there is a "direct and substantial connection between the State exercising jurisdiction and the matter in question".⁴⁹⁷ If a State would purport to exercise extraterritorial jurisdiction in the absence of any "direct and substantial connection" such exercise of jurisdiction would be regarded as an infringement over other States' sovereignty and those States would protest.⁴⁹⁸ With regard to crimes which are regarded as "international crimes", however, the jurisdictional limitation imposed by the principle of State sovereignty is lifted.⁴⁹⁹ The fact that an offence is a crime under international law implies that a such crime is of common concern to all States, which gives them the right to bring perpetrators to justice, regardless of territory and the nationality of the perpetrator or the victim.⁵⁰⁰ As Lee⁵⁰¹ says:

[U]nlike other bases for jurisdiction, which require some direct connection between the offense and the state exercising jurisdiction, the universality principle is predicated on the assumption that certain offenses are so egregious and universally condemned that all states have an interest in proscribing and punishing the offenses no matter where or by whom they occur.

The principle of universal jurisdiction is grounded in the assumption that there is a need to expand enforcement mechanisms needed to protect individuals against the most serious violations of human rights defined as crimes under international law; and that such expanded jurisdictional enforcement network will produce deterrence and

496 See 2.5.3.4.2.2 above.

497 Dugard *International Law* 148.

498 Dugard *International Law* 152.

499 Yee 2011 *Chinese Journal of International Law* 505. In the *Eichman* case, the District Court of Jerusalem described universal jurisdiction as follows: "The abhorrent crimes defined in this Law are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ("*delicta juris gentium*"). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal". *Attorney General of the Government of Israel v Adolf Eichmann* District Court of Jerusalem Case N° 40/61 (11 December 1961) para 12. A copy of this judgement is accessible at <http://www.internationalcrimesdatabase.org/Case/192> [30 Jan 2012].

500 Bassiouni *International Criminal Law* 50; Dugard *International Law* 154 and Yee 2011 *Chinese Journal of International Law* 505. See also Bassiouni 2001 *Virginia Journal of International Law* 88: "As an *actio popularis*, universal jurisdiction may be exercised by a state without any jurisdictional connection or link between the place of commission, the perpetrator's nationality, the victim's nationality, and the enforcing state".

501 Lee 1999 *Virginia Journal of International Law* 433-434

prevention, and ultimately will enhance world order.⁵⁰² Thus, when a State's courts exercise universal jurisdiction, the State is not acting in its own name *uti singulus*, but in the name of the international community as a whole.⁵⁰³

However, while international law "permits" universal jurisdiction, it is the domestic law of states which confers jurisdiction to national courts. As correctly put by Gubbay JA in *S v Mharapara*⁵⁰⁴ in relation to extraterritorial jurisdiction:

[T]he permissibility under international law for a state to exercise jurisdiction is not a sufficient basis for the exercise of jurisdiction by a municipal court of that state. A municipal court must be satisfied in addition that the municipal law itself authorizes the trial of a national for an offence committed abroad which would be punishable if committed at home.

This argument applies with equal force with regard to universal jurisdiction. While international law may permit such jurisdiction, it is the national laws of states that actually authorize the trial of those cases before national courts.⁵⁰⁵ The Implementation Act fulfils this function with regard to the prosecution of international crimes in South African courts. It gives them jurisdiction over international crimes not only when they are committed on South African territory but also when they were committed outside the territory of the Republic and "that person, after the omission of the crime, is present in the territory of the Republic".⁵⁰⁶

It is in pursuance of the principle of universal jurisdiction, that a number of perpetrators of the 1994 Genocide against the Tutsis in Rwanda have been tried and convicted in Belgium,⁵⁰⁷ pursuant to its 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 1977,⁵⁰⁸ which criminalised violations of those treaties without regard to the place where the crime was committed. This was the first time in history that a third party State

502 Bassiouni 2001 *Virginia Journal of International Law* 97.

503 Abi-Saab 2003 *Journal of International Criminal Justice* 600. See also *Dugard International Law* 154.

504 1986 1 SA 556 (ZS).

505 Lamprecht *Adjudication of International Crimes* 259: "[n]ational courts would normally not exercise international criminal jurisdiction unless they have been empowered by the legislators of their respective states to do so".

506 Section 4(3) Implementation Act.

507 *Prosecutor v Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera* Brussels Cour d'Assises (8 June 2001). A copy of the judgement is accessible at [http://www.haguejusticeportal.net/Docs/NLP/Belgium/Ntezimana_arret_\(8-6-2001\).pdf](http://www.haguejusticeportal.net/Docs/NLP/Belgium/Ntezimana_arret_(8-6-2001).pdf) [30 March 2014].

508 *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 05 August 1993).

convicted persons of war crimes not directly affecting the prosecuting State.⁵⁰⁹ Furthermore, the trial was very significant in that the defendants were not former high-ranking government officials. Two of the defendants,⁵¹⁰ were ordinary Benedictines while the third⁵¹¹ was a professor at the National University of Rwanda, and the fourth⁵¹² was a businessman.⁵¹³

Other countries which exercised universal jurisdiction over perpetrators of the Rwandan genocide are Switzerland and Canada. In 1999, a Swiss military court tried and found Mr. Fulgence Niyonteze, a former mayor in Rwanda, guilty of war crimes.⁵¹⁴ In Canada, in 2009, Desire Munyaneza, was convicted of genocide, crimes against humanity and war crimes committed in Rwanda and against Rwandan citizens.⁵¹⁵

Germany has also exercised universal jurisdiction in cases related to the conflict in the Former Yugoslavia. In 1997 Mr. Nikola Jorgic, a Bosnian Serb, was found guilty of genocide against Bosnian Muslims.⁵¹⁶ In 1999, a German court also found Mr Maksim Sokolovic, a Serbian, guilty of aiding and abetting the crime of genocide against the Muslim population in Osmaci in Bosnia and Herzegovina.⁵¹⁷ Again, in 1999, a German court found Mr Djuradj Kusljic, another Bosnian Serb and former chief of the police station in northern Bosnia, guilty of genocide and sentenced him to life imprisonment.⁵¹⁸

509 Case Western Reserve School of Law 2003
<http://www.nesl.edu/userfiles/file/wcmemos/2003/harrah.pdf>

510 Sister Gertrude (Consolata Mukangano) and Sister Maria Kisito (Julienne Mukabutera).
 511 Vincent Ntezimana.
 512 Alphonse Higaniro.
 513 Keller 2001 <http://www.asil.org/insigh72.cfm>

514 *Prosecutor v Fulgence Niyonteze* Tribunal Militaire d'Appel Geneva Switzerland (26 May 2000). Accessed at http://www.trial-ch.org/fileadmin/user_upload/documents/APPEL_FN.pdf [1 Jan 2012].

515 *R v Munyaneza* Superior Court (Quebec) Canada Case N° 500-73-002500-052 (29 Octobre 2009). Accessed at http://www.google.rw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCgQFjAB&url=http%3A%2F%2Fwww.cci.j.ca%2Fprograms%2Fcases%2Fmunyaneza-judgment-en-2009-05-22.pdf&ei=3HktU_iBHKLA7AbmuoCQBg&usq=AFQjCNHK-MykXfEzINbZgsmHK-r2pRVBjQ&bvm=bv.62922401,d.Yms [22 March 2014].

516 *Prosecution v Nikola Jorgić* Federal Court of Justice Case N° 3 StR 215/98 (30 April 1999). A summary of the case as well as the link to the original judgement (in Germany) are available on the ICRC's website at <http://www.icrc.org/ihl-nat.nsf/0/3DD61210D58D48C9C1256ACC003457D1> [20 March 2014].

517 *Prosecution v Maksim Sokolović* Higher Regional Court (Oberlandesgericht) of Dusseldorf Case N° 2 StE 6/97 (29 November 1999). A summary of the case as well as the link to the original judgement (in Germany) are available on the ICRC's website at <http://www.icrc.org/ihl-nat.nsf/0/6FECEBA3886F31A2C1256A95004D6E14> [22 March 2014].

518 *Prosecution v Djuradj Kusljic* Bavarian Higher Regional Court Case No 6 St 1/99 (15 December 1999). A summary of the case as well as a link to the judgement (in Germany) are available at

2.5.2 The crimes that are subject to universal jurisdiction

While the existence of the notion of universal jurisdiction is not disputed, the question as to which crimes States have such jurisdiction is not easily answerable. In legal literature, it is often simply stated that States have universal jurisdiction over “international crimes”. But, what are these international crimes over which all States have universal jurisdiction?

According to Dugard,⁵¹⁹ the crimes that are considered as affecting the international legal order as a whole and which, consequently, fall under the universal jurisdiction of all States, are genocide, war crimes, crimes against humanity, piracy,⁵²⁰ slave-trading and torture; a view which is supported by a number of commentators on this subject.⁵²¹ Some commentators⁵²² also view the crime of aggression as falling under this category.

For the purposes of this study it suffices to note that the universal jurisdiction over genocide, crimes against humanity and war crimes, which are the proper focus of the study, is clearly established in state practice and generally accepted in legal

the ICRC's website at <http://www.icrc.org/ihl-nat.nsf/0/89CE874FA05E14DBC1256ACC004E5E09> [22 March 2014].

519 Dugard *International Law* 154.

520 In support of the view that piracy is an international crime subject to the universal jurisdiction of all States, see also Sand “After Pinochet: the role of national courts” 87 and Lulu “Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law” 40. Some commentators oppose this view. They hold the view that this crime is not an international crime in the strict sense of the word and that, consequently, it is not subject to the universal jurisdiction of all States. The reason for this, they argue, is that piracy is not committed against the “humanity” as a whole but against particular States. Cassese *International Criminal Law* 2nd ed 23-25 and Lee *Universal Jurisdiction* 26. It is not on behalf of the international community as a whole, Lee argues, that piracy is universally suppressed; it is rather “on states’ own behalf, or better yet, on each other’s behalf”, that piracy is suppressed. Lee *Universal Jurisdiction* 26. Against this argument, it may be said that since piracy is committed on the High Seas, which are not under the jurisdiction of a particular State, pirates threaten, not a particular State, but the whole world in general. They endanger international trade and commerce generally, not only for some States. See in this regard *France v Turkey The Case of the SS “LOTUS”* Dissenting Opinion by Mr Moore PCIJ Series A N^o 7 (27 September 1927) 70: “Piracy by law of nations, in its jurisdictional aspects, is sui generis. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind-hostis humani generis-whom any nation may in the interest of all capture and punish”. See also Jessica “Human Rights” 227 and Kittichaisaree “Piracy: International Law & Policies” 1.

521 Newton 2001 *Military Law Review* 30 and Chengyuan “The Connotation of Universal Jurisdiction” 160

522 Macedo *et al* “Princeton Principles” 29 and Hoover “Universal Jurisdiction” 23.

literature.⁵²³ In particular, the fact that these crimes (together with aggression) have been included in the Rome Statute, which, as of 22 March 2014, has been ratified by 122 States⁵²⁴ (out of 193 which are member to the UN),⁵²⁵ makes the status of these crimes as core “international crimes” beyond serious dispute.

2.5.3 Universal jurisdiction, a “right”, not a “duty”

The principle of universal jurisdiction entails only the authority to prosecute, not a duty to do so.⁵²⁶ The duty to prosecute perpetrators of international crimes is a different concept. This duty, which is often expressed in its Latin form: *aut dedere aut judicare* (which literally translated means extradite or prosecute) means that those who commit crimes under international law may not be granted safe havens anywhere in the world, thus making prosecution or extradition mandatory.⁵²⁷

Thus, as a right, universal jurisdiction is merely permissive. Accordingly, a State may not be compelled to exercise universal jurisdiction if it does not wish to do so.⁵²⁸ However, in order to avoid impunity for international crimes, the State in question can be compelled to extradite the suspect to another State that is willing to prosecute.⁵²⁹

It is on the basis of the principles of universal jurisdiction and *aut dedere aut judicare*⁵³⁰ that the ICJ in July 2012 ordered Senegal to prosecute or extradite to Belgium (which was willing to prosecute under the principle of universal jurisdiction) the former Chadian

523 See also Institute of International Law “Universal Criminal Jurisdiction”. 2.

524 ICC Date Unknown The States Parties to the Rome Statute http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

525 Jewish Virtual Library 2014 <http://www.jewishvirtuallibrary.org/jsource/UN/unmembers.html>

526 Werle *International Criminal Law* 70 and Dugard *International Law* 155.

527 Zeidy 2002 *Michigan Journal of International Law* 948 and Lamprecht *Adjudication of International Crimes* 265-266

528 Council of the European Union “The AU-EU Expert Report” para 13: “Under customary international law, these bases of jurisdiction are, like universal jurisdiction, merely permissive: a state is not obliged to assert a jurisdiction granted to it by custom”.

529 Lamprecht *Adjudication of International Crimes* 266. See also Hurwitz “Universal Jurisdiction” 271-272: “The principle of universal jurisdiction allows states to investigate and prosecute in their domestic courts certain grave violations of international law, namely genocide, torture, war crimes and crimes against humanity, that have occurred extraterritorially even when there is no link (nexus) with the perpetrator, victims or location of the crime. A related rule, *aut dedere aut judicare*, stems from the principle that states may not shield a person suspected of certain categories of crimes, and that they have an obligation to prosecute or facilitate the extradition of a perpetrator found within their territory to a country or tribunal willing or able to prosecute”.

530 The principle of *aut dedere aut judicare* is also codified in art 7(1) of the 1984 Torture Convention to which Senegal is party

dictator Hissène Habré who was accused of crimes of torture committed when he was still president of Chad.⁵³¹

2.5.4 *Delegated jurisdiction is not universal jurisdiction*

States which have a substantial connection to a crime may, by way of bilateral or multilateral conventions, delegate their jurisdiction over such a crime to the States where the perpetrator of those crimes will be found.⁵³² With respect to war crimes, for example, the four Geneva Conventions of 1949 relating to the conduct of armed conflict provide for a kind of “delegated jurisdiction”⁵³³ over the grave breaches provided therein. In articles 49, 50, 125 and 146 respectively, it is provided that each High Contracting Party is under the obligation to search for and prosecute before its own courts persons suspected to have committed war crimes, “regardless of their nationality”. However, although such jurisdiction is independent of any traditional jurisdictional link to the crime, the victim or the perpetrator, it would be incorrect to call it “universal jurisdiction”, because the power to exercise that jurisdiction is reserved only to the States that are party to the relevant Conventions.⁵³⁴ In contrast to this limited jurisdiction under the Geneva Conventions, customary international law allows all States’ courts, party or not to the Geneva Conventions, to prosecute the perpetrators of war crimes regardless of any territorial or national links to the crime, making jurisdiction over these crimes truly “universal”.⁵³⁵

2.5.5 *Absolute versus conditional universal jurisdiction*

Universal jurisdiction can be exercised in two ways: “absolute” or “pure” universal jurisdiction and “conditional” universal jurisdiction.⁵³⁶ Pure or absolute universal

531 *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* 2012 ICJ 422 (20 July 2012) para 121: “The Court emphasizes that, in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. Senegal must therefore take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré”. For a more detailed discussion of this case, see 3.4.1.2.2.2.2 below.

532 Poels 2005 *Netherlands Quarterly of Human Rights* 68.

533 Poels 2005 *Netherlands Quarterly of Human Rights* 68.

534 Colangelo 2005 *Virginia Journal of International Law* 19 and Geneuss 2009 *Journal of International Criminal Justice* 953.

535 Colangelo 2005 *Virginia Journal of International Law* 20.

536 Cryer *et al International Criminal Law* 52.

jurisdiction (also called universal jurisdiction *in absentia*)⁵³⁷ arises when a State's court asserts jurisdiction over an international crime while the suspect is not present in the territory of the forum State.⁵³⁸ Conversely, conditional universal jurisdiction is exercised when the suspect is already in the State asserting jurisdiction.⁵³⁹

But, although many States tend to limit the universal jurisdiction of their courts to cases where a suspect is present on their territory, the distinction between pure and conditional universal jurisdiction is not based on any conceptual ground and can probably be explained by the concern that adopting pure universal jurisdiction "may show a lack of international courtesy",⁵⁴⁰ or as a matter of ensuring the right to a fair trial for the accused person,⁵⁴¹ rather than as a matter of international law.⁵⁴²

537 Cryer *et al International Criminal Law* 52 and Philippe 2006 *International Review of the Red Cross* 380.

538 Kourula "Universal Jurisdiction for Core International Crimes" 137; Cryer *et al International Criminal Law* 52 and Poels 2005 *Netherlands Quarterly of Human Rights* 72. An example of this type of universal jurisdiction may be found in section 8 of the New Zealand *International Crimes and International Criminal Court Act* of 2000, which provides as follows:

"(1) Proceedings may be brought for an offense [...]
(c) against section 9 (genocide) or section 10 (crimes against humanity) or section 11 (war crimes) regardless of [...]
(iii) whether or not the person accused was in New Zealand at the time that the act constituting the offense occurred or at the time a decision was made to charge the person with an offense".

539 Kourula "Universal Jurisdiction for Core International Crimes" 137 and Cryer *et al International Criminal Law* 252. This type of universal jurisdiction is also known as "universal jurisdiction with presence" Cryer *et al International Criminal Law* 52. An example of this type of universal jurisdiction is found in section 3(c) of the Implementation Act, which provides that a person who commits an international crime outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if [...] "that person, after the commission of the crime, is present in the territory of the Republic".

540 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 3.

541 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Separate Opinion by judges Higgins, Kooijmans and Buergenthal 2002 ICJ 3 (14 February 2002) para 56: "[s]ome jurisdictions provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognised under international law".

542 Cryer *et al International Criminal Law* 252. See also Philippe 2006 *International Review of the Red Cross* 380.

Other reasons for the conditional judicial universal jurisdiction would appear to be practical. As Judge *ad hoc* Van den Wyngaert observed in the *Arrest Warrant* case,⁵⁴³ referring to the requirement of the suspect in the territory of the forum State:

a practical consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system...The concern with the linkage with the national order...seems to be of a pragmatic than of a juridical nature.

Political considerations may also play a role in States choosing to limit the universal jurisdiction of their courts to situations where the suspect is already in the territory of the State exercising jurisdiction. This may be illustrated by reference to the 1999 Belgium law which gave universal jurisdiction to the Belgian courts over war crimes, genocide, and crimes against humanity.⁵⁴⁴ Under this law, the presence of the suspect in Belgium was not required and immunities were declared not applicable in proceedings relating to that Act.⁵⁴⁵ This law immediately proved to be politically controversial; complaints were swiftly laid against ex-US President George H W Bush, Vice-President Dick Cheney and General Colin Power for war crimes alleged to have been committed by them in the Gulf War in the 1991 Gulf War.⁵⁴⁶ Subsequent to these claims, Belgium came under severe pressure from the United States to alter its legislation⁵⁴⁷ as a result of which Belgium revised its law in 2003 to limit its jurisdiction.⁵⁴⁸ Under the 2003 revised legislation,⁵⁴⁹ Belgian courts have universal jurisdiction over genocide, crimes against humanity and war crimes, only if the accused is Belgian or has primary residence in Belgian territory, if the victim is Belgian or had lived in Belgium for at least three years at the time the crimes were committed, or if Belgium is obliged under international convention or customary law to exercise jurisdiction over the case.⁵⁵⁰

543 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 56.

544 Art 7(1) *Law of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law of 10 February 1999* (Belgian Official Journal of 23 March 1999).

545 Art 5(3): "The immunity attributed to the official capacity of a person, does not prevent the application of the present Act". This approach to immunity was, however, challenged by the ICJ in the *Arrest Warrant* case and will be discussed in Chapter III of this study.

546 Cryer *et al International Criminal Law* 257.

547 Cryer *et al International Criminal Law* 257.

548 See Reydam's 2003 *Journal of International Criminal Justice* 679.

549 *Law of 5 August 2003 Relating to Grave Breaches of International Humanitarian Law* (Belgian Official Journal of 7 August 2003).

550 Article 6(1° *bis*), article 10(1° *bis*) and article 12 *bis* introduced by the Law of 2003 (*Law of 5 August 2003 Relating to Grave Breaches of International Humanitarian Law* (Belgian Official

As far as the universal jurisdiction of South African courts is concerned, the Implementation Act provides that they can exercise such jurisdiction over international crimes committed abroad only if after the commission of the crime, the person concerned is present in the territory of the Republic.⁵⁵¹ Universal jurisdiction *in absentia* is therefore not given to South African courts.

2.6 Conclusion

The purpose of this chapter was to lay the foundation for the discussions of the substantive questions raised in the introduction (chapter one) of this study. The chapter has provided a background to the Rome Statute⁵⁵² and its complementarity regime according to which States Parties, not the ICC, have the primary responsibility of bringing perpetrators of international crimes to justice.⁵⁵³

The chapter has also attempted to clarify the concepts of State sovereignty⁵⁵⁴ and universal jurisdiction.⁵⁵⁵ It was argued that under modern international law, sovereignty is no longer an absolute doctrine as it used to be in the period following the Peace of Westphalia. However, it was also argued that, although not absolute, the principle of State sovereignty remains at the heart of international law and is central to the UN system itself. In the light of this conclusion the question posed in the previous chapter resurges: to what extent can South African courts, acting under the complementarity regime of the Rome Statute, exercise universal jurisdiction over international crimes committed in foreign States, without violating the sovereignty of those States? As stated earlier,⁵⁵⁶ one of the questions raised by the principle of State sovereignty is the question whether foreign officials, such as heads of State, heads of government and ministers of foreign affairs, may or may not be arrested, detained and prosecuted in South African courts for international crimes committed in foreign countries. This question is related to the issue of immunity which is discussed in the next chapter.

Journal of 7 August 2003) into the Belgian *Code of Criminal Procedure*. See also Reress-FIDH "Universal Jurisdiction in the European Union: Country Studies" 4.

551 Section 4(3)(c).
552 See 2.2 above.
553 See 2.3 above.
554 See 2.4 above.
555 See 2.5 above.
556 See 1.2.2 above.

CHAPTER 3

IMMUNITY

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.⁵⁵⁷

3.1 Introduction

Existing records on international crimes indicate that it is States' officials, and in particular senior officials, who often commit international crimes.⁵⁵⁸ 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,⁵⁵⁹ States adopted the Rome Statute of the ICC. Most importantly, the principle that immunities do not apply to proceedings before international tribunals⁵⁶⁰ was reaffirmed in this Statute. To this end, the Rome Statute provides that:

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.⁵⁶¹
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.⁵⁶²

Nevertheless, under the complementarity regime of the Rome Statute, the jurisdiction of the ICC is secondary to the jurisdiction of domestic courts.⁵⁶³ States Parties have the

557 Franey *Immunity* 27-28.

558 Cassese *International Criminal Law* 2nd ed 307. See also 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 [...]"

559 Preamble to the Rome Statute para 5.

560 See 1.2.2 and 2.2.5.2 above.

561 Art 27(1) Rome Statute.

562 Art 27(2) Rome Statute.

563 Van Sliedregt and Stoitchkova "International criminal law" 257.

primary responsibility for investigating and prosecuting international crimes.⁵⁶⁴ In order to give effect to the complementarity principle of the Rome Statute, South Africa enacted the Implementation Act which empowers South African courts to try international crimes, irrespective of the nationality of the perpetrator or the place where the crime was committed; if after the commission of the crime the alleged perpetrator is present on South African territory.⁵⁶⁵ Section 4(2)(a) of the Implementation Act further 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.⁵⁶⁶

Most commentators on the Implementation Act have interpreted this provision as removing whatever immunity (both function and personal) of foreign officials before South African courts.⁵⁶⁷ Dugard and Abraham⁵⁶⁸ 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”.⁵⁶⁹ In support of this view, Du Plessis⁵⁷⁰ says:

564 Art 17(1)(a) Rome Statute.

565 Art 4(3)(c) Implementation Act.

566 Section 4(2) Implementation Act.

567 Du Plessis 2003 *South African Journal of Criminal Justice* 6; Dugard and Abraham 2002 *Annual Survey of South African Law* 166 and Chok “The Struggle” 14. See also Steynberg *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”.

568 Dugard and Abraham 2002 *Annual Survey of South African Law* 166. See also 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”.

569 Dugard and Abraham 2002 *Annual Survey of South African Law* 166.

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.

This chapter 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 immunities of foreign States' officials, both functional and personal. In light of this interpretation, the chapter goes on to determine which law must be applied should a case involving immunities of foreign States' officials be brought before a South African court. In order to give a proper background to this discussion, it is necessary to first trace the history and justifications of the doctrine of State immunity.

3.2 *Origins and development of the notion of State immunity*

3.2.1 From sovereign immunity to State immunity

The notion of immunity is as old as the concept of sovereignty itself. It takes its roots from the time when in the seventeenth century the concept of sovereignty emerged when, following the Treaty of Westphalia in 1648,⁵⁷¹ independent secular States started to exist.⁵⁷² At this time the idea that kings were sovereign within their territories emerged.⁵⁷³

At this time, sovereign rulers were considered to be above the law.⁵⁷⁴ It was believed that the king derived his power to rule from God, rather than from the people, under the maxim *rex grantia dei*.⁵⁷⁵ The king's power to rule being derived from God, he was not open to complaint as that would signify a challenge to God's wish.⁵⁷⁶

It was also believed (or at least the kings made this claim) that since all political and legal order came from the monarch, any law that would purport to bind and limit his power and his actions would be seen as conceptually illogical, for then "that agency that

570 Du Plessis 2007 *Journal of International Criminal Justice* 15. For a similar view, see Chok "The Struggle" 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.

571 Fox "International Law and Restraints" 359.

572 Yitiha *Immunity* 93-94.

573 Yitiha *Immunity* 93-94 and Redress "Immunity v Accountability" 11.

574 Comment 1954 *Yale Law Journal* 1148.

575 Yitiha *Immunity* 105. Translated, the Latin maxim means that the "king rules his subjects by the grace of God". Yitiha *Immunity* 108.

576 Yitiha *Immunity* 105.

binds the monarch would be the true monarch”.⁵⁷⁷ This meant that the king (sovereign) could not be held accountable or tried for any wrongdoing in any court in his own jurisdiction.⁵⁷⁸

Sovereign rulers also extended immunity to foreign sovereigns on the basis that it would be illogical for them to be sued in foreign courts when they enjoyed complete immunity from their own domestic courts.⁵⁷⁹ The immunity of kings (sovereigns) from the jurisdiction of foreign courts was expressed in the maxim *par in parem non habet imperium*: “an equal has no power over an equal”.⁵⁸⁰ This accordance of immunity between sovereigns was reciprocal in nature; failure to grant similar treatment to a foreign State was an indication of either hostility or superiority.⁵⁸¹ Thus, in order to maintain peaceful relations, sovereigns granted each other complete and full immunity.⁵⁸²

When the state apparatus became sophisticated and included other organs apart from the king (sovereign) himself, the concept of “State immunity” started to be used in lieu of sovereign immunity.⁵⁸³ At this time, States were granted absolute immunity before the courts of another, meaning that they enjoyed immunity under all circumstances.⁵⁸⁴ Towards, the end of the 19th century, however, many States started moving away from the doctrine of absolute immunity towards a position in which immunity is only granted to a foreign State in certain circumstances.⁵⁸⁵

3.2.2 *From absolute to restrictive immunity*

Before the emergence of the socialist State after the Russian revolution in 1917, States were not involved in private acts of trade and commerce.⁵⁸⁶ At this time, the boundary between the acts of a State (sovereign acts) which were immune from the jurisdiction of foreign courts, and those of private individuals was clear and, as a consequence, the

577 Hill “The Philosophy of the Law of Sovereign Immunity” 17.

578 McGregor 2008 *The European Journal of International Law* 913; Yitiha *Immunity* 105 and Dugard *International Law* 240.

579 Redress “Immunity v Accountability” 11.

580 Badr *State Immunity* 89 and Hillier *Public International Law* 289.

581 Comment 1954 *Yale Law Journal* 1148.

582 Comment 1954 *Yale Law Journal* 1148 and Murungu *Immunity of State Officials* 47.

583 Yitiha *Immunity* 93 and Dugard *International Law* 241.

584 Fox *State Immunity* 2 and Redress “Immunity v Accountability” 9.

585 Redress “Immunity v Accountability” 9.

586 Dugard *International Law* 241.

practice of States' immunity did not pose any problem to commercial activities.⁵⁸⁷ Accordingly, States' immunity from the courts of other States was absolute.⁵⁸⁸ During the 1920s,⁵⁸⁹ however, States started to be involved in trade.⁵⁹⁰ The emergence of the Communist States and the increasing use of nationalisation as a tool of economic development resulted in a massive growth in the commercial activity of States.⁵⁹¹ It thus became increasingly common for private individuals and corporations to enter into contracts with foreign States' trading companies.⁵⁹²

Absolute immunity became inappropriate in view of this development, especially with regard to the notions of stability, fairness and equity in the market place.⁵⁹³ If absolute immunity persisted with regard to commercial transactions, governmental organizations engaged in commerce would have been in an extremely unfair position and, for that reason, countries started to develop ways to ensure that commercial governmental agencies and private individuals were placed on an equal footing.⁵⁹⁴ A restrictive doctrine emerged, which distinguished between public acts (*acts jure imperii*) which attracted immunity and private acts (*acts jure gestionis*) which did not.⁵⁹⁵ A State acting as a private individual was no longer to be placed in the advantageous position of being immune from the courts of foreign States and was liable in the same way and to the same extent as private persons.⁵⁹⁶ Restrictive immunity was also justified by the belief

587 Yitiha *Immunity* 97.

588 Dugard *International Law* 241.

589 Bantekas and Nash *International Criminal Law* 166.

590 Yitiha *Immunity* 97.

591 Dugard *International Law* 241. See also Brownlie *Principles* 327: "In the course of the nineteenth century states appeared as commercial entrepreneurs on a considerable scale, creating monopolies in particular trades, and operating rail-way, shipping, and postal services. The First World War increased such activities, and the appearance of socialist states has given greater prominence to the public sector in national economies".

592 Hillier *Public International Law* 289.

593 Higgins 1982 *Netherlands International Law Review* 265.

594 Yitiha *Immunity* 97; Wallace *International Law* 121 and Bantekas and Nash *International Criminal Law* 166: "With the rapid growth of interstate commerce, there was a need to procure guarantees to private enterprises that trading with State entities would be on an equal basis. Indeed, the erosion of absolute immunity rested on financial considerations".

595 Brownlie *Principles* 327; Dugard *International Law* 241; O'Donnell 2008 *Boston University International Law Journal* 377; Hillier *Public International Law* 289; Yitiha *Immunity* 97; Wallace *International Law* 121; Swanepoel *The Emergence* 44; Fox "International Law and Restraints" 361 and Bantekas and Nash *International Criminal Law* 166.

596 Wallace *International Law* 122 and Malanczuk *International Law* 119.

that judicial review of a foreign State's commercial or private actions did not offend a State's dignity.⁵⁹⁷ It was considered that:

once the sovereign has descended from his throne and entered the marketplace he has divested himself of his sovereign status and is therefore no longer immune to the domestic jurisdiction of the courts of other countries.⁵⁹⁸

Belgian courts were the first to adopt the private acts exception as early as 1857,⁵⁹⁹ and Italian courts followed in the 1880s.⁶⁰⁰ By the middle of the 20th century the restrictive State immunity doctrine took hold in Western Europe; the commercial activity exception was codified in international treaties⁶⁰¹ and many countries enacted statutes that restricted State immunity with reference to the commercial or private nature of the activity. These countries include the US,⁶⁰² the UK,⁶⁰³ Canada,⁶⁰⁴ and South Africa.⁶⁰⁵ The activities that are not covered by State immunity under these laws include those relating to commercial activities,⁶⁰⁶ those relating to contracts of employment made in the forum State⁶⁰⁷ or to ownership, possession and use of property situated in the forum

597 O'Donnell 2008 *Boston University International Law Journal* 381.

598 Finke 2010 *European Journal of International Law* 859, referring to the legal opinion of the plaintiff in *I° Congreso Del Partido* House of Lords 16 July 1981 64 (1983) ILR 154.

599 Finke 2010 *European Journal of International Law* 858.

600 Finke 2010 *European Journal of International Law* 858.

601 See for example the 1926 *International Convention for the Unification of Certain Rules Concerning the Immunities of State-Owned Ships*. This convention was signed in Brussels on 10 April 1926 by representatives of twenty nations, including all the major powers except the United States and Russia. It limited sovereign immunity in the area of maritime commerce to ships and cargoes employed exclusively for public and non-commercial purposes. Accessible at <http://cil.nus.edu.sg/rp/il/pdf/1926%201934%20IC%20for%20the%20Concerning%20the%20Immunity%20of%20State-owned%20Vessels%20and%20Additional%20Protocol-pdf.pdf> [17 Octobre 2012].

602 *Foreign Sovereign Immunities Act* 28 USC §§ 1330 1602–1611.

603 *State Immunity Act* 1978 17 ILM (1978) 1123.

604 *State Immunity Act* 1982 21 ILM (1982) 798.

605 *Foreign States Immunities Act* 87 of 1981. This Act starts by asserting a general rule of immunity enjoyed by foreign states before South African courts (section 2(1)) and then proceeds to spell out the circumstances under which State immunity will not apply. See sections 4-12.

606 See, for example, section 4 of the South African Foreign States Immunities Act 87 of 1981. It is worth noting that quite before the passing of this Act, South African courts had already endorsed the restrictive approach to State immunity in the cases of *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 2 SA 111 (T) and *Kaffraria Property v Government of the Republic of Zambia* 1980 2 SA 709 (E). The facts of these cases are discussed in Swanepoel *The Emergence* 45-46 and Dugard *International Law* 242-243.

607 See for example s 4(1) of the *State Immunity Act* 1978 17 ILM 1123 (1978). See also s 5 of the South African *Foreign States Immunities Act* 87 of 1981.

State,⁶⁰⁸ or delictual acts that cause damages committed on the territory of the forum State.⁶⁰⁹

A general feature of these peaces of legislation is that sovereign immunity is the rule unless an exception has been created by a specific provision in the relevant national statute. This is so even if the allegations brought before the court relate to the acts that are contrary to international law.⁶¹⁰ In *Siderman de Blake v Republic of Argentina*⁶¹¹ a US court observed as follows:

we do not write on a clean slate. [...] we conclude that if violations of jus cogens committed outside the United States are to be exceptions to immunity, Congress must make them so.⁶¹²

The same approach was taken by British courts in *Al-Adsani v Kuwait*.⁶¹³ In this case, the plaintiff had brought a civil claim against the State of Kuwait for his alleged torture in a Kuwaiti prison. The Court of Appeal held that the State of Kuwait was entitled to immunity even in a case involving allegations of torture on the basis that no such exception was provided in the *State Immunity Act* of 1978, which it referred to as a “comprehensive code”.⁶¹⁴

This view was also recently endorsed by the ICJ in *Germany v Italy*,⁶¹⁵ a case which was brought by Germany in relation to a number of decisions by Italian courts which, ignoring the State immunity of Germany, upheld claims against Germany brought by Italian victims of war crimes committed by German soldiers during World War II. The

608 See for example section 6(1) of the *State Immunity Act* 1978 17 ILM (1978) 1123. See also section 7 of the South African *Foreign States Immunities Act* 87 of 1981.

609 For example, section 28 USC § 1605(a)(5) of the American FSIA provides that a foreign state shall not be immune from jurisdiction in any case “in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment [...]”. The “tort exception” was successfully used in the 1980 case of *Letelier v Republic of Chile* Chile 502 F Supp 259 (5 November 1980). In this case, the family of a former Chilean ambassador, Letelier, obtained an order for compensation from the Chilean government through the US courts for the death of the ex-ambassador who had been killed by a car bomb planted by Chilean agents in his car. Accessed at <http://homepage.ntlworld.com/jksonc/docs/letelier-502FSupp259.html> [13 June 2012].

610 Jia 2012 *Journal of International Criminal Justice* 1314-1315.

611 *Siderman de Blake v the Republic of Argentina* 965 F 2d 688 (22 May 1992). A link to the judgement is available at <http://www.icrc.org/applic/ihl/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/752434334a8a7d0ec1256d180031c242?openDocument> [1 April 2014].

612 At 718-719.

613 *Al-Adsani v Government of Kuwait* CA 12 March 1996 107 ILR 536.

614 *Al-Adsani v Government of Kuwait* CA 12 March 1996 107 ILR 542.

615 *Germany v Italy (Greece intervening) Jurisdictional Immunities of the State* Judgement 2012 ICJ 99 (3 February 2012).

ICJ found that Italy was wrong to ignore the immunity of Germany, and ordered Italy to render the decisions of its courts against Germany without effect.⁶¹⁶

3.2.3 *The 2004 UN Convention on the Jurisdictional Immunities of States and Their Properties*

In December 2004, the UN General Assembly voted the UN Convention on the Jurisdictional Immunities of States and Their Properties.⁶¹⁷ Although not yet in force,⁶¹⁸ this Convention represents the most recent international attempt for harmonisation and certainty in the area of State immunity.⁶¹⁹ Various exceptions to State immunity are recognised in this Convention. These relate to, for example, commercial transactions,⁶²⁰ contracts of employment performed on the territory of the forum State⁶²¹ and personal injuries and damage to property which take place on the territory of the forum State and the author of the delictual act was present in that territory at the time of the act or omission.⁶²² This Convention thus cements the view that States' immunity is not absolute.⁶²³

This Convention also recognises the immunity of “representatives of the State acting in that capacity”.⁶²⁴ The Convention unambiguously recognises the principle of immunity *ratione materiae* for acts performed in an official capacity,⁶²⁵ and provides that it is “without prejudice” to immunities *ratione personae* accorded under international law to

616 *Germany v Italy (Greece intervening) Jurisdictional Immunities of the State* Judgement 2012 ICJ 99 (3 February 2012) 60: “Finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect”.

617 *UN Convention on Jurisdictional Immunities of States and their Property* (2004).

618 Art 30(1) of this Convention provides that the Convention will enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. As of 23 March 2014 only 28 States have signed the Convention. See United Nations Treaty Collection at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en [23 March 2014].

619 Stewart 2011 *Vanderbilt Journal of Transnational Law* 1047; Brownlie *Principles* 344 and Knuchel 2011 *Northwestern Journal of International Human Rights* 151.

620 Art 10 *UN Convention on Jurisdictional Immunities of States and their Property* (2004).

621 Art 11 *UN Convention on Jurisdictional Immunities of States and their Property* (2004).

622 Art 12 *UN Convention on Jurisdictional Immunities of States and their Property* (2004). Other exceptions relate to ownership, possession and use of property (art 13); Intellectual and industrial property (art 14). See also articles 15-17.

623 Dugard argues that the adoption of this Convention by the General Assembly has entrenched the restrictive doctrine of State immunity as a rule of customary law. Dugard *International Law* 241.

624 Art 2(1)(b)(iv) *UN Convention on Jurisdictional Immunities of States and their Property* (2004).

625 Stewart 2011 *Vanderbilt Journal of Transnational Law* 1056.

heads of State,⁶²⁶ and other States' officials in relation to the exercise of the functions of "its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences, as well as (b) persons connected with them".⁶²⁷ The immunities of States' officials will be the focus of this chapter. Since the immunities of States' officials derive from the immunity of States, however, it is important to first look at the justifications of the immunity of the States themselves, as opposed to those of their officials.

3.3 Justifications of State immunity

3.3.1 "Sovereign equality" as a justification for State immunity

State immunity is an essential corollary of the sovereignty and equality of States.⁶²⁸ It prevents the subjection of an independent State to proceedings in another country relating to a dispute about its exercise of governmental power.⁶²⁹ If the courts of one State would assume jurisdiction over the public acts of another State, the authority of the forum State to adjudicate the dispute would conflict with the principle of State equality. This idea is traditionally expressed by the maxim *par in parem non habet imperium* which literally means, "an equal has no power over an equal".⁶³⁰

3.3.2 Immunity and "non-intervention" in the internal affairs of a State

State sovereignty and the related notion of non-intervention in the internal affairs of a State constitute grounding principles of international law.⁶³¹ As stated earlier,⁶³² according to the principle of State sovereignty, each State is understood to have exclusive control and competence over its own territory.⁶³³ This is known as internal sovereignty.⁶³⁴ Thus, in order to protect the internal sovereignty of each State, the

626 Art 3(1)(2) *UN Convention on Jurisdictional Immunities of States and their Property* (2004).

627 Art 3(1)(a)(b) *UN Convention on Jurisdictional Immunities of States and their Property* (2004).

628 Forcese 2007 *McGill Law Journal* 133.

629 Fox *State Immunity* 11.

630 See 3.2.1 above. See also Knushel 2011 *Northwestern Journal of International Human Rights* 150; O'Donnell 2008 *Boston University International Law Journal* 380 and Lulu "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law" 46.

631 Redress "Immunity v Accountability" 48.

632 See 2.4.1 above.

633 Ferreira-Snyman 2006 *Fundamina* 4; Redress "Immunity v Accountability" 48 and Forcese 2007 *McGill Law Journal* 131.

634 Redress "Immunity v Accountability" 48.

principle of non-intervention in the internal affairs of a State applies.⁶³⁵ This implies that each State can do whatever it pleases within its own territory and that in doing so it cannot be subject to scrutiny by other States.⁶³⁶ The doctrine of State immunity fulfils this function.⁶³⁷

3.3.3 *International comity and good relations between States*

Comity has been characterised as “rules of politeness, convenience, and goodwill”.⁶³⁸ Such rules are not rules of international law.⁶³⁹ For example, many States recognise that a foreign judgment may be given effect in the enforcing State (through a procedure known as *exequatur*) without inquiring into the factual or legal merits of the foreign judgment.⁶⁴⁰ Although this practice is prevalent among many States, however, it is based primarily on considerations of convenience, courtesy and respect between States, not a matter of a legal obligation.⁶⁴¹ Likewise, extradition of criminals, in the absence of a treaty, is a matter of comity, not of legal obligation.⁶⁴²

Historically, the concept of State immunity developed as a rule of comity: “Do unto others as you would have them do to you”. In this regard, each State granted immunity to foreign States and their kings in the hope that its own sovereign would be protected when out of his country.⁶⁴³ Viewed from this angle, immunity may be seen as a privilege granted by way of exception to the jurisdiction which the forum State would otherwise be entitled to exercise but which it chooses not to, in order to promote comity and good relations with foreign States.⁶⁴⁴ As such, immunity is not seen so much as a matter of legal entitlement but rather as a matter of whether a local court has jurisdiction in

635 Forcese 2007 *McGill Law Journal* 130-131 and Redress “Immunity v Accountability” 48.

636 Redress “Immunity v Accountability” 48.

637 Brownlie *Principles* 325.

638 Wingfield “Conflict and the Enforcement of Foreign Judgments” 1 and Murungu *Immunity of State Officials* 47.

639 Murungu *Immunity of State Officials* 47.

640 Wingfield “Conflict and the Enforcement of Foreign Judgments” 2.

641 US Legal Date Unknown <http://uslegal.com/international-law/> and Akehurst 1973 *British Year Book of International Law* 237.

642 Akehurst 1973 *British Yearbook of International Law* 215.

643 Murungu *Immunity of State Officials* 47. See also Lulu “Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law” 46.

644 Forcese 2007 *McGill Law Journal* 135: “A [...] practical justification for state immunity is simple reciprocity. Were a state to ignore the dictates of state immunity, it might precipitate a like response from other states, placing its own overseas assets and officials at risk of seizure. Tit-for-tat retaliation of this sort would obviously impair international diplomacy”.

accordance with the internal laws of the forum State.⁶⁴⁵ However, although not entirely obsolete, this justification of State immunity does not provide a complete basis of States' immunity in contemporary international law which recognises immunity not just as a rule of comity, but as a matter of a legal entitlement. This will become clearer immediately below.

3.3.4 Immunity and the dignity of States

The doctrine of immunity of a State from the jurisdiction of foreign States is also based on the principle of state dignity.⁶⁴⁶ This is the idea that it is incompatible with a state's sovereignty and dignity for it to be subject to another state's jurisdiction.⁶⁴⁷

By linking State immunity to State sovereignty and dignity, State immunity becomes not just a principle of comity in international relations but a fundamental right of States under international law.⁶⁴⁸ This right is not altered by the fact that the State's act giving rise to the claim before the courts of foreign States is unlawful under international law.⁶⁴⁹ In *Bouzari v Iran*⁶⁵⁰ for example, the Ontario Superior Court of Justice dismissed a claim for damages arising from allegations of torture brought against the Islamic Republic of Iran on the basis that allowing such a claim would be inconsistent with customary international law.⁶⁵¹ The Court stressed that "while international law may

645 Murungu *Immunity of State Officials* 47.

646 Brownlie *Principles* 326 and Murungu *Immunity of State Officials* 46.

647 Garnett 1999 *Australian Year Book of International Law* 176 and Murungu *Immunity of State Officials* 46.

648 Redress "Immunity v Accountability" 11. See also Bantekas and Nash *International Criminal Law* 165: "[A]lthough designed to enhance interstate relations and limit the reach of the receiving State's judicial and executive machinery the concept of State immunity is not based on comity. State practice at the international level suggests that what was once an implied licence has now evolved to a legal obligation on the part of the receiving sovereign".

649 Jia 2012 *Journal of International Criminal Justice* 1314-1315.

650 2002 OJ No 1624 Court File No 00-CV-201372 (1 May 2002). Accessed at <http://www.ccij.ca/uploads/Bouzari-Superior%20Court%20of%20Justice.pdf> [2 April 2014].

651 *Bouzari v Iran* 2002 OJ No 1624 Court File No 00-CV-201372 (1 May 2002) para 73: "Therefore, the decisions of state courts, international tribunals, and state legislation do not support the conclusion that there is a general state practice which provides an exception from state immunity for acts of torture committed outside the forum state. As a result, there is no conflict between the Canadian State Immunity Act as written, with its limited exceptions, and customary international law. Indeed, the Canadian Act, in its present form, is consistent with current norms of customary international law [...] Were I to accept the suggestion of the plaintiff and find such an exception, not only would I be interpreting the legislation incorrectly, but also, in Mr. Greenwood's view, putting Canada in violation of customary international law. Therefore, the action is barred by s 3 of the Act [...]"

someday evolve to include a further exception for acts of torture, it does not do so now".⁶⁵²

Although this view is questionable,⁶⁵³ it has been endorsed by the European Court of Human Rights (ECHR) in *Al-Adsani v UK*.⁶⁵⁴ In this case, the ECHR held that:

[N]otwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.⁶⁵⁵

Since the present study is not concerned with the immunity of States from foreign (civil) jurisdiction but rather with the immunity of States' officials from the (criminal) jurisdiction of foreign States, we will now proceed to examine the immunities afforded to natural persons who act on behalf of the States rather than the States themselves.

3.4 Immunities of State officials from the jurisdiction of other States

Two types of immunity may apply to States' individual officials. First, there is immunity *ratione materiae* which applies to acts performed in an official capacity.⁶⁵⁶ This immunity is often referred to as subject-matter immunity or functional immunity and continues to apply even once the official has left office.⁶⁵⁷ 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.⁶⁵⁸

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

652 *Bouzari v Iran* 2002 OJ No 1624 Court File No 00-CV-201372 (1 May 2002) para 73.

653 See in this regard Forcese 2007 *McGill Law Journal* 127-169. See also Dugard *International Law* 256: "Foreign states are not immune from litigation in respect of international crimes by virtue of any fundamental sovereign right, but because states, for reasons of policy and comity, decline to exercise jurisdiction".

654 *Al-Adsani v The United Kingdom* ECHR Application N° 35763/97 (21 Novembre 2001). Accessed at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59885#{%22itemid%22:\[%22001-59885%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59885#{%22itemid%22:[%22001-59885%22]}) [2 April 2014].

655 *Al-Adsani v The United Kingdom* ECHR Application N° 35763/97 (21 Novembre 2001) para 61. See also para 66: "The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State".

656 Dugard *International Law* 253.

657 Akande and Shah 2011 *European Journal of International Law* 827; Wickremasinghe "Immunities" 390; Markovich 2009 *Potentia* 59 and Cryer *et al International Criminal Law* 534.

658 Redress "Immunity vs Accountability" 9.

immunity). It is the State which is the real beneficiary of the immunity and, for this reason, the State may waive⁶⁵⁹ it, irrespective of the wishes of the person claiming the immunity.⁶⁶⁰ The waiver must be express, not implied; the criminal jurisdiction may be exercised over officials of a foreign State only on the basis of a “clear and unequivocal indication” by that State that it wishes not to invoke the immunity on behalf of the official involved.⁶⁶¹

The legal regime of immunities of States’ officials may seem complex.⁶⁶² The jurisprudence and authorities in this area have been described as “perplexing, contradictory, confused or incoherent”.⁶⁶³ 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.

3.4.1 Immunity *ratione materiae* or functional immunity

3.4.1.1 Definition

Also known as functional immunity, immunity *ratione materiae* relates to conduct carried out on behalf of a State.⁶⁶⁴ The rationale of this type of immunity is that actions against States’ agents in respect of their official acts are essentially proceedings against the State they represent.⁶⁶⁵ This immunity is thus grounded in the view that if one State would adjudicate upon the conduct of another State, through the proceedings against

659 A waiver is the permission given by a State whose official enjoys immunity *ratione personae*, authorizing the State with enforcement jurisdiction to proceed with investigation, arrest and trial of the official concerned. Yitihā *Immunity* 136. See also ILC “Documents of the thirty-first session” 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 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”.

660 Cryer *et al International Criminal Law* 534 and Bassiouni (ed) *International Criminal Law* 62-63. For a contrary view see Steynberg *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 former belongs to the individual official, the later belongs to the State on behalf of which the individual performed the act that forms the basis of the litigation. See 3.5.2 hereunder.

661 Bassiouni (ed) *International Criminal Law* 63.

662 Cryer *et al International Criminal Law* 533.

663 Cryer *et al International Criminal Law* 532-533, citing Alebeek 2000 *British Yearbook of International Law* 47 and Barker 1999 *International and Comparative Law Quarterly* 938.

664 Steynberg *et al Criminal Law* 579.

665 See Stewart 2011 *Vanderbilt Journal of Transnational Law* 1056.

the official who carried out the act, that would conflict with the principle of state equality.⁶⁶⁶

Functional immunity prevents a State's courts from indirectly exercising jurisdiction over acts of foreign States through proceedings against State officials who carry out States' activities.⁶⁶⁷ As a British court once said:⁶⁶⁸

[A] foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'en poste' at the date of his suit.⁶⁶⁹

Immunity *ratione materiae* is enjoyed by all foreign officials regardless of rank.⁶⁷⁰ 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.⁶⁷¹ 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.⁶⁷²

666 Knushel 2011 *Northwestern Journal of International Human Rights* 150 and Franey *Immunity* 16. See also 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 they are both sovereign and equal".

667 Akande 2004 *American Journal of international Law* 427. See also ILC "Second report on immunity" 58: "State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself".

668 *Zoersch 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". Accessed at <https://www.casetext.com/case/chuidian-v-philippine-nat-bank-3#.Uzxc96LsW7A> [2 April 2014].

669 See also 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".

670 Knushel 2011 *Northwestern Journal of International Human Rights* 151. See also ILC "Second report on immunity" 59: "All serving officials enjoy immunity in respect of acts performed in an official capacity".

671 Steynberg *et al Criminal Law* 579; Akande and Shah 2011 *European Journal of International Law* 827; Wickremasinghe "Immunities" 390 and Markovich 2009 *Potentia* 59. See also 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".

672 ILC "Second report on immunity" 58

This (procedural) defence can be illustrated by reference to the American civil case of *Herbage v Meese*.⁶⁷³ In this case, Mr Herbage, a British citizen, had been extradited from the UK to the USA where he was charged with offences of fraud and deception. Herbage, however, proceeded to sue a number of UK officials who had taken a part in the extradition process alleging a number of irregularities in the process that led to his arrest and extradition.

Among other things, Mr Herbage alleged that the defendants conspired to violate his due process rights by falsely (and knowingly) stating that the United States had made a valid "provisional request" for his extradition, a necessary prerequisite to such extradition. It was on the basis of this request that a London magistrate had issued the provisional warrant under which he was arrested in England. Because that basis was false, Herbage claimed, his constitutional rights had been violated and, for relief, Herbage sought, among other things, an order for compensatory damages.⁶⁷⁴

The British defendants argued that they were entitled to immunity as officials of a foreign State. Mr. Herbage asserted that he was not suing a foreign sovereign, but suing the British defendants, solely, in their individual capacity. The court found that the actions complained of were ones that the British officials could have taken only in their official capacities, they were acting as law enforcement officers, and that immunity under the FSIA covered these officials, for:

the activity complained of is governmental in nature and performed by officials of that government, this Court does not have jurisdiction over a foreign sovereign.⁶⁷⁵

This case illustrates the rule that, at least with regard to civil jurisdiction, if a State is immune then the official who acted on the behalf of the State is also immune.⁶⁷⁶ In that way, immunity *ratione materiae* functions as a jurisdictional or procedural defence by preventing circumvention of the immunity of a State through proceedings brought against officials acting on its behalf.⁶⁷⁷

673 *Herbage v Meese* Civ A N° 89-0645 747 F Supp 60 (20 Decembre 1990). Accessed at http://www.leagle.com/get_cited/747%20F.Supp.%2060 [10 June 2012].

674 *Herbage v Meese* Civ A N° 89-0645 747 F Supp 63.

675 *Herbage v Meese* Civ A N° 89-0645 747 F Supp 67.

676 *Franey Immunity* 173.

677 Bantekas and Nash *International Criminal Law* 168; Akande and Shah 2011 *European Journal of International Law* 827 and Wickremasinghe "Immunities" 403. See also Foakes "Immunity for International Crimes?" 8: "The main effect of such immunity is to prevent litigants from seeking

In so doing, some commentators have argued,⁶⁷⁸ functional immunity serves at the same time as a “substantive defence”⁶⁷⁹ for the State official by ensuring that the individual official “cannot”⁶⁸⁰ 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 chapter) 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.⁶⁸¹ 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.⁶⁸² If the State chooses to waive his immunity, the official cannot claim immunity himself.⁶⁸³

Whether immunity *ratione materiae* is also available in criminal cases, in particular serious crimes under international law is discussed next.

3.4.1.2 Immunity *ratione materiae* and international crimes

A survey of literature and decisions of national courts reveals that immunity *ratione materiae* does not apply before the criminal courts of foreign States which have jurisdiction over a crime. Furthermore, State practice suggests that these crimes include

to circumvent the rules on state immunity by taking action against the individuals carrying out the business of the state”.

678 Swanepoel 2007 *Journal for Juridical Science* 127 and Akande and Shah 2011 *European Journal of International Law* 826.

679 Akande and Shah 2011 *European Journal of International Law* 826. See also Cassese 2002 *European Journal of International Law* 863 and Bantekas and Nash *International Criminal Law* 168.

680 Swanepoel 2007 *Journal for Juridical Science* 127. See also Zappalà 2001 *European Journal of International Law* 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”.

681 Cryer *et al International Criminal Law* 534.

682 Cryer *et al International Criminal Law* 534.

683 Wickremasinghe “Immunities” 406: “None of the immunities which have been considered are for 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*”.

not only those committed against a direct interest or citizen of the forum State⁶⁸⁴ but also international crimes with not substantial link with the prosecuting State.⁶⁸⁵ In order to clearly and exhaustively argue this point the State practice relating to both ordinary and international crimes will be explored.

3.4.1.2.1 Ordinary crimes

A survey of state practice indicates that when State agents are prosecuted for engaging in criminal activities on behalf of their States against the interests of foreign States, immunities have never been accepted before the national courts of the prosecuting States. Such cases include those relating to terrorism, kidnapping and espionage. These cases are discussed hereunder.

3.4.1.2.1.1 Terrorism

A well-known case of international terrorism is the so-called *Lockerbie* case.⁶⁸⁶ 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 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 caused the explosion.⁶⁸⁷

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.⁶⁸⁸

684 See 3.4.1.2.1 hereunder.

685 See 3.4.1.2.2 hereunder.

686 *Her Majesty's Advocate v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhima* The High Court of Justiciary Case N^o 1475/99 (30 January 2001). Accessed at <http://www.scotcourts.gov.uk/docs/sc---lockerbie/lockerbiejudgement.pdf?sfvrsn=2> [5 February 2013].

687 Franey *Immunity* 208.

688 Franey *Immunity* 208.

The issue of immunity did not arise at all. The US and UK requested Libya to extradite the two suspects,⁶⁸⁹ and the UN Security Council supported this request, saying that it was:

[D]eeply 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.⁶⁹⁰

More significantly, Libya could have claimed that neither the British or American courts had jurisdiction, on the basis that the allegations concerned actions of sovereign State, which were immune from the jurisdiction of foreign States, but did not do so. Instead Libya said that it would consider trying the men itself.⁶⁹¹ 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 they were therefore entitled to be acquitted. On 31 January 2001 the court convicted Mr al-Megrahi of murder.⁶⁹²

The *Lockerbie* case is thus a clear example of State agents being accused and convicted of committing crimes on the orders of their State, and being held liable as individuals for the criminal conduct.⁶⁹³

3.4.1.2.1.2 Kidnapping

3.4.1.2.1.2.1 England-Nigeria

On 5 July 1984 British anti-terrorist police officers foiled an attempt to kidnap a certain Umaru Dikko, a former Nigerian Transport Minister, at Stansted Airport in London.⁶⁹⁴ Mr Umaru Dikko, accused of stealing millions of dollars from the Nigerian State, had been

689 Franey *Immunity* 208.

690 Para 5 and 6 UN SC Resolution 731(1992) of 21 January 1992.

691 Franey *Immunity* 208-209.

692 *Her Majesty's Advocate v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhima* The High Court of Justiciary Case N° 1475/99 (30 Jan 2001) para 89. The second accused, Mr Fhima, was found not guilty and released. See para 85 of the same judgment.

693 Franey *Immunity* 210.

694 Franey *Immunity* 218.

anaesthetised into unconsciousness and hidden in a crate in the hold of a Nigeria Airways Boeing 707 which was heading to Nigeria.⁶⁹⁵

Nigeria was implicated in this offence.⁶⁹⁶ The accredited Nigerian diplomats implicated in the matter could not be prosecuted on the basis of the immunity *ratione personae* which will be discussed later in this chapter.⁶⁹⁷ They were only expelled from the UK. Four other men were arrested and tried in connection with attempted kidnapping.⁶⁹⁸ Mr Yusufu, one of the four men charged with the kidnapping, was travelling on a Nigerian diplomatic passport (but had never been accredited as a diplomat in the UK and could not plead diplomatic immunity).⁶⁹⁹ Although Mr Yusufu was carrying out the kidnapping on behalf of the Nigerian State, he was not accorded immunity *ratione materiae*, and neither did Nigeria at any stage of the proceedings claim that Mr Yusufu was entitled to immunity *ratione materiae*.⁷⁰⁰

3.4.1.2.1.2.2 Italy-USA

In 2003, Hassan Nasr, an Egyptian national suspected of being involved in terrorism, was kidnapped on the streets of Milan, Italy by CIA agents and then transferred to Egypt where he was allegedly tortured by Egyptian secret services.⁷⁰¹ On 9 November 2009, the 23 CIA officers involved in the incident were tried *in absentia*, convicted of kidnapping and sentenced to terms of imprisonment ranging between five and eight years.⁷⁰²

On 19 September 2012 the Italian Court of Cassation upheld the convictions.⁷⁰³ This case also illustrates that immunity *ratione materiae* does not apply in criminal cases.

695 Under art 27(3) of the Vienna Convention, a “diplomatic bag” cannot be opened. However, to qualify as such, the bag in question must be “clearly marked”. In the *Dikko* case, the UK authorities justified their action on the argument that the crate used in the attempted abduction lacked “visible external marks”. This kept the opening of the crate within the bounds of the Convention. Wallace *International Law* 128.

696 Franey *Immunity* 219.

697 See 3.4.2 hereunder.

698 *R v Lambeth Justices ex-parte Yusufu* 1985 reproduced in *Criminal Law Review* 510.

699 Franey *Immunity* 219.

700 Franey *Immunity* 219.

701 Foakes “Immunity for International Crimes?” 12.

702 Schimizzi 2009 <http://jurist.org/paperchase/2009/11/italy-judge-convicts-23-former-cia.php>

703 Votava 2012 <http://jurist.org/paperchase/2012/09/italy-high-court-upholds-sentences-of-23-former-cia-agents-in-rendition-case.php>

3.4.1.2.1.3 Espionage

Cases of espionage reported in the media further suggest that no immunity *ratione materiae* is accorded to foreign States' officials who engage in criminal activities against other States. One of the famous cases of this kind took place in China in 1967. George Watt, a British engineer was arrested on charges of espionage in China in September 1968.⁷⁰⁴ On 15 March 1968 Mr Watt was sentenced to three years' imprisonment for espionage.⁷⁰⁵ This case indicates that although espionage is an "official" act in the sense that it is conducted on the behalf of States, it is not regarded as an act which a State can claim to perform in the exercise of its sovereignty and which is immune from the criminal jurisdiction of the foreign victim State.⁷⁰⁶

3.4.1.2.2 International crimes

From what has been said above with respect to ordinary crimes, it seems that there should be little doubt that international crimes cannot be regarded as "sovereign acts" which are immune from scrutiny by criminal courts of foreign States. International law cannot regard as sovereign those acts which constitute an attack against its very predominant values.⁷⁰⁷

Indeed, considerable support can be drawn from state practice to maintain the proposition that States' officials can be held accountable before the criminal courts of foreign States for crimes against international law. Evidence of state practice in this regard can be drawn from the various treaties proscribing international crimes, as well as in the statutes and jurisprudence of national and international criminal tribunals to the effect that no defence of immunity *ratione materiae* is available in case of crimes of international law. These treaties, conventions and judicial decisions are discussed below.

704 Taiwan Today 1968 <http://taiwantoday.tw/ct.asp?xItem=150250&CtNode=103>

705 Cohen "The Personal Security of Businessmen and Trade Representatives" 288.

706 Franey *Immunity* 207.

707 Bianchi 1999 *European Journal of International Law* 265. See also Zappalà 2001 *European Journal of International Law* 159 and Reiman 1995 *Michigan Journal of International Law* 421.

3.4.1.2.2.1 International conventions

3.4.1.2.2.1.1 The Geneva Conventions of 1949

The first,⁷⁰⁸ second,⁷⁰⁹ third⁷¹⁰ and fourth⁷¹¹ Geneva Conventions of 1949, and their Additional Protocols,⁷¹² constitute the body of international humanitarian law that regulates the conduct of armed conflict and seeks to limit its effects. They protect people who are not taking part in the hostilities (civilians, health workers and aid workers) and those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war.

These conventions classify some of the violations of their provisions as “grave breaches” and provide that such breaches are punishable by all member States under the principle of universal jurisdiction.⁷¹³ Each Member State is under an obligation to search for persons alleged to have committed such grave breaches who are present on its territory and to bring such persons, regardless of their nationality, before its own

708 Geneva Convention I.

709 Geneva Convention II.

710 Geneva Convention III.

711 Geneva Convention IV.

712 *Protocol (I) Additional (I) to the Geneva Conventions; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977); Protocol (III) Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (2005).*

713 Article 50 of Geneva Convention I which relates to the wounded and sick in armed forces in the field, and article 51 of Geneva Convention II which relates to the wounded, sick and shipwrecked in armed forces at sea define the acts as “wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”. Article 130 of Geneva Convention III which relates to prisoners of war defines the acts as “wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention”, and article 147 of Geneva Convention IV which relates to civilians defines the acts as “wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

courts, unless that State chooses to hand those persons over for trial to another Member State which is willing to prosecute them.⁷¹⁴

Although all the alleged perpetrators would be State officials, in that they would be members of the armed forces of the States, immunity is not referred to at all in these conventions. This means that member States to these conventions did not consider international crimes as sovereign activities for which immunity *ratione materiae* should be accorded.⁷¹⁵

3.4.1.2.2.1.2 The Torture Convention of 1984

Article 1 of the Torture Convention⁷¹⁶ defines torture as any act by which severe pain or suffering is intentionally inflicted on a person:

when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Thus, from the very definition of torture, the official status of the torturer is a fundamental element of the offence.⁷¹⁷ Since the Torture Convention creates universal jurisdiction⁷¹⁸ over the crime of torture, it is evident that in adopting the Torture Convention, States parties intended to create a world where no torturer can evade justice for the mere reason that he was acting on behalf of a sovereign State.⁷¹⁹

3.4.1.2.2.1.3 The Apartheid Convention

Another multilateral convention that provides support to the argument that immunity *ratione materiae* cannot be invoked as a bar to criminal proceedings against a person who is accused of an international crime in the courts of foreign States is the *International Convention on the Suppression and Punishment of the Crime of Apartheid*

714 Article 49 Geneva Convention I; article 50 Geneva Convention II; article 129 Geneva Convention III; and article 146 Geneva Convention IV.

715 Franey *Immunity* 249.

716 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984).

717 Franey *Immunity* 250.

718 Art 5(2) of the Torture Convention provides as follows: "Each State Party shall [...] take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article".

719 Foakes "Immunity for International Crimes?" 10 and Bantekas and Nash *International Criminal Law* 171: "[s]ince Art 1(1) of the Torture Convention defines torture as an act that can only be inflicted by a public official, the mere invocation of immunity *ratione materiae* would render the Torture Convention redundant. Article 1(1) has to be read, hence, as excluding such immunity".

(hereinafter referred to as Apartheid Convention).⁷²⁰ This Convention provides universal jurisdiction⁷²¹ over the crime of apartheid and provides that criminal responsibility shall apply to:

individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

- a. Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;
- b. Directly abet, encourage or co-operate in the commission of the crime of apartheid.

By providing universal jurisdiction and including the “representatives of the State” among the persons that may be held criminally accountable for the crime of apartheid, the Apartheid Convention, just like the other conventions discussed above, implicitly recognised that immunity *ratione materiae* cannot be pleaded as a jurisdictional defence in the courts of foreign States.⁷²² In fact, since apartheid is by definition always committed as a State policy,⁷²³ and since the State on behalf of which officials carry out

720 Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973.

721 Art V of the Apartheid Convention: “Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction”.

722 Murungu *Immunity of State Officials* 78.

723 Art 2 of the Apartheid Convention defines the crime of Apartheid as any of: “the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

the apartheid policy cannot be expected to punish them, it would have been absurd for the member States to this Convention to criminalise apartheid and then provide jurisdictional immunity to States' officials accused of apartheid from the courts of foreign States.

3.4.1.2.2.2 National jurisprudence

3.4.1.2.2.2.1 England-Chile

There is less state practice in the form of national prosecutions of State's officials for international crimes. The decision of the House of Lords in the *Pinochet* case⁷²⁴ was the first judgment rendered by a municipal court in which a former head of State was held to be legally accountable for criminal acts against international law (torture) committed while in office.⁷²⁵

The legal question in this case was whether former Chilean President Augusto Pinochet could claim immunity *ratione materiae* from torture allegations made by a Spanish court and therefore evade extradition to Spain. The House of Lords decided that General Pinochet was not immune from prosecution by Spanish courts for the crimes of torture committed during his time as president of Chile. If immunity *ratione materiae* applied to the crime of torture, the Court said, "the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive".⁷²⁶

The House of Lords reasoned that since torture is by definition committed by States' officials,⁷²⁷ if immunity *ratione materiae* were to exist in respect of that crime, that would

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- d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
 - (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
 - (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid".

724 *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] 4 All ER 897.

725 Bianchi 1999 *European Journal of International Law* 276.

726 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) [1999] 2 All ER 115.

727 Torture is defined as a pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a "public official" or other person acting in an "official capacity". Art 1(1) Torture Convention.

render the offence of torture under the Torture Convention “null and void”.⁷²⁸ The court added that:

[T]orture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of State. [...] international law has made plain that certain types of conduct, including torture and hostage taking, 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.⁷²⁹

3.4.1.2.2.2 Senegal-Chad

Another example of a former head of State being tried for crimes committed during office is the currently ongoing trial of Hissène Habré, the former President of Chad. Habré’s rule was marked by widespread atrocities in Chad.⁷³⁰ Reports indicate that Habré’s government was responsible of some 40,000 political murders and systematic incidents of torture.⁷³¹

Habré has been living in exile in Senegal since he was overthrown in 1990.⁷³² Senegal took no action against Habré from 1990 until the filing of the victims’ complaint in January 2000. In February of the same year, a Senegalese judge indicted⁷³³ Habré on charges of torture, crimes against humanity, and ‘barbaric acts’. However, after political interference by the Senegalese government,⁷³⁴ an appellate court dismissed the case

728 Barker, Warbrick and McGoldrick 1999 *International and Comparative Law Quarterly* 948.

729 *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] 4 All ER 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 190.

730 Human Rights Watch “The Case of Hissène Habré” 1.

731 Habré’s regime periodically targeted various ethnic groups such as the Sara (1984), Hadjerai (1987), Chadian Arabs and the Zaghawa (1989-90), killing and arresting group members en masse when he believed that their leaders posed a threat to his rule. Most abuses were carried out by his notorious Documentation and Security Directorate (DDS), whose directors reported directly to Habré. Human Rights Watch “The Case of Hissène Habré” 1.

732 Mr Hissène Habré was president of the Republic of Chad from 1982 until he was deposed in 1990 by Idriss Déby Itno, the current president. Human Rights Watch “The Case of Hissène Habré” 1.

733 *Cour d'Appel de Dakar Tribunal Régional Hors Classe de Dakar Cabinet de Mr Demba Kandji Juge d'instruction N° du Parquet 482 N° de l'instruction 13/2000.*

734 Human Rights Watch “The Case of Hissène Habré” 4.

on the grounds that Senegalese courts lacked jurisdiction to try crimes committed abroad.⁷³⁵

Some of Habré's victims then filed a case against him in Belgium in November 2000. In 2005, the Belgian authorities indicted Habré on charges of crimes against humanity, war crimes, and torture, and sought his extradition from Senegal. However, Senegal did not honour this request.⁷³⁶

Instead, Senegal referred the matter to the African Union (AU). The AU Assembly of Heads of State and Government issued Decision 127 (VII)⁷³⁷ in 2006 deciding that the case falls within the competence of the AU and instructed Senegal to prosecute Habré, but Senegal claimed that it lacked financial resources and requested international financial assistance.⁷³⁸

Belgium then took the matter before the ICJ.⁷³⁹ The ICJ determined that under article 7 of the Torture Convention Senegal had an obligation to prosecute or to extradite Mr Habré.⁷⁴⁰ The ICJ opined that while extradition was an option, prosecution was an international obligation under the Torture Convention, the violation of which is a wrongful act engaging the responsibility of the State.⁷⁴¹ The ICJ also held that neither Senegal's referral of the matter to the AU nor its financial difficulties could justify Senegal's delays in complying with its obligations under the Torture Convention.⁷⁴²

With regard to the timing of Senegal's compliance, the ICJ held that a "reasonable time, in a manner compatible with the object and purpose of the Convention" is implicit in the

735 Human Rights Watch 2001 <http://www.hrw.org/news/2001/03/20/senegal-bars-charges-against-ex-chad-dictator>

736 FIDH 2013 <http://www.fidh.org/en/africa/Chad/Hissene-Habre-Case/senegal-hissene-habre-indicted-for-crimes-against-humanity-war-crimes-and-13629>

737 AU *Decision on the Hissène Habré Case and the African Union Assembly/AU/Dec127 (VII)*.

738 See *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* Judgement 2012 ICJ 422 (20 July 2012) 23, 28.

739 *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* Judgement 2012 ICJ 422 (20 July 2012) 95.

740 Art 7 of the Torture Convention.

741 *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* Judgement 2012 ICJ 422 95.

742 *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* Judgement 2012 ICJ 422 (20 July 2012) 112.

text of the Torture Convention and ordered Senegal to submit the case of Habré to its authorities for prosecution or otherwise extradite him “without delay”.⁷⁴³

Immediately after the ICJ judgment was announced, Senegal started negotiations to create a special court to try Habré. These talks resulted in the creation of a special court for Mr Habré, which came to be known as the “Extraordinary African Chambers”.⁷⁴⁴ The Chambers were created inside the existing court structure of Senegal, namely the *Tribunal Régional Hors Classe de Dakar* and the Dakar Court of Appeals.⁷⁴⁵ The purpose of the Chambers is stated in article 1 of its Statute as:

to implement the decision of the African Union concerning the Republic of Senegal’s prosecution of international crimes committed in Chad between 7 June 1982 and 1 December 1990, in accordance with Senegal’s international commitments.

The Chambers were inaugurated in Dakar on 8 February 2013.⁷⁴⁶ On 2 July 2013, Hissène Habré was charged with crimes against humanity, torture and war crimes and placed in pre-trial detention by the Extraordinary African Chambers in the courts of Senegal. Habré was charged with crimes against humanity, torture and war crimes by the Chambers’ investigating judges on July 2, 2013, and then remanded to custody.⁷⁴⁷ If Habré is found guilty, the Chambers could impose a sentence of up to life imprisonment.⁷⁴⁸

With respect to the question of immunity, the Statute⁷⁴⁹ of the Chambers unambiguously provides that:

743 *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* Judgement 2012 ICJ 422 (20 July 2012) 112.

744 Buys 2012 <http://www.asil.org/insights120911.cfm> In November 2012, Senegal and a number of donor countries agreed to a budget of \$ 9.7 million to cover Habré’s trial. Commitments were made by: Chad (2 billion CFA francs or US\$3,743,000), the European Union (€2 million), the Netherlands (€1 million), the African Union (US\$1 million), the United States (US\$1 million), Belgium (€500,000), Germany (€500,000), France (€300,000), and Luxembourg (€100,000). Human Rights Watch “The Case of Hissène Habré” 10.

745 Art 2 of the Statute. The Chambers have four levels: an Investigative Chamber with four Senegalese investigative judges, an Indicting Chamber of three Senegalese judges, a Trial Chamber, and an Appeals Chamber (art 2 of the Statute). The Trial Chamber and the Appeals Chamber each have two Senegalese judges and a president from another Member State of the African Union (art 11 of the Statute).

746 Human Rights Watch “The Case of Hissène Habré” 5.

747 Human Rights Watch “The Case of Hissène Habré” 2.

748 Art 24(b) of the Statute.

749 Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad Between 7 June 1982 and 1 December 1990. Unofficial translation by Human Rights Watch. The original name of the Statute in French is “*Statut des Chambres Africaines Extraordinaires au Sein des Juridictions Sénégalaises pour*

[T]he official position of an accused, whether as Head of State or Government, or as a responsible government official, shall not relieve him or her of criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.⁷⁵⁰

This provision thus clearly excludes functional immunity being pleaded by Mr Habré as a defence to the international crimes that he allegedly committed during his presidency.

3.4.1.2.2.2.3 Netherlands-DRC

On 8 April 2004, Mr Sebastien Nzapali, a former officer in the army of the former dictator of Zaire Mobutu Sese Seko, was convicted of torture committed in the Democratic Republic of the Congo (then Zaire) in 1995 and 1996.⁷⁵¹ He was sentenced to a a term of 30 months imprisonment.⁷⁵²

This trial, like that of Hissène Habré in Senegal, illustrates the view that criminal acts such as torture cannot be regarded as “official” acts for which former States’ officials are immune from the jurisdiction of foreign States.

3.4.1.2.2.2.4 Belgium-Rwanda

Another case of a former State official who was tried before domestic courts of a foreign country is Major Bernard Ntuyahaga who, on 5 July 2007, was convicted in Belgium for war crimes and crimes against humanity committed during the 1994 genocide in Rwanda. The charges against Major Bernard Ntuyahaga included the murder of several Belgian peacekeepers and an undetermined number of Rwandan civilians. On 12 December 2007 the *Cour de Cassation* rejected Ntuyahaga’s appeal and confirmed his conviction and sentence.⁷⁵³ This case, like those discussed above, indicates that international crimes cannot be regarded as official acts and that immunity *ratione materiae* cannot be pleaded if a former State official is charged with such crimes before the courts of foreign States.

la Poursuite des Crimes Internationaux Commis au Tchad durant la Période du 7 juin 1982 au 1er décembre 1990’.

750 Art 10(4) of the Statute, unofficial translation by Human Rights Watch.

751 Human Rights Watch 2004 <http://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted>

752 Simons 2004 <http://www.nytimes.com/2004/04/08/world/world-briefing-europe-the-netherlands-congo-man-convicted-of-torture.html>

753 Track Impunity Always 2013 <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/477/action/show/controller/Profile/tab/legal-procedure.html>

In the light of the State practice discussed above, it is clear that customary international law is established for the principle that no immunity *ratione materiae* can be pleaded in case of international crimes.⁷⁵⁴ The characterisation of a conduct as an international crime absolves that conduct from the protection of immunity *ratione materiae*.⁷⁵⁵ This is a correct position. Immunity *ratione materiae* 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.⁷⁵⁶ 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 subject to universal jurisdiction of all States.⁷⁵⁷

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.⁷⁵⁸ Nevertheless, since international crimes are prohibited by international law, prosecuting States' 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.⁷⁵⁹

754 See also Murungu *Immunity of State Officials* 36: "Such immunity cannot exist when a person is charged with international crimes either because such acts can never be "official" or because they violate norms of *jus cogens* and such peremptory norms must prevail over immunity".

755 See also Bianchi 1999 *European Journal of International Law* 265; Wirth 2002 *European Journal of International Law* 888 and Dugard *International Law* 253: "[s]uch immunity [*ratione materiae*] 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".

756 Franey *Immunity* 195 and Steynberg *et al Criminal Law* 579.

757 Cryer *et al International Criminal Law* 542-543: "[t]he State cannot complain that its sovereignty is being restricted or that a policy is being imposed on it, when the prohibited conduct is recognized by all as an international crime". See also Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law* 612: "The fact that the official position of a person does not shield him or her from responsibility for the perpetration of severe human rights violations and that state immunity from jurisdiction cannot come to his or her rescue [reflects] an important shift of priorities, namely that more weight is given to key universal humanitarian values and less to the traditional interpretation of state sovereignty".

758 Wirth 2002 *European Journal of International Law* 888.

759 Wirth 2002 *European Journal of International Law* 888 See also 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 the very conduct which it criminalizes and for which it imposes duties to prosecute".

Thirdly, this type of immunity is justified as necessary to enable a State's officials to perform their functions without fear of subsequent prosecution.⁷⁶⁰ 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.⁷⁶¹ States' officials who commit international crimes are thus rightly held personally accountable by the courts of foreign States.⁷⁶²

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".⁷⁶³ 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 authorizing action "moves outside its competence under International Law".⁷⁶⁴

In light of the above considerations, it is concluded that under customary international law, States' officials do not enjoy immunity *ratione materiae* from the jurisdiction of foreign States, when they are accused of international crimes.⁷⁶⁵ It follows from this conclusion that by denying this immunity in possible future cases, South African courts would not violate any 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 foreign ministers will be considered.

760 Franey *Immunity* 195.

761 Franey *Immunity* 195. See also UN ESC "Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights" 17: "Under international law, crimes of this kind are not classed as political offences or, more accurately, the rules of international law, while not denying their political character, preclude the application of various measures of protection available to political offenders". Emphasis added.

762 Cryer *et al International Criminal Law* 543. See also Murungu *Immunity of State Officials* 91: "In international law, it is not acceptable that commission of international crimes can qualify as acts performed in official capacity".

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

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

765 See also The Institute of International Law "Immunity from Jurisdiction", article III(1): "No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes".

3.4.2 Immunity *ratione personae* or personal immunity

3.4.2.1 Definition

International relations and international cooperation between States require an effective process of communication between States' representatives.⁷⁶⁶ Accordingly, international law confers immunities on certain States' officials in order to enable them to negotiate with each other freely and without harassment by other States.⁷⁶⁷ This immunity is described as immunity *ratione personae* or personal immunity.⁷⁶⁸

In contrast to functional immunity, personal immunity is absolute.⁷⁶⁹ It provides complete immunity of the person of certain office holders while they carry out representative functions.⁷⁷⁰ 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.⁷⁷¹ It also applies whether or not the act in question was carried out at a time when the official is in office or before entry to office.⁷⁷²

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.⁷⁷³ It is this type of immunity which was referred to by the ICJ in the *Arrest Warrant* case, when the Court stated that:

in international law it is firmly established that [...] certain holders of high-ranking office in a State, such as the Head of State, the Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.⁷⁷⁴

766 Akande and Shah 2011 *European Journal of International Law* 818.

767 Tunks 2002 *Duke Law Journal* 657 and Knushel 2011 *Northwestern Journal of International Human Rights* 151.

768 Akande and Shah 2011 *European Journal of International Law* 818.

769 Gevers "Immunity" 3.

770 Cryer *et al International Criminal Law* 533.

771 Steynberg *et al Criminal Law* 579; Akande and Shah 2011 *European Journal of International Law* 819 and Knushel 2011 *Northwestern Journal of International Human Rights* 151. See also 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 perform his official functions whatever the reason for his arrest)".

772 *Arrest Warrant* case paras 54–55.

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

774 *Arrest Warrant* case para 51.

An example of a civil case in which this type of immunity was applied is *Lafontant v Aristide*.⁷⁷⁵ The facts that gave rise to this case are as follows. In January 1991, an unsuccessful military coup was attempted against President Aristide of Haiti, shortly after his election. However, in September of the same year, a second coup, this time successful, forced Aristide to flee his country and seek asylum in the United States.⁷⁷⁶

While in exile, a certain Gladys Lafontant filed a civil suit for damages against President Aristide for having killed her husband, Dr Roger Lafontant. She alleged that President Aristide had ordered the execution of the deceased shortly before Aristide went into exile because of his participation in the failed coup attempt in January 1991. Aristide pleaded that as the recognised head of State of the Republic of Haiti he was personally immune from suit in the courts of the United States. His claim was supported by a "suggestion" by the US Department of State that read, in part:

The United States has an interest and concern in this action against President Aristide insofar as the action involves the question of immunity from the Court's jurisdiction of the head-of-state of a friendly foreign state.⁷⁷⁷

On the basis of this suggestion, the court held that Mr Aristide, although in exile in the United States at the time of trial, was recognised as the Head of State of Haiti by the United States government and the proceedings were accordingly terminated.⁷⁷⁸

A criminal case where this type of immunity was considered and recognised is the *Gaddafi* case⁷⁷⁹ 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.⁷⁸⁰ The Court held that international customary law does not allow that sitting

775 *Lafontant v Aristide* 844 F Supp 128 (27 January 1994). Accessed at http://www.leagle.com/get_cited/844%20F.Supp.%20128 [2 March 2013].

776 Grosscup 2004 *Denvil Journal of International Law and Policy* 366.

777 *Lafontant v Aristide* 844 F Supp 131.

778 *Lafontant v Aristide* 844 F Supp 140: "This court has subject matter jurisdiction, but it cannot exercise in personam jurisdiction over defendant because of his head-of-state immunity. "

779 *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 *European Journal of International Law* 151 and Markovich 2009 *Potentia* 64.

780 *Gaddafi Court of Appeal of Paris* 20 Oct 2000; *Court of Cassation* 13 March 2001 [2004] 125 ILR 509.

heads of State be the subject of proceedings before criminal tribunals of a foreign State and, accordingly, quashed the proceedings against the Libyan leader.⁷⁸¹

It thus seems that the existence of immunity *ratione personae* is firmly established both in civil and criminal cases. What is debatable is whether this immunity can also be invoked in cases of allegations concerning international crimes. This question is considered below.

3.4.2.2 Immunity *ratione personae* and international crimes

The granting of immunity to State officials from criminal proceedings arising out of gross human rights violations has been described as “artificial, unjust, and archaic”.⁷⁸² It has also been argued 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.⁷⁸³ In order to determine whether or not international law recognises immunity *ratione personae* in case of international crimes, it is necessary to investigate the state practice and *opinio juris* (customary international law) relating to such crimes and critically analyse whether such immunity is or is not in conflict with the *jus cogens* norms of international law.

3.4.2.2.1 The position under customary international law

3.4.2.2.1.1 Defining customary international law

Custom in international law is defined as “a practice followed by those involved because they feel legally obliged to behave in such a way”.⁷⁸⁴ Article 38 of the Statute of the International Court of Justice, which is considered as “the traditional starting point for any discussion of the sources of international law”,⁷⁸⁵ defines customary law as “international custom, as evidence of a general practice accepted as law”.

From this definition of customary international law, it is possible to detect two basic elements which constitute an international custom. These are the material facts, that is,

781 Gaddafi *Court of Appeal of Paris* 20 Oct 2000; *Court of Cassation* 13 March 2001 [2004] 125 ILR 510.

782 Knuchel 2011 *Northwestern Journal of International Human Rights* 149.

783 See for example, Bassiouni 1996 *Law and Contemporary Problems* 63.

784 Hillier *Public International Law* 66.

785 Hillier *Public International Law* 63.

the actual behaviour of States (material element), and the psychological or subjective belief that such behaviour is “law”.⁷⁸⁶

It is the psychological element (*opinio juris*) that distinguishes international law from “principles of morality or social usage”.⁷⁸⁷ This is because States do not restrict their behaviour only to what is legally required. For example, States do not have to allow tourists on their territories, nor are they obliged to distribute economic aid to developing nations. The mere fact that such things are done does not mean that they are legally required to be done.⁷⁸⁸ As the ICJ held in the *North Sea Continental Shelf Cases*:⁷⁸⁹

[T]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.⁷⁹⁰

3.4.2.2.1.2 Some State practice relating to international crimes and immunity *ratione personae* in domestic courts

It has been stated that functional immunity does not apply to international crimes.⁷⁹¹ The same cannot be said of immunity *ratione personae*. State practice indicates that this type of immunity is respected “regardless of the nature of the charges”.⁷⁹² As Akande⁷⁹³ observes, judicial opinion and state practice on this point are unanimous. No case exists

786 Shaw *International Law* 70. See also Haust *Handbook* 6 and Hillier *Public International Law* 75
787 Shaw *International Law* 70. See also Enache-Brown and Fried 1998 *McGill Law Journal* 629: “At its most basic, *opinio juris* means that state practice is motivated by a sense of obligation”.
788 Shaw *International Law* 71.
789 *Federal Republic of Germany v Denmark and the Netherlands North Sea Continental Shelf Cases* Judgement 1969 ICJ 3 (20 February 1969) para 77.
790 In another case, the ICJ described the two elements forming customary international law as follows: “[f]or a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.” *Nicaragua v United States Military and Para-military Activities in and against Nicaragua* Judgement 1986 ICJ 14 (27 June 1986) para 207.
791 See 3.4.1 above.
792 Cryer *International Criminal Law* 545. See also Steynberg *et al Criminal Law* 587 and Bassiouni 2001 *Virginia Journal of International Law* 84: “With respect to certain international crimes, the substantive defense of immunity has been eliminated since the Nuremberg Charter and the judgments of the International Military Tribunal at Nuremberg (IMT). Such removal of substantive immunity means that a defendant cannot rely on his or her status as a head of state or diplomat to interpose as a substantive defence resulting in exoneration from criminal responsibility for these crimes. However, so far, there is no treaty or customary law practice that removes the temporal immunity of heads of state or diplomats while they are in office”.
793 Akande 2004 *American Journal of International Law* 411.

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.⁷⁹⁴

The view that immunity *ratione personae* is not removed even in cases of allegations of international crimes was confirmed, albeit *obiter*, by the House of Lords in the first *Pinochet* case.⁷⁹⁵ The Court held that the former Chilean president who was accused of torture, which is an international crime,⁷⁹⁶ would have been entitled to immunity had he been still in office.⁷⁹⁷ This view was confirmed in the third *Pinochet* case,⁷⁹⁸ where the House of Lords stated that:

[T]he immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever.⁷⁹⁹

The House of Lords held that if Senator Pinochet were still the head of State of Chile, he would be in a position to complain that the entire process of his extradition to Spain was a violation of the duties owed under international law to a person of his status.⁸⁰⁰ Immunity was denied to Pinochet since he was a former, not sitting head of State.⁸⁰¹

794 Akande 2004 *American Journal of International Law* 411.

795 *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] 4 All ER 938.

796 Torture is also recognised a "*jus cogens*" crime. See *Prosecutor v Anto Furundzija* Judgement ICTY IT-95-17/1-T (10 December 1998) paras 153-154: "because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules [...] this [prohibition of torture] [...] is an absolute value from which nobody must deviate".

797 *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] 4 All ER 938: "[t]here can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity".

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

799 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 171.

800 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 171: "This immunity is not in issue in the present 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".

801 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 181: "A head of state on a visit to another country is inviolable. He cannot be arrested or detained, let alone removed against his will to another country, and he is not subject to the judicial processes, whether civil or criminal, of the courts of the state that he is visiting. But Senator Pinochet is no longer head of state of Chile".

Two cases in which immunity *ratione personae* of foreign officials accused of international crimes was judicially recognised are discussed below.

3.4.2.2.1.2.1 The *Sharon* case

The House of Lords *dictum* in *Pinochet* was followed by the Court of Cassation of Belgium in 2003, in a case against Ariel Sharon, then Prime Minister of Israel.⁸⁰² The case against Sharon related to an alleged massacre in a Lebanese refugee camp in 1982 when hundreds of Palestinian civilians in the Sabra and Chatila refugee camps near Beirut were said to have been slaughtered by a Lebanese Christian militia allied with the State of Israel.⁸⁰³ An Israeli inquiry had found Sharon indirectly responsible and forced him to resign as defence minister in 1983.⁸⁰⁴

In 2001 twenty-four individuals of Palestinian and Lebanese origin, brought an action before the Belgian courts against Mr Ariel Sharon, then Israeli Prime Minister, and Mr Amos Yaron, Director General at the Israeli Ministry of Defence. The allegation was that Ariel Sharon and Amos Yaron had been complicit in the massacres, and that they had failed to intervene to stop them, and therefore they were guilty of serious violations of international humanitarian law.⁸⁰⁵ Section 7 of the Belgian Law 1993, granted Belgian courts universal jurisdiction over a series of violations of international humanitarian law, in particular war crimes, genocide and crimes against humanity, irrespective of the place where the crimes were committed.

The Court of Cassation found that customary international law prohibited heads of State and governments from being the subject of proceedings before the criminal courts of foreign States⁸⁰⁶ and, accordingly, the Court held that Ariel Sharon as Prime Minister of Israel was entitled to immunity and the proceedings against him were inadmissible.⁸⁰⁷ The court emphasised that any domestic legislation that would provide the contrary

802 *Re Sharon and Yaron Court of Appeal of Brussels* 26 June 2002; *Court of Cassation* 12 Feb 2003 [2005] 127 ILR 110.

803 *Re Sharon and Yaron Court of Appeal of Brussels* 26 June 2002; *Court of Cassation* 12 Feb 2003 [2005] 127 ILR 111.

804 Haaretz 2003 <http://www.haaretz.com/news/belgium-s-highest-court-throws-out-case-against-sharon-1.101075>

805 *Re Sharon and Yaron Court of Appeal of Brussels* 26 June 2002; *Court of Cassation* 12 Feb 2003 [2005] 127 ILR 111.

806 *Re Sharon and Yaron Court of Appeal of Brussels* 26 June 2002; *Court of Cassation* 12 Feb 2003 [2005] 127 ILR 123.

807 *Re Sharon and Yaron Court of Appeal of Brussels* 26 June 2002; *Court of Cassation* 12 Feb 2003 [2005] 127 ILR 124.

would violate the “principle of customary international criminal law relating to jurisdictional immunity”, when the person who is protected is prosecuted, “before national courts of a State which asserts universal jurisdiction”.⁸⁰⁸

3.4.2.2.1.2.2 The *Arrest warrant* case

On 17 October 2000 the DRC instituted proceedings before the ICJ 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. 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.⁸⁰⁹

The DRC argued that Belgium had violated its right to conduct its foreign relations through being appropriately represented by its foreign minister.⁸¹⁰ 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.⁸¹¹ 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 courts while in office for official actions⁸¹² and ordered Belgium to cancel the arrest warrant.⁸¹³

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.⁸¹⁴ 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

808 *Re Sharon and Yaron Court of Appeal of Brussels* 26 June 2002; *Court of Cassation* 12 Feb 2003 [2005] 127 ILR 124.

809 Orakhelashvili 2002 *American Journal of International Law* 677.

810 *Arrest Warrant* case para 42-43.

811 *Arrest Warrant* case para 55. See also Wickremasinghe “Immunities” 401.

812 *Arrest Warrant* case para 78 (2).

813 *Arrest Warrant* case para 78 (3).

814 *Arrest Warrant* case para 59

immunity remains opposable before the courts of foreign States, even in cases involving the crimes over which universal jurisdiction applies.⁸¹⁵

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.⁸¹⁶ Some scholars have expressed opposition to the ICJ decision in the *Arrest Warrant* case. Dugard⁸¹⁷ has described this decision as “controversial, and short-sighted”. In particular, Dugard⁸¹⁸ 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.⁸¹⁹ As Yitiha⁸²⁰ notes, the “lack of mobility” of such persons, due to fear of arrest, would seriously infringe 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 States’ high-ranking officials of their duties as representatives of their States must be prevented.⁸²¹

Immunity *ratione personae* also helps to avoid abuses and imprudent misuses of criminal jurisdiction. Universal jurisdiction can cause disruptions in world order when

815 *Arrest Warrant* case para 59.

816 *Arrest Warrant* case para 58. See also Aust *Handbook* 161 and Cassese 2003 *Journal of International Criminal Justice* 594.

817 Dugard 2002 *Annual Survey of South African Law* 165.

818 Dugard 2002 *Annual Survey of South African Law* 166. See also Bianchi 1999 *European Journal of International Law* 276-277: “the very notion of crimes of international law is inconsistent with the application of jurisdictional immunities...particularly as regards those crimes which by their very nature either presuppose or require state action. If immunity were granted to state officials [...] prosecution of such crimes would be impossible and the overall effectiveness of international criminal law irremediably undermined”.

819 Tunks 2002 *Duke Law Journal* 656.

820 Yitiha *Immunity* 136.

821 Swanepoel 2007 *Journal for Juridical Science* 134. See also 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”.

used in a politically motivated manner or for vexatious purposes.⁸²² Also, even with the best of intentions, universal jurisdiction can be used imprudently, and that could lead to frictions 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”.⁸²³ Immunity *ratione personae* of States’ officials is thus also mandated by the requirements of friendly foreign relations as enshrined in the UN Charter,⁸²⁴ 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.⁸²⁵

The next section will consider the question whether immunity *ratione personae* is not perhaps in conflict with the *jus cogens* status of international law rules prohibiting international crimes.

3.4.2.2.2 *Is immunity ratione personae in conflict with the jus cogens character of international crimes?*

Since the end of World War II, the perception has grown that serious international crimes can no longer be considered to be the internal domain of one State, but the concern and responsibility of the international community as a whole.⁸²⁶ This perception was further nourished by the progressive recognition of the superior status of a number of international law norms, known as peremptory norms of international law or *jus cogens*, deemed to possess a greater normative weight and which must be adhered to in all circumstances.⁸²⁷ Their higher rank in the hierarchy of international rules has been

822 Bassiouni 2001 *Virginia Journal of International Law* 82 and Macedo *et al* “Princeton Principles” 24-25. See also Cryer *et al* *International Criminal Law* 546: “Its [immunity *ratione personae*] purpose is to preclude any pretext for interference with a State representative, in order to allow international relations between potentially distrustful States”. See also Colangelo 2005 *Virginia Journal of International Law* 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 Human Rights Watch 2009 <http://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>

823 Bassiouni 2001 *Virginia Journal of International Law* 154. See also Zappalà 2001 *European Journal of International Law* 167.

824 Art 1(2) UN Charter.

825 Wirth 2002 *European Journal of International Law* 888.

826 Redress “Immunity v Accountability” 49.

827 Knushel 2011 *Northwestern Journal of International Human Rights* 153.

put forward as the justification for lifting immunity *ratione personae* in claims arising from their violations.⁸²⁸

3.4.2.2.1 The notion of *jus cogens*

Under international law, a norm having the character of *jus cogens* is a norm from which States are not allowed to depart under any circumstances.⁸²⁹ These norms are often referred to as “peremptory norms of international law”.⁸³⁰ Unlike other international legal norms, States cannot choose to reverse these norms by either treaty or practice.⁸³¹

Jus cogens norms relate to the recognition that certain values or interests are common to and affect the international community as a whole.⁸³² The violation of these values or interests threatens not just the interests of a particular State but the whole world order.⁸³³ The legal effect of the characterisation of a norm of international law as a *jus cogens* norm was aptly explained in *Al-Adsani v United Kingdom* as follows:

The basis characteristic of a *jus cogens* norm is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or in any event, does not produce any legal effects which are in contradiction with the content of the peremptory rule.⁸³⁴

This notion was codified in the Vienna Convention on the Law of Treaties, which defines a peremptory norm of international law as a norm:

accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁸³⁵

In its commentaries to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, the ILC gave as examples of *jus cogens* norms the prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture, the basic rules of international humanitarian law applicable in armed

828 Knushel 2011 *Northwestern Journal of International Human Rights* 153.

829 Redress “Immunity v Accountability” 28 and Knushel 2011 *Northwestern Journal of International Human Rights* 153.

830 Rakate *The Duty to Prosecute and the Status of Amnesties* 173.

831 Knushel 2011 *Northwestern Journal of International Human Rights* 153.

832 See also Costelloe 2011 *Washington University Jurisprudence Review* 5.

833 Redress “Immunity v Accountability” 28.

834 *Al-Adsani v The United Kingdom* ECHR Application No 35763/97 Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic (21 November 2001) para 1.

835 Art 53 *Vienna Convention on the Law of Treaties* (1969).

conflict and the principle of self-determination.⁸³⁶ The ILC identified these rules from the “international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine”.⁸³⁷ For the purposes of this study, it seems not important to indulge in any lengthy discussion of whether all international crimes, as defined in the Implementation Act, have really attained the *jus cogens* status among other rules of international law. Rather, it appears more important, on the assumption that all international crimes may have attained the status of *jus cogens* norms in international law, to analyse whether immunity *ratione personae* is in fact in conflict with such norms and, hence, void.

3.4.2.2.2 The *jus cogens* argument against immunity *ratione personae*

As stated above,⁸³⁸ no “derogation” is allowed from a rule that has attained the *jus cogens* status. The binding nature of *jus cogens* norms renders any attempt to derogate from them void *ab initio*.⁸³⁹ With regard to international crimes, one commentator has argued that:

obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of “obedience to superior orders” [...].⁸⁴⁰

The above statement is only partly correct. Without an obligation to prosecute or extradite safe havens may be created to harbour and shield international criminals from prosecution. It is also clear that if statutes of limitations were applicable to international crimes, and if the defence of superior orders was acceptable in case of international crimes, impunity would result and that this would be in conflict with the *jus cogens* character of international crimes. In respect of immunity *ratione personae*, however, such conflict does not arise at all. A conflict of norms requires that the legal consequences of two norms are incompatible with each other, a requirement not met in the case of fundamental human rights and immunity *ratione personae*.⁸⁴¹ To prove only the *jus cogens* character of the rule prohibiting core international crimes does not

836 Art 40(4-5) “Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentaries”.

837 Art 40(2) “Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentaries”.

838 See 3.4.2.1.1.3 above.

839 Redress “Immunity v Accountability” 28-29.

840 Bassiouni 1996 *Law and Contemporary Problems* 63.

841 Finke 2010 *European Journal of International Law* 869.

suffice.⁸⁴² In order to be incompatible with *jus cogens* norms of international law prohibiting international crimes, it must also be established that immunity *ratione personae* results in impunity for such crimes, which is not the case.

The UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity define impunity as:

impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative, or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.⁸⁴³

It is submitted that immunity *ratione personae* does not result in impunity for international crimes and that, consequently, it is not in conflict with the *jus cogens* norms of international law that prohibit international crimes. As emphasised by the ICJ in the *Arrest Warrant* case,⁸⁴⁴ immunity from criminal jurisdiction and individual criminal responsibility are separate concepts. Jurisdictional immunity is procedural in nature, whereas criminal responsibility is a question of substantive law.⁸⁴⁵ Thus, immunity *ratione personae*:

does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.⁸⁴⁶

Thus, the argument that immunity *ratione personae* conflicts with the *jus cogens* status of the prohibition of international crimes is based on a “false conflict”.⁸⁴⁷ Jurisdictional immunity may bar prosecution for a certain period but it does not exonerate the person to whom it applies from all criminal responsibility for ever.⁸⁴⁸ Firstly, after a person ceases to hold office, he will no longer enjoy the immunity *ratione personae* from the courts of foreign States.⁸⁴⁹ Once the person is removed from office and no longer

842 Finke 2010 *European Journal of International Law* 870.

843 UN ESC/CHR “Updated Set of principles for the protection and promotion of human rights through action to combat impunity” 6.

844 *Arrest Warrant* case para 60.

845 Wickremasinghe “Immunities” 396: “Jurisdictional immunities operate purely at the procedural level, by barring the adjudicative powers of the local courts in respect of the holder, but they do not in themselves amount to substantive exemptions from the law itself”.

846 Fox *State Immunity* 525.

847 Cryer *et al International Criminal Law* 532.

848 Cryer *et al International Criminal Law* 534: “The existence of 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 alleged offender”.

849 *Arrest Warrant* case para 61.

represents State interests abroad, he or she may be prosecuted for offences committed at any time in the past.⁸⁵⁰

It may be argued that it may take some time for the official to be removed from power. But, this is only a matter of time; it is not an absolute impossibility. To conclude from the *jus cogens* character of a norm that all other norms which may temporarily limit its enforcement are invalid would require the existence of the following rule: “any *ius cogens* norm, because of its superior value, invalidates rules which limit its enforcement”.⁸⁵¹ But, such a rule does not exist.⁸⁵² Accordingly, there cannot be any conflict between the *jus cogens* character of international crimes and the rule granting immunity *ratione personae* on the sole basis that it may take considerable time for the concerned official to quit office to allow courts of foreign States to be able to initiate criminal proceedings against him.

Secondly, the existence of a permanent international criminal tribunal (the ICC) ensures that impunity will not necessarily ensue in the event the concerned State’s official would never leave office, for example kings. Since immunity *ratione personae* does not apply before the ICC, this tribunal is the proper avenue for the prosecution of such State officials. The current proceedings against presidents Al Bashir of Sudan⁸⁵³ and Uhuru Kenyatta of Kenya⁸⁵⁴ before the ICC are clear evidence of the fact that immunity *ratione personae* does not necessarily result into impunity.

In her dissenting opinion in the *Arrest Warrant* case,⁸⁵⁵ Judge *ad hoc* Van den Wyngaert argued that the ICC, like the *ad hoc* international tribunals, will not be able to deal with all crimes that come under its jurisdiction and that, accordingly, there will always be a need for States to investigate and prosecute international crimes.⁸⁵⁶ This argument, however, cannot justify the removal of immunity *ratione personae*. Although the number

850 Bantekas and Nash *International Criminal Law* 168-169 and Macedo *et al* “Princeton Principles” 51.

851 Finke 2010 *European Journal of International Law* 869.

852 Finke 2010 *European Journal of International Law* 869.

853 *The Prosecutor v Omar Hassan Ahmad Al Bashir* Second Decision on the Prosecution's Application for a Warrant of Arrest ICC-02/05-01/09 (12 July 2010).

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

855 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002).

856 *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002) para 37.

of alleged perpetrators of international crimes may exceed the capacity of the ICC,⁸⁵⁷ it is highly unlikely that the number of those qualifying for personal immunity would surpass the capacity of the ICC to effectively investigate and prosecute international crimes. Furthermore, if need be, the ICC can be supplemented by an international *ad hoc* tribunal. Since immunities do not apply before such tribunals,⁸⁵⁸ they may also be resorted to as alternative avenues for dealing with incumbent States' officials. This has already occurred in the case of Charles Taylor when on 7 March 2009 an indictment was issued against him when he was at that time President of Liberia.⁸⁵⁹ The court stressed that the official position of Charles Taylor as an incumbent head of State at the time when the criminal proceedings were initiated was not a bar to his prosecution by the Special Court, as an international tribunal.⁸⁶⁰ The possibility of creating such *ad hoc* international tribunals constitutes a further guarantee that no impunity will ensue from immunity *ratione personae*. On this view, this immunity is not in any way in conflict with the *jus cogens* nature of international crimes.

Thirdly, since immunity belongs to the State, not the individual,⁸⁶¹ immunity cannot be equated to impunity because it can be waived by the State to which the concerned official belongs.⁸⁶² This is also applicable to all State officials who enjoy immunity in foreign jurisdictions.⁸⁶³

The cases where States have waived the immunity of officials are clear evidence that waiver is not just wishful thinking but reality. In January 1997 President Shevardnadze

857 It is estimated, for example, that the *Gacaca* courts in Rwanda tried some 1.2 million cases of those who were allegedly involved in the 1994 genocide against the Tutsis. Human Rights Watch "Country Summary: Rwanda" 2.

858 See *Arrest Warrant* case para 61: "An incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction". See also 1.2.2 above.

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

860 *Prosecutor v Charles Ghankay Taylor* Decision on Immunity from Jurisdiction SCSL-2003-01-AR72(E) (31 May 2004) para 52.

861 Wickremasinghe "Immunities" 406.

862 *Arrest Warrant* case para 61. See also Foakes "Immunity for International Crimes?" 4: "Both types are based on notions as to the independence and equality of states and the resulting view that no state should claim jurisdiction over another. Both belong to the state, not the individual, and can be waived by the state should it choose to do so". See further Fox "International Law and Restraints" 363: "The plea is one of immunity from suit, not of exemption from law. Hence if immunity is waived the case can be decided by the application of the law in the ordinary way". See also Lulu "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law" 50.

863 Wickremasinghe "Immunities" 406 and Yitiha *Immunity* 136.

of the Republic of Georgia waived the immunity of the Deputy Ambassador to the United States Gueorgui Makharadze. Mr Makharadze was speeding and driving under the influence of alcohol when he crashed, causing the death of a sixteen year-old girl and injuries to four others. Mr Makharadze was sentenced to seven to twenty-one years imprisonment.⁸⁶⁴ Likewise, Colombia waived immunity for the trial for murder of Jairo Soto-Mendoza, a military attaché at the Colombian Embassy in London. Mr Soto-Mendoza was accused of the murder of Damian Broom, a petty criminal who had mugged his son. Mr Soto-Mendoza was entitled to immunity from prosecution, but Colombia decided to waive it. Mr Soto-Mendoza was found not guilty at the Central Criminal Court on 22 July 2003.⁸⁶⁵ These cases are clear evidence that immunity *ratione personae* can be waived and that, therefore, such immunity does not necessarily mean impunity.

In light of the above considerations, it must be concluded, as the ICJ correctly pointed out in the *Arrest Warrant* case,⁸⁶⁶ that immunity *ratione personae* cannot be equated with impunity and that, accordingly, it should continue to be respected before national courts. International criminal tribunals are the appropriate venues for the trials of high level States' officials who are protected by immunity *ratione personae* before the courts of foreign States.

The subsequent discussion will focus on the provisions of the Implementation Act relating to the question of immunities, both functional and personal, of foreign States' officials accused of international crimes in South African courts.

3.5 Immunities of foreign States' officials under the Implementation Act

3.5.1 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-

864 Sangeetha Date Unknown <http://www.legalserviceindia.com/articles/dhuman.htm>

865 The Telegraph 2002 <http://www.telegraph.co.uk/news/uknews/1408509/Colombian-is-charged-with-Tesco-murder.html>

866 *Arrest Warrant case* para 61.

- (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.

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.⁸⁶⁷ Du Plessis⁸⁶⁸ 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”.⁸⁶⁹ Thus, he says, because the customary rules according immunity *ratione personae* (as discussed above)⁸⁷⁰ are contrary to an Act of Parliament (the Implementation Act), Du Plessis concludes that, in accordance with the provisions of section 232 of the Constitution,⁸⁷¹ such rules are not applicable in South Africa.

As it 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 grammatical⁸⁷² approach to statutory interpretation. This argument is elaborated upon below.

867 Du Plessis “International Criminal Courts” 211; Dugard and Abraham 2002 *Annual Survey of South African Law* 165-66; Chok “The Struggle” 14 and Steynberg *et al Criminal Law* 102. See also Du Plessis 2007 *Journal of International Criminal Justice* 470 and Dugard *International Law* 257.

868 Du Plessis “International Criminal Courts” 211. See also Du Plessis 2007 *Journal of International Criminal Justice* 470; Dugard and Abraham 2002 *Annual Survey of South African Law* 165-66 and Chok “The Struggle” 14.

869 Du Plessis “International Criminal Courts” 211

870 See 3.4.2.1.1.1 above.

871 Section 232 of the Constitution provides that “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

872 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* (eds) *Constitutional Law* 32-160.

3.5.2 The concept of “defence to a crime”

The words “defence to a crime” are found in various treatises on South African criminal law. Snyman⁸⁷³ 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. Burchell⁸⁷⁴ 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) 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*).⁸⁷⁵

Burchell⁸⁷⁶ then goes on saying, 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); 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.⁸⁷⁷ These immunities act as “procedural” bars to “prosecution”⁸⁷⁸ 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.⁸⁷⁹ For example, a police officer who searches a suspected criminal is not guilty of assault or *crimen iniuria*.⁸⁸⁰ Likewise, a police officer who kills a suspected criminal in the course of effecting a lawful arrest is not guilty of murder if

873 Snyman *Criminal Law* 553.

874 Burchell *Criminal Law and Procedure* 45.

875 Burchell *Criminal Law and Procedure* 45.

876 Burchell *Criminal Law and Procedure* 47.

877 Akande and Shah 2011 *European Journal of International Law* 819.

878 Coracini “Evaluating domestic legislation” 729.

879 Snyman *Criminal Law* 129.

880 Snyman *Criminal Law* 130.

certain conditions provided for in the Criminal Procedure 51 of 1977 are met.⁸⁸¹ This defence is known as “official capacity”⁸⁸² or “public authority”.⁸⁸³

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”⁸⁸⁴ but are not liable for those acts because those acts are “justified”.⁸⁸⁵ This is not a procedural defence but a substantive defence, in other words, a “defence to a crime”. It is this defence that the ILC⁸⁸⁶ 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 “substantive defence” rather than a “procedural defence”, which is dealt with in 27(2).⁸⁸⁷ The reference to “criminal responsibility” in article 27(1) bears a striking similarity with 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, both *ratione materiae* and *ratione personae* which is dealt with in a separate provision, i.e, article 27(2). This article (article 27(2)) provides that:

881 Steynberg *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 section 49 of the *Criminal Procedure Act* 51 of 1977 as amended by the Criminal Procedure Amendment Act, 2012.

882 Snyman *Criminal Law* 129.

883 Steynberg *et al Criminal Law* 101.

884 Steynberg *et al Criminal Law* 101.

885 Snyman *Criminal Law* 129.

886 ILC “Report of the International Law Commission covering its second session” 375.

887 Article 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.

Dugard⁸⁸⁸ 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.⁸⁸⁹

With respect, Dugard’s argument is not correct. 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,⁸⁹⁰ it is a settled issue in international law that both immunity *ratione materiae* and immunity *ratione personae* do not apply before international criminal tribunals. However, as stated earlier in this chapter,⁸⁹¹ immunity *ratione personae* (not immunity *ratione materiae*) applies when international crimes are prosecuted in domestic courts. As the ICJ stated

888 Dugard *International Law* 257.

889 Dugard *International Law* 257.

890 See 1.2.2 and 3.1 above.

891 See 3.4.1 and 3.4.2 above.

in the *Arrest Warrant* case,⁸⁹² 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 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" is unfounded. 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. Although section 2 of the Implementation Act provides that South African courts hearing matters arising from the application of the Implementation Act "may apply conventional international law, and in particular the Statute",⁸⁹³ it would be incorrect to view this provision as making the Rome Statute part of the South African legal order. Some provisions of the Rome Statute, for instance, pertain to the "composition and administration"⁸⁹⁴ of the ICC or to the initiation and conduct of "investigation and prosecution"⁸⁹⁵ by the ICC; it would thus be erroneous to view these provisions as part of the South African legal order. On this view, Dugard's argument that section 4(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 correct.

892 Para 58. See also Dugard *International Law* 252.

893 An example of a situation where a provision of the Rome Statute may possibly be considered and applied by a South African court is the following: In terms of section 7(3) of the Implementation Act, the "staff" of the Office of the ICC Prosecutor and the "staff" of the Registry shall, when performing their duties in the Republic, "enjoy the privileges and facilities necessary for the performance of their functions in the Republic as may be published by proclamation in the *Gazette* in accordance with section 7(2) of the *Diplomatic Immunities and Privileges Act 2001*". Should a case arise where an individual affiliated with the work of the ICC in South Africa is accused of a crime before a South African court (for example in case of driving under the influence of alcohol) and the said person raises immunity as a member of the "staff" of the Office of the Prosecutor, the matter must be resolved by reference to the provisions (in particular art 44) of the Rome Statute pertaining to the staff of the ICC. For instance, would a volunteer who is not salaried by the ICC but who forms part of an ICC investigative team be considered as a staff member for the purposes of section 7(3) of the Implementation Act? Under article 44(4) of the Rome Statute such a "gratis" employee may qualify as staff.

894 Art 22-32 Rome Statute.

895 Art 33-40 Rome Statute.

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.⁸⁹⁶

Thus, since the Constitution seeks to ensure that South African law will evolve in accordance with international law,⁸⁹⁷ Dugard's argument cannot stand.

Official statements of the South African government also support the interpretation of section 4(2)(a)(i) as not removing immunity *ratione personae* of foreign officials even when they are accused of international crimes. Subsequent to the ICC's arrest warrant against President Bashir⁸⁹⁸ South Africa's government declared that if President Bashir were to visit South Africa, he would be arrested and surrendered to the ICC.⁸⁹⁹ 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 immunities of foreign States' officials accused of international crimes before South African courts.⁹⁰⁰ 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

896 Section 233 *Constitution*.

897 Dugard 1997 *European Journal of International Law* 92. See also *Glenister v President of the Republic of South Africa* 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 [...]".

898 *Warrant of Arrest for Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 (4 March 2009).

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

900 Gevers and Steynberg *et al* interpret the words "defence to a crime" contained in section 4(2)(a)(i) of the Implementation Act as referring to immunity *ratione materiae*. See Gevers "Immunity" 17 and Steynberg *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 3.4 above). This is not applicable to the defence of official capacity which belongs to the individual official, not the state.

pleaded. The *Diplomatic Immunities and Privileges Act*⁹⁰¹ provides the answer to this question. This Act 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”.⁹⁰²

As stated above,⁹⁰³ 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’s 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 States’ officials accused of international crimes before South African courts. In regard to this immunity, two questions need further attention. First, what are the foreign officials which, under customary international law, are entitled to immunity *ratione personae* before South African courts? Secondly, does immunity *ratione personae* apply to foreign States’ officials who would be in South African, not on official missions, but on private visits? In order to answer these questions one must refer to the provisions of the *Diplomatic Immunities and Privileges Act* and the rules established under customary international law in regard to the immunities of foreign States’ officials from the jurisdiction of foreign courts.

3.5.3 *Foreign State officials who qualify for immunity ratione personae before South African criminal courts*

The *Diplomatic Immunities and Privileges Act* provides that, in addition to diplomatic⁹⁰⁴ and consular⁹⁰⁵ immunities recognised in the 1961 and 1963 Vienna Conventions, foreign heads of State,⁹⁰⁶ special envoys and certain representatives of foreign States are immune from the criminal (and civil) jurisdiction of the South African courts “in

901 Act 37 of 2001.

902 Section 4(2)(a) *Diplomatic Immunities and Privileges Act*.

903 See 3.4.1 above.

904 Section 3(1) *Diplomatic Immunities and Privileges Act*.

905 Section 3(2) *Diplomatic Immunities and Privileges Act*.

906 Section 4(1)(a) *Diplomatic Immunities and Privileges Act*.

accordance with the rules of customary international law".⁹⁰⁷ The various State officials who qualify for this immunity will be identified below.

Before passing to that discussion, it is necessary to note that the *Diplomatic Immunities and Privileges Act* also provides for immunities of the representatives of the UN,⁹⁰⁸ specialised agencies⁹⁰⁹ and other international organisations,⁹¹⁰ in accordance with The Convention on the Privileges and Immunities of the United Nations of 1946, the Convention on the Privileges and Immunities of the Specialised Agencies of 1947 or pursuant to any agreement entered to between the Republic of South Africa and an international organisation. In addition, the *Diplomatic Immunities and Privileges Act* provides that immunities may be provided for in an agreement between South Africa and a foreign State.⁹¹¹ However, these immunities will not be dealt with in this study. First, since the focus of this study is the immunities of the officials of foreign States, immunities of the representatives of the UN, specialised agencies and other international organisations fall outside the scope of this study. On the other hand, since this study is concerned with the question of immunity as a matter of legal entitlement, immunities that may be provided for in an agreement between South Africa and a foreign State⁹¹² also fall outside the scope of the present study and will not be considered here.

The officials of foreign States who are entitled to immunity *ratione personae* before South African courts will be considered hereunder.

3.5.3.1 The head of State

It has long been recognised that under customary international law the head of State possesses immunity from the jurisdiction of foreign states.⁹¹³ The head of State is the

907 Section 4(2)(a) *Diplomatic Immunities and Privileges Act*.

908 Section 5(1) *Diplomatic Immunities and Privileges Act*.

909 Section 5(2) *Diplomatic Immunities and Privileges Act*.

910 Section 5(3) *Diplomatic Immunities and Privileges Act*.

911 Section 4(2)(b) *Diplomatic Immunities and Privileges Act*.

912 During the writing of this thesis, no agreement containing a clause granting immunity to a foreign state's officials immunity from the criminal jurisdiction of South African courts came to the attention of the present writer. However, in accordance with the Vienna Convention on the Law of Treaties (article 26), should such agreement exist South African courts would lack jurisdiction over the persons covered by the immunities as stipulated in the agreement and in accordance with the provisions of the *Diplomatic Immunities and Privileges Act*.

913 Akande and Shah 2011 *European Journal of International Law* 818.

prime representative of the State, the personification of the State.⁹¹⁴ He is the embodiment of the State, and if he were to be arrested and prosecuted in foreign courts, the State would be insulted.⁹¹⁵ Thus, the immunity which a head of State enjoys attaches to him as a symbol of the sovereignty and dignity of the State he represents.⁹¹⁶ This was eloquently summed up by the House of Lords, *obiter*, in the third *Pichochet* case⁹¹⁷ as follows:

It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever

This customary rule was also confirmed by the Bow Street Magistrates' Court (England) in proceedings for an arrest warrant for President Robert Mugabe of Zimbabwe. In this case,⁹¹⁸ Mr Peter Tatchell applied for a warrant for the arrest of Robert Mugabe, the serving head of government of Zimbabwe on the basis of the allegation that President Mugabe was committing offences of torture in Zimbabwe. The Court declined to issue the arrest warrant on the grounds that President Mugabe enjoyed State immunity under customary international law as well as under English law.⁹¹⁹ The provisions of the *Diplomatic Immunities and Privileges Act*⁹²⁰ that grant foreign heads of State immunity

914 *Franey Immunity* 77.

915 *Franey Immunity* 78. For a contrary view, see Murungu "Judgment" 25: "[a]s long as punishment of international crimes is concerned, there is no point in regarding heads of state as a special class that deserves protection different from any other private individual who commit the same international crimes".

916 *Franey Immunity* 77.

917 *R v Bow Street Metropolitan Stipendiary Magistrate*, ex parte Pinochet Ugarte (No 3) [1999] 2 All ER 171.

918 *Re Mugabe* Bow Street Magistrates' Court 14 Jan 2004 ILDC 96 (UK 2004), reproduced in Warbrick 2004 *International and Comparative Law Quarterly* 769. See also The Guardian 2004 <http://www.guardian.co.uk/world/2004/jan/08/zimbabwe.uk> And News 24 2004 <http://www.news24.com/xArchive/Archive/Mugabe-immune-to-arrest-20040114>

919 The Judge held that: "international customary law which is embodied in our Common Law currently provides absolute immunity to any Head of State. In addition to the Common Law our State Immunity Act of 1978 which extends the Diplomatic Privileges Act of 1964 provides for immunity from the criminal jurisdiction for any Head of State. I am satisfied that Robert Mugabe is President and Head of State of Zimbabwe and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention and I am therefore unable to issue the warrant that has been applied for". *Re Mugabe* Bow Street Magistrates' Court 14 Jan 2004 ILDC 96 (UK 2004), reproduced in Warbrick 2004 *International and Comparative Law Quarterly* 770. See also Akande 2009 *Journal of International Criminal Justice* 334: "[t]he immunity accorded to a serving head of state, *ratione personae*, from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when he is accused of committing an international crime".

920 Section 4(1)(a) *Diplomatic Immunities and Privileges Act*.

from the jurisdiction of South African criminal (and civil) courts are thus reflective of customary law.

3.5.3.2 The head of government

Not all heads of State are also head of government. In the UK, for example, the Queen is the head of State while the Prime Minister is the head of government.⁹²¹ It is the Prime Minister who, as head of government, oversees the operation of the government agencies and appoints members of the government.⁹²² The *Diplomatic Immunities and Privileges Act* does not make any mention of head of government among the foreign officials who qualify for immunity from South African courts. However, the Act grants immunity to “representatives” of foreign States “in accordance with the rules of customary international law”.⁹²³ The question whether foreign heads of government should be granted immunity *ratione personae* in South African courts must therefore be answered by reference to customary international law.

This question was considered by a Belgian court in 2002 in proceedings against Mr Ariel Sharon,⁹²⁴ then Israeli Prime Minister.⁹²⁵ As already discussed above,⁹²⁶ the Belgian Court of Cassation held that customary international law prohibited heads of government from being the subject of proceedings before the criminal courts of foreign States and held that the proceedings against him were inadmissible.⁹²⁷ The immunity *ratione personae* of the head of government was also endorsed in the *Arrest Warrant* case. The ICJ held, *obiter*, that the head of government is one of the holders of high ranking office in a State who enjoy immunity from both criminal and civil jurisdiction in

921 Website of the British Government Date Unknown <https://www.gov.uk/government/how-government-works>

922 Website of the British Government Date Unknown <https://www.gov.uk/government/how-government-works>

923 Section 4(2)(a) *Diplomatic Immunities and Privileges Act*

924 *Re Sharon and Yaron Court of Appeal of Brussels* 26 June 2002; *Court of Cassation* 12 Feb 2003 [2005] 127 ILR 110.

925 In Israel, the President is the Head of State while the Prime Minister is the Head of Government. See the website of the Israel Ministry of Foreign Affairs 2013 <http://mfa.gov.il/mfa/aboutisrael/state/democracy/pages/office%20of%20the%20president.aspx>

926 See 3.4.2.1.1.1.2.1 above.

927 *Re Sharon and Yaron Court of Appeal of Brussels* 26 June 2002; *Court of Cassation* 12 Feb 2003 [2005] 127 ILR 124.

other States, and that the purpose of such immunity is to enable them to perform their function.⁹²⁸

It therefore appears to be no doubt that, under customary law, the head of government is entitled to immunity *ratione personae* in the same manner as the head of State.⁹²⁹ Consequently, although the *Diplomatic Immunities and Privileges Act* does not specifically mention the head of government among the list of foreign officials who qualify for immunity from South African courts, such an important official should be accorded immunity under the category of State “representatives”.

3.5.3.3 The minister of foreign affairs

The *Diplomatic Immunities and Privileges Act* does also not specifically mention the Foreign minister among the officials who enjoy immunity from jurisdiction of South African courts. However, given the important function that such an official fulfils, there is no doubt that, under customary international law, he enjoys such immunity.

This immunity was considered in the *Arrest Warrant* case. The ICJ held that a foreign minister needed to be able to travel and communicate freely to be able to fulfil his role and that for this reason he must be accorded immunity from the criminal jurisdiction of foreign States.⁹³⁰ The Court observed that:

the functions of a Minister of for Foreign Affairs are such that, throughout the duration of his or her office, he or she would enjoy full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.⁹³¹

The ICJ was thus unequivocal in its finding that an incumbent foreign minister is absolutely immune from the criminal jurisdiction of foreign States. Thus, just as the head of government, the foreign minister should be accorded personal immunity in the group of “certain representatives”. What the ICJ did not consider was whether such immunity should also be granted to ministers other than the foreign minister.

928 *Arrest Warrant* case para 51.

929 See also Foakes “Immunity for International Crimes?” 5 and Cryer *et al International Criminal Law* 535.

930 *Arrest Warrant* case para 70.

931 *Arrest Warrant* case para 54. See also para 53: “In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States”.

3.5.3.4 Other ministers

In the *Arrest Warrant* case the ICJ did not say anything about whether ministers other than the foreign minister were also immune from the criminal jurisdiction of foreign States. Though, in describing the rule according immunity *ratione personae*, the ICJ stated that it applies to:

certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs.⁹³²

The use of the words ‘such as’ suggests that the list of senior officials entitled to this immunity is not exhaustive.⁹³³ In fact, the ICJ made it clear that it was only the immunity of an incumbent foreign minister that was being considered in the *Arrest Warrant* case.⁹³⁴

In this case, foreign ministers were held to be immune because they are responsible for the international relations of the State and that in the performance of these functions, they are frequently required to travel internationally, and thus must be in a position to do so freely whenever the need should arise.⁹³⁵ This justification of the foreign minister’s immunity applies with equal force to justify the granting of personal immunity to other ministers other than the foreign minister. Other ministers also represent their States internationally and need to be able to operate without the fear of arrest, detention or prosecution. In fact, it is difficult to think of any ministerial position that will not require some level of international involvement.⁹³⁶

The question of whether ministers other than the foreign minister are entitled to immunity *ratione personae* arose in a case against General Shaul Mofaz, the Israeli Defence Minister, in the United Kingdom. In this case,⁹³⁷ an application had been made to the Bow Street Magistrates’ Court for a warrant for the arrest of General Shaul Mofaz,

932 *Arrest Warrant* case para 51.

933 Foakes “Immunity for International Crimes?” 5: “the language used in paragraph 51 of the judgment, with its reference to ‘certain holders of high-ranking office in a state, such as the head of state, head of government and minister for foreign affairs’, suggested that there may be other holders of high office who also enjoy such immunities”.

934 *Arrest Warrant* case para 51.

935 *Arrest Warrant* case para 53.

936 Akande 2011 *European Journal of International Law* 821.

937 *Application for Arrest Warrant against General Shaul Mofaz* Decision of District Judge Pratt, Bow Street Magistrates’ Court (12 February 2004), reproduced in Warbrick 2004 *International and Comparative Law Quarterly* 771. Also available at http://www.geneva-academy.ch/RULAC/pdf_state/Application-for-Arrest-Warrant-Against-General-Shaul-Mofaz.pdf [15 April 2014].

who was believed to be visiting England. It was alleged that General Mofaz, in his capacity as defence minister, committed grave breaches of article 147 of Geneva Convention IV. The court considered whether General Mofaz had State immunity in his capacity as Israeli defence minister, and held:

[A]lthough travel will not be on the same level as that of a Foreign Minister, it is a fact that many states maintain troops overseas and there are many United Nations missions to visit in which military issues do play a prominent role between certain States, It strikes me that the roles of defence and foreign policy are very much intertwined, in particular in the Middle East.⁹³⁸

Accordingly, the judge declined to issue the requested arrest warrant against Israeli Defence Minister.⁹³⁹ The same approach was followed in a case against Mr Bo Xilai, then Chinese minister of commerce.⁹⁴⁰ The case arose at Bow Street Magistrates' Court, when on 8th November 2005 an application was made for a warrant for the arrest of Mr Bo Xilai on the allegations of conspiracy to commit torture. The court held that the functions of a minister of commerce were equivalent to those exercised by a Minister for Foreign Affairs and that, for that reason, the Chinese minister had immunity under customary international law as he would not be able to perform his functions unless he is able to travel freely.⁹⁴¹ Accordingly, the court declined to issue the requested arrest warrant.⁹⁴²

The above decisions are well reasoned. A defence minister or minister of commerce, although not in charge of foreign affairs need to be able to travel on official missions without fear of arrest. In fact, all ministers may have to conduct bilateral negotiations with foreign governments or may represent their governments in international organizations or at international summits and conferences.⁹⁴³ For this reason, it is suggested that immunity *ratione personae* from South African courts should be extended to all ministers, under the category of State "representatives"⁹⁴⁴ as provided for in the *Diplomatic Immunities and Privileges Act*. Furthermore, all ministers would also fall in

938 *Application for Arrest Warrant against General Shaul Mofaz* Decision of District Judge Pratt, Bow Street Magistrates' Court (12 February 2004), reproduced in Warbrick 2004 *International and Comparative Law Quarterly* 773.

939 *Application for Arrest Warrant against General Shaul Mofaz* Bow Street Magistrates' Court Decision of District Judge Pratt (12 February 2004), reproduced in Warbrick 2004 *International and Comparative Law Quarterly* 773.

940 *Re Bo Xilai* Bow Street Magistrates' Court 8 Nov 2005 [2007] 128 ILR 713.

941 [2007] 128 ILR 714.

942 [2007] 128 ILR 715.

943 Akande 2011 *European Journal of International Law* 821.

944 Section 4(2)(a) *Diplomatic Immunities and Privileges Act*.

the broader category of “special envoys” as provided in section 4(2)(a) of the *Diplomatic Immunities and Privileges Act*, which will be considered next.

3.5.3.5 Officials on special missions

A very wide number of senior and junior State officials with non-ministerial posts are charged with the conduct of international relations.⁹⁴⁵ Accordingly, it becomes necessary to extend personal immunity to State officials other than ministers who need to travel in the exercise of their official functions. This issue is addressed by the 1969 Convention on Special Missions.⁹⁴⁶ This treaty confers immunities on States’ officials on a “special mission” in foreign States.⁹⁴⁷ Under this Convention, the person of any official abroad on a “special mission” on behalf of his or her State is inviolable and not liable to any form of arrest or detention.⁹⁴⁸ They are accorded immunity from the criminal jurisdiction of the receiving State.⁹⁴⁹ This is a treaty-based immunity *ratione personae* which extends the category of States officials covered by such immunity beyond the Head of State, the Head of Government, and ministers and is intended to facilitate the conduct of international relations.

South Africa is not party to the Convention on Special Missions.⁹⁵⁰ However, under the *Diplomatic Immunities and Privileges Act* immunity *ratione personae* is granted to the “special envoys” of foreign States. Under this Act, a “special envoy or representative” means:

a person duly authorised by the sending state, government [or organisation] to undertake a special mission or task in the Republic on behalf of such state, government [or organisation].⁹⁵¹

This definition of “special envoys” clearly includes any foreign State’s official on a special mission in South Africa. The Act provides that such envoys shall be accorded immunity in accordance with the rules of customary international law. The customary nature of immunity *ratione personae* of such officials was considered by the ILC which,

945 Akande 2011 *European Journal of International Law* 821 and Wickremasinghe “Immunities” 401.

946 *Convention on Special Missions* (1970).

947 Arts 21, 39, and 31 *Convention on Special Missions*.

948 Art 29 *Convention on Special Missions*.

949 Art 31(1) *Convention on Special Missions*.

950 The list of signatory States and States that have acceded to the *Convention on Special Missions* is available at the treaty collection of the United Nations at http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=III-9&chapter=3&lang=en

951 Section 1(6) *Diplomatic Immunities and Privileges Act*.

in a report published in 1967, was of the view that this immunity was established as a matter of customary international law.⁹⁵² The US Government has also asserted that foreign officials who are temporarily in the United States on official missions are entitled to immunity from the jurisdiction (criminal and civil) of US courts.⁹⁵³

The customary law status of the rule granting immunity to members of special missions has also been recognised by an English court in proceedings against Chinese minister of commerce.⁹⁵⁴ In this case, which was discussed earlier in this chapter, the court held that the immunity *ratione personae* of officials on special missions was part of customary international law. The court decided that the minister was entitled to personal immunity as a minister of commerce, but also as a member of a special mission. The court said:

Although Mr Bo has been here for a number of days performing official duties as Minister for International Trade, he today forms part of the official delegation for the state visit of the President of the People's Republic of China. As such, I am satisfied that he is a member of a Special Mission and as such has immunity under Customary International Law. That immunity has been embodied in the Convention on Special Missions of the 8th December 1969 which by virtue of article 31 declares that the representatives of the sending state in the Special Mission and the members of all its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving state. [...] I am therefore satisfied that particularly by virtue of being a member of a Special Mission Mr Bo has immunity of prosecution and I am declining to issue a warrant.⁹⁵⁵

Under the Convention on Special Missions, a special mission is defined as a:

temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.⁹⁵⁶

This definition makes it clear that the receiving State must consent to the presence and to the performance of the specified task on the territory of the receiving State.⁹⁵⁷ It is this

952 ILC *Yearbook of the International Law Commission* Vol II (1967) 358: "It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members".

953 See the suggestion of immunity issued by the US Executive Branch in *Li Weixum v Bo Xilai*, DCC Civ No 04-0649 (RJL), available at www.state.gov/documents/organization/98832.pdf See also the statement of John Bellinger Legal Adviser, US State Department, available at <http://opiniojuris.org/2007/01/18/immunities/>

954 *Re Bo Xilai* Bow Street Magistrates' Court 8 November 2005 [2007] 128 ILR 713. Another case that is worth being mentioned here is the case of Ehud Barak who, while Israeli Minister of Defence in 2009 was the subject of an application for an arrest warrant for war crimes when he was on an official visit in England, but the application was denied. See Cobain and Black 2009 <http://www.theguardian.com/world/2009/sep/29/ehud-barak-war-crimes-israel>

955 *Re Bo Xilai* Bow Street Magistrates' Court 8 November 2005 [2007] 128 ILR 713 -714.

956 Art 1(a) Convention on Special Missions.

957 Akande 2011 *European Journal of International Law* 823.

consent which gives rise to the immunity.⁹⁵⁸ This requirement implies that the special mission immunity would not apply to State officials on South African territory on holiday or private visit.⁹⁵⁹ These officials can therefore be arrested and prosecuted before South African courts. The status of other foreign States' officials on private visits will be considered later in this chapter. Before embarking on this discussion the immunities (*ratione personae*) of diplomats and consular agents are considered first.

3.5.3.6 Immunity *ratione personae* under the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations

Under customary international law, diplomats enjoy absolute immunity from the jurisdiction of the receiving State.⁹⁶⁰ The justification of diplomatic immunity is twofold. First, from a functional point of view, the immunity *ratione personae* enjoyed by diplomats allows them to perform their duties without interference or other hindrance.⁹⁶¹ Secondly, the diplomatic immunity protects the dignity of the sending State.⁹⁶² Diplomats represent their State, and if a person who represents a State is arrested or charged and brought before a court in another State then the dignity of the sending State is compromised.⁹⁶³

Diplomatic immunity is also justified by the considerations of international peace and security. If the dignity of a State or its representative is not respected, then friendly relations between States are not being developed, and international peace and security may be threatened.⁹⁶⁴ This importance of the accorded to diplomats was highlighted by the ICJ in the *US Diplomatic and Consular Staff in Tehran Case* 1980,⁹⁶⁵ where the

958 Akande 2011 *European Journal of International Law* 823.

959 See also Akande 2011 *European Journal of International Law* 823.

960 Wallace *International Law* 129. The *Vienna Convention on Diplomatic Relations* of 1961 is accepted as being declarative of customary international law. Franey *Immunity* 35.

961 Bantekas and Nash *International Criminal Law* 174; Hillier *Public International Law* 315 and Malanczuk *International Law* 124. See also Wallace *International Law* 125: "Diplomatic privileges and immunities have, as their *raison d'être*, a functional objective-the purpose of such privileges and immunities is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing states".

962 Franey *Immunity* 65.

963 Franey *Immunity* 65.

964 Franey *Immunity* 65.

965 *United States of America v Iran Case Concerning United States Diplomatic and Consular Staff in Tehran* Judgement 1980 ICJ 3 (24 May 1980).

court held that diplomatic law was “vital for the security and well-being” of the international community.⁹⁶⁶

The absolute inviolability of diplomats was codified into the Vienna Convention of Diplomatic Relations.⁹⁶⁷ Under this Convention diplomats accredited to a host State enjoy absolute immunity *ratione personae* from the criminal jurisdiction of the receiving.⁹⁶⁸ The Vienna Convention on Diplomatic Relations expressly recognise the customary nature of the immunity of diplomats by stating in its preamble that “peoples of all nations from ancient times have recognised the status of diplomatic agents”,⁹⁶⁹ and that “the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention”.⁹⁷⁰

South Africa signed the Vienna Convention on Diplomatic Immunity on 28 March 1962 and ratified it on 21 Aug 1989.⁹⁷¹ Accordingly, unless the sending State chooses to waive the immunity of its diplomat,⁹⁷² South African courts must accord immunity *ratione personae* to foreign diplomats accredited to South Africa. Reference to this Convention is also made in the *Diplomatic Immunities and Privileges Act* which provides that the *Vienna Convention on Diplomatic Relations* applies to “all diplomatic missions and members of such missions in the Republic”.⁹⁷³ This leaves no doubt that foreign diplomats accredited to the South African government enjoy immunity *ratione personae* before South African courts even in cases arising from the allegations of crimes defined under the Implementation Act.⁹⁷⁴

In accordance with article 40(1) of the Vienna Convention on Diplomatic Immunity, immunity *ratione personae* must also be accorded to diplomats accredited in foreign States who are in “transit” on South African territory. This article reads as follows:

966 1980 ICJ 3 43.

967 *Vienna Convention on Diplomatic Relations* (1961).

968 Art 31(1) *Vienna Convention on Diplomatic Relations*.

969 Para 1 Preamble to the *Vienna Convention on Diplomatic Relations*.

970 Para 5 Preamble to the *Vienna Convention on Diplomatic Relations*.

971 UN Date Unknown http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-3&chapter=3&lang=en

972 Art 32(1) *Vienna Convention on Diplomatic Relations*.

973 Section 3(1) *Diplomatic Immunities and Privileges Act*.

974 Earlier in this chapter, it was found that the fact that a person is accused of international crimes does not remove his immunity *ratione personae* before the courts of foreign States. See 3.4.2 above.

If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return.

Trying before South African courts a diplomat accredited to the South African government, or in transition as stipulated in article 40(1) of the Vienna Convention on Diplomatic Immunity, would be contrary to South Africa's obligations under this Convention.

The above considerations, however, do not apply to consuls. The Convention on Consular Relations⁹⁷⁵ provides that consuls are granted immunity from prosecution only for activities performed in the "exercise of consular functions".⁹⁷⁶ This convention further provides that consuls are not to be arrested or detained "pending trial", except in the case of a grave crime and pursuant to a decision by the competent judicial authority.⁹⁷⁷ The reference to a possible trial in the Convention suggests that immunity *ratione personae* is not envisaged in consular relations. Also, since international crimes cannot be regarded as "consular functions" it seems clear that no immunity *ratione materiae* can be invoked by consuls before South African courts in cases of crimes against international law. In a nutshell, consuls do not enjoy any immunity, functional or personal, for crimes provided for under the Implementation Act. The only protection they enjoy is that they cannot be detained during trial. But, even in this case, if such privilege is not waived by the sending State,⁹⁷⁸ a decision by a court to order the arrest and detention of the consular agent concerned would be justified because of the grave nature of the crimes defined in the Implementation Act.⁹⁷⁹

3.5.4 Immunity *ratione personae* of foreign officials on private visits

The *Diplomatic Immunities and Privileges Act* does not contain an express provision on the question as to whether or not high ranking foreign States' officials on private visits are accorded immunity *ratione personae* from the criminal jurisdiction of South African courts. However, this Act seems to make a distinction between the immunity of foreign

975 *Vienna Convention on Consular Relations* (1963). Section 3(2) of the *Diplomatic Immunities and Privileges Act* provides that this Convention is applicable in South Africa. It reads as follows: "The Vienna Convention on Consular Relations, 1963, applies to all consular posts and members of such posts in the Republic".

976 Art 43(1) *Convention on Consular Relations*.

977 Art 41(1) *Convention on Consular Relations*.

978 Art 45(1) *Vienna Convention on Consular Relations*.

979 Art 41(1) *Convention on Consular Relations*.

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”.⁹⁸⁰ With regard to the special envoys and other “representatives” however, this Act adds a proviso that their immunities are subject to the Minister (Foreign Affairs)⁹⁸¹ making a notice in the *Gazette* recognising a special envoy or representative.⁹⁸² 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 do not 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 the head 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 their immunity *ratione personae* 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 symbolizes: the sovereign State.⁹⁸³ 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.⁹⁸⁴ 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.⁹⁸⁵

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”.⁹⁸⁶ The principle of sovereign equality of States

980 Section 4(1)(a).

981 Section 1 *Diplomatic Immunities and Privileges Act*.

982 Section 4(3).

983 Akande and Shah 2011 *European Journal of International Law* 824.

984 Franey *Immunity* 59.

985 *R v Bow St Magistrate, Exp Pinochet* (No 3) [1999] 2 WLR 824 905 H.

986 *Nicaragua v United States Military and Para-military Activities in and against Nicaragua* 1986 ICJ 14 (27 June 1986) para 202.

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”.⁹⁸⁷ To arrest and detain a head of State is effectively to change the 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.⁹⁸⁸ 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.⁹⁸⁹

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,⁹⁹⁰ the ICJ took the view that immunity *ratione personae* of heads of governments 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.⁹⁹¹ In some States, when a head of government resigns or is removed from office, the entire government is deemed to have resigned and a new government

987 Art 2(1) UN Charter.

988 Akande and Shah 2011 *European Journal of International Law* 823.

989 *Arrest Warrant* case para 55.

990 *Arrest Warrant* case para 55.

991 Akande and Shah 2011 *European Journal of International Law* 824.

must be formed.⁹⁹² 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 State, which would be an impermissible infringement of that State's sovereignty. Therefore, the reasoning of the ICJ in the *Arrest Warrant* case⁹⁹³ 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 governments 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* case⁹⁹⁴ 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".⁹⁹⁵ 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.⁹⁹⁶ Thus, the ICJ's view in regard to the immunity *ratione personae* of ministers of foreign affairs seems to be exaggerative. As Cryer⁹⁹⁷ 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.⁹⁹⁸ 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 transit between the home country and the host country.⁹⁹⁹ There appears to be no reason that ministers of foreign affairs, and all ministers in general, should be subject to a more favourable regime than diplomats. On

992 Examples of such legal systems include Japan (see for instance the case of Prime Minister Yoshihito 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 Wall Street Journal 2012 <http://online.wsj.com/article/SB10001424052702303459004577361451277633774.html>).

993 *Arrest Warrant* case para 55.

994 *Arrest Warrant* case para 55.

995 Akande and Shah 2011 *European Journal of International Law* 825.

996 Akande and Shah 2011 *European Journal of International Law* 825.

997 Cryer *et al International Criminal Law* 548.

998 Cryer *et al International Criminal Law* 548.

999 Cryer *et al International Criminal Law* 548.

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.¹⁰⁰⁰

This reasoning is inapplicable to private travel.¹⁰⁰¹ Thus, as Yitiha¹⁰⁰² says, extending 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 sovereign equality and dignity of States on the one hand and the imperatives of respect for human rights on the other.¹⁰⁰³

3.6 Conclusion

Prosecuting States’ officials for international crimes at the national level, involves a balancing of two conflicting interests. On the one hand, there is the principle of State sovereignty which is the expression of a horizontally-organised community of equal and independent States and, on the other hand, the need that international crimes should not go unpunished. This chapter has been concerned with the extent to which officials of foreign States can be accorded, or denied, immunity before South African courts in prosecutions arising from the crimes defined in the Implementation Act. Two types of immunities have been considered. First, the chapter 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 protects certain foreign (in general high ranking) officials because of their status or the office they hold.

1000 *Arrest Warrant* case para 55.

1001 Cryer *et al International Criminal Law* 549.

1002 Yitiha *Immunity* 125. See also Akande and Shah 2011 *European Journal of International Law* 825.

1003 Akande and Shah 2011 *European Journal of International Law* 825.

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.¹⁰⁰⁴ Three arguments were advanced in this chapter to support this State practice. First, it was argued that 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, it would be an unacceptable interference by that State in the affairs of the other State. However, given the characterisation of international crimes as crimes against the international community as a whole, these crimes cannot be considered as an internal matter of a single country. Secondly, immunity *ratione materiae* is justified as necessary to protect States' dignity in that it prevents a foreign State from passing a judgment over a conduct of another State. Nevertheless, it was argued that 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 rather requires States to refrain from engaging in such activities. Thirdly, this type of immunity is justified as necessary to enable State officials to perform their "functions" without fear of subsequent prosecution. This justification does not stand either because, far from being a function of a State, the perpetration of international crimes is the opposite of any of a State's functions. States must protect their citizens, not kill them or otherwise seriously violate their rights to the extent prohibited by international law.

However, the same cannot be said of immunity *ratione personae*. With regard to this type of immunity, it was found that, as a matter of customary international law, it still applies even when a State official is accused of international crimes.¹⁰⁰⁵ This immunity is necessary to allow certain State officials to carry out their international representative functions freely and without harassment by other States. It was found that immunity *ratione personae* ensures a balance between the protection of States' officials' ability to conduct their international functions on the one hand and, on the other hand, the protection of human rights. This immunity ensures that the highest State representatives and other State officials on special missions should be in a position to discharge their functions without fear of judicial harassment, but at the same time, serves to

1004 See 3.4.1 above.

1005 See 3.4.2 above.

“forewarn”¹⁰⁰⁶ that, once out of office, they might be held liable for even their “official conducts”, if such conducts turn out to be crimes against international law as defined in the Rome Statute and the Implementation Act. It was further argued that immunity *ratione personae* is necessary in order to avoid frictions among States, thereby contributing to the maintenance of international peace. It was argued that without this immunity, universal jurisdiction may be abused for the purposes of harassing political opponents or for causing political embarrassment to foreign enemy States and their leaders and that this improper use of universal jurisdiction can be highly destructive of the international legal order. On this view, it was argued that in order to maintain good relations between States and preserve international peace, immunity *ratione personae* must prevail over the value which is addressed by criminal prosecution of perpetrators of international crimes, namely the protection and vindication of human rights. It was also found that this view reflects the current status of customary international law on immunity *ratione personae* of States’ officials from the criminal jurisdiction of other States.¹⁰⁰⁷

The provisions of the Implementation Act were also considered. Contrary to the views advanced by most commentators, this chapter has argued that the Implementation Act does not address the question of immunity, both *ratione materiae and ratione personae*, of foreign officials accused of international crimes before South African courts. This is so because the words “defence to a crime” in section 4(2)(a)(i) of the Implementation Act do not carry the same meaning as the defence of immunity (whether *ratione materiae and ratione personae*), which is a “jurisdictional defence”, not a “substantive defence”. The argument advanced by the present author is that the words “defence to a crime” employed in section 4(2)(a)(i) of the Implementation Act refer to the official status of the accused person being pleaded as the defence generally known as “official status” or “public authority”, in accordance with which public officials, acting in the performance of their duties, may commit acts that are *prima facie* unlawful but are not liable for those acts because the acts in question are “justified”.¹⁰⁰⁸ On the basis of this view, the present author concluded that the Implementation Act does not address the issue of

1006 Swanepoel *The Emergence* 44. See also Bassiouni 2001 *Virginia Journal of International Law* 85: “Under existing customary international law, heads of state and diplomats can still claim procedural immunity in opposition to the exercise of national criminal jurisdiction. However, if brought to trial, they cannot raise immunity as a substantive defence to the crime charged”.

1007 See 3.4.2.1.1.1 above.

1008 See 3.5.2 above.

immunities of foreign States' officials accused of international crimes before South African courts.

The above conclusion led to the following question: if the Implementation Act is silent on the question of 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".¹⁰⁰⁹ Thus, as stated above,¹⁰¹⁰ 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 international law, this immunity applies even when a foreign State's official is accused of international crimes before the domestic courts of a foreign State.¹⁰¹¹ In accordance with the provisions of the *Diplomatic Immunities and Privileges Act* therefore, this immunity must be accorded to foreign States' officials accused of international crimes before South African courts.¹⁰¹² The categories of officials who qualify for this immunity were also considered. It was found that this immunity should be granted to the heads of State, heads of government, ministers, diplomats and officials on special missions. 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 governments. On this point, it was argued that South African law is not in line with customary international law. It was found that customary international law grants immunity *ratione personae* to State

1009 Section 4(1)(a) and 4(2)(a) *Diplomatic Immunities and Privileges Act*.

1010 See 3.4.1 above.

1011 See 3.4.2 above. In support of this conclusion, see also Cassese *International Criminal Law* 2nd ed 12.

1012 See 3.5.3 above.

officials on private visits in foreign countries not only to heads of State but also to heads of governments. 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 concluded that the view which is propounded by most commentators on the Implementation Act that foreign officials accused of international crimes do not enjoy any immunity before South African courts is not correct. The approach advocated in this chapter is the correct reflection of South African law. Where necessary, a few changes have been suggested to bring it more in line with international law.

Before passing to the next chapter, it is important to emphasise that if section 4(2)(a)(i) of the *Implementation Act* was in fact negating 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.¹⁰¹³ 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.¹⁰¹⁴

1013 In support of this conclusion, see also Council of the European Union “The AU-EU Expert Report” 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”.

1014 See 3.5.2 above.

CHAPTER 4

AMNESTY

While many considered amnesty an over-studied phenomenon in the 1980's, it has recently taken on renewed importance. The trend toward increased extraterritorial prosecutions under the principle of universal jurisdiction suggests that, in the years ahead, numerous states may need to determine whether to accord such legislation extraterritorial validity.¹⁰¹⁵

4.1 Introduction

The term amnesty refers to an act of forgiveness that a sovereign State grants to individuals who have committed criminal acts.¹⁰¹⁶ Amnesty eliminates the criminal nature of the conduct as defined by law.¹⁰¹⁷ The conduct is deemed not to have constituted an offence and any criminal proceeding that may have been instituted is extinguished.¹⁰¹⁸

Amnesties have been used for different purposes, some of which appear to be quite morally justifiable. For example, amnesties have been used as tools for ending rebellions,¹⁰¹⁹ or for facilitating a transition from an authoritarian oppressive regime to democracy.¹⁰²⁰

1015 Burke-White 2001 *Harvard International Law Journal* 467-468.

1016 Jurdi *The International Criminal Court* 73.

1017 The above definition excludes from the definition of amnesty, executive (presidential) pardons, which remit the penalty but do not expunge the conviction. Joyner 1998 *Denver Journal of International Law and Policy* 612 and UN ESC "Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights" 4.

1018 Joyner 1998 *Denver Journal of International Law and Policy* 612; UN ESC "Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights" 3 and Rakate *The Duty to Prosecute and the Status of Amnesties* 22. It is worth noting, however, that amnesty does not prohibit "frank public discussion" (such as in media) of the act covered by the amnesty as a criminal act and the person being "described" as a "criminal". *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 223 (CC).

1019 One may cite for example the *Amnesty Act* 2000 which was passed by the Ugandan Parliament in order to incite the Lord's Resistance Army's fighters to lay down arms and end the rebellion. See 4.2.1.2 hereunder.

1020 South Africa and Haiti offer good examples. See 4.2.3 hereunder.

From a sovereignty perspective, it may be argued that a State should be allowed to decide freely how to deal with crimes committed on its territory, including by granting amnesties.¹⁰²¹ As the Special Court for Sierra Leone once observed:

[T]he grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power.¹⁰²²

When an amnesty law is passed over crimes such as genocide, crimes against humanity and war crimes over which all States have universal jurisdiction, however, sovereignties may “overlap”.¹⁰²³ Two or more States may want to act, one by granting amnesty, the other(s) by exercising universal jurisdiction over the perpetrators of the crimes.¹⁰²⁴ A legal question thus arises: are foreign States bound by an amnesty law passed by another State for crimes over which they have universal jurisdiction? In other words, does the doctrine of State sovereignty bar the exercise of universal jurisdiction when the State where the crimes were committed has decided to grant amnesty to the perpetrators of those crimes?¹⁰²⁵

Thus, this chapter seeks to investigate the following question: are South African courts, acting under the complementarity regime of the Rome Statute, allowed to exercise universal jurisdiction over international crimes which were committed and have been the subject of amnesty in a foreign State? This question is particularly important in view of the Rome Statute’s express provision that nothing in the Statute shall be taken as authorizing any State Party to “intervene” in the “internal affairs” of any other State.¹⁰²⁶

In order to emphasize the importance of the question under consideration, this chapter will first highlight some of the different policy considerations that may press States that are emerging from oppression or civil strife to enact amnesties for perpetrators of past

1021 Stigen *The Principle of Complementarity* 419 and O’Shea *Amnesty* 96.

1022 *Prosecutor v Kallon and Kamara* Decision on Challenge to Jurisdiction: Lomé Accord Amnesty Case Nos SCSL-2004-15-AR72(E); SCSL-2004-16-AR72(E) (13 March 2004) para 75. See also Cassese 1998 *European Journal of International Law* 11 and Cryer *et al An Introduction* 43.

1023 Cryer *et al An Introduction* 43.

1024 Boed 2000 *Cornell International Law Journal* 325.

1025 See also Meintjes and Mendez 2000 *International Law Forum du Droit International* 76: “What deference does the international community owe in such cases to the domestic arrangements made by the state in reckoning with the serious human rights violations and international crimes of its recent past?”

1026 Preamble to the Rome Statute para 8.

human rights violations.¹⁰²⁷ The chapter will then explore the policy arguments that support the view that amnesties for gross human rights violations (as defined in the Rome Statute) should not receive foreign recognition,¹⁰²⁸ and the legal bases on which the courts of foreign States would found their right to disregard such amnesties.¹⁰²⁹ Finally, the chapter will consider whether, given the prevailing socio-political situation in a particular country, and given South Africa's own experience of amnesty, the Implementation Act provides some legal framework for South African prosecutors to exercise discretion not to interfere with a foreign amnesty where the interests of the victims in the territorial State outweigh the quest for justice.¹⁰³⁰

4.2 Policy arguments in favour of amnesties

Experience has proved that in a society that has been plagued with war or oppression, criminal justice is not always the only consideration. In such societies, it may be necessary to sacrifice the pursuit of justice for other social imperatives.¹⁰³¹ If a choice has to be made between, for instance, peace and punishment, peace seems to be the natural choice of a society seeking advancement.¹⁰³² The same can be said of amnesties in a transitional society from an oppressive regime to democracy.

For the purposes of understanding the rationales of amnesty laws it will not be necessary to present an exhaustive global survey of such laws. A few examples of amnesties that have been used by States to end wars,¹⁰³³ to allow regime change from oppression to democracy or from a minority regime to majority rule¹⁰³⁴ or to protect a democratically elected civil government from military coups¹⁰³⁵ will suffice.

4.2.1 Amnesty for ending a rebellion

One of the responsibilities of a government is to protect its citizens against violence and atrocities.¹⁰³⁶ Thus, for many years, amnesties have been used as incentives to quell

1027 See 4.2 hereunder.

1028 See 4.3 hereunder.

1029 See 4.4 hereunder.

1030 See 4.6 hereunder.

1031 Rakate *The Duty to Prosecute and the Status of Amnesties* 120.

1032 O'Shea *Amnesty* 83.

1033 See 4.2.1 hereunder.

1034 See 4.2.2 hereunder.

1035 See 4.2.3 hereunder.

1036 Stigen *The Principle of Complementarity* 421.

rebellions by encouraging combatants to leave their organizations and end war.¹⁰³⁷ Examples of these amnesties can be found in Algeria and Uganda, to name just two.

4.2.1.1 Algeria

Between 1992 and 1999 Algeria experienced a civil war between government forces and the banned Islamist movement, the *Front Islamiste du Salut* (FIS). The violence started in 1992 after the country's first democratic multi-party elections to elect a Parliament.¹⁰³⁸ Preliminary reports from the election indicated that the FIS, an Islamic party that had declared its opposition to democracy, was set to win a majority of seats in Parliament. The military annulled the elections, declared martial law, established a transitional government and banned the FIS from all political participation.¹⁰³⁹ A bloody civil war ensued in which between 100,000 and 200,000 people died.¹⁰⁴⁰

In July 1999, in an attempt to bring the rebellion to an end, President Abdelaziz Bouteflika passed the *Civil Concord Law*¹⁰⁴¹ which granted amnesty to perpetrators of the acts of rebellion against the government on condition that they surrender and hand over their weapons to the government within a specified period.¹⁰⁴² However, since the amnesty provision of this law did not apply to those who had committed acts of murder, rape, grievous bodily injuries resulting in permanent infirmity and those who had used explosives in public places, the amnesty offer was seen as insufficient by most insurgents and only a very few of them surrendered themselves to the government.¹⁰⁴³ As a response, a presidential decree of 12 January 2000 extended the amnesty to all combatants, regardless of the nature of the crimes they had committed.¹⁰⁴⁴ Subsequent

1037 UN ESC "Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights" 11; Rakate *The Duty to Prosecute and the Status of Amnesties* 41 and Reisman 1996 *Law and Contemporary Problems* 78.

1038 Trumbull 2007 *Berkeley Journal of International Law* 327.

1039 Trumbull 2007 *Berkeley Journal of International Law* 327.

1040 Algeria-Watch 2006 http://www.algeria-watch.org/en/articles/2006/algerian_amnesty.htm

1041 Art 3 *Loi n° 99-08 du 29 Rabie El Aouel 1420 Correspondant au 13 juillet 1999 Relative au Rétablissement de la Concorde Civile* (Official Journal of the Republic of Algeria N° 46 of 13 July 1999).

1042 Art 3. See also Rakate *The Duty to Prosecute and the Status of Amnesties* 42-43.

1043 Algeria-Watch 2001 <http://www.algeria-watch.de/farticle/kettani.htm>

1044 Articles 1 and 2 *Décret Présidentiel n° 2000-03 du 4 Chaoual 1420 Correspondant au 10 Janvier 2000 Portant Grace Amnistiante* (Official Journal of the Republic of Algeria N° of 12 January 2000).

to the promulgation of this amnesty decree, the vast majority of militants laid down their weapons and Algeria is now a stable State.¹⁰⁴⁵

This experience of Algeria shows that where insisting on prosecuting the perpetrators of past crimes may prolong the suffering to the local populations and cause more crimes, the State should prioritise the safety of the citizens and forego criminal justice.¹⁰⁴⁶ A 2000 amnesty legislation in Uganda provides a further illustration of amnesty being used as a method of quelling an internal rebellion.

4.2.1.2 Uganda

In 2000, Uganda enacted an amnesty law¹⁰⁴⁷ which was aimed at ending the war between Government forces and the Lord’s Resistance Army which had been ravaging the Northern part of Uganda for more than two decades.¹⁰⁴⁸

During this war, which started in 1987, an estimated 100,000 civilians were killed and nearly two million people were displaced from their homes.¹⁰⁴⁹ The LRA fighters mutilated thousands of people, including hacking off of their lips.¹⁰⁵⁰ Thousands of children were also abducted to serve as porters, soldiers, and sexual slaves or domestic servants for the rebel. Some of these children were as old as seven years and eight years old.¹⁰⁵¹

The *Amnesty Act* of 2000 has been credited with weakening the LRA from which more than 13,000 fighters have defected since 2000 to obtain amnesty.¹⁰⁵² As of May 2013, the LRA was believed to have as few as 250 combatants and 250 civilian-dependants, including abducted women.¹⁰⁵³

1045 Perspective Monde Date Unknown
<http://perspective.usherbrooke.ca/bilan/servlet/BMEve?codeEve=932>
 1046 Stigen *The Principle of Complementarity* 421.
 1047 *Amnesty Act* 2000.
 1048 O’Shea *Amnesty* 39. For a more detailed account of this war, see Pensky 2008 *Ethics and Global Politics* 3-4.
 1049 Lamunu 2012 <http://iwpr.net/report-news/no-more-amnesty-ugandas-lra>
 1050 Pensky 2008 *Ethics and Global Politics* 3.
 1051 Pham, Vinck and Stover “Abducted: The Lord’s Resistance Army and Forced Conscription in Northern Uganda” 5.
 1052 Lamunu 2012 <http://iwpr.net/report-news/no-more-amnesty-ugandas-lra>
 1053 Nguyen 2013 <http://allafrica.com/stories/201308050032.html>

The Ugandan experience shows that amnesties can play a big role in weakening rebel organisations by offering to combatants a safe exit from the bush to normal life. From a policy point of view, no one can seriously argue that the Ugandan Parliament erred in passing the 2000 amnesty law as this has helped materially to stabilize the northern part of the country and allow the people of that region to live without the fear of death and atrocities.

Insisting on criminal accountability for the crimes committed by the LRA fighters would have prolonged the agony and suffering of innocent civilians. No responsible government can take that option. Criminal justice, as important as it may be, must be secondary to the search for peace.¹⁰⁵⁴ As one commentator has remarked:

the quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow.¹⁰⁵⁵

4.2.2 *Amnesty for maintaining peace and stability after a fragile democratic transition*

In addition to being used as a means of ending a civil war, amnesties have also been used as a means of ensuring the survival of newly-established democratic civilian governments. This situation occurred in Latin American countries in the period when democracies replaced dictatorships where the successor governments failed to prosecute the members of the security apparatuses for the crimes committed during the past era. The most telling examples are the experiences of Argentina and Uruguay in the 1980s. These two cases are discussed below.

4.2.2.1 Argentina

Between 1976 and 1983, Argentina experienced seven years of military dictatorship after a coup deposed President Isabel Peron.¹⁰⁵⁶ When he was democratically elected in 1983, President Raul Alfonsin issued a decree ordering the arrest and prosecution of high-ranking military officers for crimes committed during the so-called "war against subversion" in the late 1970s and early 1980s.¹⁰⁵⁷

1054 Stigen *The Principle of Complementarity* 421.

1055 Anonymous 1996 *Human Rights Quarterly* 258.

1056 O'Shea *Amnesty* 56.

1057 Decree 158/83 of 12 December 1983 (Official Gazette of 15 December 1983). See O'Shea *Amnesty* 57.

Some five senior former members of the army were prosecuted.¹⁰⁵⁸ However, later larger efforts to prosecute active lower and mid-level officers stoked discontent among the soldiers, some of whom started a mutiny against Alfonsin's government.¹⁰⁵⁹ When the rest of the soldiers refused to move against the rebel units, President Alfonsin convinced the parliament to pass the Due Obedience Law (*Ley de Obediencia Debida*),¹⁰⁶⁰ on 4 June 1987, which created an irrebuttable presumption that military officials, with the exception of certain high-level commanders, committed human rights abuses under coercion, and rendered them immune from prosecution on this basis.¹⁰⁶¹ Although this law did not employ the word "amnesty" it had the same effect of ensuring that the lower and mid-level soldiers were granted impunity.¹⁰⁶²

From a pragmatic point of view, this course of action taken by the administration of President Alfonsin was the most rational. Had he insisted on bringing the security agents to justice for the crimes committed during the past regime, his government would have been overthrown and human rights violations would certainly have reoccurred. No serious government can choose to take this path.¹⁰⁶³

4.2.2.2 Uruguay

During the Uruguayan transition from repressive military rule to democracy during the 1980s, two amnesty laws were introduced.¹⁰⁶⁴ The first, enacted in 1985 soon after the inauguration of the civilian president Julio Sanguinetti, benefited the former human rights, political activists and left-wing guerrillas who had been prosecuted and imprisoned for subversive activities against the military dictatorship. Thus, this amnesty, rather than being viewed as a tool for impunity, was regarded by the international human rights community as a form of reparations for the victims of military rule.¹⁰⁶⁵

In contrast, the second amnesty law, passed in 1986, was enacted in response to an impending military uprising, following the government's attempt to prosecute the members of the security forces for the crimes committed against the members of the

1058 Roht-Arriaza 1990 *California Law Review* 459.

1059 Roht-Arriaza 1990 *California Law Review* 459.

1060 Law N° 23.521 of 4 June 1987.

1061 Orentlicher 1991 *Yale Law Journal* 2597.

1062 O'Shea *Amnesty* 58.

1063 Stigen *The Principle of Complementarity* 422.

1064 Mallinder "Uruguay's Evolving Experience of Amnesty" 1.

1065 Mallinder "Uruguay's Evolving Experience of Amnesty" 1.

opposition parties and human rights activists during the previous military regime.¹⁰⁶⁶ The army had left power voluntarily and remained strong. When the first arrest warrants and subpoenas were issued in August 1985 military officers were instructed by their superiors not to respect them; the prospect of civil obedience loomed large.¹⁰⁶⁷ A government spokesperson was quoted as saying:

either we extend the amnesty to military and police officers or we must assume we are going to find ourselves in a new situation of violence that will lead to the fall of democratic institutions.¹⁰⁶⁸

In response to the impending military mutiny, which the new government did not have the power to control, Uruguay's Parliament passed the *Ley de Caducidad* (which translates as "Expiry Law") which granted the military and police officers immunity from prosecution with respect to crimes committed either for political reasons or in fulfilment of their functions and in obeying orders from superiors during the period of military rule.¹⁰⁶⁹

The above experiences in Argentina and Uruguay illustrate the dilemma that a new democratic government can face when choosing between justice and its own survival. If the new government insisted on criminal accountability for the crimes committed by security forces during the previous regime, they would have been overthrown. For realists, the choice should be clear: the priority of the new government must be to ensure its further existence. No government can be required to commit political suicide.¹⁰⁷⁰

4.2.3 *Amnesty for regime change*

Achieving a better society may require a process of transition from one type of government to another, which may only be possible with the consent of the officials of the former regime.¹⁰⁷¹ The granting of amnesty for the crimes committed by the agents of the oppressive government, rather than prosecution, may be the only peaceful means

1066 Mallinder "Uruguay's Evolving Experience of Amnesty" 1.

1067 O'Shea *Amnesty* 63.

1068 Mallinder "Uruguay's Evolving Experience of Amnesty" 43; citing Eduardo C "Fears of Coup Grow in Uruguay as Military demands total Amnesty" *The Times* (20 Nov 1986).

1069 O'Shea *Amnesty* 50.

1070 Orentlicher 1991 *Yale Law Journal* 2541. See also at 2548 where the author says that no governments should "press prosecutions to the point of provoking their own collapse". See also and Naqvi 2003 *International Review of the Red Cross* 624.

1071 O'Shea *Amnesty* 24.

of securing such consent.¹⁰⁷² The threat of prosecution might cause the perpetrators to cling to power, possibly resulting in more bloodshed.¹⁰⁷³ The South African TRC amnesties and the 1993 UN-brokered amnesty in Haiti feature prominently in this category.

4.2.3.1 South Africa

Before 1994, South Africa was ruled on the basis of racial discrimination under the Apartheid system of government. The unbanning of the African National Congress (ANC) in 1990, the release from prison of Nelson Mandela and other political prisoners, and the lifting of the state of emergency paved the way for a negotiated peace settlement between the apartheid regime and those who opposed it.¹⁰⁷⁴ The negotiations resulted in the establishment of a date for the country’s first democratic elections and for an interim constitution to be enacted.¹⁰⁷⁵

A major obstacle to finalizing the interim constitution and the holding of the elections was the question of accountability of those guilty of gross human rights violations during the years of apartheid.¹⁰⁷⁶ Many of the members of the security forces had committed crimes during the apartheid era and were afraid that without an amnesty clause in the interim constitution, they risked ending their lives in prison. They thus demanded that an amnesty clause be included in the interim constitution. On the other hand, the representatives of the liberation movements believed that there should be accountability for past crimes, along the lines of the Nürnberg trials.¹⁰⁷⁷ This posed a major threat to stability in the country.¹⁰⁷⁸ Many believe that, if not addressed, the issue of amnesty

1072 Dugard *International Law* 192; Rakate *The Duty to Prosecute and the Status of Amnesties* 40-41 and Orentlicher 1991 *Yale Law Journal* 2547.
 1073 Stigen *The Principle of Complementarity* 422.
 1074 Bubenzer *Post-TRC Prosecutions* 8.
 1075 Encyclopædia Britannica Date Unknown
<http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC>
 1076 Bubenzer *Post-TRC Prosecutions* 11.
 1077 Bubenzer *Post-TRC Prosecutions* 12 and Encyclopædia Britannica Date Unknown
<http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC>
 1078 Trumbull 2007 *Berkeley Journal of International Law* 322 and Rakate *The Duty to Prosecute and the Status of Amnesties* 288 & 303.

could have impeded the whole transition process and would have ended in bloodshed.¹⁰⁷⁹

Intense political consultations ensued, resulting in the inclusion of the amnesty clause in the *Interim Constitution*,¹⁰⁸⁰ which was confirmed in the 1996 final *Constitution*,¹⁰⁸¹ and was given effect by the *Promotion of National Unity and Reconciliation Act* 34 of 1995. Under this Act, the Truth and Reconciliation Commission¹⁰⁸² could grant amnesty for any crime committed with a political motive between 1 March 1960 (the month of the so-called “Sharpeville massacre”)¹⁰⁸³ and 10 May 1994.¹⁰⁸⁴ The Commission received more than 7,000 amnesty applications and granted 1,500 amnesties.¹⁰⁸⁵

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- 1079 Trumbull 2007 *Berkeley Journal of International Law* 322 and Rakate *The Duty to Prosecute and the Status of Amnesties* 288 & 303.
- 1080 The Postamble to the *Interim Constitution* (National Unity and Reconciliation) provided that: “In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed”.
- 1081 Section 22 (Transitional arrangements) of the *Constitution*: “(l) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading “National Unity and Reconciliation” are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity”.
- 1082 The Commission consisted of three committees: a committee on human rights violations (sections 12-15), a committee on reparations (sections 23-27) and a committee on amnesty (sections 16-22).
- 1083 On 21 March 1960, around 69 black protesters were shot dead by police officers. The protesters were demonstrating against pass laws which required black South Africans to carry passbooks with them any time they travelled out of their designated home areas. Although it is acknowledged the protesters were not peaceful and were attacking the police with stones, it is generally accepted that the police response was disproportionate. Today, 21 March is celebrated as a public holiday in honour of human rights and to commemorate the “Sharpeville massacre”. Nessler Date Unknown <http://robbenessler.efoliomn.com/sharpevillemassacre>
- 1084 10 May 1994 is the date on which Nelson Mandela was inaugurated as president. This is the date that officially marks the end of Apartheid and the struggle between, on the one hand, the apartheid government and the white right-wing (the Afrikaner Weerstandsbeweging (AWB) and Afrikaner Volksfront) which opposed the elections by violent means and, on the other hand, black groups such as the Pan Africanist Congress (PAC) and Azanian People’s Liberation Army (APLA), which had continued the “armed struggle” during the negotiation process. Truth and Reconciliation Commission of South Africa “Report” Vol I 120.
- 1085 Encyclopædia *Britannica* Date Unknown
<http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC>

Without an amnesty clause in the 1993 *Interim Constitution* the transition would have failed.¹⁰⁸⁶ The amnesty helped avoid a looming civil war, and the transfer of power was accomplished with little bloodshed.¹⁰⁸⁷ Bishop Desmond Tutu was once quoted as saying that without the amnesty clause in the post-apartheid constitution, the “reasonably peaceful transition from repression to democracy would instead have become a bloodbath”.¹⁰⁸⁸

The South African experience thus makes evident the fact that in exceptional cases the granting of amnesties may be the wisest course of action to take. The ANC leadership chose negotiation over bloodshed and, accepted amnesty for their former oppressors rather than punishment.¹⁰⁸⁹

4.2.3.2 Haiti

Another illustration of an amnesty law being used to facilitate a change in government is the 1993 UN-mediated agreement in Haiti, which granted full amnesty to members of General Cedras’ military regime, accused of having committed serious crimes in Haiti from 1991 to 1994.¹⁰⁹⁰ The amnesty was granted to the General and his men in exchange for their acquiescence to the return to power of the democratically elected President Bertrand Aristide whom they had ousted in 1991.¹⁰⁹¹ The Security Council hailed the Agreement as “the only valid framework for resolving the crisis in Haiti”,¹⁰⁹² and President Bill Clinton commented that the amnesty deal was necessary to avert “massive bloodshed” and “extended occupation” by the military regime.¹⁰⁹³

1086 Trumbull 2007 *Berkeley Journal of International Law* 322, Rakate *The Duty to Prosecute and the Status of Amnesties* 288, Scharf 1999 *Cornell International Law Journal* 510; O’Shea *Amnesty* 295, Varushka *The Truth and Reconciliation Commission* 1 and Dugard “Possible Conflicts with Truth Commissions” 694.

1087 Trumbull 2007 *Berkeley Journal of International Law* 314 and Scharf 1999 *Cornell International Law Journal* 510.

1088 Trumbull 2007 *Berkeley Journal of International Law* 322.

1089 O’Shea *Amnesty* 295.

1090 The agreements reached in the UN-mediated process include the *New York Pact* of 16 July 1993 (Annex to the Report of the Secretary-General on the Situation in Haiti 13 Aug 1993 (S/26297)).

1091 Bassiouni 2000 *University of Colorado Law Review* 416.

1092 Statement of the President of the Security Council at the 48th Session UN Doc S/INF/49 (1993) 26. See also Scharf 1996 *Texas International Law Journal* 1-42.

1093 President Bill Clinton Remarks at White House Press Conference (19 September 1994), cited by Trumbull 2007 *Berkeley Journal of International Law* 315.

The lesson that can be learnt from the Haitian experience is that, unless the international community is willing to use force to remove a rogue regime, the consent of the senior leaders of that regime is necessary to peacefully put in place a responsible and democratic government. To secure the consent of those leaders, amnesty may play an indispensable role.

Despite the obvious role that amnesties may play in peace building and transitional democracies, however, amnesties may encourage future perpetrators of human rights and thereby threaten human rights. It thus appears that, from another policy point of view, a need for discouraging amnesties and insisting on prosecutions also exists. This point is discussed in the next section.

4.3 Policy arguments against foreign amnesties

In the previous section, it was argued that criminal justice is not always the only consideration in peacemaking and building of democratic institutions. The point was made that under certain extreme circumstances, it may be necessary to sacrifice the pursuit of justice for other social and political imperatives. From this point of view, a State that has passed the amnesty law appears to have a legitimate ground for claiming that its amnesty process be recognised in third States. These arguments of necessity, however, relate to the political stability within a nation, while the effects of the amnesty and the resulting impunity may go beyond the borders of the State which is directly concerned.¹⁰⁹⁴ While an amnesty can guarantee peace and stability within a State, such amnesty may create a perception in foreign States that people can commit atrocities and manage to get away from criminal accountability. Such perception may have devastating effect of encouraging the perpetration of atrocities in other States that are experiencing instability.¹⁰⁹⁵

Thus, it is possible to argue that, where gross human rights are concerned, the stability within one State is not the sole consideration in determining whether an amnesty process in one country should be given recognition in foreign States. Deterrence of potential offenders in foreign States is also a relevant consideration.¹⁰⁹⁶

1094 O'Shea *Amnesty* 85.

1095 Orentlicher 1991 *Yale Law Journal* 2542 and O'Shea *Amnesty* 86.

1096 Orentlicher 1991 *Yale Law Journal* 2542.

Since international crimes are often committed by States' officials or in complicity with them,¹⁰⁹⁷ it is reasonable to believe that without the possibility of holding the perpetrators of gross violations of human rights accountable before international and foreign courts, most of these crimes would never be punished because perpetrators would often be in a position to grant amnesties for themselves and their accomplices. That weakens the deterrent effect of criminal law and encourages future atrocities.¹⁰⁹⁸ Some believe that the failure to prosecute the Turkish perpetrators of the genocide of the Armenians was an incentive for Hitler to embark upon the Holocaust. It is said that Hitler once asked: "who still remembers the Armenians?"¹⁰⁹⁹ It is thus clear that, from a policy point of view, a case exists to argue that foreign States have a clear interest in not condoning impunity for serious violations of human rights.

On the African continent in particular, a need for South African courts to disregard foreign amnesties is the most obvious. Africa has a bad record of human rights abuses. Evidence of this fact is that all of the cases that the ICC is currently investigating and prosecuting have to do with crimes allegedly committed on the African continent.¹¹⁰⁰ One should rejoice because national amnesties cannot bar prosecutions before an international criminal tribunal such as the ICC.¹¹⁰¹ Nevertheless, with its limited resources, the ICC cannot deal with all cases of genocide, crimes against humanity and war crimes.¹¹⁰² South Africa, a country with strong democratic institutions and an independent judiciary, may play a role in ensuring accountability for international crimes on the African continent where the ICC cannot be reasonably expected to do it. Some of the perpetrators of the alleged crimes against humanity and torture in Sudan¹¹⁰³ and

1097 Akande 2011 *European Journal of International Law* 816.

1098 Orentlicher 1991 *Yale Law Journal* 2542: "If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct".

1099 Jackson 2007 *Tulane Journal of International Law and Comparative Law* 121 and Rakate *The Duty to Prosecute and the Status of Amnesties* 115.

1100 Du Plessis, Maluwa and O'Reilly "Africa and the International Criminal Court" 2.

1101 *The Prosecutor v Kallon and Kamara* Decision on Challenge to Jurisdiction: Lomé Accord Amnesty Case Nos SCSL-2004-15-AR72(E); SCSL-2004-16-AR72(E) (13 March 2004) para 88.

1102 Burke-White 2008 *Harvard International Law Journal* 54 and Stigen *The Principle of Complementarity* 339.

1103 In 2005 a commission of inquiry created by the UN Secretary General found that Government of Sudan and its militias had conducted indiscriminate attacks against civilian populations and villages and had committed numerous crimes, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout the Darfur region. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. It is

Kenya¹¹⁰⁴ may once visit South Africa. Yet, it may happen that at the time of initiating those prosecutions, an amnesty law has been passed in one or more of these countries. Ignoring such amnesties and prosecuting those persons in South African courts would send a clear message to other potential perpetrators of human rights atrocities that there are now more chances of ending their lives in prisons than there were in the past. However, this raises a legal question: would such prosecutions in South African courts in disregard of a foreign amnesty law, not perhaps violate the sovereignty of the State where the crimes were committed and which has chosen to resolve its problems through amnesty rather than punishment? The legal arguments which militate against foreign amnesties are discussed in the next section.

4.4 Legal arguments against foreign amnesties

Two arguments will be advanced to support the proposition that South African courts have the power to disregard foreign amnesties in cases of international crimes. First, for a State to be able to invoke the doctrine of State sovereignty, it must be asserted that amnesties for gross human rights violations are lawful under international law, because the doctrine of State sovereignty does not cover the acts which are contrary to international law.¹¹⁰⁵ Yet, as it will be explained, amnesties for international crimes are contrary to States' obligations under international law and, consequently, cannot be considered as "sovereign acts". Secondly, it will be argued that since international crimes are committed not against a single State but against the international community as a whole, an amnesty law passed by one State (i.e the State where the crime was committed) cannot affect the right of other States to prosecute the perpetrators of such crimes. Thus, according to this argument, regardless of whether or not amnesties for international crimes as defined in the Implementation Act are lawful under international law, South African courts could legitimately trump foreign amnesties. These two arguments are elaborated upon below.

on the basis of this report that the Security Council referred the Darfur case to the ICC for investigation and prosecution of the persons responsible for these crimes. See International Commission of Inquiry on Darfur "Report to the Secretary-General" 3.

1104 It is alleged that in the period from 27 December 2007 (the day of the presidential election) to February 28, 2008 (when a power-sharing deal was struck between the rival parties), between 1,133 and 1,220 people were killed and 3,561 were injured. An increased number of rapes and acts of sexual violence also took place during this time. Open Society Justice Initiative 2013 <http://www.icckenya.org/background/>

1105 Bianchi 1999 *European Journal of International Law* 265 and Belsky, Merva and Roht-Arriaza 1989 *California Law Review* 394.

4.4.1 *Amnesty for gross human rights violations is contrary to States' obligations under international law*

4.4.1.1 States' acts that are contrary to international law are not "sovereign acts"

The first argument that is advanced in favour of the South African courts' right to disregard foreign amnesties in case of international crimes is that such amnesties are contrary to international law because they violate the States' duty to prosecute and punish perpetrators of international crimes.¹¹⁰⁶

The point that is made here is that international law cannot regard as "sovereign" those acts which constitute an attack against its very "predominant values".¹¹⁰⁷ In other words, since States have a duty to punish perpetrators of international crimes and since amnesties deviate from that obligation, such amnesties cannot be regarded as sovereign acts and the State is no longer entitled to invoke the doctrine of sovereignty.¹¹⁰⁸

A duty for the States to prosecute international crimes may arise from one of the two principal sources of international law: treaty and custom. A State may accept such a duty by becoming a party to a treaty that explicitly requires signatory States to prosecute certain types of crimes.¹¹⁰⁹ Alternatively, customary international law may create an obligation to prosecute certain crimes, even where a State has never explicitly agreed to such an obligation through treaty law.¹¹¹⁰ Finally, a number of commentators

1106 Dugard "Possible Conflicts with Truth Commissions" 697: "A necessary consequence of the argument that there is a duty to prosecute is that international law prohibits the granting of amnesty in the case of the violation of international crimes".

1107 Bianchi 1999 *European Journal of International Law* 265: "[h]uman rights atrocities cannot be qualified as sovereign acts: international law cannot regard as sovereign those acts which are not merely a violation of it, but constitute an attack against its very foundation and predominant values".

1108 Belsky, Merva and Roht-Arriaza 1989 *California Law Review* 394: "The existence of a system of rules that states may not violate implies that when a state acts in violation of such a rule, the act is not recognized as a sovereign act".

1109 Obura "Duty to Prosecute International Crimes Under International Law" 14-15: "The obligation of a state to punish or extradite the perpetrators of international crimes may be provided for by treaties to which the state is a party. In such a case, the failure to prosecute and punish persons responsible for committing crimes defined in the treaty would constitute a breach of the state's treaty obligations".

1110 Roht-Arriaza 1990 *California Law Review* 488 and Werle *International Criminal Law* 77. See also Mitchell 2009 *Aut Dedere, aut Judicare* 20: "If an extradite or prosecute obligation can be shown to be part of customary international law, depending on that obligation's precise content, it could bind States regardless of whether the State in question is a party to the relevant treaty that includes the obligation, whether the relevant treaty includes such an obligation (such as the

argue that such a duty exists as a peremptory or *jus cogens* norm of international law.¹¹¹¹

These arguments will be discussed in the following order: First, since the Rome Statute is the only international agreement that comprises all the crimes defined in the Implementation Act, the study will start with an inquiry as to whether the Rome Statute contains any obligation for States Parties to prosecute those who commit international crimes. In the second subsection the inquiry will be made in respect of those States that are not party to the Rome Statute. The reason for this approach is that for these States the existence of a duty to prosecute cannot be established from a single and common source. For example, while the crime of genocide has been the subject of a specialised convention, such convention does not exist for crimes against humanity. And, while the 1949 Geneva Conventions (and their Protocols) create an express obligation for the States parties to prosecute the “grave breaches” committed during international armed conflicts, they do not impose any similar express obligation in respect of the “other serious violations of the laws and customs applicable in international armed conflicts”¹¹¹² and the war crimes committed in internal armed conflicts. Therefore, in regard to the States that are not party to the Rome Statute, the existence, or non-existence, of a duty to prosecute perpetrators of international crimes must be investigated on a case by case basis.

4.4.1.2 Amnesty and States Parties to the Rome Statute

The Rome Statute is silent on the question of national amnesties for international crimes. No provision is made for lack of jurisdiction, or otherwise, by the ICC over a case in the event that a person has been granted amnesty under the domestic law of a State.¹¹¹³

1111 Genocide Convention) or whether or not there is in fact a relevant treaty (for example, crimes against humanity”).
Bassiouni 1996 *Law and Contemporary Problems* 68; Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law* 614, Enache-Brown and Fried 1998 *McGill Law Journal* 616; Motala 1995 *Comparative and International Law Journal of Southern Africa* 353,357 and Stigen *The Principle of Complementarity* 211.

1112 These are war crimes committed during international armed conflicts but which are not classified as “grave breaches”. See 4.4.2.3.3 hereunder.

1113 Dugard “Possible Conflicts with Truth Commissions” 700; Werle *International Criminal Law* 78 and Rakate *The Duty to Prosecute and the Status of Amnesties* 191.

Nevertheless, commentators on the ICC have argued that a number of the provisions of the Rome Statute imply that the Statute excludes national amnesties.¹¹¹⁴ These provisions are discussed below.

4.1.1.1.1 The Preamble to the Rome Statute

The Preamble to the Rome Statute states that States Parties are “determined to put an end to impunity for the perpetrators” of international crimes as defined in the Statute,¹¹¹⁵ that “the most serious crimes of concern to the international community as a whole must not go unpunished”,¹¹¹⁶ and that:

their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.¹¹¹⁷

The Vienna Convention on the Law of Treaties provides that a treaty must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.¹¹¹⁸ Since the object and purpose of the Rome Statute are obviously to end impunity for the gross violations of human rights,¹¹¹⁹ it seems quite clear that the above provisions of the Preamble are incompatible with national amnesties.¹¹²⁰

The Vienna Convention on the Law of Treaties also provides that treaties must be performed in good faith.¹¹²¹ In light of this provision and of the overall purpose of the Rome Statute (to end impunity for gross human rights violations), adopting an amnesty

1114 Rakate *The Duty to Prosecute and the Status of Amnesties* 193; Robinson 2003 *European Journal of International Law* 485; Akande 2003 *Journal of International Criminal Justice* 643; Arsanjani 1999 *American Society of International Law* 67 and Hafner 1999 *European Journal of International Law* 108.

1115 Para 5 Preamble to the Rome Statute.

1116 Para 5 Preamble to the Rome Statute.

1117 Para 5 Preamble to the Rome Statute.

1118 Scharf 1999 *Cornell International Law Journal* 522.

1119 Para 5 Preamble to the Rome Statute. In his 1998 Report, the UN Secretary General also stated that the Rome Statute aims at putting “an end to the global culture of impunity—the culture in which it has been easier to bring someone to justice for killing one person than for killing 100.000”. UN Secretary General “Annual Report of the Secretary-General on the Work of the Organisation-1998” UN Doc A/53/457 (27 August 1998) para 180.

1120 Arsanjani 1999 *American Society of International Law* 67; Robinson 2003 *European Journal of International Law* 484. See also Hafner 1999 *European Journal of International Law* 108: “[a]llowing amnesties as a ground for denying surrender of a person to the Court would run counter to the need to avoid impunity for the crimes in question [...]”.

1121 Art 26 (“*Pacta sunt servanda*”): “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

for the ICC crimes would be contrary to the duty of good faith performance with regard to the duty stated in the Preamble.¹¹²²

In view of the above, it must be concluded that amnesties are contrary to States Parties' obligations under the Rome Statute and that this places amnesties for international crimes outside the realm of States Parties' sovereignty. This conclusion is also supported by the provisions of article 17(1)(a) of the Rome Statute, which is discussed below.

4.1.1.1.2 Article 17(1)(a) of the Rome Statute

Article 17 (1)(a) of the Rome Statute sets out the conditions for the admissibility of a case before the ICC. If one of these conditions is not met, a case will be declared inadmissible by the ICC Pre-Trial Chamber.

Under this article, a case will not be admissible if it 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. This provision embodies the principle that, on the one hand, the ICC is not meant to replace national courts,¹¹²³ but that, on the other hand, in order to end impunity of gross violations of human rights, the ICC will take over a case, where the State's authorities are unwilling or unable to genuinely investigate and prosecute a case.¹¹²⁴

Jurdi¹¹²⁵ argues that since amnesty laws preclude the possibility for national authorities to investigate a case for the purposes of trial and punishment, such amnesties cannot bar a case from being admissible under article 17(1)(a). Instead, amnesties would be regarded as evidence of inability or unwillingness of national authorities to

1122 Bellelli "The Establishment of the System of International Criminal Justice" 38.

1123 O'Shea *Amnesty* 257: "The stated determination in the preamble to ensure an 'end to impunity' requires, in a regime of 'complementarity' that states are similarly obliged to pursue international offenders".

1124 Rakate *The Duty to Prosecute and the Status of Amnesties* 194.

1125 Jurdi *The International Criminal Court* 82.

prosecute.¹¹²⁶ Given this interpretation, it is clear that the drafters of the Statute did not consider amnesty as a bar to the exercise of the ICC's jurisdiction.¹¹²⁷

Furthermore, given the fact that one of the purposes of the complementarity regime of the Rome Statute is to protect the States Parties' jurisdictional sovereignty,¹¹²⁸ and given that amnesties were not included in the Rome Statute as grounds of inadmissibility of a case before the ICC, one should conclude that States Parties did not consider amnesties for the ICC crimes as a legitimate exercise of their "sovereignty".

The implication of the above argument is that South African courts can try perpetrators of international crimes that have been the subject of an amnesty law in a foreign State that is party to the Rome Statute, without violating the sovereignty of that State. Such prosecutions would be quite lawful under international law.

4.4.1.3 Amnesty and States that are not party to the Rome Statute

For the States that are not party to the Rome Statute, a duty to prosecute perpetrators of international crimes can be found from a number of international treaties which contain a duty for member States to prosecute certain crimes, such as genocide. Nevertheless, it is not possible to find such duty in respect of all the international crimes contained in the Implementation Act. First, only the 1948 Genocide Convention and the 1949 Geneva Conventions contain explicit provisions that require member States to prosecute perpetrators of the crimes of genocide and the war crimes characterised as "grave breaches". A similar provision does not exist with regard to war crimes other than the grave breaches. In respect of crimes against humanity, no specific convention (other than the Rome Statute) exists at all. Secondly, while virtually all the States (except Palestine and Vatican) are now party to the 1949 Geneva Conventions, there are many States that are not party to the Genocide Convention.¹¹²⁹

1126 Rakate *The Duty to Prosecute and the Status of Amnesties* 194.

1127 Rakate *The Duty to Prosecute and the Status of Amnesties* 197; Van den Wyngaert and Ongena "Ne bis in idem Principle, including the issue of Amnesty" 727 and Zeidy 2002 *Michigan Journal of International Law* 941.

1128 Yang 2005 *Chinese Journal of International Law* 122

1129 As of 24 March 2014, only 144 States are party to the Genocide Convention. ICRC Date Unknown
<http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=1507EE9200C58C5EC12563F6005FB3E5>

In light of the above considerations, a determination of whether States that are not party to the Rome Statute have any obligation to prosecute international crimes must be made on a case-by-case basis.

4.4.2.3.1 Amnesty and the crime of genocide

The Genocide Convention¹¹³⁰ was adopted on 3 December 1948 and entered into force on 12 January 1951. When this Convention was adopted, its principle purpose was to prevent genocide through criminal punishment.¹¹³¹ This is reflected in the provisions of this Convention which oblige member States to prosecute persons responsible for acts of genocide,¹¹³² and to provide “effective penalties” for those persons.¹¹³³

Nevertheless, since not all States are party to the Genocide Convention, the Convention’s duty does not apply to non-member States. In respect of these States, a duty to prosecute and punish perpetrators of genocide would arise only to the extent that such a duty can be said to exist under another source of international law apart from the Convention.

4.4.2.3.1.1 Amnesty and member States to the Genocide Convention

The Genocide Convention imposes an affirmative duty on member States to criminalize genocide and to prosecute individuals who commit this crime.¹¹³⁴ The Convention expressly provides that these persons “shall be punished”,¹¹³⁵ and that the contracting parties must “enact the necessary legislation to give effect to the provisions of the Convention” by, in particular, providing “effective penalties for persons guilty of genocide”.¹¹³⁶

For the States that are party to the Genocide Convention, the granting of amnesty to persons responsible for genocide would therefore constitute a breach of the

1130 *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

1131 Orentlicher 1991 *Yale Law Journal* 2563 and Obura “Duty to Prosecute International Crimes Under International Law” 16.

1132 Art IV Genocide Convention.

1133 Art V Genocide Convention.

1134 Dugard “Possible Conflicts with Truth Commissions” 696.

1135 Art IV Genocide Convention.

1136 Art V Genocide Convention.

Convention's obligation for which no exception is accepted.¹¹³⁷ Logically, it follows that amnesty for the crime of genocide would be contrary to the States' obligations under the Convention.¹¹³⁸ Accordingly, a national amnesty for genocide cannot be regarded as an attribute of these States' sovereignty. As will emerge in the discussion which follows below in relation to the States that are not party to the Genocide Convention, a duty to prosecute genocide also exists under customary law as well as a *jus cogens* norm of international law. These rules apply to all States, whether or not they are member to the Genocide Convention.

4.4.2.3.1.2 Amnesty, genocide and States that are not party to the Genocide Convention

A general duty to prosecute genocide that would bind States that are not party to the Genocide Convention would exist only if such duty can be found in customary rule or as part of the so-called *jus cogens* rules of international law.

4.4.2.3.1.2.1 The duty to prosecute genocide under customary international law

There appears to be a consensus among scholars that a duty to prosecute genocide exists under international customary law.¹¹³⁹ There seems to be sufficient state practice to support this assertion. First, through a UN General Assembly resolution, genocide was treated as an offence against international law even before the Genocide Convention was drafted, when the General Assembly adopted resolutions in 1946 affirming the Nuremberg Principles¹¹⁴⁰ and declaring genocide to be an international crime.¹¹⁴¹ Secondly, the Genocide Convention, which contains an express obligation for States to prosecute perpetrators of genocide, is now widely ratified, making such

1137 Scharf 1999 *Cornell International Law Journal* 516; Rakate *The Duty to Prosecute and the Status of Amnesties* 173.

1138 Boed 2000 *Cornell International Law Journal* 319; O'Shea *Amnesty* 185, Jurdi *The International Criminal Court* 75 and Dugard "Possible Conflicts with Truth Commissions" 696.

1139 Orentlicher 1991 *Yale Law Journal* 2565; Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law* 626; Joyner 1998 *Denver Journal of International Law and Policy* 604; Simma and Paulus 1999 *American Journal of International Law* 309; Edelenbos 1994 *Leiden Journal of International Law* 7; Obura "Duty to Prosecute International Crimes Under International Law" 17 and Amnesty International "Universal Jurisdiction" 34. See also the U S Restatement (Third) of Foreign Relations Law of the United States para 702 comment (d): "A state violates customary law if it practices or encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide".

1140 UN GA Resolution 95(I) of 11 December 1946.

1141 UN GA Resolution 96(I) of 11 December 1946. See also Joyner 1996 *Law and Contemporary Problems* 159.

obligation a rule of customary law.¹¹⁴² This was confirmed by the ICJ in the Advisory Opinion on the *Reservations to the Genocide Convention*, where the Court held that the principles underlying the Genocide Convention "are recognised by civilized nations as binding on States, even without any conventional obligation".¹¹⁴³

In light of the aforesaid, it seems quite a settled issue that even non-member States to the Genocide Convention are bound to punish persons who commit genocide and who happen to be found on their territorial jurisdictions. Accordingly, the granting of amnesty cannot be regarded as a lawful exercise of their sovereignty and, by implication, South African courts can exercise their universal jurisdiction over the persons amnestied in foreign States without violating those States' sovereignty.¹¹⁴⁴

4.4.2.3.1.2.2 The *jus cogens* argument

Jus cogens refers to the hierarchical status of particular norms considered by the international community as a whole as non-derogable.¹¹⁴⁵ Obligations that arise from these norms are *erga omnes*, in the sense that they are owed to the international community as a whole, the breach of which allows third party States legal standing to take action to enforce the obligation.¹¹⁴⁶

The characterisation of genocide as a *jus cogens* crime is generally accepted by scholars¹¹⁴⁷ and national courts,¹¹⁴⁸ and has been recognised by the ICJ.¹¹⁴⁹ One

1142 As of 24 March 2014, 144 States have ratified (or acceded to) the Genocide Convention. ICRC Date Unknown
<http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=1507EE9200C58C5EC12563F6005FB3E5>

1143 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion 1951 ICJ 15 (28 May 1951) 23.

1144 In support of this conclusion, see Werle *International Criminal Law* 77: "It is certain, at least, that an across-the-board exemption from criminal responsibility is unacceptable, to the extent that international law imposes a duty to prosecute and punish. This means that general amnesties for crimes under international law are impermissible under customary international law. As a result, an amnesty in contravention of international law is not a bar to prosecution by third states".

1145 Art 53 *Vienna Convention on the Law of Treaties*.

1146 Mitchell 2009 *Aut Dedere, aut Judicare* 60. See also *Belgium v Spain Barcelona Traction, Light and Power Co Ltd* Judgement 1970 ICJ 3 (5 February 1970) 32: "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

1147 Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law* 614 and Lee 1999 *Virginia Journal of International Law* 438.

implication of the characterization of genocide as *jus cogens* crime is that all States have a duty to cooperate in bringing those who commit such crime to justice,¹¹⁵⁰ by either prosecuting perpetrators of genocide who are within their custody or extradite them to States willing and able to prosecute.¹¹⁵¹

The duty to extradite or prosecute (*aut dedere aut judicare*)¹¹⁵² is itself a part of *jus cogens*, because it is a necessary condition of the underlying *jus cogens* norm.¹¹⁵³ Just as States have an absolute obligation to refrain from committing acts of genocide, States also have an obligation to either prosecute or extradite individuals accused of genocide who are within their territory. Any State that ignores this duty and grants amnesty is in breach of its international obligations,¹¹⁵⁴ and, consequently, the granting of amnesty to perpetrators of genocide can never be regarded as a sovereign act of a State.

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- 1148 *Princz v Federal Republic of Germany* Dissenting opinion of Circuit Judge Wald 26 F3d 1166 307 US App DC 102 (1 July 1994) para 79: "One need not pause long before concluding that the international community's denunciation of both genocide and slavery are accepted norms of customary international law and, in particular, are *jus cogens* norms". Accessed at <http://openjurist.org/26/f3d/1166/princz-v-federal-republic-of-germany> [2 March 2013]. See also *Siderman de Blake v Republic of Argentina* 965 F2d 715 (22 May 1992): "The universal and fundamental rights of human beings identified by Nuremberg-rights against genocide, enslavement, and other inhumane acts [...] are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*". Accessed at <http://www.derechos.org/nizkor/arg/ley/siderman.html> [2 March 2013].
- 1149 *Bosnia and Herzegovina v Yugoslavia Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* Preliminary Objections Judgment 1996 ICJ 595 (11 July 1996) 616: "It follows that the rights and obligations enshrined by the Convention are rights and obligations erga omnes". The ICJ recalled this view in *Democratic Republic of the Congo v Rwanda Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) *Jurisdiction and Admissibility* Judgment 2006 ICJ 6 (3 February 2006) 31-32.
- 1150 Lee 1999 *Virginia Journal of International Law* 450.
- 1151 Lee 1999 *Virginia Journal of International Law* 450: "This means that not only do all states have an obligation to refrain from committing genocide, they also have a legal interest, vis-à-vis other states, in the prohibition itself".
- 1152 See 2.5.3 above.
- 1153 Lee 1999 *Virginia Journal of International Law* 447. See also at 448: "The absolute prohibition of genocide has no meaning unless all states have an absolute obligation to bring offenders to justice".
- 1154 Lee 1999 *Virginia Journal of International Law* 442.

4.4.2.3.2 Amnesty and war crimes constituting “grave breaches” under the 1949 Geneva Conventions

The four Geneva Conventions of 12 August 1949 are international treaties that establish the rules of international law for the humanitarian conduct of armed conflict. They entered into force on 21 October 1950.¹¹⁵⁵

These conventions (and their Protocols) make a distinction between international and non-international armed conflicts. The rules that govern international armed conflicts (the four Conventions plus Additional Protocol I) define some violations of the Conventions as “grave breaches”.¹¹⁵⁶ The war crimes contained in article 8(2)(a) of the Rome Statute (and incorporated into the Implementation Act as schedule 1) are exactly the same as these crimes defined as “grave breaches” under the 1949 Geneva Conventions. These crimes are:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

In regard to these crimes, member States (to the Geneva Conventions) have an obligation to investigate and prosecute those responsible for such offences, unless they choose to hand them over to another State that is willing to prosecute.¹¹⁵⁷

1155 ICRC 2010 <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>

1156 Art 50 Geneva Convention I; art 51 Geneva Convention II; art 130 Geneva Convention III; art 147 Geneva Convention IV.

1157 Art 49(2), Geneva Convention I; art 50(2) Geneva Convention II; art 129(2) Geneva Convention III; art 146(2) Geneva Convention IV. See also Roht-Arriaza 1990 *California Law Review* 465; Cryer *Prosecuting International Crimes* 102; Joyner 1996 *Law and Contemporary Problems* 156-157; Cassese 1998 *European Journal of International Law* 5; Scharf 1999 *Cornell International Law Journal* 516; Gavron 2002 *International and Comparative Law Quarterly* 92; Werle *International Criminal Law* 69 and Obura “Duty to Prosecute International Crimes Under International Law” 16.

National amnesties in respect of the acts classified as “grave breaches” under the Geneva Conventions would therefore be in violation of the member States’ treaty obligation to prosecute these crimes.¹¹⁵⁸ The legal implication of this is that a State that would grant amnesty for these crimes would not be heard to complain that a foreign State that wants to prosecute is interfering with its sovereignty. An act that is contrary to a State’s obligation does not qualify as a sovereign act under international law.¹¹⁵⁹

Since the Geneva Conventions are universally ratified,¹¹⁶⁰ the customary nature of the duty to prosecute grave breaches should also be beyond doubt.¹¹⁶¹ Furthermore, a consensus exists that this rule has acquired the status of a *jus cogens* (or peremptory norm) of international law.¹¹⁶² Since all the States are party to these conventions, a further enquiry into the customary or *jus cogens* nature of this duty seems unwarranted.

4.4.2.3.3 Amnesty, crimes against humanity and war crimes other than the “grave breaches”

There is no treaty outside the Rome Statute that contains a specific obligation for States to prosecute perpetrators of crimes against humanity and war crimes other than the “grave breaches” of the 1949 Geneva Convention. On the one hand, apart from the Rome Statute, there is no other convention that defines crimes against humanity as an international crime.¹¹⁶³ There are only two specific crimes that also constitute crimes against humanity in respect of which specific conventions exist and which contain an explicit obligation for member States to prosecute perpetrators of those crimes. These

1158 Scharf 1996 *Law and Contemporary Problems* 44; Jurdi *The International Criminal Court* 76 and Dugard “Possible Conflicts with Truth Commissions” 696.

1159 See 4.4.1.1 above.

1160 ICRC 2010 <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>: “[s]even new ratifications since 2000 have brought the total number of States Party to 194, making the Geneva Conventions universally applicable.” See also Scharf 1996 *Law and Contemporary Problems* 44.

1161 Rakate *The Duty to Prosecute and the Status of Amnesties* 259.

1162 Motala 1995 *Comparative and International Law Journal of Southern Africa* 348: “International and individual responsibility for compliance with humanitarian law is a peremptory norm of international law, even for a state not party to the Geneva Conventions”. See also Cassese 1998 *European Journal of International Law* 6: “Arguably, the prohibition of such crimes and the consequent obligation of states to prosecute and punish their authors should be considered a peremptory norm of international law (*jus cogens*): hence, states should not be allowed to enter into international agreements or pass national legislation foregoing punishment of those crimes”.

1163 Scharf 1999 *Cornell International Law Journal* 519.

crimes are torture¹¹⁶⁴ and apartheid.¹¹⁶⁵ These are, however, a very narrow group of crimes against humanity which, under the Rome Statute, include other crimes such as murder, enslavement, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and persecution.¹¹⁶⁶ In regard to these other crimes, a duty to prosecute must be sought from the other sources of international law namely, custom and *jus cogens* rules.

On the other hand, there exist two categories of war crimes in respect of which an obligation to prosecute is not explicitly set out in the conventions which create such crimes. These are the “other serious violations of the laws and customs applicable in international armed conflict”¹¹⁶⁷ and the war crimes committed during non-international armed conflicts.¹¹⁶⁸ The problem arises in regard to the former crimes because, although they relate to international armed conflicts, they did not exist under the 1949 Conventions.¹¹⁶⁹ They were mainly imported into the Rome Statute (and hence in the Implementation Act) from the various rules contained in the 1907 Hague Convention respecting the Laws and Customs of War on Land,¹¹⁷⁰ the 1977 Protocol I Additional to the Geneva Conventions,¹¹⁷¹ the 1899 Hague Declaration (IV, 3) concerning Expanding Bullets,¹¹⁷² and the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.¹¹⁷³ These treaties do not contain any reference to the obligation for member States to prosecute the persons guilty of violations of their provisions. Thus, for the States that are not party to the Rome Statute, a duty to prosecute perpetrators of the “other serious violations”

1164 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984). Art 7 of this Convention provides that member states are required to submit cases of torture to competent national authorities for the purpose of prosecution when committed on their territories. Amnesty would thus violate a member state’s obligation to prosecute under art 7 of the convention. See also Lubbe *Successive and Additional Measures* 30 and Obura “Duty to Prosecute International Crimes Under International Law” 18.

1165 *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1974). Art VI of this Convention requires states to criminalise apartheid and to prosecute, bring to trial and punish the persons responsible. There is thus no room for amnesty under this convention. Jurdi *The International Criminal Court* 77.

1166 Art 7 Rome Statute.

1167 Art 8(2)(b) of the Rome Statute, annexed as schedule 1 to the Implementation Act.

1168 Art 8(2)(c) of the Rome Statute, annexed as schedule 1 to the Implementation Act.

1169 Dörmann 2003 *Max Planck Yearbook of United Nations Law* 344.

1170 Geneva Convention (IV).

1171 Protocol Additional (I).

1172 *Declaration (IV,3) concerning Expanding Bullets* (1899).

1173 *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* (1925).

defined in article 8(2)(b) of the Rome Statute must be found elsewhere than in the treaties from which these crimes had been imported.

The same applies to war crimes committed during non-international armed conflict. In respect of these crimes, article 3 common to the 1949 Conventions,¹¹⁷⁴ which deals with non-international armed conflicts, does not create any explicit obligation for States to prosecute those who commit war crimes in this type of conflict.¹¹⁷⁵ A duty to prosecute perpetrators of these crimes must therefore also be found in other sources of international law.

A number of scholars and human rights bodies have argued that such a duty can be inferred from a number of international and regional conventions that impose upon member States a duty to “ensure” the full exercise of rights protected under those treaties, and from the “right to a remedy” contained in some of such treaties.¹¹⁷⁶ Commentators also argue that an obligation for States to prosecute perpetrators of crimes against humanity and war crimes other than the grave breaches can be inferred from a number of international and regional treaties which, although not explicitly requiring member States to prosecute and punish gross violations of human rights, have been interpreted as requiring States to impose criminal punishment as the most effective and adequate means to ensure those rights.¹¹⁷⁷ These are the UN Charter, the ICCPR, the Inter-American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.

1174 This article was inserted in all four Geneva Conventions in order to extend their protections to the victims of non-international armed conflict. It is thus often referred to as “Common article 3” because it appears in all these Conventions as article 3.

1175 Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law* 617; Simma and Paulus 1999 *American Journal of International Law* 310, 311. See also *Prosecutor v Tadić Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* ICTY IT-94-1 (2 October 1995) para 80.

1176 See art 21(III) ICCPR; art 1(25) ACHR; art 1(13) ECHR). See also Ambos 1977 *Human Rights Law Journal* 6; Orentlicher 1991 *Yale Law Journal* 2568 and Scharf 1999 *Cornell International Law Journal* 518.

1177 Enache-Brown and Fried 1998 *McGill Law Journal* 626; Roht-Arriaza 1990 *California Law Review* 472; Cryer *Prosecuting International Crimes* 102; Burke-White 2001 *Harvard International Law Journal* 520 and O’Shea *Amnesty* 165.

Some scholars also argue that a duty to prosecute perpetrators of crimes against humanity and war crimes generally is established as a customary law rule¹¹⁷⁸ as well as a *jus cogens* norm of international law.¹¹⁷⁹ These arguments are discussed below.

4.4.2.3.3.1 International and regional treaties from which an obligation to prosecute and punish violators of human rights can be inferred

4.4.2.3.3.1.1 The UN Charter

The promotion of human rights is included in the UN Charter as one of the purposes of the United Nations.¹¹⁸⁰ Article 55 (3) also provides that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. Article 56 of the UN Charter further provides that the member States pledge themselves to co-operate with the UN for the achievement of its purposes.

O’Shea¹¹⁸¹ argues that amnesty laws set a bad precedent of impunity for human rights violations and have the potential to encourage individuals to disrespect human rights. Amnesties create the feeling that the law is ineffective or, because of their political nature, that crimes against humanity and war crimes are not as serious as common crimes.¹¹⁸² Viewed from this angle, amnesties for crimes against humanity and war crimes are inconsistent with the purposes of the United Nations and thereby contrary to the UN Charter.¹¹⁸³ This interpretation was underscored by the UN General Assembly when it affirmed that:

1178 Roht-Arriaza 1990 *California Law Review* 488. See also Mitchell 2009 *Aut Dedere, aut Judicare* 20: “If an extradite or prosecute obligation can be shown to be part of customary international law, depending on that obligation’s precise content, it could bind States regardless of whether the State in question is a party to the relevant treaty that includes the obligation, whether the relevant treaty includes such an obligation (such as the Genocide Convention) or whether or not there is in fact a relevant treaty (for example, crimes against humanity)”. See also Werle *International Criminal Law* 77.

1179 Bassiouni 1996 *Law and Contemporary Problems* 68; Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law* 614, Enache-Brown and Fried 1998 *McGill Law Journal* 616; Motala 1995 *Comparative and International Law Journal of Southern Africa* 353,357 and Stigen *The Principle of Complementarity* 211.

1180 Articles 1(3), 13(1)(b), 55(c), 62(2) and 76(c) UN Charter.

1181 O’Shea *Amnesty* 165.

1182 O’Shea *Amnesty* 165.

1183 Enache-Brown and Fried 1998 *McGill Law Journal* 626: “The promotion of human rights not only requires the existence of substantive norms, *i.e.*, prohibitions, but of procedural norms as

refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.¹¹⁸⁴

In light of the above interpretation of the UN Charter, it must be concluded that under the UN Charter all member States have an international duty to prosecute perpetrators of crimes against humanity and war crimes (irrespective of whether they are characterised as grave breaches or not) and that the granting of amnesty would be a deviation from this duty and cannot be regarded as a legitimate exercise of a State's sovereignty.

4.4.2.3.3.1.2 The International Covenant on Civil and Political Rights

Another international convention that is often cited as imposing on States an obligation to prosecute violators of human rights, including war crimes and crimes against humanity, is the ICCPR. The rights protected under the ICCPR include the right to life¹¹⁸⁵ and freedom from torture.¹¹⁸⁶

Under this convention, States undertake to “ensure” the full and free exercise of the rights set forth in that instrument.¹¹⁸⁷ Furthermore, the ICCPR provides that any person whose rights or freedoms recognised in the Covenant are violated shall have an “effective remedy”,¹¹⁸⁸ which is defined as including competent action by judicial, administrative or legislative authorities, or any competent, authority provided for by the legal system of the member State.¹¹⁸⁹

The Human Rights Committee (HRC), the monitoring body that was established by the member States to the ICCPR, has on several occasions held that the “respect and ensure” and the “effective remedy” provisions of the ICCPR imply an obligation for member States to prosecute those found guilty of serious violations of the rights protected under the Covenant. In a case involving the extra-judicial killing of 15 persons

well. Without mechanisms for implementation, prohibitions become empty vessels. Implementation mechanisms are necessary corollaries of prohibitions. For the effective treatment of universal crimes, a duty must be found that requires states to take some form of action against the perpetrators of the offences envisaged in article 55(c)”.

1184 UN GA Resolution 2840(XXVI) of 18 December 1971 para 4.

1185 Art 6(1) ICCPR.

1186 Art 7 ICCPR.

1187 Art 2(1) ICCPR.

1188 Art 2(3)(a) ICCPR.

1189 Art 2(3)(b) ICCPR.

by the agents of the Surinamese military police, the HRC urged the government of Suriname to take effective steps to investigate the killings and bring to justice any persons found to be responsible for the death of the victims.¹¹⁹⁰ More recently, in a 1994 General Comment on the prohibition of torture, the HRC held that the prohibition of torture read together with article 2(1) would imply that:

[S]tates must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible [...].¹¹⁹¹

Implicit in the Committee's decision in these cases is the view that criminal prosecutions are the appropriate means of securing the right to life and the rights to be free from torture and forced disappearance which are the most serious violations of the rights guaranteed by the ICCPR.¹¹⁹²

Scharf¹¹⁹³ opines that to read in the duty to “respect and ensure” or in the right to “effective remedy” a duty to prosecute violations of the rights enshrined in the ICCPR would be “a bit of an overstretch”. He argues that all what the ICCPR requires of States parties is “to do something to give meaning to the rights enumerated in the Covenant”, a duty which may be satisfied by taking alternative measures such as dismissal from the military, banning the perpetrator from public office, and/or requiring the payment of damages through civil proceedings.¹¹⁹⁴ It is submitted that this argument is not correct. The obligation to provide to victims “effective remedy” cannot be satisfied without

1190 *Baboeram v Suriname Communication* Nos 146-1983 and 148-154-1983 HRC CCPR/C/24/D/154/1983 (4 April 1985) para 16: “The Committee therefore urges the State party to take effective steps (i) to investigate the killings of December 1982; (ii) to bring to justice any persons found to be responsible for the death of the victims) (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life is duly protected in Suriname”.

1191 HRC *General Comment No 07: Torture or cruel, inhuman or degrading treatment or punishment (Art 7)* (30 May 1982) para 1. Accessed at <http://www.refworld.org/docid/4538840021.html> [12 April 2014].

1192 The HRC underscored this interpretation in other cases concerning arbitrary arrests, torture, and disappearances in Uruguay during the 1970s and 1980s. In the case of *Eduardo Bleier*, for example, the Committee found that the State had a duty to investigate and, if necessary, prosecute. It called on the Uruguayan government to: “take effective steps (i) to establish what has happened to Eduardo Bleier since October 1975; to bring to justice any persons found to be responsible for his death, disappearance or ill-treatment; and to pay compensation to him or his family for any injury which he has suffered; and (ii) to ensure that similar violations do not occur in the future”. *Eduardo Bleier v Uruguay Communication* N° R7/30 HRC Supp N° 40 (A/37/40) at 130 [1982] (29 March 1982) para 15. See also *Barbato v Uruguay Communication* N° 84/1981 HRC CCPR/C/OP/2 at 112 [1990] (21 October 1982) and *Quinteros v Uruguay Communication* N° 107/1981 HRC CCPR/C/OP/2 at 138 [1990] (21 July 1983).

1193 Scharf 1996 *Law and Contemporary Problems* 49.

1194 Scharf 1996 *Law and Contemporary Problems* 49.

prosecuting those who are responsible for serious violations of human rights, such as murder, torture and forced disappearance. In fact, that criminal punishment is the appropriate punishment for such serious violations of human rights can also be implied from the HRC's language in the *Bautista de Arellana v Colombia* case,¹¹⁹⁵ where the Committee held that disciplinary and administrative remedies were not "adequate and effective" in cases of serious violations of human rights, as required by article 2(3) of the ICCPR,¹¹⁹⁶ and urged the Government of Colombia to expedite the criminal proceedings leading to the "prosecution and conviction" of the persons implicated in the crimes in question.¹¹⁹⁷

The HRC reiterated its view that criminal punishment is the only appropriate remedy in cases of serious violations of human rights when it considered the Peruvian Decree Law 26 of 1995 which absolved the members of the military, police and civilian agents of the State who were accused of serious violations of human rights committed during the so-called "war on terrorism" from May 1980 until June 1995 from criminal liability. The HRC held that such amnesty law contributed to "an atmosphere of impunity among perpetrators of human rights violations" and, consequently, was incompatible with the "duty" under article 2 to "ensure that they do not occur in the future".¹¹⁹⁸

The HRC took a similar approach when it considered the Argentinean Act 23, 492 (Full Stop Law) of 12 December 1986,¹¹⁹⁹ which prevented the prosecution of the members

1195 *Bautista de Arellana v Colombia* Communication N° 563/1993 HRC CCPR/C/55/D/563/1993 [1995] (27 October 1995).

1196 Para 8(2).

1197 Para 10.

1198 HRC *Comments on Peru* UN Doc CCPR/C/79/Add67 (25 July 1996) para 9: "The Committee is deeply concerned that the amnesty granted by Decree Law 26,479 on 14 June 1995 absolves from criminal responsibility and, as a consequence, from all forms of accountability, all military, police and civilian agents of the State who are accused, investigated, charged, prosecuted or convicted for common and military crimes for acts occasioned by the "war against terrorism" from May 1980 until June 1995. It also makes it practically impossible for victims of human rights violations to institute successful legal action for compensation. Such an amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations, and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the Covenant. In this connection, the Committee reiterates its view, as expressed in its General Comment 20 (44), that this type of amnesty is incompatible with the duty of States to investigate human rights violations, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future".

1199 *Full Stop Law (Ley de Punto Final)* N° 23.40 of 23 December 1986 (Official Bulletin of 29 December 1986).

of armed forces who had committed gross violations of human rights during the previous military regime. The Committee held that the amnesty law denied victims of human rights violations an “effective remedy” and, therefore, violated article 2 of the ICCPR.¹²⁰⁰

For the purposes of the present study, the legal effect of the above interpretation of the ICCPR is that amnesties for crimes against humanity and war crimes violate the States’ obligation to ensure the right to an effective remedy set forth in the ICCPR. As a consequence, such amnesties cannot be regarded as sovereign acts and cannot bar foreign States from exercising their jurisdictions over the same crimes.

4.4.2.3.3.1.3 The American Convention on Human Rights

The American Convention on Human Rights (ACHR) was adopted in 1986. The ACHR protects substantive human rights, such as life¹²⁰¹ and physical integrity.¹²⁰² The Convention further contains certain procedural rights and responsibilities pertaining to the enforcement of substantive rights in domestic judicial systems. For example, article 1(1) requires States to “ensure” the full exercise by the persons subject to their jurisdictions of the substantive rights guaranteed in the Convention.

The bodies charged with monitoring the implementation and enforcement of the ACHR are the Inter-American Commission on Human Rights (hereafter referred to as the American Commission) and the Inter-American Court of Human Rights (hereafter

1200 HRC *Concluding observations of the Human Rights Committee: Argentina* CCPR/C/79/Add.46 (04 May 1995) para 153: “The Committee is concerned that amnesties and pardons have impeded investigation into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons. The Committee express concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations”. The same view that amnesty violated the member States’ obligation to prosecute gross human rights violations under article 2 of the ICCPR was made by the HRC in reaction to the amnesties in France. The HRC observed as follows: “The Committee is obliged to observe that the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged violations of human rights”. HRC *Concluding Observations of the Human Rights Committee: France* CCPR/C/79/Add.80 (4 August 1997) para 13.

1201 Art 4 ACHR.

1202 Art 5(1) ACHR.

referred to as the American Court).¹²⁰³ Both of them have developed an interesting jurisprudence on amnesties granted after gross human rights violations.

Writing on the duty under article 1(1) of the ACHR to “ensure” the rights set forth in the Convention,¹²⁰⁴ the American Court stated, in the *Valasquez Rodriguez* case,¹²⁰⁵ that this obligation implies:

the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention [...]¹²⁰⁶

Implicit in the above interpretation of article 1(1) of the American Convention is the view that amnesty is incompatible with the member States’ obligation to ensure full exercise of the rights set forth in the Convention.¹²⁰⁷ The same approach was followed by the American Commission in the *Masacre Las Hojas* case¹²⁰⁸ where the Commission held that the granting of amnesty by the El Salvador government:

renders nugatory the obligations imposed by Article 1 (1) of the Convention, and thus constitutes a violation of this article of the Convention. The present amnesty law, as applied in these cases, by foreclosing the possibility of judicial relief in cases of murder, inhumane treatment and absence of judicial guarantees, denies the fundamental nature of the most basic human rights. It eliminates perhaps the single most effective means of enforcing such rights, the trial and punishment of offenders.¹²⁰⁹

Scharf¹²¹⁰ argues that since the American Commission did not specifically refer to criminal prosecution as opposed to other forms of disciplinary action or punishment, one should not to read too much into the *Valasquez Rodriguez* and *Masacre Las Hojas* cases a duty for the member States to prosecute perpetrators of the violations of the

1203 Art 33 ACHR.

1204 Art 1(1) ACHR: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.

1205 *Velásquez Rodríguez case* Inter-American CHR Judgment Case N° 4 [1988] (29 July 1988).

1206 Para166. For a detailed discussion of this case, see Roht-Arriaza 1990 *California Law Review* 472; Cryer *Prosecuting International Crimes* 102 and Burke-White 2001 *Harvard International Law Journal* 520.

1207 Dugard “Possible Conflicts with Truth Commissions” 697.

1208 *Masacre Las Hojas v El Salvador* Inter-American CHR Report N° 26/92 Case N° 10.287 (24 September 1992). The case concerned the assassination of about 74 people by members of the Salvadoran security forces.

1209 Para 19. See also *Mendoza et al v Uruguay* Inter-Am CHR Report N° 29/92 Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (2 October 1993) para 50-51.

1210 Scharf 1996 *Law and Contemporary Problems* 50.

rights set forth in the ACHR.¹²¹¹ This argument is not correct. Without criminal punishment, it is hard to imagine how States can deter the commission of serious crimes such as murder and torture and thereby comply with the obligation to “ensure” the exercise of the right to life set forth in the ACHR. As the American Commission stated in the *Garay Hermosilla et al v Chile* case, which concerned the Chilean amnesty law of 1978 and the resulting failure to prosecute cases of disappearances, summary and extrajudicial executions, and torture, criminal punishment is the only “appropriate punishment” to ensure that such particularly serious violations of human rights are not repeated in the future.¹²¹² In this case, Chile’s new democratic government had awarded some compensatory damages to families of the victims, *inter alia* a pension not less than the average for Chilean families; special attention from the State with regard to health, education, and housing; assistance with debts; and exemption from obligatory military service for sons of victims. The American Commission held that such measures were insufficient if not accompanied by prosecutions and the imposition of an appropriate punishment.¹²¹³

Although the American Commission did not explain what it meant by “appropriate punishment” it seems obvious that no punishment other than criminal punishment would be appropriate for serious violations of human rights, such as torture and extra-judicial executions. In order to ensure deterrence for future offenders,¹²¹⁴ States are required to

1211 See also Acirokop *Accountability for Mass Atrocities* 91: “[g]rant of amnesty does not necessarily mean the absence of accountability, if amnesty is tied to accountability measures such as truth and reparations, documentation of abuses (and identification of perpetrators by name), and employment bans and purges (referred to as ‘lustration’) that keep such perpetrators from positions of public trust”.

1212 *Garay Hermosilla et al v Chile* Inter-Am CHR Report N° 36/96 Case N° 10.843 (15 October 1996) para 77: “The State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing *appropriate punishment* on them [...]” Emphasis added.

1213 For a detailed account of this case, see Cassel 1996 *Law and Contemporary Problems* 215-217.

1214 On the relationship between the duty to prosecute gross human rights violations and deterrence for future violations, see Slye 2003 *Virginia Journal of International Law* 197; Dyke and Berkley 1992 *Denvil Journal of International Law and Policy* 244 and Cassese 1998 *European Journal of International Law* 17. See also Roht-Arriaza 1990 *California Law Review* 452-453: “To avoid the continuing cycle of repression, the only remedy must be the recognition of an affirmative obligation on governments to investigate and prosecute gross state-attributed human rights abuses”. See also at 461: “With no fear of retribution, each new regime can again succumb to the same repressive behaviour. These problems can only be remedied by placing an affirmative obligation on the state to investigate and prosecute past rights violators”. See further Kritz 1996 *Law and Contemporary Problems* 129: “Although a variety of factors may ultimately require limiting prosecution to senior key individuals or certain categories of perpetrators, total impunity, in the form of comprehensive amnesties or the absence of any accountability for past atrocities,

impose not “some form of punishment” as suggested by Scharf,¹²¹⁵ but an “appropriate punishment”,¹²¹⁶ which, given the serious nature of the human rights violations that constitute crimes against humanity and war crimes, cannot be something less than criminal punishment.¹²¹⁷ Amnesties that preclude the possibility of imposing such punishment are thus contrary to the member States’ obligations under the American Convention.

4.4.2.3.3.1.4 The African Charter on Human and Peoples’ Rights

Another human rights instrument from which a duty for States to prosecute perpetrators of crimes against humanity and war crimes is the African Charter on Human and Peoples’ Rights (hereafter referred to as the African Charter),¹²¹⁸ which guarantees to every individual “the right to an appeal to competent national organs against acts violating fundamental rights as recognised and guaranteed by conventions, law regulations and customs in force”.¹²¹⁹

The Charter established the African Commission on Human and Peoples’ Rights (the African Commission) as the organ responsible for monitoring and enforcing the Charter’s obligations by member States. The Commission has in recent years handled several communications relating to national amnesties for human rights violations. In these communications the Commission held that such amnesties deprive the victims of their right to “appeal to competent national organ”, under article 7(1)(a) and that, accordingly, those amnesties are contrary to States’ obligations under the African Charter.¹²²⁰

is immoral, injurious to victims, and in violation of international legal norms. It can be expected not only to encourage new rounds of mass abuses in the country in question but also to embolden the instigators of crimes against humanity elsewhere. In short, criminal prosecution in some form must remain a threat and a reality”.

1215 Scharf 1996 *Law and Contemporary Problems* 52.

1216 Orentlicher 1991 *Yale Law Journal* 2600-2601. See also Cassel 1996 *Law and Contemporary Problems* 210.

1217 Cassel 1996 *Law and Contemporary Problems* 217: “It is now clear that nothing less than judicial investigations designed to identify perpetrators, name names, and punish the guilty will suffice”.

1218 OAU *African Charter on Human and Peoples’ Rights* (1981). This Charter will be referred to hereafter as the African Charter.

1219 Art 7(1)(a) of the African Charter.

1220 *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d’Ivoire* ACHPR Case N° 246/02 (29 July 2008) para 96: “Adopting laws that would grant immunity from prosecution of human rights

The African Commission also found that by granting amnesties, States do not only prevent the victims from seeking redress, but also encourage impunity and thus violate obligations in violation of articles 1 and 7(1) of the African Charter which requires member States to:

recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.¹²²¹

The African Commission took the same approach in relation to the Clemency Order No. 1 of 2000 which granted general amnesty for all political crimes, including torture and kidnappings committed by the supporters of President Mugabe and the State security forces against the members of the opposition parties.¹²²² The African Commission held that by enacting Decree 1 of 2000 and the concomitant failure to “ensure that perpetrators of the alleged atrocities were punished:”

the respondent state did not only prevent the victims from seeking redress, but also encouraged impunity, and thus reneged on its obligation in violation of articles 1 and 7 (1) of the African Charter.¹²²³

In light of the above holdings of the African Commission, it must concluded that member States to the African Charter have an obligation to prosecute perpetrators of violations of human rights, which include crimes against humanity and war crimes, and that the granting of amnesties for such violations is a violation of States’ treaty obligations under the Charter.¹²²⁴

This conclusion also applies to States that are party to any of the treaties discussed above from which a duty to prosecute gross human rights violations exists. Amnesty for

violators and prevent victims from seeking compensation render the victims helpless and deprives them of justice”.

1221 *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d’Ivoire* ACHPR Case N° 246/02 (29 July 2008) para 97.

1222 *Zimbabwe Human Rights NGO Forum v Zimbabwe* ACHPR Case N° 245/02 (15 May 2006).

1223 ACHPR Case N° 245/02 (15 May 2006) para 215.

1224 See also *Malawi African Association and Others v Mauritania* Nos 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (11 May 2000) para 83: “The Commission recalls that its role consists precisely in pronouncing on allegations of violations of the human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter”.

human rights violations is contrary to those States' obligations under those treaties,¹²²⁵ and, accordingly, their acts of granting amnesties cannot be regarded as "sovereign acts" under international law.

It is important to note, however, that, with the exception of the UN Charter to which virtually all States are party (except Palestine and Vatican), not all countries are parties to one or more of the human rights instruments described above.¹²²⁶ Accordingly, the obligation to prosecute human rights violations would not apply to them all, unless such obligation can be found to exist as a customary law norm. This is discussed below.

4.4.2.3.3.2 A customary duty to prosecute crimes against humanity and war crimes other than the "grave breaches"

The existence of a customary duty to prosecute crimes against humanity and war crimes other than the grave breaches of the Geneva Conventions has been the subject of heated debate in legal literature. On the one hand, there are those who take the view that customary international law imposes upon States a duty to prosecute crimes against humanity and war crimes irrespective of the type of armed conflict they were committed in.¹²²⁷

On the other hand, some commentators argue that there is no sufficient state practice and *opinio juris* to such an obligation under customary law.¹²²⁸ In particular, those who dispute the existence of a State's duty to prosecute perpetrators of war crimes committed during non international armed conflict argue that instead of requiring States to prosecute, the Geneva Conventions encourage States to grant amnesty to the

1225 Roht-Arriaza 1990 *California Law Review* 483 and 485. See also UN ESC "Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights" 17.

1226 For example, South Sudan has not yet acceded to the African Charter (African Commission on Human and Peoples' Rights Date Unknown <http://www.achpr.org/instruments/achpr/ratification/>), while the United States and Canada (and some other Latin American States) have not yet ratified or acceded to the American Convention (Organisation of American States 2012 http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

1227 Cryer *Prosecuting International Crimes* 106; Simma and Paulus 1999 *American Journal of International Law* 313 and Rakate *The Duty to Prosecute and the Status of Amnesties* 185-191 and Salmón 2006 *International Review of the Red Cross* 337.

1228 See Scharf 1996 *Law and Contemporary Problems* 57; Newman 2005 *American University International Law Review* 311; Stigen *The Principle of Complementarity* 417; Trumbull 2007 *Berkeley Journal of International Law* 291 and Cassese *International Criminal Law* 1st ed 315. See also Dugard "Possible Conflicts with Truth Commissions" 696: "Although international law is clearly evolving in the direction of a general duty to prosecute international crimes, it cannot be said that this stage has yet been reached".

perpetrators of war crimes committed in civil wars.¹²²⁹ Their argument is based on the provision of article 6(5) of Protocol II which provides that at the end of hostilities:

the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Based on the above provision, for example, the *Constitutional Court* of South Africa held in the *AZAPO* case that:

there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights. [...] The need for this distinction is obvious. It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction.¹²³⁰

It is submitted that the Constitutional Court's interpretation of article 6(5) was not correct. The *travaux préparatoires* of the Protocol indicate that the provision of article 6(5) was never intended to mean that national authorities should grant amnesties to persons who had committed war crimes. Rather, the amnesty was envisaged for persons whose only crime was to have participated in the conflict. In other words, the act of taking up arms should preferably not itself be punished in order to facilitate reintegration and national reconstruction.¹²³¹ This interpretation is confirmed by the International Committee of the Red Cross (ICRC), the agency under whose auspices the Geneva Conventions were negotiated.¹²³² The Legal Division of the ICRC has explained article 6(5) of Additional Protocol as follows:¹²³³

[A]rticle 6(5) of Protocol II is the only and very limited equivalent in the law of non-international armed conflict of what is known in the law of international armed conflict as "combatant immunity", i.e., the fact that a combatant may not be punished for acts of hostility, including

1229 See for example, Jurdi *The International Criminal Court* 77.

1230 *AZAPO v President of the Republic of South Africa* 1996 4 SA 689-690 (CC).

1231 Asser Institute Date Unknown
http://www.asser.nl/default.aspx?site_id=9&level1=13336&level2=13374&level3=13463 See
also Naqvi 2003 *International Review of the Red Cross* 605.

1232 ICRC *Customary International Humanitarian Law* 612.

1233 Roht-Arriaza 1996 *Law and Contemporary Problems* 97, citing a letter dated 15 April 1997 from Dr Toni Pfanner, Head of the Legal Division, ICRC Headquarters, to the author.

killing enemy combatants, as long as he respects international humanitarian law, and that he has to be repatriated at the end of active hostilities. In non-international armed conflict, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought, even if they respect international humanitarian law. The “travaux préparatoires” of article 6(5) indicate that this provision aims at encouraging amnesty i.e., a sort of release at the end of hostilities. It does not aim at amnesty for those who violate international humanitarian law.

This interpretation has further been affirmed by the Inter-American Commission of Human Rights,¹²³⁴ the UN Human Rights Committee.¹²³⁵ Properly understood, therefore, the amnesties encouraged under article 6(5) of Protocol II of the Geneva Conventions are amnesties for the mere fact of having participated in hostilities, but not war crimes.¹²³⁶

Nevertheless, while neither common article 3 of the Geneva Conventions nor Protocol II authorise the granting of amnesties, there is no indication whatsoever that they prohibit States from doing so. Without a specific provision creating such a duty, recourse must be had to customary law. Yet, some commentators argue that an obligation for States to prosecute war crimes committed during non international armed conflicts is not yet established in international law because there is no sufficient state practice and *opinio juris*.¹²³⁷

The same has been said of crimes against humanity. Without evidence of extensive state practice as well as *opinio juris*, it has been argued, a duty to prosecute perpetrators of crimes against humanity cannot be said to exist under customary international law. In fact, Scharf¹²³⁸ argues that if there is any extensive state practice in this area, it is the practice of granting amnesties to the perpetrators of crimes against humanity.¹²³⁹ In view of this practice, Newman¹²⁴⁰ concludes, the claim that there is a

1234 *Lucio Parada Cea and others vs El Salvador* Inter-American CHR Report N° 1/99 Case 10.480 (27 January 1999) para 115.

1235 HRC *Concluding observations of the Human Rights Committee: Lebanon* CCPR/C/79/Add.78 (04 Jan 1997) para 12. See also Cassel 1996 *Law and Contemporary Problems* 219.

1236 Slye 2003 *Virginia Journal of International Law* 177: “Such amnesties are not meant to apply to human rights violations; in fact, they are designed and intended to further, rather than thwart, human rights principles”.

1237 Edelenbos 1994 *Leiden Journal of International Law* 20. See also Scharf 1999 *Cornell International Law Journal* 526.

1238 Scharf 1996 *Law and Contemporary Problems* 57. See also Newman 2005 *American University International Law Review* 313: “Any conclusion that a generalized duty to prosecute exists would thus fly in the face of current state practice”.

1239 See also Jackson 2007 *Tulane Journal of International Law and Comparative Law* 125: “there is pervasive state practice granting amnesties in times of transition, as well as widespread acceptance by other states and multilateral institutions of this practice”.

customary norm prohibiting of amnesties for perpetrators of crimes against humanity “must be inventive”.¹²⁴¹

Instances of such practice of granting amnesties, instead of prosecutions, include the amnesty that was granted as soon as the term “crimes against humanity” had been first coined with respect to the massacres of Armenians during WWI, an amnesty which was also agreed upon by the Allied Powers.¹²⁴² Scharf¹²⁴³ then concludes that despite the strong policy and jurisprudential arguments warranting such a rule:

the practice of states does not yet support the present existence of an obligation under customary international law to refrain from conferring amnesty for such crimes.¹²⁴⁴

In the light of the above arguments, one may be tempted to accept the conclusion that an obligation to prosecute perpetrators of crimes against humanity and war crimes committed during internal armed conflicts does not exist in customary international law. To this conclusion, however, it can be objected that although state practice in terms of actual prosecutions may not provide sufficient evidence of the required practice for the obligation in question to exist under customary law, there are General Assembly resolutions that may support the existence of that obligation. In 1971, the General Assembly passed a resolution that clearly referred to a duty for States to punish crimes against humanity. This resolution “affirms” that:

1240 Newman 2005 *American University International Law Review* 311: “Any claim that there is a customary legal prohibition of amnesties must be inventive if it is to maintain that there is the necessary state practice and *opinio juris*, as current state practice obviously includes the granting of amnesties”. See also Stigen *The Principle of Complementarity* 417: “[m]ore often than not international crimes have been left unpunished. In fact, it was this failure of states to investigate and prosecute that prompted the establishment of the ICC. Not only have suppressive governments failed to punish crimes in which they themselves were involved; most of the peaceful transitions from oppressive regimes to democracies over the last decades have involved some form of legal or *de facto* amnesty, granted or accepted by democratic governments”. See further Cassese *International Criminal Law* 1st ed 315: “There is not yet any general obligation for States to refrain from amnesty laws on these crimes”. See also Trumbull 2007 *Berkeley Journal of International Law* 291.

1241 See also Scharf 1996 *Law and Contemporary Problems* 59: “Notwithstanding an array of General Assembly resolutions calling for the prosecution of crimes against humanity and the strong policy and jurisprudential arguments warranting such a rule, the practice of states does not yet support the present existence of an obligation under customary international law to refrain from conferring amnesty for such crimes”.

1242 Scharf 1996 *Law and Contemporary Problems* 57.

1243 Scharf 1996 *Law and Contemporary Problems* 57.

1244 See also Mitchell 2009 *Aut Dedere, aut Judicare* 22: “as desirable as it may seem to find a general obligation to extradite or prosecute for international crimes based on an idealistic notion of the good of the international community as a whole, it is necessary to look at State practice and *opinio juris* to determine whether this obligation exists beyond those treaty obligations willingly accepted by States”.

the refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.¹²⁴⁵

The above resolution was reinforced in 1973 when the General Assembly passed a resolution on Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, in which it was stated that:

[W]ar crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.¹²⁴⁶

Given the fact that the UN General Assembly is the forum through which States express their views regarding what they deem to be appropriate actions by the States in the conduct of their external relations and in the way they treat their citizens, the above resolutions should be sufficient State practice as well as an expression of *opinio juris* to constitute a customary duty prosecute (or extradite) perpetrators of war crimes and crimes against humanity.¹²⁴⁷

One commentator has argued that it would be incorrect to conclude from the above “non-binding” General Assembly resolutions that States are in fact under a customary law obligation to prosecute perpetrators of gross human rights violations because, for a customary rule to be created, deeds are what count, not words.¹²⁴⁸ To this argument, it can be objected that the state practice required for the formation of customary law is not limited to internal state practices. States’ practice can also be sought from their declarations and resolutions through the medium of international organizations such as the UN. In voting a resolution which affirms a “duty”, a State not only creates a practice, but also expresses its view as to *opinio juris*.¹²⁴⁹ In other words, although UN General Assembly’s resolutions are not binding, they nevertheless constitute official expressions

1245 UN GA Resolution 2840(XXVI) of 8 December 1971 para 4. See also para 1: “*Urges* all states to implement the relevant resolutions of the General Assembly and to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes”.

1246 UN GA Resolution 3074(XXVIII) of 3 December 1973 principle 1.

1247 Cryer *Prosecuting International Crimes* 106.

1248 Scharf 1996 *Law and Contemporary Problems* 56. See also Scharf 1999 *Cornell International Law Journal* 520.

1249 Mitchell 2009 *Aut Dedere, aut Judicare* 42. See also Roht-Arriaza 1990 *California Law Review* 492: “States’ [...] resolutions and declarations are practices which may evince a customary international law obligation to investigate and prosecute”.

of the different States represented on what they see as appropriate and what they see as condemnable. Consequently, such resolutions may carry some weight in determinations of the rules of international law.¹²⁵⁰

Thus, the fact that some States, by granting amnesty,¹²⁵¹ may have acted in a way that is inconsistent with the rule proclaimed in the 1971 and 1973 General Assembly's resolutions ought to be regarded as breaches of the rule, not as indications of a different rule.¹²⁵² States may violate international law, just as individuals violate municipal law; but that does not mean that the law does not exist.¹²⁵³

Another state practice that supports the existence of the obligation to prosecute perpetrators of crimes against humanity and war crimes is the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights in which the 171 States represented stated that:

[S]tates should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.¹²⁵⁴

Given the big number of States that adopted the above Declaration, it seems that the existence of a customary duty to prosecute perpetrators of crimes against humanity and war crimes (irrespective of the type of conflict where they were committed) is sufficiently established. State practice consists not only of what States do, but also of what they say.¹²⁵⁵

Finally, a customary duty to prosecute crimes against humanity and war crimes may be inferred from the multilateral human rights treaties which, as discussed earlier in this chapter,¹²⁵⁶ contain a general obligation for States to prosecute perpetrators of gross human rights violations. As argued, such a duty exists under the UN Charter, the ICCPR, the Inter-American Convention and the African Charter. Since these treaties are

1250 Enache-Brown and Fried 1998 *McGill Law Journal* 619.

1251 For example South Africa in 1994 and Uganda in 2000.

1252 Roht-Arriaza 1990 *California Law Review* 496. See also *Nicaragua v United States of America Case Concerning Military and Paramilitary Activities in and Against Nicaragua* Judgement 1986 ICJ 14 (27 June 1986) para 186.

1253 *Filartiga v Pena-Irala* 630 F 2d 876 2nd Cir (30 June 1980) 11. Accessed at <http://hrp.law.harvard.edu/wp-content/uploads/2011/04/filartiga-v-pena-irala.pdf> [1 April 2012].

1254 UN "World Conference on Human Rights" para 60.

1255 Baxter 1968 *British Year Book of International Law* 300.

1256 See 4.4.2.3.3.1 above.

widely ratified, a strong case exists to support the argument that the obligation concerned here has attained the status of a customary law duty. The inclusion of an express duty to prosecute international crimes, including crimes against humanity and war crimes (other than the grave breaches), in the preamble to the Rome Statute,¹²⁵⁷ and the fact that the majority of States,¹²⁵⁸ have signed the Rome Statute is sufficient state practice to make the duty proclaimed therein a rule of customary international law.¹²⁵⁹ As the ICJ remarked in the *North Sea Continental Shelf Cases*, very widespread and representative participation in a convention may suffice to establish a rule of customary international law.¹²⁶⁰ State practice consists not only of what States do, but also of what they say.¹²⁶¹ The requirement of *opinio juris* is equally satisfied: by signing the Rome Statute, which contains a duty to prosecute crimes against humanity and war crimes, States accepted the duty in question.¹²⁶² It thus appears that even if it

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- 1257 Para 6 Preamble to the Rome Statute: “Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.
- 1258 As of 22 March 2014, the total number of States Parties is 122. ICC Date Unknown The States Parties to the Rome Statute http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx
- 1259 Simma and Paulus 1999 *American Journal of International Law* 313 and Rakate *The Duty to Prosecute and the Status of Amnesties* 185-191. See also Salmón 2006 *International Review of the Red Cross* 337: “Customary international law, together with Article 8(2)(c) and (e) of the Rome Statute of the International Criminal Court, confirms that there is individual criminal responsibility for war crimes committed in non-international armed conflicts, implying a duty to prosecute those offenders”. See also Asser Institute Date Unknown http://www.asser.nl/default.aspx?site_id=9&level1=13336&level2=13374&level3=13463
- 1260 *Federal Republic of Germany v Denmark and The Netherlands North Sea Continental Shelf Cases* Judgment 1969 ICJ 3 (20 February 1969) para 73: “With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected”.
- 1261 Baxter 1966 *British Year Book of International Law* 300: “Reliance on a multilateral treaty as evidence of customary international law is not conditional on any demonstration that the signatory States have actually observed the norms of the treaty for any length of time. The process of establishing the state of customary international law is one of demonstrating what States consider to be the measure of their obligations. The actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts”.
- 1262 Enache-Brown and Fried 1998 *McGill Law Journal* 629: “The state, through the act of signing related international agreements, articulates the belief that *aut dedere aut judicare* is an accepted norm and that it is the most effective way of preventing certain forms of conduct. This belief satisfies the requirement of *opinio juris* when establishing customary norms”. See also Simma and Paulus 1999 *American Journal of International Law* 310.

were to be accepted that the duty under discussion did not exist in the period before the adoption of the Rome Statute, such a duty is now clearly established.¹²⁶³

From the aforesaid, it is concluded that a State that would grant amnesty for crimes against humanity and war crimes would contravene its obligation to prosecute under customary international law, and that, as a consequence, amnesty for such crimes cannot be regarded as a legitimate exercise of a state's sovereignty.

The above conclusion is further reinforced by the view that the crimes under consideration are part of the so-called peremptory, non-derogable, or *jus cogens* norms of international law. This argument is discussed below.

4.4.2.3.3.3 The *jus cogens* argument

A number of scholars have taken the view that international crimes are, by their very nature, part of the *jus cogens* norms of international law,¹²⁶⁴ and that such *jus cogens* character of international crimes gives rise to an obligation *erga omnes* on States to either prosecute or extradite any alleged offenders present on their territory.

Bassiouni¹²⁶⁵ says:

[C]rimes against humanity, genocide, war crimes (under conventional and customary regulation of armed conflicts), and torture are international crimes that have risen to the level of *jus cogens*. As a consequence, the following duties arise: the obligation to prosecute or extradite; to provide legal assistance; to eliminate statutes of limitations; to eliminate immunities of superiors up to and including heads of states. Under international law, these obligations are to be considered as *obligatio ergo omnes*, the consequence of which is that impunity cannot be granted. The crimes establish inderogable protections and the mandatory duty to prosecute or to extradite accused perpetrators, and to punish those found guilty, irrespective of locus since universal jurisdiction presumably applies.

1263 See also Wouters "The Obligation to Prosecute" 3: "the Rome Statute's consensual nature has not prevented it from contributing to the formation of new customary international law or the crystallisation and refinement of previously existing customary norms". See also Jackson 2007 *Tulane Journal of International Law and Comparative Law* 132: "Combined with the preamble's introduction, article 6 reads: "State Parties to this Statute ... [recall] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". This is the formulation onto which those 104 states have signed. In terms of evidence of an emerging customary law, this is powerful evidence of broad state support".

1264 See Bassiouni 1996 *Law and Contemporary Problems* 68; Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law* 614; Enache-Brown and Fried 1998 *McGill Law Journal* 616; Motala 1995 *Comparative and International Law Journal of Southern Africa* 353,357 and Stigen *The Principle of Complementarity* 211: "[t]he ICC crimes arguably all enjoy *jus cogens* status under international law, and no state can declare them lawful or otherwise tolerate their commission".

1265 Bassiouni "The Need for International Accountability" 10.

According to the above argument, the duty to prosecute (or extradite) is also itself part of *jus cogens*, because it is a necessary condition of the underlying *jus cogens* norm, i.e., the prohibition of serious violations that are defined as international crimes. In other words, the only way the prohibition of international crimes can have any concrete meaning as a *jus cogens* norm is if this norm is supported by a corresponding *jus cogens* duty to prosecute (or extradite).¹²⁶⁶ As the Trial Chamber of the ICTY stated in relation to the crime of torture:

It would be senseless to argue, on the one hand, that an account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law.¹²⁶⁷

According to the ICTY, the granting of amnesty for the crime of torture would violate international and, as such, cannot be accorded international legal recognition.¹²⁶⁸ If this argument is extended to all international crimes, the granting of amnesties in cases of crimes against humanity and war crimes (including those that are not characterised as grave breaches) would be a violation of international law and could not be regarded as a legitimate exercise by States of their sovereignty.¹²⁶⁹

Naqvi¹²⁷⁰ argues, however, that although it may be accepted that some crimes such as genocide and torture are part of the peremptory norms of international law, it is difficult to accept that all international crimes are part of such norms. Put differently, there is no evidence that States have accepted that all war crimes and all crimes against humanity have attained the *jus cogens* status in international law. According to Mitchell,¹²⁷¹ for a norm to attain the status of a *jus cogens* rule, the norm first needs to be universally accepted as a customary rule before it can be claimed that such a norm has attained

1266 Steven 1999 *Virginia Journal of International Law* 450: “[T]he *aut dedere aut judicare* principle, at least with respect to genocide, must be a *jus cogens* norm because of the very nature of the universal prohibition of genocide. As a *jus cogens* norm, the prohibition of genocide gives rise to an obligation *erga omnes* – an obligation owed to the international community as a whole. This means that not only do all states have an obligation to refrain from committing genocide, they also have a legal interest, *vis-à-vis* other states, in the prohibition itself. And an interest in a prohibition means that states have the *right and duty* to both prevent and punish the violators of the prohibition”. See also Naqvi 2003 *International Review of the Red Cross* 613.

1267 *Prosecutor v Furundžija* ICTY Case N° IT-95-17/1-T (10 December 1998) para 155.

1268 Para 155.

1269 Dugard 1999 *Leiden Journal of International Law* 1003 and Rakate *The Duty to Prosecute and the Status of Amnesties* 205-206. See also Bassiouni 1996 *Law and Contemporary Problems* 66: “[A]bove all, the characterization of certain crimes as *jus cogens* places upon states the *obligation erga omnes* not to grant impunity to the violators of such crimes”.

1270 Naqvi 2003 *International Review of the Red Cross* 611-612.

1271 Mitchell 2009 *Aut Dedere, aut Judicare* 64.

the status of a *jus cogens* norm. He argues that the requirement of State practice is intrinsic to the very definition of the *jus cogens* concept which is defined in article 53 of the Vienna Convention as:

a peremptory norm of general international law is a norm *accepted* and *recognized* by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Without evidence of state practice, Mitchell¹²⁷² argues, it cannot be said that States have “accepted” and “recognised” any peremptory duty to prosecute perpetrators of international crimes. Mitchell’s argument seems to be well-reasoned. Without evidence of state practice, it is difficult to support a claim that those very States have accepted a certain rule as a peremptory norm of international law.¹²⁷³ In the context of crimes against humanity and war crimes, however, Mitchell’s argument, which may have been convincing in 1996 when he wrote his article, becomes less convincing in the light of the development that occurred after 1996: the adoption of the Rome Statute in 1998 which was signed by 139 States¹²⁷⁴ and includes an explicit obligation for States to prosecute perpetrators of crimes against humanity and war crimes committed in non-international armed conflicts. The recognition of the duty in question by such a big number of States suggests that this duty has now attained the status of a peremptory norm of international law.

Accordingly, amnesties in respect of crimes against humanity and war crimes must be seen as contrary to States’ obligations under international law and may not be considered as “sovereign acts”. Consequently, it is concluded that, under international

1272 Mitchell 2009 *Aut Dedere, aut Judicare* 64: “Article 53 of the Vienna Convention on the Law of Treaties defines a peremptory norm as one ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’ Thus, it is clear that the norm first needs to be universally accepted as a customary rule before the overwhelming majority of States accept its peremptory character. Given that the lack of State practice and *opinio juris* means that there is no customary obligation to extradite or prosecute, it is impossible therefore to argue that the obligation has *jus cogens* status”.

1273 In support of the view that *jus cogens* norms of international law are dependent upon such rules being first established in customary law see Bassiouni who says that a *jus cogens* norm rises to that level when: “the principle it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio juris*, by most states”. For example, Bassiouni says, the principle of territorial sovereignty has risen to the level of a “peremptory norm” because all states have consented to the right of states to exercise exclusive territorial jurisdiction. Bassiouni 1996 *Law and Contemporary Problems* 73.

1274 Coalition for the International Criminal Court Date Unknown
<http://www.iccnw.org/?mod=romesignatures>

law, such amnesties cannot bar South African courts from exercising their universal jurisdiction over the international crimes defined in the Implementation Act.

In the next section, it will be shown that the principle of universal jurisdiction also implies a limitation on amnesty laws in case of international crimes in that an individual granted an amnesty by one State may still be prosecuted by another which has universal jurisdiction over the same crime.

4.5 The principle of universal jurisdiction entitles States to trump foreign amnesties

A second legal basis on which South African courts can rely to disregard foreign amnesty laws in case of international crimes is that since international crimes are crimes of international concern, and that the interest to suppress them extends beyond the State directly involved,¹²⁷⁵ a national amnesty law should not prevent other jurisdictions, foreign or international, from dispensing justice in the event that the alleged offender leaves the territory of the State where he benefits from amnesty.¹²⁷⁶

In other words, implicit in the principle of universal jurisdiction is the principle that a State cannot deprive another State of its jurisdiction to prosecute and punish the offender by granting amnesty.¹²⁷⁷ As the SCSL once said:

a state has no right to bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.¹²⁷⁸

Indeed, if a State would purport to promulgate an amnesty law with extra-territorial effect, this would rather constitute an infringement of the sovereign jurisdiction of the

1275 Enache-Brown and Fried 1998 *McGill Law Journal* 621 and Randall 1988 *Texas Law Review* 815.

1276 O'Shea *Amnesty* 307; Pensky 2008 *Ethics and Global Politics* 14; Dugard "Possible Conflicts with Truth Commissions" 699 and Lamprecht *International Law in the Post-1994 South African Constitutions* 339.

1277 Stigen *The Principle of Complementarity* 419; Lee 1999 *Virginia Journal of International Law* 439-440; Meintjes and Mindez 2000 *International Law Forum du Droit International* 85 and Robinson 2003 *European Journal of International Law* 503-504;

1278 *The Prosecutor v Kallon and Kamara* Decision on Challenge to Jurisdiction: Lomé Accord Amnesty Case Nos SCSL-2004-15-AR72(E); SCSL-2004-16-AR72(E) (13 March 2004) para 67. See also para 88: "[...] whatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes".

foreign States which have an interest in prosecuting the amnestied offenders.¹²⁷⁹ This argument was relied on by the French *Cour de Cassation* in the 2002 case of *Ely Ould Dah*.¹²⁸⁰ The case concerned allegations of torture committed in a Mauritanian prison back in 1990 and 1991 by Captain Ould Dah against a number of black Mauritians who were suspected of conspiracy to overthrow the Arab-dominated government. Before the court, Mr Ould Dah argued that the action was not admissible in French courts because his actions had been the subject of an amnesty law in 1993 in his home State, where the alleged crimes had taken place. The French *Cour de Cassation*, in October 2002, rejected this argument, holding that:

the exercise of universal jurisdiction by a French court entails the application of French law, even in the instances of a foreign amnesty law.¹²⁸¹

Another case that may be cited in support of the argument that an amnesty law passed by one State does not affect the right of other States to exercise their jurisdiction over an international crime, is the 1998 case of Pinochet in England. When General Pinochet was arrested in England in 1998 pursuant to an arrest warrant issued by a Spanish judge, neither Pinochet's lawyers nor the Government of Chile invoked the Chilean amnesty law before the English courts; which may be regarded as suggesting that they believed the Chilean amnesty could have no effect in Spain or England.¹²⁸²

In view of the foregoing considerations, it is concluded that in accordance with the principle of universal jurisdiction, foreign amnesty laws do not bar South African courts from trying the perpetrators of international crimes who may have been the subject of amnesty laws in foreign States. This conclusion is also consistent with the current trend of international law which is moving away from a system where the sovereignty of

1279 O'Shea *Amnesty* 308.

1280 *Ely Ould Dah case* Cour de Cassation *Bulletin Criminel* n° 195 (23 October 2002). Accessible at <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007070167&dateTexte> [10 April 2014].

1281 *Bulletin criminel* n° 195 725. Translation by Rakate *The Duty to Prosecute and the Status of Amnesties* 163. The original paragraph reads as follows: "Qu'en effet, l'exercice par une juridiction française de la compétence universelle emporte la compétence de la loi française, même en présence d'une loi étrangère portant amnistie".

1282 Stigen *The Principle of Complementarity* 424; O'Shea *Amnesty* 312; Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law* 627 and Dugard "Possible Conflicts with Truth Commissions" 699.

individual States is the dominant element to one where the common good of the international community as a whole is more central.¹²⁸³

As stated earlier,¹²⁸⁴ however, some of the reasons that can push a State to grant amnesties may be so compelling that the State has no other viable option than granting amnesty. It was said that rebel groups or entrenched oppressive regimes may be reluctant to cease hostilities or relinquish power if they know that they will face prosecution thereafter.¹²⁸⁵

During such politically sensitive times, the international community's interest in bringing the perpetrators of serious violations of human rights to book should be reconciled with the equally compelling needs of the territorial State which is trying to move on from the past towards peace, democracy and stability.¹²⁸⁶ Despite the strong message that South African courts would send to the rest of the continent and throughout the world that perpetrators of international crimes would no longer escape accountability, respecting a national amnesty might, under the circumstances, best serve the interests of the affected populations.¹²⁸⁷ The socio-political situation that is prevailing in the State that grants amnesty for gross human rights violations thus cannot always be ignored. If pursuing justice in international or foreign courts may cause more bloodshed and suffering in the affected State, the quest for justice may yield to the quest for peace.

In fact, during the drafting of the Rome Statute, some States, South Africa being the pioneer, proposed that the issue of amnesty should be expressly provided for, indicating when the ICC should defer to national amnesties that met certain criteria.¹²⁸⁸ They were concerned that national amnesty processes which were necessary to bring about peace in the country or to move from an oppressive regime to democratic rule would be impeded by the prospect of an ICC prosecution.¹²⁸⁹ In the light of the South African experience, a general consensus appeared to exist that an amnesty process covering

1283 Mitchell 2009 *Aut Dedere, aut Judicare* 21.

1284 See 4.2 above.

1285 See also Trumbull 2007 *Berkeley Journal of International Law* 285. See also Reisman 1996 *Law and Contemporary Problems* 75: "If the elite and substantial parts of the rank-and-file of one side anticipate that a consequence of a peace agreement will be their prosecution for acts undertaken in the course of the conflict, they hardly will be disposed to lay down their arms".

1286 Naqvi 2003 *International Review of the Red Cross* 586. See also Stigen *The Principle of Complementarity* 463-464 and Trumbull 2007 *Berkeley Journal of International Law* 314.

1287 See also Stigen *The Principle of Complementarity* 463-464.

1288 Schabas *An Introduction* 43 and Stigen *The Principle of Complementarity* 424.

1289 Stigen *The Principle of Complementarity* 424.

international crimes might not be disturbed in exceptional circumstances.¹²⁹⁰ Nevertheless, delegates were unable to reach consensus on the exact scope of such exceptions and, in the end, no express provision on national amnesties was adopted into the Rome Statute.¹²⁹¹

However, although no express provision for amnesty was made in the Rome Statute, the fact that provision was made in the Statute that the Security Council may determine that intervention by the ICC may jeopardize peace and security,¹²⁹² indicates that States Parties contemplated the possibility that in fact criminal justice may imperil peace and security. Furthermore, under article 53 of the Rome Statute, the ICC Prosecutor has discretion not to initiate an investigation or prosecution if, having regard to the interests of victims, he determines that an investigation would not serve the interests of justice. This gives the ICC Prosecutor a measure of prosecutorial discretion which allows him to take cognizance of the prevailing political situation in a particular State and to exercise that discretion in favour of differing to an amnesty process of a particular State.¹²⁹³

It must be emphasised, however, that the above provisions of the Rome Statute that allow the Security Council and the ICC Prosecutor to defer in favour of national amnesties are delaying mechanisms only, not means to achieve a permanent recognition of domestic amnesties in international law. What these articles say is that if a choice has to be made between peace and criminal justice, peace may be given

1290 Stigen *The Principle of Complementarity* 424.

1291 Dugard "Possible Conflicts with Truth Commissions" 700.

1292 Art 16 (titled "Deferral of investigation or prosecution"): "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions". See also Stigen *The Principle of Complementarity* 427 and Robinson 2003 *European Journal of International Law* 503. See also Naqvi 2003 *International Review of the Red Cross* 592: "This provision signals that peace and justice do not always coincide and that where they appear to be in conflict, the objective of securing or maintaining peace will prevail".

1293 Dugard "Possible Conflicts with Truth Commissions" 702. See also O'Shea *Amnesty* 317: "A flexible understanding of justice, as employed in article 53 of the Rome Statute, might afford the Prosecutor a broad political decision-making power. This might include the ability to refrain from prosecuting where it would not in his or her view be in the overall interests of the international community or the collective needs of a state". See also Lubbe *Successive and Additional Measures* 32: "Despite the fact that it is silent on amnesty in that it does not recognise amnesty as a defence against prosecution, the provisions that were adopted at the Rome Conference have been held to reflect "creative ambiguity" which could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the ICC". See further Robinson 2003 *European Journal of International Law* 483 and Rakate *The Duty to Prosecute and the Status of Amnesties* 120.

priority.¹²⁹⁴ That does not make amnesties for international crimes lawful. It simply means that impunity can be temporarily tolerated where the quest for justice would prolong the agony of the populations in the affected State.¹²⁹⁵ But that is only a temporal measure, once the internal situation has improved, the ICC Prosecutor can proceed with investigation and prosecution.¹²⁹⁶

In fact, the recent practice by the Security Council suggests that the Security Council will be more inclined to find that investigations and prosecutions of international crimes are prerequisites for the maintenance and restoration of peace rather than as threats to it.¹²⁹⁷ A manifestation of this is the Security Council's establishment of the ICTY and the ICTR in the wake of human rights violations in the Former Yugoslavia and Rwanda, as well as its recent referral of the Darfur situation to the ICC Prosecutor.¹²⁹⁸ Another example of a situation where the Security Council opposed amnesty for international crimes is when it rejected the amnesty clause in the Lomé Agreement between the Revolutionary United Front (RUF) leader Foday Sankoy and the government of Sierra Leone. The Security Council stated that the amnesty:

shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.¹²⁹⁹

All the same, the fact that provision was made in the Rome Statute that the Security Council may request the ICC not to commence an investigation or prosecution, or to defer any proceedings already in progress, signals that States recognise that a situation

1294 O'Shea *Amnesty* 83.

1295 In particular, although article 53 allows the ICC Prosecutor to take cognisance of a national amnesty process (Rakate *The Duty to Prosecute and the Status of Amnesties* 120 and Gavron 2002 *International and Comparative Law Quarterly* 110), it must be kept in mind that this article only creates discretionary power that the Prosecutor may exercise at will. It does not create any right for the state that granted the amnesty for the accused who benefited from it to challenge a case from being admissible before the ICC.

1296 Gavron 2002 *International and Comparative Law Quarterly* 109: "I disagree with the reasoning that equates requiring the court to defer (post-pone) its jurisdiction for 12 months to requiring it to defer (submit) to a national amnesty. Deferring to a national amnesty implies (since amnesty laws are rarely overturned) a permanent respect for that amnesty. While it is true that the Security Council may renew this provision, it is unlikely to be renewed more than a few times (if at all). In my opinion Article 16 was intended as a delaying mechanism only, to prevent the Court intervening in the resolution of an ongoing conflict by the Security Council. It would be an unwieldy provision to invoke to achieve permanent respect for an amnesty law". For a contrary view, see Lubbe *Successive and Additional Measures* 32: "Clearly there is a place for (permissible) amnesty in international law today. The *Rome Statute* can be used as support for this view".

1297 Stigen *The Principle of Complementarity* 428.

1298 Stigen *The Principle of Complementarity* 428.

1299 Para 5 Preamble to the UN SC Resolution 1315 of 14 August 2000.

where criminal justice may endanger peace and security is not beyond reasonable contemplation.¹³⁰⁰ It is therefore quite possible that the Security Council might once request the ICC not to press an investigation or a prosecution where “a delicate non-prosecutorial truth and reconciliation process is underway”.¹³⁰¹

In light of this consideration, it must be concluded that although international law permits South African courts to disregard foreign amnesties, a decision by the National Director to initiate a prosecution should be taken with some level of political judgement and a degree of flexibility of approach. It would, for example, not be wise for the National Director to initiate a prosecution against a member of a foreign rebel group who would be on South African soil for peace negotiations which are being conducted under the auspices of the South African government in an attempt to end a protracted and bloody civil war. In a situation such as this, instituting proceedings against the foreign delegate would be irresponsible because that could disrupt the mediation process and cause people living in the State where the crimes occurred to bear extended hostilities. By pursuing this course of action, South Africa would be saying: “[W]e are not willing to risk the loss of our own soldiers” to rescue the victims in the war-torn state, but:

we are willing to allow more people in the conflict-ridden state to die in order to preserve the right to seek justice on behalf of mankind.¹³⁰²

Such a position would clearly be a selfish one as it would only be considering the interests of the international community at the expense of the more compelling interests of the people living in the affected State. That clearly is not desirable. The legal framework under which a decision by South African authorities may decide not to tamper with a foreign amnesty law is discussed below.

4.6 Foreign amnesties and prosecutorial discretion

In the previous section, a point has been made that, unless a third party State is willing to engage its troops to stop human rights violations, such a State should not place the cost of seeking justice on the miserable persons that are directly affected by the conflict.¹³⁰³ It was argued that although South Africa, just like the rest of the world, has

1300 Naqvi 2003 *International Review of the Red Cross* 592.
1301 Robinson 2003 *European Journal of International Law* 503.
1302 Trumbull 2007 *Berkeley Journal of International Law* 319.
1303 See also Trumbull 2007 *Berkeley Journal of International Law* 319.

an undeniable interest in seeking justice, this interest may “yield to the greater demands of preserving the lives of the innocent”.¹³⁰⁴ Flexibility is required here as elsewhere in politics and law.¹³⁰⁵

The power that prosecutors have to choose to prosecute or not to prosecute a particular crime or particular criminal is known as prosecutorial discretion.¹³⁰⁶ The Implementation Act provides a framework for the exercise of the proposed discretion. Section 5(1) provides that no prosecution may be instituted against a person accused of having committed a crime (as defined in the Act) “without the consent of the National Director”.¹³⁰⁷ It is suggested that in determining when to give or to withhold his consent to initiate a prosecution in regard to international crimes committed in foreign States, the National Director should be guided by, among other factors, the political situation that is prevailing in the country where the crime was committed. The political situation may be that resorting to amnesty is the only realistic way of ending a civil war or allowing a transition from oppression to democracy. That reality should not be ignored by the National Director.¹³⁰⁸

1304 Trumbull 2007 *Berkeley Journal of International Law* 314.

1305 Macedo *et al* “Princeton Principles” 25 : “[t]he imprudent or untimely exercise of universal jurisdiction could disrupt the quest for peace and stability struggling to recover from violent conflict or political oppression. Prudence and good judgment are required here, as elsewhere in politics and law”.

1306 Manuel and Garvey “Prosecutorial Discretion in Immigration Enforcement: Legal Issues” 1.

1307 The broad powers of the National Director are spelled out in section 22 of the National Prosecuting Authority Act 32 of 1998, which reads as follows:

“(1) The *National Director*, as the head of the *prosecuting authority*, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the *prosecuting authority* by the *Constitution* , *this Act* or any other law.

(2) In accordance with section 179 of the *Constitution*, the *National Director*-

(a) must determine prosecution policy and issue policy directives as contemplated in section 21;

(b) may intervene in any prosecution process when policy directives are not complied with; and

(c) may review a decision to prosecute or not to prosecute, after consulting the relevant *Director* and after taking representations, within the period specified by the *National Director* , of the accused person, the complainant and any other person or party whom the *National Director* considers to be relevant”. See also Kruger *Hiemstra’s Criminal Procedure* 1-2(1) and Stone “Implementation of the Rome Statute in South Africa” in Murungu and Biegon (ed) *Prosecuting International Crimes* 314.

1308 In terms of section 5(5) of the Implementation Act, in the event that the National Director of Public Prosecutions decides not to prosecute, the National Director must inform the Central Authority (the Director-General: Justice and Constitutional Development) of that decision and provide full reasons thereof. That decision, together with the reasons, must then be forwarded

Under section 33(2)(a) of the National Prosecuting Authority Act,¹³⁰⁹ read together with section 179(6) of the *Constitution*,¹³¹⁰ the National Director may be required to furnish the Minister of Justice with reasons for his decision not to institute a prosecution. However, as the Supreme Court of Appeal reminded in *National Director of Public Prosecutions v Zuma*,¹³¹¹ although the National Director has such a duty of informing the Minister whenever he is requested to do so, the decision to initiate a prosecution or not belongs to the sole discretion of the National Director, not the Minister. The Minister may not instruct the National Director to prosecute (or, *a contrario*, to decline to prosecute or to terminate a pending prosecution).¹³¹² The discretionary powers that the Implementation Act gives to the National Director in regard to whether or not to institute a prosecution with respect to international crimes remains therefore unfettered.

On this note, it is concluded that although South African courts have a right to disregard foreign amnesty laws in case of gross human rights violations, a decision by prosecutors to initiate a prosecution ought to be taken after careful consideration of the political situation in the concerned State and the interests of the victims.¹³¹³ Guidelines that would assist the National Director in exercising the proposed discretion are suggested below.

-
- to the Registrar of the ICC. It is then up to the ICC to determine whether it will initiate its own investigation and prosecution or not.
- 1309 “(1) The Minister shall, for purposes of section 179 of the *Constitution*, *this Act* or any other law concerning the *prosecuting authority*, exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act*.
 (2) To enable the *Minister* to exercise his or her final responsibility over the *prosecuting authority*, as contemplated in section 179 of the *Constitution*, the *National Director* shall, at the request of the *Minister* -
 (a) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;”
- 1310 “The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority”.
- 1311 *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA).
- 1312 2009 1 SACR 376-377: “[t]he Constitution on the one hand vests the prosecutorial responsibility in the NPA while, on the other, it provides that the Minister must exercise final responsibility over it. These provisions may appear to conflict but, as the Namibian Supreme Court held in relation to comparable provisions in its Constitution, they are not incompatible. It held (I am using terms that conform with our Constitution) that although the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority”.
- 1313 In support of this argument see Robinson 2003 *European Journal of International Law* 504. Here, the author mentions, as a precedent the fact that “up to the present date, states have declined to initiate prosecutions for crimes against humanity committed under apartheid regime in South Africa, which likely reflects the higher level of international regard for the reconciliation measures adopted in the unique circumstances of South Africa”.

4.7 Proposed guidelines for the National Director

The suggestion that some amnesties may deserve foreign recognition raises the question about drawing a line between “permissible and impermissible amnesties”.¹³¹⁴ Dugard¹³¹⁵ has suggested that international recognition might be accorded where amnesty has been granted:

1. As part of a truth and reconciliation commission which was established by a democratically elected government or an international organisation;
2. The commission functions in accordance with due process of law requirements;
3. Each person granted amnesty has been obliged to make a full disclosure of his criminal acts as a precondition for amnesty;
4. The crimes were politically motivated.

It is submitted that these guidelines have weaknesses. The proposition that the amnesty be granted by a truth commission established by a democratically elected government is solely concerned with “how” the amnesty was granted but ignores the most fundamental question of “why” the amnesty was granted in the first place. In the context of South Africa for example, the amnesties granted to the apartheid criminals were not so much “accepted” by the international community because they were granted by a truth and reconciliation commission, but and solely because such amnesties were required as a precondition for the Apartheid regime to hand over the reins of power to the majority black population of the country.

Whether or not the TRC functioned in accordance with due process of law requirements and whether or not the beneficiaries of the amnesty process were required to disclose the truth about the apartheid era crimes do not also matter at all. The matter is that without amnesty, there would have been no regime change in South Africa and the confrontation between the apartheid government and the black population would have continued, causing more bloodshed and destruction.¹³¹⁶

1314 Dugard “Possible Conflicts with Truth Commissions” 699.

1315 Dugard “Possible Conflicts with Truth Commissions” 700.

1316 Another justification that has been attributed to the post-apartheid amnesty process in South Africa is that it could help to achieve reconciliation between the different groups in South African society. See Truth and Reconciliation Commission of South Africa “Report” Vol I para 68-73. However, as reconciliation should occur among the people themselves not the government with the people, some commentators argue that the power to forgive is not that of the governments but of the victims. Only the victims can do that. See Rakate *The Duty to Prosecute and the*

The same can be said of the criteria set out in point n° 4 above, namely that the crime must have a political character. The issue is not how and under which circumstances the crimes were committed, but why amnesty is needed.¹³¹⁷

Identifying guidelines that include the consideration of the underlying purpose of the amnesty should thus be the proper focus of a study of this kind. Stigen¹³¹⁸ has proposed the following guidelines to assist the ICC Prosecutor in deciding whether or not he should give a chance to a national amnesty process:

1. Were there compelling reasons to grant amnesty?
2. Is the amnesty adopted and implemented democratically and in good faith?
3. Has the amnesty-granting body proceeded in an effective manner?
4. Does the mechanism provide some measure of accountability or compensation?
5. Is amnesty granted to the most responsible perpetrators?
6. Has the amnesty had positive effects and has it been internationally recognised?
7. Do the involved parties perceive the amnesty as fair?

Of all the above guidelines, only the first one seems to be appropriate because it emphasises the importance of looking at the reasons that pushed the State to grant amnesty. The guidelines proposed in (2) and (3) above related the question of “how” the amnesties were granted instead of “why”, as already discussed. The weakness of guideline n° (4) is that it seeks to substitute “some” other “measure of accountability” or “compensation” for criminal punishment. This is clearly not an acceptable guideline because, as said earlier in this chapter,¹³¹⁹ without criminal punishment the international criminal justice system is deprived of its deterrent function. Disciplinary and administrative sanctions or ordering the perpetrators to compensate victims cannot

Status of Amnesties 130: “Forgiveness is essentially a private matter, a person-to-person thing, not a public catharsis as the TRC and politicians would have us believe”. See also Bassiouni 1996 *Law and Contemporary Problems* 19: “But how can governments forgive themselves for crimes they have committed against others? And how can governments forgive crimes committed by some against others? The power to forgive, forget, or overlook in the cases of genocide, crimes against humanity, war crimes, and torture is not that of the governments but of the victims”. Thus, it seems that the element of reconciliation cannot be taken seriously to justify of the TRC amnesties. The only relevant justification is that the TRC amnesties were a necessary component of the political settlement for the “handing over of the reins of power”. O’Shea *Amnesty* 24.

1317 However, since genocide, crimes against humanity and war crimes are naturally committed in pursuance of a political motive, this criterion would virtually always be met.

1318 Stigen *The Principle of Complementarity* 452-463.

1319 See 4.3 above.

deter future perpetrators of serious crimes such as genocide, crimes against humanity and war crimes.

Regarding the proposition made in point (5) that amnesty should not be recognised if it is granted to the most responsible perpetrators, it is submitted that such a proposition also overlooks the important consideration of the purpose of the amnesty process in the concerned country. As pointed out earlier in this chapter,¹³²⁰ amnesties can be granted as part of a process to effect a regime change,¹³²¹ to end civil war¹³²² or to protect a new fragile democratically elected government from a coup by the members of security forces who might have committed crimes during the previous regime.¹³²³ One must be too optimistic to believe that the purposes of these amnesty processes could have been achieved if only the low-level perpetrators had been accorded the benefit of amnesty. A rebellion cannot end without the consent of the high-ranking officers of the rebel movement; a regime change also cannot be effected without the consent of the senior officials. The same may also be true in a country where the military and police apparatus of a previous regime is still intact and poses a real threat to the new government. If the senior officers of the security forces are excluded from the amnesty scheme, the whole process may collapse. Thus, in light of this consideration, the focus should not be so much on who benefited from the amnesty and who is excluded but rather on the genuineness of the overall purpose which underlies the amnesty process.

As for the criteria set out in point (6) that an amnesty should have positive effects and be internationally recognised, it seems that this criterion contains two elements that should be analysed separately: the effect that the amnesty has had and the way the amnesty has been perceived internationally. Regarding the effects of the amnesty Stigen¹³²⁴ says that if interfering with a national amnesty would “set back an improved situation”, such interference ought to be avoided. This argument is true because it underlines the reason why the amnesty was given and the possible negative impact that interference may bring about. However, one may never know if an amnesty process will bring about positive results if that process is not implemented and supported in the first place. If the amnesty has recently been implemented and no tangible progress has

1320 See 4.2 above.

1321 Such as South Africa in 1994 and Haiti in 1994. See 4.2.3 above.

1322 Such as in Uganda in 2000 and Algeria 1999 and 2000. See 4.2.1 above.

1323 For example, Argentina in 1987 and Uruguay in 1986. See 4.2.1 above.

1324 Stigen *The Principle of Complementarity* 460.

been made, for example the rebels have not yet surrendered their arms, the National Director ought still to assess whether instituting a prosecution in South African courts does not risk shutting the door of negotiations and cause the rebels to renege to war. Conversely, if the amnesty has been in place for a long time and has had no effect, a decision by the National Director ought to have any negative impact on the political situation in the country where the crimes were committed. The relevant consideration should therefore be the effect that the interference by South African prosecutors would have in the affected State, not the effect that the amnesty has already had.

With regard to the suggestion that the amnesty should have international recognition, this may be a factor to take into account, not a decisive factor. The National Director must make his own assessment of the prevailing situation in the concerned country with a view of determining whether his interference with the amnesty process in that country is or is not in the interests of the affected population. The opinion of the international organisations and foreign States must be only a factor to be taken into account in arriving at an informed decision.

Finally, with respect to criterion n^o (7); i.e. whether or not the involved parties perceive the amnesty as fair, the present author submits that this consideration is also just one factor among others that the National Director may take into account in determining whether a foreign amnesty law was justified by compelling reasons. If for example rebels are willing to cease hostilities on condition that they be given amnesty but such amnesty is opposed by the victims of the crimes committed during the conflict, that alone ought not to be a decisive factor. If there is no other way of ending the conflict except by negotiation, amnesty must be accepted as the price for peace. In other words, the decisive consideration must always be whether there are compelling reasons that require the passing of the amnesty law, not how the victims perceive it.

Ultimately, it is suggested that the National Director should exercise his discretion not to institute a prosecution in relation to any crime defined in the Implementation Act where the accused person has been granted amnesty in the State where the crime was committed, and:

(1) the amnesty was absolutely needed in order:

(i) to end a civil war; or

- (ii) to allow change in government from a minority or oppressive rule to a majority or democratic rule; or
 - (iii) to protect a newly democratically elected government from the threat of a coup by the members of the security forces; and
- (2) at the time of investigation and prosecution, there are serious reasons to believe that the institution of proceedings in South African courts would impede the realisation of the objectives for which the amnesty was implemented.

4.8 Conclusion

This chapter has been concerned with the question as to whether, under the international law doctrine of State sovereignty, a foreign amnesty law is a bar to the South African courts' universal jurisdiction over the perpetrators of international crimes committed in a foreign State. The analysis conducted in this chapter has revealed two arguments that support the right of South African courts to disregard such foreign amnesty laws in case of international crimes as defined in the Implementation Act.¹³²⁵

First, it was argued that amnesties for international crimes constitute a violation of States' international law obligation to prosecute and punish perpetrators of gross human rights violations. Such a duty, it was argued, exists both in treaties, customary law and as a *jus cogens* norm of international law. In accordance with this argument, it was concluded that the granting of amnesties to perpetrators of international crimes cannot be regarded as a legitimate exercise of a State's sovereignty and that a decision by South African courts to disregard those amnesties would not be regarded as a violation of the foreign State's sovereignty.¹³²⁶

Alternatively, it was argued that South African courts can also rely on the right to universal jurisdiction to trump foreign amnesties. According to this argument, the principle of universal jurisdiction grants to all States the right to exercise their jurisdiction over the crimes that the international community regards as universally condemnable. In

1325 For a same conclusion, see Dugard 1999 *Leiden Journal of International Law* 1003. See also Cassese *International Criminal Law* 1st ed 315: "if a court of another State having in custody persons accused of international crimes decides to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other states".

1326 See 4.4 above.

accordance with this principle, one State cannot dictate how other States should react to those crimes.¹³²⁷ Accordingly, it was concluded that foreign amnesties may not be a bar to South African courts' jurisdiction over international crimes.

It was suggested however, that considerations of peace and democratic transition in the territorial State have to be carefully calculated. Amnesties designed to further such purposes as ending a civil war or necessary for a political transition from a repressive regime to one that promises respect for human rights in the future, it was argued, should be supported by the National Director through his discretionary powers to institute or not a prosecution in relation to any crime contained in the Implementation Act.¹³²⁸ It is needless to remind, together with Robinson,¹³²⁹ that the National Director should exercise a "serious scrutiny" of the claims of necessity to ensure that he does "not give in to the easy temptation of concluding that an amnesty is unavoidable [...]".

1327 See 4.5 above.

1328 In support of this argument, see also Schabas 2004 *Davis Journal of International Law and Policy* 168: "Peace and reconciliation are both legitimate values that should have their place in human rights law. They need to be balanced against the importance of prosecution rather than simply discarded".

1329 Robinson 2003 *European Journal of International Law* 496. See also Stigen *The Principle of Complementarity* 452.

CHAPTER 5

RETRIAL OF CASES ALREADY TRIED IN FOREIGN COUNTRIES

In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct where the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards. Sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle.¹³³⁰

5.1 Introduction

The principle that a person should not be prosecuted more than once for the same criminal conduct is prevalent among many legal systems of the world.¹³³¹ This principle is often referred to as the “rule against double jeopardy” and expressed in maxim *ne bis in idem*,¹³³² or *nemo debet bis vexari pro eadem causa*.¹³³³ It is also often referred to as the rule against “double jeopardy”.¹³³⁴ The principle serves to prevent the trial of a case where the defendant has already been acquitted (*autrefois acquit*) or convicted (*autrefois convict*) of the same crime.¹³³⁵ In *Green v United States*¹³³⁶ Black J explained

1330 Macedo *et al* “Princeton Principles” 33.

1331 Conway 2003 *International Criminal Law Review* 217; Finlay 2009 *University of California Davis Journal of International Law and Policy* 224; Kemp, Terblanche and Watney *Criminal Procedure* 184; Van den Wyngaert and Ongena “Ne bis in idem Principle, including the issue of Amnesty” 706 and Fletcher 2003 *Journal of International Criminal Justice* 580. See also Spinellis 2002 *Revue Internationale de Droit Pénal* 1150: “The ne bis in idem principle is almost universally included in the domestic laws of the States [...]” See Further Carter 2010 *Santa Clara Journal of International Law* 170: “The concept is worldwide - all or almost all nations have a ne bis in idem provision as do each of the international criminal tribunals”.

1332 Conway 2003 *International Criminal Law Review* 217.

1333 The Law Reform Commission of Hong Kong “Double Jeopardy” 6. The *ne bis in idem* principle is said to be the “most ancient of all procedural guarantees”. The history of this legal principle dates back to 355 BC. Jordaan 1998 *South African Journal of Criminal Justice* 21.

1334 Coffey 2007 *Dublin University Law Journal* 26. See also See also *Pearce v The Queen* (1998) HCA 57 (10 September 1998) para 54. Accessed at <https://jade.barnet.com.au/Jade.html#!article=68081> [15 April 2014].

1335 Conway 2003 *International Criminal Law Review* 217; Joubert (ed) *Criminal Procedure* 258; The Law Commission (UK) “Double Jeopardy” 5 and The Law Reform Commission of Hong Kong “Double Jeopardy” 7. See also Van den Wyngaert and Stessens 1999 *International and Comparative Law Quarterly* 780; Stigen *The Principle of Complementarity* 207 and Finlay 2009 *University of California Davis Journal of International Law and Policy* 223.

1336 *Green v United States* 355 US 184 (16 December 1957). Accessed at <https://supreme.justia.com/cases/federal/us/355/184/case.html> [10 April 2014].

the fundamental reason why a person should not be prosecuted more than once for the same offence as follows:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity [...]¹³³⁷

The explanation given by Black J in the *Green* case is grounded upon the belief that a person who has undergone the ordeal of a criminal trial should, following the final verdict, be left undisturbed to live a normal life.¹³³⁸ However, while the rule against double jeopardy undoubtedly provides security for the individual who has been tried, a difficulty may arise from the society's point of view whether a person should be allowed to rely on that rule and escape justice when, for example, subsequent to his acquittal, new compelling evidence has emerged, which clearly points to his guilt.¹³³⁹ As the English Law Commission¹³⁴⁰ once remarked:

There is [...] the spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person's own admission) points strongly or conclusively to guilt. Such cases may undermine public confidence in the criminal justice system as much as manifestly wrong convictions. The erosion of that confidence, caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself.

The emergence of new evidence of guilt, it has been observed, "calls into question the legitimacy of an acquittal and suggests that a mistake has been made",¹³⁴¹ and that the double jeopardy rule should be relaxed to allow such mistake to be corrected.¹³⁴² The

1337 *Green v United States* 355 US 187. See also *S v Basson* 2004 1 SACR 313 (CC): "The process of prosecution is disruptive and there must be the prospect of and timely receipt of finality in a prosecution".

1338 The Law Reform Commission of Hong Kong "Double Jeopardy" 23.

1339 Scientific advances (in particular, DNA evidence) can provide new and compelling evidence that clearly point to the guilt of the accused. See Scottish Government "Double Jeopardy" 10. See also The Law Reform Commission of Hong Kong "Double Jeopardy" 27. Another situation where new evidence can clearly contradict with a previous acquittal is when, subsequent to such acquittal, the acquitted person confesses to have committed the crime. Kirby 2003 *Criminal Law Journal* 29 and The Law Reform Commission of Hong Kong "Double Jeopardy" 27.

1340 The Law Commission (UK) "Double Jeopardy" 36.

1341 The Law Reform Commission of Hong Kong "Double Jeopardy" 27.

1342 See for example, the Law Commission (UK) "Double Jeopardy". In particular, see at 35 where the Law Commission says: "The crucial question is whether the principles underpinning the rule against double jeopardy can ever be outweighed by the need to pursue and convict the guilty. In favour of an exception, we can identify a high value in terms of the accuracy of the outcome of the proceedings – that is, convicting the guilty, and only the guilty – which is a key aim of the criminal justice system".

same difficulty arises when it is later discovered that the accused secured the acquittal by abusing the processes of justice such as by corrupting or intimidating judges or witnesses.¹³⁴³ The problem becomes even more pronounced in the context of international criminal law. International crimes are often committed by States' officials or in complicity with them.¹³⁴⁴ There is therefore an increased likelihood that the proceedings at the national level against those responsible for those crimes, if at all conducted, would not be conducted in good faith¹³⁴⁵ and, consequently, the outcome would be nothing more than a "sham".¹³⁴⁶ A strict adherence to the *ne bis in idem* rule thus carries with it a considerable danger of having to respect the outcomes of sham trials in "corrupt and illegitimate regimes".¹³⁴⁷ That seems not to be in line with the international community's determination "to put an end to impunity for the perpetrators of these crimes" and "to contribute to the prevention of such crimes".¹³⁴⁸

The Rome Statute addresses this concern. It provides that the ICC may retry a case if the proceedings at the national level were undertaken "for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court",¹³⁴⁹ or were conducted in a manner which, in the circumstances, was "inconsistent with an intent to bring the person concerned to justice".¹³⁵⁰ But, the problem is not necessarily resolved. In accordance with the complementarity regime of the Rome Statute, it is the States Parties, not the ICC, that have the primary responsibility to prosecute international crimes.¹³⁵¹ The ICC is only a court of last resort established to complement national systems. In fact, with its limited human and financial

1343 The Law Reform Commission of Hong Kong "Double Jeopardy" 72-77.

1344 Cassese *International Criminal Law* 2nd ed 307.

1345 Cassese 1999 *European Journal of International Criminal Law* 158: "[c]omplementarity might lend itself to abuse. It might amount to a shield used by states to thwart international justice. This might happen with regard to those crimes (genocide, crimes against humanity) which are normally perpetrated with the help and assistance, or the connivance or acquiescence, of national authorities. In these cases, state authorities may pretend to investigate and try crimes, and may even conduct proceedings, but only for the purpose of actually protecting the allegedly responsible persons".

1346 Carter 2010 *Santa Clara Journal of International Law* 194; Finlay 2009 *University of California Davis Journal of International Law and Policy* 235; Calvo-Goller *The Trial Proceedings* 175; Spinellis 2002 *Revue Internationale de Droit Pénal* 1159; Van den Wyngaert and Ongena "Ne bis in idem Principle, including the issue of Amnesty" 724 and Macedo *et al* "Princeton Principles" 33.

1347 The Law Commission (UK) "Double Jeopardy" 77.

1348 Para 5, Preamble to the Rome Statute.

1349 Art 20(3)(a) Rome Statute.

1350 Art 20(3)(b) Rome Statute.

1351 Carter 2010 *Santa Clara Journal of International Law* 167.

resources, the ICC cannot correct all the sham trials that may take place around the world. The courts of States (other than the one that has conducted the sham trials) would thus play a crucial role in correcting such sham trials in order to fight impunity for the most serious crimes against international community.

The Implementation Act gives South African courts jurisdiction over international crimes, including, in some cases, those committed in foreign States.¹³⁵² A question that arises in this regard is whether South African courts, acting under the complementarity regime of the Rome Statute, are allowed to retry cases which have been already tried in foreign States if it is established that, such cases were not tried in good faith and would be admissible for retrial before the ICC?

On the level of international law, a possibility of retrial of a case already tried in a foreign State entails that a decision of the courts of a foreign independent State could be challenged in South African courts. Is that permissible under international law? Would that be compatible with the doctrine of State sovereignty? On the level of national law, does South African law itself allow a second trial of a person already tried in a foreign country? This chapter addresses these questions.

For the purposes of clarity and simplicity the terms *ne bis in idem* rule or the “double jeopardy” rule will be used when referring to the general principle that a person should not be prosecuted more than once for the same crime. In order to lay a foundation for the rest of the discussions, the rationales of the *ne bis in idem* rule are discussed hereunder.

5.2 The rationales of the *ne bis in idem* rule

There are at least six main rationales which justify the *non bis in idem* principle. First, the principle protects individuals against judicial harassment by police and prosecutors. Secondly, it protects the individuals against the anxiety and stress arising from multiple prosecutions by a State. Thirdly, by preventing endless and costly trials, the rule protects the accused against the possibility of wrong conviction. Fourthly, by only allowing one chance for the State to prosecute and individual for a particular conduct,

1352 See 1.2.1 above.

the principle works as an incentive for procedural efficiency. Fifthly, the *ne bis in idem* rule ensures that scarce prosecutorial and judicial resources are conserved and used in an effective manner. Furthermore, the principle promotes respect for judicial decisions which have been definitely rendered. Finally, the *ne bis in idem* rule serves to protect the peace and order of the society by putting an end to the disruptive effect of a criminal trial. These issues are discussed hereunder.

5.2.1 *Accused-centred rationales*

5.2.1.1 Protection of the accused against “abusive” and “ill intentioned” prosecutions

The first, and probably the most important, rationale of the *ne bis in idem* principle is to prevent abuse of State’s prosecutorial power. If the government could retry an individual for the same offence following his acquittal, that power could be abused and be used illegitimately by ill-intentioned State officials against their enemies.¹³⁵³ Similarly the police and prosecutors, unhappy at an individual's being acquitted by the court, could harass that individual by continuing to investigate and prosecute him even if they did not find any new evidence of the acquitted individual's guilt, but for the only purpose of forcing him to undergo “additional embarrassment, anxiety, concern, and expense arising from the continued investigation”.¹³⁵⁴

5.2.1.2 Protection of the accused against the anxiety and stress arising from multiple prosecutions

The second function of the double jeopardy rule is to prevent a State’s excessive use of judicial power against individuals. The principle prevents a person from continually

1353 Rudstein 2008 *San Diego International Law Journal* 255 and Bernard 2011 *Journal of International Criminal Justice* 3. See also Jordaan 1998 *South African Journal of Criminal Justice* 21: “[t]he idea of a prohibition on relitigation of the same issue attained particular significance at that stage in English legal history when the state began to institute action against an individual at its own discretion. It was during this period (towards the thirteenth century) that the rule began to realize its most important function: the prevention of abuse by the state of the criminal process. By placing certain restraints on the prosecutor's powers to institute criminal proceedings the rule gradually developed into a powerful instrument to protect the individual against the arbitrary exercise of state power”.

1354 Rudstein 2008 *San Diego International Law Journal* 255. See also Freeman 1988 *Criminal Law Journal* 11 and Jordaan 2000 *Fundamina* 113.

being troubled with multiple prosecutions arising from the same offence.¹³⁵⁵ It removes the constant threat and anxiety of a further prosecution.¹³⁵⁶ It ensures that at a certain point in time the accused must be left alone.¹³⁵⁷ The inevitable consequence, that a guilty person sometimes will escape punishment because the national court erred on fact or law, is an acceptable price for promoting this purpose, even when the crimes in question are extremely grave.¹³⁵⁸ When the offender is prosecuted and punished, he must know that, by serving the punishment, he has paid his dues to society and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again for the same crime.¹³⁵⁹ This rationale of the *ne bis in idem* principle is sometimes referred to as the “due process” rationale of the double jeopardy rule.¹³⁶⁰

5.2.1.3 Protecting the accused against a wrong conviction

Another justification of the *ne bis in idem* rule is the view that the accused cannot have enough resources to fight an endless legal battle (the trial) against the State and that hence, the larger the number of prosecutions permitted by law, the greater the possibility that even though innocent, the accused person may be found guilty.¹³⁶¹ According to this argument, with each new prosecution, dealing with the same alleged

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- 1355 Rudstein 2008 *San Diego International Law Journal* 246-249. See also Law Commission (New Zealand) “Acquittal Following Perversion of the Course of Justice” 5 and Klip and Harmen 2004 <http://arno.unimaas.nl/show.cgi?fid=7993>
- 1356 Conway 2003 *International Criminal Law Review* 223 and Jordaan 2000 *Fundamina* 113. See also Law Reform Commission of Hong Kong “Executive Summary” 2: “The rule avoids the repeated distress of the trial process, which affects not only the accused, but also his family, witnesses on both sides and the victim”.
- 1357 Klip and Harmen 2004 <http://arno.unimaas.nl/show.cgi?fid=7993>
- 1358 Stigen *The Principle of Complementarity* 208.
- 1359 *Criminal Proceedings v Hüseyin Gözütok Klaus Hans Fritz Brügge* ECJ Joined Cases C-187/01 and C-385/01 Opinion of Advocate General Colomer (19 September 2002) para 49. Accessed at http://www.asser.nl/default.aspx?site_id=8&level1=10785&level2=10816&level3=11019 [10 October 2012] See also Kirby 2003 *Criminal Law Journal* 14-15, especially at 33: “This rule has the salutary effect of ensuring that a case, when it is presented, is as strong as the state and its agencies can make it. Until that is possible, people are not troubled by the need to defend themselves repeatedly against public process”. See further Chandrasekharan *Double Jeopardy* 48-60
- 1360 Freeman 1988 *Criminal Law Journal* 12.
- 1361 *Green v United States* 355 US 188 (1957). See also Scheffer “*Non Bis in Idem* and the Rome Statute of the International Criminal Court” 3: “Its rationale lies principally in the need to protect individuals, with their limited access to resources, from being harassed through repeated prosecutions by the powerful state, with its access to extensive resources. It prevents the state from attempts to retry facts underlying an acquittal thereby limiting erroneous convictions which could flow from the fact that defendants do not have the resources and energy to fight against repeated and vexatious prosecutions”.

criminal conduct, the State, with all its resources, secures an increased chance of obtaining a conviction.¹³⁶²

5.2.2 *The criminal justice system-centred rationales*

5.2.2.1 Encouraging procedural efficiency

Allowing the government to retry an acquitted defendant for the same offence would give rise to the danger that prosecutors would not initially investigate and prosecute the case, as diligently as they otherwise might.¹³⁶³ The *ne bis in idem* rule emphasises that efficient investigation of crime is of particular importance and, that efficiency may be undermined should the prosecution be allowed to introduce the same charges for a second time.¹³⁶⁴ The *ne bis in idem* principle ensures that the State authorities only get one chance of “settling society’s score” in respect of certain conduct.¹³⁶⁵ If the authorities have “missed their chance” the defendant should benefit from this.¹³⁶⁶ In this way, the principle is also considered as a sanction against the authorities for any negligence during the first trial. The principle thus operates as a powerful incentive to efficient and exhaustive investigation and prosecution from the outset.¹³⁶⁷

1362 Kirby 2003 *Criminal Law Journal* 20; Rudstein 2008 *San Diego International Law Journal* 249-251; Jordaan 2000 *Fundamina* 113 and Finlay 2009 *University of California Davis Journal of International Law and Policy* 223. See also Law Reform Commission of Hong Kong “Executive Summary” 2: “The chances of a wrongful conviction must increase if an individual is tried more than once for the same offence. The likelihood of conviction, whether the defendant was guilty or not, might be greater at a second trial as the prosecution may have acquired, because of the first trial, a tactical advantage. Furthermore, an innocent person may not have the stamina or resources to fight a second prosecution”. See further Costa 1998 *University of California Davis Journal of International Law and Policy* 185: “there is a risk that innocent individuals will wear down and tire of fighting to prove their innocence, if forced to prove it again and again”.

1363 Rudstein 2008 *San Diego International Law Journal* 253-254. See also Law Reform Commission of Hong Kong “Executive Summary” 2: “It could be argued that if the prosecution were able to prosecute once again a defendant who had been acquitted there would be a risk that the initial investigation might not be carried out as diligently as it should have been. The fact that there is but one chance to convict a defendant operates as a powerful incentive to efficient and exhaustive investigation”.

1364 Law Commission (New Zealand) “Acquittal Following Perversion of the Course of Justice” 7: “Opportunity for the Crown to revisit its case after acquittal would provide perverse disincentives to getting it right at the outset”. See also Haesler 2003 http://www.publicdefenders.lawlink.nsw.gov.au/pdo/public_defenders_rule_against_double_jeopardy.html

1365 Bockel *The Ne Bis in Idem Principle in EU Law* 27.

1366 Bockel *The Ne Bis in Idem Principle in EU Law* 30.

1367 Rudstein 2008 *San Diego International Law Journal* 254. See also Finlay 2009 *University of California Davis Journal of International Law and Policy* 223-224: “The rule against double jeopardy also reinforces the need for investigations and prosecutions to be thorough and

5.2.2.2 Conservation of scarce prosecutorial and judicial resources

In addition to the protection that the *ne bis in idem* rule offers to the individual, the principle also prevents a prosecutor from expending additional money and tying up courtrooms, judges, and court personnel in endless attempts to convict an individual for the same offence. By doing so, the principle serves to conserve limited prosecutorial and judicial resources.¹³⁶⁸

5.2.2.3 Respect for the finality and conclusiveness of judicial decisions

The *ne bis in idem* principle also embodies the respect for judicial decisions that have been finally rendered.¹³⁶⁹ Once a case has been disposed of, it should not be reopened. Respect for judicial proceedings and the judiciary in general could be seriously undermined if the outcome of criminal proceedings that have been definitely determined could still be questioned in subsequent eventual proceedings.¹³⁷⁰ Proponents of this rationale argue that even if the government could ultimately obtain a conviction after a previous acquittal, the inconsistent verdicts could affect the community's confidence in the accuracy of the legal system and "dilute the moral force of the criminal law".¹³⁷¹ That would leave "people in doubt whether innocent men are being condemned".¹³⁷²

This idea is expressed in the maxim *res judicata pro veritate habetur*: the matter which has finally been adjudicated is deemed to be the truth.¹³⁷³ The principle states that when all the appeals that are available to challenge a court's decision have been

diligent, with police and prosecutors knowing that they will not get a second chance to secure a conviction".

1368 Rudstein 2008 *San Diego International Law Journal* 254-255 and Finlay 2009 *University of California Davis Journal of International Law and Policy* 223.

1369 Rudstein 2008 *San Diego International Law Journal* 242-245; Stigen *The Principle of Complementarity* 209 and Bernard 2011 *Journal of International Criminal Justice* 3.

1370 Van Den Wyngaert and Stessens 1999 *International and Comparative Law Quarterly* 781. See also Conway 2003 *International Criminal Law Review* 217; Freeman 1988 *Criminal Law Journal* 11 and Chandrasekharan *Double Jeopardy* 44-48. See further Law Commission (New Zealand) "Acquittal Following Perversion of the Course of Justice" 5: "By preventing harassment and inconsistent results it promotes confidence in court proceedings and the finality of verdicts".

1371 Rudstein 2008 *San Diego International Law Journal* 256. See also Finlay 2009 *University of California Davis Journal of International Law and Policy* 223: "In a broader sense, the principle of double jeopardy reflects the importance of finality in the criminal justice system and protects against inconsistent results. From this perspective, the doctrine plays a role in upholding public confidence in the justice system and respect for judicial proceedings [...]".

1372 Rudstein 2008 *San Diego International Law Journal* 256, citing *In re Winship* 397 US 358 (31 March 1970) 364.

1373 Van Den Wyngaert and Stessens 1999 *International and Comparative Law Quarterly* 781 and Bockel *The Ne Bis in Idem Principle in EU Law* 35.

exhausted, seeking further to reopen the case would weaken public confidence in the justice system.¹³⁷⁴ The *ne bis in idem* rule thus protects the legal system itself.¹³⁷⁵

5.2.3 A community-centred rationale: Protecting the peace and order of society

The criminal trial is a “public drama” which is regarded as “a serious and potentially disruptive social event endangering the peace and order of society”.¹³⁷⁶ Finality brings an end to the anxiety that a criminal trial causes to the accused, but also to the nervousness that it inflicts to his family, the victims or their families and the society in general.¹³⁷⁷ As eloquently put by Lord Wilberforce in the *Amphill Peerage* case:¹³⁷⁸

[A]ny determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth [...] and these are cases where the law insists on finality.¹³⁷⁹

The *ne bis in idem* rule thus also serves to bring an end to the disturbing effect of a criminal trial. In the next section of this study the *ne bis in idem* rule will be analysed in the specific context of international law. Specifically, the question is whether, under customary international law, States have an obligation to recognise judgements handed down by criminal courts of other (foreign) States.

5.3 *Ne bis in idem* and international law

As stated earlier in this study,¹³⁸⁰ one of the fundamental norms that regulate the conduct of States in international relations is the principle of “sovereign equality”.¹³⁸¹ This fundamental principle of international law is captured in art 2(1) of the UN Charter

1374 *R v Carroll* [2002] HCA 55 (5 December 2002) para 128. Accessed at <http://www.austlii.edu.au/au/cases/cth/HCA/2002/55.html> [10 March 2013]. See also Kirby 2003 *Criminal Law Journal* 18.

1375 Rudstein 2008 *San Diego International Law Journal* 256.

1376 Kirby 2003 *Criminal Law Journal* 17.

1377 Kirby 2003 *Criminal Law Journal* 17.

1378 *Re Amphill Peerage* [1977] AC 547 (1 January 1977) 569. Accessed at <http://www.duth-civpro.net/blog/tsantinis/docs/1977%20AC%20547%20The%20Amphill%20Peerage%20Case.rtf> [13 April 2014].

1379 See also Kirby 2003 *Criminal Law Journal* 17: “The law embraces finality in this respect with open eyes, accepting its imperfections”.

1380 See 2.4 above.

1381 Ansong 2012 http://works.bepress.com/alex_ansong/2

which provides that: “[T]he Organization is based on the principle of the sovereign equality of all its Members”. One of the attributes of sovereign equality is the principle of “non-intervention” in internal matters of another State.¹³⁸² This principle was included in the UN Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.¹³⁸³ The principle of non-interference was also reiterated in the General Assembly’s resolution on the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.¹³⁸⁴ This Declaration provides that the principle of non-intervention includes:

[T]he duty of a State, in the conduct of its international relations [...] to refrain from measures which would constitute interference or intervention in the internal [...] affairs of another State, thus preventing it from determining freely its political, economic and social development.¹³⁸⁵

Can it be inferred from the above principle that a review of the outcome of criminal proceedings undertaken in one State by the courts of another State constitutes “interference” in the “internal matters” of that State? In other words, can it be argued that the respect for the decisions of the courts of one State is an attribute of the doctrine of sovereign equality of States and that such doctrine is affected when a further prosecution of the same offence is initiated in a foreign State?¹³⁸⁶

The present author is of the view that for such a rule to exist, it must be proved that the *ne bis in idem* rule contained in the numerous national legislations is not just a rule designed to uphold the rights of individuals but also a rule required as a matter of an obligation owed to foreign States. Without such proof, the *ne bis in idem* cannot be considered as a rule of customary international law.

1382 Fenton *Understanding the UN Security Council* 5; 13.

1383 Para 16(c) Preamble to the UN GA Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ((2625 (XXV)) of 24 October 1970.

1384 UN GA Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (36/103) of 9 December 1981.

1385 Para II(k).

1386 See also Conway 2003 *International Criminal Law Review* 237.

Despite the near universal prevalence of a *ne bis in idem* rule in national laws,¹³⁸⁷ however, the majority of opinion in legal literature denies the status of *ne bis in idem* as a rule of general international law.¹³⁸⁸ Spinellis¹³⁸⁹ argues that:

[T]he extent to which the *res judicata* in one State should be recognized and have a positive effect in another State depends on the full discretion of the legislature in that State.

This view was supported by the ILC in a report published in 1996, where it held that there is no obligation under international law, for a State which has a particular interest in ensuring the effective prosecution and punishment of an offender, to recognise a criminal judgment handed down by a foreign court.¹³⁹⁰

In fact, scholars take the view that far from requiring States to recognise criminal judgments handed down by foreign courts, the principle of “sovereign equality”¹³⁹¹ of States would rather seem to support the contrary argument that “one State’s courts cannot bind the courts of another State”.¹³⁹² Applying the *ne bis in idem* principle between States would require those States to recognise foreign judicial decisions as an obstacle to their own criminal jurisdiction, and that this would constitute an infringement on the sovereignty of the State which wants to conduct the subsequent proceedings.¹³⁹³ That would amount to “an abdication of sovereignty”, by the other State.¹³⁹⁴

1387 Bassiouni says that the protection against double jeopardy can be found in “over fifty national constitutions”. Bassiouni 1993 *Duke Journal of Comparative and International Law* 289. See also Colangelo 2009 *Washington University Law Review* 815: “Without doubt, most states’ domestic laws contain some type of double jeopardy protection, whether through constitutional guarantee or by statutory or common law rule”.

1388 Bockel *The Ne Bis in Idem Principle in EU Law* 2. See also Spinellis 2002 *Revue Internationale de Droit Pénal* 1150: “An international rule barring or limiting the prosecution in a certain State of a person for an offence for which he has been already convicted or acquitted finally in another State is not yet recognized or accepted in the legislation of most States”. See further Conway 2003 *International Criminal Law Review* 229; Cryer *et al International Criminal Law* 80; Van Den Wyngaert and Stessens 1999 *International and Comparative Law Quarterly* 781 and Colangelo 2009 *Washington University Law Review* 812-815.

1389 Spinellis 2002 *Revue Internationale de Droit Pénal* 1150.

1390 ILC “Report of the International Law Commission on its forty-eight session” 37.

1391 Art 2(1) UN Charter.

1392 Cryer *et al International Criminal Law* 80.

1393 Bockel *The Ne Bis in Idem Principle in EU Law* 40.

1394 Van Den Wyngaert and Stessens 1999 *International and Comparative Law Quarterly* 782. See also Van den Wyngaert and Ongena “*Ne bis in idem Principle, including the issue of Amnesty*” 708. See further Conway 2003 *International Criminal Law Review* 218: “Although many principles of international law limit national sovereignty, *ne bis in idem* operates in the context of criminal jurisdiction, an area of sovereignty that states tend to be particularly keen to protect against any encroachment”.

The above argument is best illustrated by the United States' law doctrine of "dual sovereignty" which allows a second prosecution for the same crime by two different States.¹³⁹⁵ One of the cases where the doctrine of double sovereignty was applied is *Heath v Alabama*.¹³⁹⁶ In this case, the Petitioner had hired men to kill his wife in the State of Alabama. The men then kidnapped his wife from her home in Alabama and killed her in the State of Georgia. The Petitioner pleaded guilty in a Georgia trial court in exchange for a sentence of life imprisonment (to avoid the death sentence). Subsequently, he was tried and convicted of murder, and was sentenced to death in an Alabama trial court, which rejected his claim of double jeopardy. The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the conviction. In affirming these convictions, the US Supreme Court held that under the dual sovereignty doctrine, successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause of the Fifth Amendment, and, hence, Alabama was not barred from trying the petitioner.¹³⁹⁷ The court remarked that:

[T]he dual sovereignty doctrine is founded on the common law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences."¹³⁹⁸

Thus, according to the doctrine of double sovereignty a criminal activity that affects different States is regarded as a set of independent offences in each of those States

1395 Colangelo 2009 *Washington University Law Review* 788 and Morosin 1995 *Nordic Journal of International Law* 263. This doctrine also denies the double jeopardy protection in federal trials to an accused where a previous trial has been conducted at a state level (and vice versa), because the federal and state prosecutions are considered to be by two different governments. Conway 2003 *International Criminal Law Review* 232. See also *United States v Lanza* 260 US 377 [1922] (11 December 1922) 385: "If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so. If a state were to punish the manufacture, transportation, and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute, or for its deterrent effect. But it is not for us to discuss the wisdom of legislation; it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts". Accessed at <http://supreme.justia.com/cases/federal/us/260/377/case.html> [8 July 2012].

1396 *Heath v Alabama* 474 US 82 [1985] (3 Dec 1985). Accessed at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=474&invol=82> [8 July 2012].

1397 474 US 82 [1985] 88.

1398 474 US 82 [1985] 88.

and a prosecution in one State does not preclude a further prosecution in another State.¹³⁹⁹

The argument against an international law *ne bis in idem* can also be inferred from the fact that all the existing major regional conventions containing a *ne bis in idem* rule limit its scope of application to the cases tried by the courts of the member States. For example, the protection against a second prosecution contained in art 54¹⁴⁰⁰ of the *Convention on the Implementation of the Schengen Agreement (CISA)*,¹⁴⁰¹ applies only to cases that have been “finally disposed of in one Contracting Party”. Since the CISA double jeopardy clause does not apply to cases tried in the courts of the States that are not party to CISA, this clause cannot be regarded as expressing a *ne bis in idem* rule as a principle of international law.¹⁴⁰²

Another major multilateral treaty that enshrines a *ne bis in idem* rule is the *Seventh Additional Protocol to the European Convention on Human Rights*.¹⁴⁰³ Nevertheless, this Protocol explicitly stipulates that the prohibition against double jeopardy that it contains offers protection only as far as proceedings in the same State are concerned. Art 4(1) of this Protocol reads as follows:

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

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- 1399 Bockel *The Ne Bis in Idem Principle in EU Law* 40. See also *Moore v People* 55 U S 13 [1852] (December Term 1852) 20, where it was held that when the same act transgresses the laws of two sovereigns, it cannot be averred that “the offender has been twice punished for the same offence”, because he has “committed two offences, for each of which he is justly punishable”. Accessed at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=55&invol=13> [10 January 2013].
- 1400 “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party”. Because article 54 CISA is the only provision contained in a major regional convention that prohibits a second prosecution in another state, it is generally regarded as the “most developed expression of an internationally applicable *ne bis in idem* rule in force”. Bockel *The Ne Bis in Idem Principle in EU Law* 23.
- 1401 *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders* (1990).
- 1402 Bockel *The Ne Bis in Idem Principle in EU Law* 140.
- 1403 Art 4(1) *Protocol N^o 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (1984).

Far from supporting an international rule against a second prosecution in a foreign State, this Protocol rather seems to confirm the view that States are not prohibited from retrying cases that were already tried in foreign States.

Finally, it is also noteworthy that the right against multiple prosecutions enshrined in art 14(7) of the ICCPR,¹⁴⁰⁴ was held to be applicable only in respect of the proceedings conducted in the same State. In *AP v Italy*¹⁴⁰⁵, an Italian citizen claimed before the HRC to be a victim of a violation of article 14(7) of the ICCPR in that he had been convicted in 1979 by a criminal court in Switzerland¹⁴⁰⁶ and that, in violation of art 14(7) of the ICCPR, the Milan Court of Appeal had convicted him *in absentia* on 7 March 1983, a conviction which was upheld by the Second Division of the Court of Cassation in Rome On 11 January 1985. The HRC rejected the double jeopardy claim holding that:

article 14, paragraph 7, of the Covenant, which the author invokes, does not guarantee *non his in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.¹⁴⁰⁷

It thus appears that no international rule exists to the effect that States are not permitted to retry cases which have been the subject of proceedings in foreign States. No such rule can be discerned from the existing multilateral and international instruments that contain a *ne bis in idem* provision.¹⁴⁰⁸ Accordingly, it is concluded with Carter¹⁴⁰⁹ that “multiple prosecutions by different national jurisdictions are not barred as a matter of customary international law”.¹⁴¹⁰ Domestic legislations, such as section 35(1)(m) of the

1404 This article reads as follows: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

1405 *A P v Italy* Communication N° 204/1986 (2 November 1987). See also Bockel *The Ne Bis in Idem Principle in EU Law* 26 and Stigen *The Principle of Complementarity* 207.

1406 The prosecution was based on a complicity in the crime of conspiring to exchange currency notes, which was the ransom paid for the release of a person who had been kidnapped in Italy in 1978.

1407 *A P v Italy* Communication N° 204/1986 (2 November 1987) para. 7.3. See also Van den Wyngaert and Ongena “*Ne bis in idem* Principle, including the issue of Amnesty” 716 and Daniels “*Non Bis in Idem*” 13.

1408 Van den Wyngaert and Ongena “*Ne bis in idem* Principle, including the issue of Amnesty” 716. See also Stigen *The Principle of Complementarity* 207.

1409 Carter 2010 *Santa Clara Journal of International Law* 172. See also Colangelo 2009 *Washington University Law Review* 815: “We need not wade too far into the complexity of exactly when and how a principle common among domestic legal systems may be recruited into a general principle of international law in order to conclude that no such generally accepted principle exists with respect to double jeopardy among states”.

1410 See also Bernard 2011 *Journal of International Criminal Justice* 3 and Finlay 2009 *University of California Davis Journal of International Law and Policy* 225. See further Cryer *et al*

Constitution, that extends the *ne bis in idem* rule to the judgments of foreign courts, must only be seen as reflecting values of fairness, equity and justice to the accused individuals rather than expressing an obligation owed to foreign States.¹⁴¹¹ Accordingly, South Africa would not violate any international obligation by allowing its courts to retry cases tried in foreign countries where it is determined that the proceedings in the foreign State were not conducted in good faith.

Nevertheless, it is important to recall that while international law may permit a State's courts to exercise jurisdiction over a matter, it is the domestic law of that State that ultimately authorises its courts to exercise such jurisdiction.¹⁴¹² It is thus of utmost importance to also determine whether South Africa's own law allows its courts to retry cases already tried in foreign countries.

5.4 The *ne bis in idem* rule under South African law

5.4.1 Introduction

The *ne bis in idem* principle is also part of the South African legal order. Section 35(3)(m) of the *Constitution* provides that:

[E]very accused person has a right to a fair trial, which includes the right—

[...]

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.

Section 35(3)(m) thus protects the accused person from being tried twice for the offence in respect of which he has previously been “acquitted” or “convicted”. This right finds practical application in section 106(1)(c) and (d) of the *Criminal Procedure Act*¹⁴¹³ which makes provision for an accused person to plead that has already been convicted or acquitted of the offence with which the person is charged.¹⁴¹⁴

International Criminal Law 80: “[i]t is lawful for a State to prosecute a person for an offence for which he or she has been prosecuted, and even punished, elsewhere. Part of this is an outcropping of the principle of sovereign equality. One State's courts cannot bind another”.

1411 Spinellis 2002 *Revue Internationale de Droit Pénal* 1150: “The recognition and the deduction are provided...in the legislation of many States and have been used in order to soften the harsh consequences of the restriction of the scope of *ne bis in idem* internationally”.

1412 See 2.5.1 above.

1413 *Criminal Procedure Act* 51 of 1977.

1414 See also Curie and De Waal *The Bill of Rights Handbook* 788.

The plea that a person has previously been acquitted on the same charge and that he cannot be prosecuted twice for the same cause is known as *autrefois* acquit.¹⁴¹⁵ The plea that a person has already been convicted of the same offence is known as *autrefois* convict.¹⁴¹⁶

For the above pleas to be upheld, the accused must have been acquitted or convicted on the “same offence”, upon the “merits” and by a “competent court”.

5.4.2 Same offence

The doctrine of double jeopardy protects a person from being tried twice for the same offence.¹⁴¹⁷ For example, if A was previously acquitted on a charge of murder in respect of Y’s death, he cannot be retried for the same offence if the prosecution finds fresh and compelling evidence that was not available or that was known at the time of the first trial.¹⁴¹⁸

Conversely, the plea is not available if the accused is subsequently charged with a different offence arising from the same set of facts. For example, if the victim of assault dies after the accused has already been convicted of assault, the accused may now be prosecuted for culpable homicide.¹⁴¹⁹

5.4.3 Upon the merits

For a plea of *autrefois* acquit to be sustained when the accused is charged for a second time, there must have been a trial followed by an acquittal or conviction.¹⁴²⁰ If, for example, a case is declared inadmissible because the court has no jurisdiction, the accused is not “acquitted” within the meaning of section 35(3)(m) and, accordingly, he

1415 Joubert (ed) *Criminal Procedure* 258 and Bubenzer *Post-TRC Prosecutions* 45

1416 Bubenzer *Post-TRC Prosecutions* 45 and Joubert (ed) *Criminal Procedure* 258.

1417 Kemp, Terblanche and Watney *Criminal Procedure* 184 and Joubert (ed) *Criminal Procedure* 258.

1418 Sorgdrager *Criminal Procedure and Evidence* 137.

1419 Joubert (ed) *Criminal Procedure* 258.

1420 Joubert (ed) *Criminal Procedure* 258. The accused will also be deemed to be acquitted on the “merits” even if the prosecution did not adduce any evidence at all. This is the same situation as where the prosecution presented insufficient evidence. *S v Mthetwa* 1970 2 SA 310 (N) 315: “[t]he fact that no evidence was led does not prevent the decision being one ‘on the merits’. The true antithesis is, in my view, whether the acquittal was ‘on the merits’ or on a technicality. And, in my judgment, the present case is one where the acquittal was ‘on the merits’ in the sense that there had been no evidence led against the then accused upon which they could have been convicted”.

will not be entitled to a plea of *autrefois acquit* if the case is reinstated before a competent court.¹⁴²¹

To this rule, there is one exception. Even where the accused is acquitted or convicted on the merits, the *ne bis in idem* rule will not apply if those proceedings are declared a “nullity” by a court of appeal.¹⁴²² In cases such as this, the proceedings are declared void and the same offence in respect of which the respondent was acquitted or convicted may again be instituted.¹⁴²³

5.4.4 By a competent court

A previous acquittal or conviction, even though upon exactly the same offence, by a court which had no jurisdiction to adjudicate upon the matter would afford no ground for the application of a plea of double jeopardy.¹⁴²⁴ Thus, for example, a plea of *autrefois convict* would fail where the accused was previously tried for rape, convicted and sentenced to corporal punishment by a headman (tribal leader) who, under the law of the country, has no jurisdiction to try such crime.¹⁴²⁵

The relationship between the pleas of double jeopardy and the right to a fair trial is discussed next.

1421 *Rex Respondent v Manasewitz Appellant* 1933 AD 165 173-174: “The proposition is sometimes stated slightly differently thus: That the accused has been previously indicted on the same charge, was in jeopardy, and was acquitted on the merits. If so stated it is necessary to add that if the indictment was invalid or the Court had no jurisdiction the accused was not in jeopardy. Again, if after conviction a superior Court quashes an indictment as bad *ab initio* the accused cannot on retrial rely upon the previous-ultimate-acquittal. This view can be justified either on the ground that the crime alleged in the subsequent, good, indictment is not that alleged on the previous, bad indictment, or on the ground that the accused was never (legally) in jeopardy or that the acquittal was not on the merits”.

1422 *S v Moodie* 1962 2 SA 587 (A) 597 GH: “An irregularity in the procedure which justifies the setting aside of a conviction by a Court of Appeal is technical under section 370 (c) of Act 56 of 1955 if it precludes a valid consideration of the merits: in other words, if it makes it impossible for the Court to give a valid verdict on the merits”. See also *Plaatjies v Director of Public Prosecutions, Transvaal* 2013 JDR 1055 (SCA) and *S v Basson* 2007 1 SACR 566 (CC).

1423 Section 322(4) of the Criminal Procedure Act provides that where the question of law has been reserved on the application of the prosecutor in the case of an acquittal, and a decision has been given by the court of appeal in favour of the prosecutor, the court of appeal may make an order requiring steps to be taken under section 324. This in turn allows the court of appeal to order that proceedings in respect of the same offences on which the accused was charged be instituted, either on the same or different charges. See *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 2 SACR 217 (SCA) 219; *DPP v Viljoen* 2005 1 SACR 505 (SCA) and *S v Katoo* 2005 1 SACR 522 (SCA).

1424 Lansdown and Campbell *Criminal Law and Procedure* 440.

1425 Strauss 1970 *Annual Survey of South African Law* 368 and Joubert (ed) *Criminal Procedure* 259, citing *S v Mogatsi* 1970 1 PH H74 (Botswana HC).

5.4.5 *The relationship between the ne bis in idem rule and the right to a fair trial*

In *S v Zuma*¹⁴²⁶ Kentridge AJ referred to the right to a fair trial as follows:

The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to [...] of the sub-section. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force (referring to the list of specific rights set out in paragraphs (a) to (o) of the sub-section).¹⁴²⁷

Kentridge AJ's dictum has been described as follows by Steytler:

The dictum is important, first, for asserting that the articulated fair trial rights should be seen as a set of minimum guarantees and second, for extending the concept of a fair trial to include substantive fairness.¹⁴²⁸

The right to a fair trial enshrined in Section 35 of the *Constitution* thus has two components: a procedural component and a substantive component. According to this broad understanding of the right to a fair trial, the fairness of the trial is judged not only in terms of the modalities of the trial but also the fairness of the "prosecution itself".¹⁴²⁹ For instance, Steytler¹⁴³⁰ says, the right against retroactive offences does not prescribe how a trial should be conducted, but "proscribes a prosecution altogether". A trial initiated on the basis of a retroactive statute would be unfair, regardless of how fairly the ensuing trial is conducted. Thus, the substantive fairness component of the right to a fair trial relates to the fairness of the prosecution itself; not the fairness of the manner in which the trial is conducted.¹⁴³¹

Like the right against retroactive offences, Steytler¹⁴³² explains the relationship between the *ne bis in idem* rule and the right to a fair trial as follows:

This substantive definition of fairness is inherent in the provisions of section 35(3) itself. The right against double jeopardy is not concerned with the way the second trial is conducted (which may comply with all the principles of a fair trial), but prohibits the institution of a second trial.

1426 *S v Zuma* 1995 2 SA 642 (CC).

1427 1995 (2) SA 651-652.

1428 Steytler *Constitution Criminal Procedure* 215.

1429 Steytler *Constitutional Criminal Procedure* 216.

1430 Steytler *Constitutional Criminal Procedure* 216.

1431 Steytler says: "The concept of a fair trial within the meaning of section 35(3) of the Constitution is broader than the conduct of the trial in terms of constitutionally mandated rules and procedures. It is submitted that it also includes a judgment whether the very institution of the prosecution is fair, regardless of how fairly the ensuing trial may be conducted". Steytler *Constitutional Criminal Procedure* 216.

1432 Steytler *Constitution Criminal Procedure* 216.

Thus, according to the above description of the relationship between the *ne bis in idem* rule and the substantive leg of the right to a fair trial, the unfairness of a prosecutor's decision to prosecute a second time is the proper focus of the right against double jeopardy, not the manner in which the ensuing trial would be conducted. The question which falls to be considered now is whether section 35(1)(m) also applies to a previous acquittal or a previous conviction by a court of a foreign State.

5.4.6 Does section 35(3)(m) apply to cases tried in foreign countries?

The Implementation Act provides that a South African court, charged with the prosecution of a person allegedly responsible for a crime defined in that Act, shall apply "the Constitution and the law". Chapter II of the Constitution, the "Bill of Rights", sets out a broad range of rights for "accused persons". One of these rights is the right "not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted".¹⁴³³ Section 35(3)(m) does not distinguish between acquittals and convictions by South African courts and those rendered by foreign courts. It is thus not clear from the wording of the section whether an accused can rely on a foreign judgment to bar a second prosecution before a South African court.

No South African court has as yet had an opportunity to interpret whether or not section 35(3)(m) of the *Constitution* applies to foreign judgments. It seems, however, that it does. This is the only interpretation that can be supported by the case law of the pre-constitutional era. In 1968, the Eastern Cape Division of the Supreme Court held that the plea of *autrefois* acquit, which was then based on section 169(2)(d) of the *Criminal Procedure Act* 56 of 1955, could be sustained even where it was based on the judgment of a foreign court of competent jurisdiction.¹⁴³⁴ The Attorney-General had contended that the word "acquitted" in section 169(2)(d) of the Act must be construed as meaning "acquitted by a competent court in the Republic of South Africa",¹⁴³⁵ but the court disagreed holding that "the ordinary meaning of the language (of section 169(2)(d) of the Act) is wide enough to embrace an acquittal anywhere".¹⁴³⁶

1433 Section 35(3)(m).

1434 *S v Pokela* 1968 4 SA 702 (E).

1435 1968 4 SA 706.

1436 1968 4 SA 706. See also at 707 where the court said that: "a judgment of a foreign court of competent jurisdiction can in law base the plea envisaged in sec. 169 (2) (d) of Act 56 of 1955 if

It is submitted that the court's view in *S v Pokela* that the *ne bis in idem* rule applies also to foreign judgments is consistent with a grammatical¹⁴³⁷ interpretation of the *Constitution*. Since section 35(3)(m) deals with a right of "every accused" person, a grammatical interpretation of this section supports the conclusion that it protects all accused persons regardless of the location where the previous proceedings took place. This is the "natural language" of section 35(3)(m) of the *Constitution* and should be preferred to any other possible meaning of the section. A purposive¹⁴³⁸ interpretation also favours the inclusion of foreign trials in the field of application of section 35(3)(m). As stated earlier in this chapter,¹⁴³⁹ the *ne bis in idem* rule protects accused persons from oppressive and maliciously-initiated trials, embarrassment, expenses and anxiety resulting from multiple trials arising from the same offense.¹⁴⁴⁰ These rationales are not altered by the location of the previous trial: whether the previous trial was conducted in the same country or in a foreign State is irrelevant when the interests of the accused come into play.¹⁴⁴¹

The Conclusion that section 35(3)(m) of the *Constitution* applies to both judgments of domestic courts and those of foreign courts is also consistent with a generous interpretation of the *Constitution* which requires the courts to adopt an interpretation that offers greater and broader protection of rights.¹⁴⁴² Since the interpretation that extends the ambit of section 35(3)(m) to foreign judgements offers broader protection to "accused persons", this interpretation should be preferred to any other interpretation that narrows the protection of section 35(3)(m) to only accused persons whose previous judgements were handed down by South African courts. In the light of these arguments,

such judgment relates to the same offence as that charged in a South African court". In support of this argument, see also Joubert (ed) *Criminal Procedure* 262.

1437 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* (eds) *Constitutional Law* 32-160.

1438 Purposive (or teleological) interpretation means that a statute should be interpreted in the light of the purpose of the statute. Woolman *et al* (eds) *Constitutional Law* 32-167.

1439 See 5.2.1 above.

1440 See also Chandrasekharan *Double Jeopardy* 48.

1441 The Law Commission (UK) "Double Jeopardy" 77.

1442 Chirwa *Human Rights* 35.

it must be concluded that section 35(3)(m) of the *Constitution* applies to the judgments of domestic courts as well as to those of foreign courts.¹⁴⁴³

Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, courts “must consider international law”. However, it must be clear, international law does not oblige States to recognise judgements of foreign courts. As stated above,¹⁴⁴⁴ international law only allows States not to recognise foreign judgements; it does not oblige them to do so. It must also be kept in mind that universal jurisdiction is a right; not an obligation. International law “allows” States to exercise universal jurisdiction; it does not “oblige” them to do so.¹⁴⁴⁵ Therefore, by interpreting section 35(3)(m) of the *Constitution* in a way that gives effect to a foreign criminal judgement in South African courts, courts would not be interpreting the Bill of Rights in any manner that is inconsistent with international law. In the light of this fact, there appears to be no reason that the literal meaning of section 35(3)(m) should not be adhered to. In fact, the words “every accused person” are clear enough to include persons whose previous acquittals or convictions were handed down by foreign criminal courts that any other interpretation to the contrary is unwarranted. As an American court¹⁴⁴⁶ once said when a statute's language is plain and clear, “the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion”.¹⁴⁴⁷ When the language of a statute “is plain and does not lead to absurd or impracticable results”,¹⁴⁴⁸ the court held:

there is no occasion or excuse for judicial construction; the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly.¹⁴⁴⁹

There is no ambiguity in the terms of section 35(3)(m) of the *Constitution*. It applies to “every accused person”. This includes both persons who were previously acquitted or convicted by South African courts as well as those who were previously acquitted or

1443 In support of the view that section 35(3)(m) of the Constitution applies to both judgements of South African courts and those of foreign courts, See Hiemstra *Criminal Procedure* 57 and Lansdown and Campbell *Criminal Law and Procedure* 440.

1444 See 5.3 above.

1445 See 2.5.3 above.

1446 *Caminetti v United States* 242 US 470 (15 January 1917). Accessed at <http://supreme.justia.com/cases/federal/us/242/470/case.html> [7 April 2014].

1447 242 US 485.

1448 242 US 471.

1449 242 US 471.

convicted by foreign courts. The relevant consideration is that the person in question is “accused”, in a South African court, for a second time in respect of the same offence for which he was previously acquitted or convicted. The location of the court which previously tried that person is not a relevant consideration. Section 35(3)(m) of the *Constitution* is clear enough and, consequently, any contrary interpretation would not be warranted.

The Implementation Act is silent on this issue. It only grants to South African courts universal jurisdiction over international crimes committed in foreign States. Yet, to imply from this universal jurisdiction that a person may be tried for a second time in South Africa, would be inimical to the spirit of the *Constitution* which provides that when interpreting any legislation, and when developing the common law,¹⁴⁵⁰ courts “must promote the spirit, purport and objects of the Bill of Rights”.¹⁴⁵¹ Since section 35(3)(m) is part of the Bill of Rights, any interpretation of the provisions of the Implementation Act to the effect that some “accused persons” are excluded from the protection that the section offers to accused persons generally would clearly run counter to the dictates of the *Constitution* because such an interpretation would not be promoting the spirit, purport and objects of the Bill of Rights. Thus, in the light of this argument, it must be concluded that section 35(3)(m) of the *Constitution* applies to judgements handed down by South African courts as well as to those of foreign courts.

The consequence of the above conclusion is that South African courts will not be able to try cases of international crimes which will have been tried in foreign States but in a manner that is inconsistent with an intent to bring the accused person to justice. That does not resonate with South Africa’s commitment to “provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa”.¹⁴⁵² One of the pillars of the Rome Statute is the principle of complementarity whose purposes is, among others, of easing “the burden of the ICC’s caseload”.¹⁴⁵³ The ICC, with its limited resources cannot be expected to retry all sham

1450 The *ne bis in idem* rule was part of the common law during the period before the *Constitution* was adopted. For examples of cases referring to the rule as part of the common law, See *State v Moodie* 1962 1 SA 587 (A); *State v Naidoo* 1962 4 SA 348 (A) and *S v Nzuzo* 1963 4 SA 856 (A).

1451 Section 39(2) *Constitution*.

1452 Preamble to the Implementation Act.

1453 Coalition for the International Criminal Court date unknown
http://www.iccnw.org/documents/FS_CICC_Implementation_Legislation_en.pdf

trials that may take place around the world. National courts of States Parties must necessarily be involved in the process of correcting such trials. The lack of an exception to section 35(3)(m) to allow South African courts to retry sham trials conducted in foreign States undermines this purpose of the complementarity regime of the ICC and is in need of reconsideration.

Such a reconsideration can be achieved by inserting in the Implementation Act a provision creating an “exception” to section 35(3)(m) of the *Constitution* which would only be applicable in cases concerning allegations of international crimes tried in foreign States where there is evidence that the person concerned was not adequately held accountable in the foreign State.¹⁴⁵⁴

However, since the right not to be prosecuted for a second time is a constitutional right, any exception to that right must be tested against the “limitation clause” (section 36 of the *Constitution*). This question will be considered in the next section.

5.5 Would an exception to section 35(3)(m) be permissible under the limitation clause?

5.5.1 Introduction

While a second trial in a South African court of a person who was fraudulently acquitted of international crimes in a foreign country is justified for the sake of international criminal justice, the need to protect the accused against multiple prosecutions, seems as valid on an international plane as it is on the domestic level. For such an individual, it does not matter whether or not a second prosecution takes place in the same country or not.¹⁴⁵⁵ The stress and anxiety to the accused are even increased when a second prosecution is initiated by a foreign State.¹⁴⁵⁶ In either case, a second trial will also cost money and will be time-consuming.

Thus, a second trial would necessarily infringe on the accused person’s right against repetitive prosecutions and therefore run afoul of the Constitution, unless such a second prosecution would be justified under section 36 of the *Constitution*.

1454 The various ways a person may be said not to have been “adequately held accountable” for an international crime in his home State are discussed in detail in 5.7 hereunder.

1455 Van Den Wyngaert and Stessens 1999 *International and Comparative Law Quarterly* 781.

1456 Conway 2003 *International Criminal Law Review* 224.

5.5.2 *The concept of limitation*

At first glance, a provision that would allow South African courts to retry cases already tried in foreign States would seem to be in conflict with the Constitution which in section 35(3)(m) enshrines the accused persons' right not to be tried for an offence in respect of an act or omission for which a person has previously been either acquitted or convicted.

However, the *Constitution* recognises that fundamental rights are not absolute.¹⁴⁵⁷ Under section 36 of the *Constitution*, it is recognised that the rights of others and the legitimate needs of the society may justify the imposition of restrictions on the exercise of fundamental rights.¹⁴⁵⁸ Nevertheless, not all limitations are acceptable. In order for a limitation to a fundamental right to be justifiable, a number of requirements must be satisfied. These requirements are set out in section 36 of the *Constitution*, which provides as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

It follows from the above provision that not all infringements of fundamental rights are unconstitutional.¹⁴⁵⁹ Where an infringement of a fundamental right can be justified within the criteria set out in section 36 it will be constitutionally valid.¹⁴⁶⁰ These criteria will be

1457 Woolman *et al* (eds) *Constitutional Law* 34-1 and Jordaan *Aspects of Double Jeopardy* 670. See also Van der Schyff *Limitation of Rights* 26: "[r]ights are not simply the sum total of their protective ambits, but can only be understood properly and effected with certainty by taking the possibility of their limitation into account".

1458 Curie and De Waal *The Bill of Rights Handbook* 163. See also Van der Schyff *Limitation of Rights* 13: "The acceptance of the possibility to limit rights is generally uncontested as it is quite obvious that not all conceivable rights could be exercised at will without conflicts arising in some form or another with the rights of others or other societal interests in general".

1459 Curie and De Waal *The Bill of Rights Handbook* 164.

1460 Jordaan *Aspects of Double Jeopardy* 671 and Curie and De Waal *The Bill of Rights Handbook* 164. The "two-stage" approach of analysis was put forward in *S v Walters* 2002 4 SA 613 (CC) 630-631 as follows: "This is essentially a two-stage exercise. First, there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the

analysed below with a view of determining whether the proposed exception to section 35(3)(m) would be justified.

5.5.3 Analysis of the criteria for limitation in relation to a possible exception to section 35(3)(m)

5.5.3.1 Law of general application

First and foremost, in terms of section 36 of the *Constitution*, a fundamental right may only be legitimately limited by a law of general application. In other words, a limitation may be only authorised by a law, and the law must be of general application.¹⁴⁶¹ Briefly stated, the requirement of law of “general application” simply means that the law should apply generally, and should not be directed to specific individuals.¹⁴⁶²

With respect to a possible exception to section 35(3)(m), it seems that this requirement would be satisfied by inserting a provision in the Implementation Act to the effect that South African courts will be entitled to retry a case already tried in a foreign country if there is evidence that the foreign proceedings were undertaken for the purpose of shielding the person concerned from criminal responsibility, or were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice. Since such a provision would be provided for by a law of general application, it would satisfy the first requirement for validity under section 36 of the *Constitution*.

5.5.3.2 Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom

The second test for validity of a law that restricts a fundamental right is that it should do so for reasons that are acceptable in an open and democratic society based on human

relevant protected right (s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b) [...] If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then. If there is indeed a limitation, however, the second limitation ensues. This is ordinarily called the limitations exercise. In essence this requires a weighing-up of the nature of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of of the limiting enactment”.

1461 Woolman *et al* (eds) *Constitutional Law* 34-48.

1462 Jordaan Aspects of Double Jeopardy 679-680 and Curie and De Waal *The Bill of Rights Handbook* 169.

dignity, equality and freedom and that there must be proportionality between the harm done by the law and its purpose.¹⁴⁶³ Section 36 contains a set of “relevant factors” to be taken into account by a court when considering the reasonableness and justifiability of a limitation. They are analysed below.

5.1.1.1.1 The nature of the right

This criterion of the balancing exercise requires that a right that is of particular importance carry a great deal of weight when balanced against justifications for their infringement. Some rights weigh more heavily than others and their limitation must serve a purpose which is particularly compelling.¹⁴⁶⁴ In other words, the more important the right is, the more compelling the justification of the limitation must be.¹⁴⁶⁵

The importance of the protection against double jeopardy cannot be over-estimated. The principle ensures that once acquitted, the person should be allowed to live in peace, even if it may later become clear that the acquittal was materially wrong.¹⁴⁶⁶ The principle protects the accused against additional burdens arising out of a second prosecution, including the duplicated costs of legal representation;¹⁴⁶⁷ it ensures that the State’s prosecutorial power is not abused against citizens,¹⁴⁶⁸ and protects accused persons, whose limited resources cannot allow them to fight endless trials with the State, from being wrongly convicted of a crime.¹⁴⁶⁹ On the other hand, however, the importance of the purpose of the proposed exception to section 35(3)(m) cannot be neglected. The importance of the right enshrined in section 35(3)(m) must, therefore, be balanced against the importance of the limitation. This is discussed under the second criterion below.

1463 Curie and De Waal *The Bill of Rights Handbook* 176 and Jordaan *Aspects of Double Jeopardy* 683-684.
1464 Curie and De Waal *The Bill of Rights Handbook* 178.
1465 Woolman *et al* (eds) *Constitutional Law* 34-71.
1466 Stigen *The Principle of Complementarity* 333. See also 5.2.1.2 above.
1467 Bockel *The Ne Bis in Idem Principle in EU Law* 29. See also 5.2.1.1 above.
1468 Rudstein 2008 *San Diego International Law Journal* 255 and Bernard 2011 *Journal of International Criminal Justice* 3. See also 5.2.1.1 above.
1469 Daniels “*Non Bis in Idem*” 3: “It prevents the state from attempts to retry facts underlying an acquittal thereby limiting erroneous convictions which could flow from the fact that defendants do not have the resources and energy to fight against repeated and vexatious prosecutions”. See also 5.2.1.3 above.

5.1.1.1.2 The importance of the purpose of the limitation

To be justifiable, a law that limits fundamental rights must serve a purpose that is “worthwhile and important in a constitutional democracy”.¹⁴⁷⁰ This factor requires two separate inquiries: the identification of the purpose of the limitation, and an appraisal of its importance.¹⁴⁷¹ In *S v Makwanyane*¹⁴⁷² the Constitutional Court held that for the death penalty to be a justifiable limitation to the right to life,¹⁴⁷³ the State had to satisfy the court that the death penalty served purposes that can be considered as particularly important in an open and democratic society. The court agreed that the death penalty served two important purposes. First, the prospect of such an extreme punishment has the effect of serving as a deterrent to violent crimes.¹⁴⁷⁴ Secondly, it was agreed that since the executed criminal may not come back to commit further crimes, the death penalty served to prevent the recurrence of violent crimes.¹⁴⁷⁵ In regard to the *ne bis in idem* rule, the purpose of the proposed exception is to avoid impunity in relation to the most serious violations of human rights by allowing South African courts to review foreign proceedings if it is established that such proceedings were conducted with the purpose of shielding the concerned person from criminal liability or were conducted in a manner that is inconsistent with an intent to punish.

The next step is to determine the importance of the purpose of the limitation. Stated briefly, the importance of the purpose of the limitation criterion means that a law that infringes on a fundamental right must serve a purpose that reasonable citizens would regard as compellingly important.¹⁴⁷⁶ With respect to the *ne bis in idem* rule, it appears that the proposed exception would serve a particularly important purpose of ending impunity for gross violations of human rights. Such a purpose seems to be compellingly important that it overrides any individual’s interest in not being tried twice for the same

1470 Curie and De Waal *The Bill of Rights Handbook* 179. See also Van der Schyff *Limitation of Rights* 227.

1471 Woolman *et al* (eds) *Constitutional Law* 34-73.

1472 *S v Makwanyane* 1995 3 SA 391 (CC).

1473 It was also alleged that the death penalty violated the rights to human dignity and freedom from cruel punishment. 1995 3 SA 410.

1474 1995 3 SA 442: “The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others”.

1475 1995 3 SA 445.

1476 Curie and De Waal *The Bill of Rights Handbook* 180.

offence. The next question is whether the proposed exception would be more extensive than is warranted.

5.1.1.1.3 The nature and extent of the limitation

Under this heading, the question is: how serious or severe is the limitation? This criterion requires courts to assess the extent to which the limitation affects the right concerned.¹⁴⁷⁷ Reasonableness requires that the more “intrusive” the limitation is the more compelling must be the interest it serves. If the harm is disproportionate to the benefits, the limitation cannot be justified.¹⁴⁷⁸ In respect to the possible exception to the right against double jeopardy contained in section (3)(m), it seems that there would be no disproportionality between the limitation (a second prosecution) and the infringed right (the protection against repetitive prosecutions). Although a second prosecution has the effect of subjecting an individual to continued anxiety, stress and associated financial costs, it appears that the purpose that it would serve (combating impunity for gross violations of human rights), outweighs the prejudice it would cause to a particular individual.

5.1.1.1.4 The relation between the limitation and its purpose

A law that limits a fundamental right will not be justified if there is no causal relationship between the law and its purpose.¹⁴⁷⁹ For example, in *S v Bhulwana; S v Gwadiso*¹⁴⁸⁰ the Constitutional court held that the fight against illegal drugs (purpose) would not be substantially furthered by a legislative presumption that a person found in possession of 115 grams of dagga was a dealer (limitation) because there was no logical connection between such possession and the presumption.¹⁴⁸¹ The court concluded on this basis that the provision could not be justified in terms of the limitation clause.¹⁴⁸²

1477 Curie and De Waal *The Bill of Rights Handbook* 181. See also Van der Schyff *Limitation of Rights* 229: “A further factor that warrants consideration pertains to the determination of the *nature and extent of an interference* with the protected conduct and interests of a right. In other words, what is the burden of an interference or to which extent is the protection afforded by a right neutralised”?

1478 Curie and De Waal *The Bill of Rights Handbook* 181-182 and Woolman *et al* (eds) *Constitutional Law* 34-71-34-85.

1479 Curie and De Waal *The Bill of Rights Handbook* 183.

1480 *S v Bhulwana, S v Gwadiso* 1996 1 SA 388 (CC).

1481 1996 1 SA 396: “There can be little doubt that the effective prohibition of the abuse of illegal drugs, particularly those which result in severe damage to the user, is a pressing social

This requirement ought not to cause any difficulty as far as the proposed exception to section 35(3)(m) is concerned. The purpose for which the said exception would be created is to fight impunity arising from sham trials conducted in foreign States. Allowing South African courts to retry such cases (limitation) would discourage foreign States from conducting sham trials and, where the sham has taken place, it would allow South African courts to correct the sham (purpose). There is therefore, an indisputable relationship between the limitation and its purpose.

5.1.1.1.5 Less restrictive means to achieve the purpose

A law that limits fundamental rights should not use a sledgehammer to crack a nut.¹⁴⁸³ To be legitimate, a law that limits a fundamental right must be the “less restrictive means to achieve the purpose”. In other words, the limitation will not be justified if other means could be employed to achieve the same purpose and such means would not either restrict the right in question at all, or would not restrict them to the same extent.¹⁴⁸⁴

In *S v Makwanyane*, for example, the court recognised deterrence and prevention as legitimate purposes of the death penalty. However, the court observed deterrence and prevention could be well also served by a sentence of imprisonment for a long period or for life. Such a punishment would also be an infringement of rights but would not be as extensive as the death penalty. In the absence of any evidence that the death penalty serves the purpose of deterrence and prevention more effectively than a sentence of

purpose. There is also little doubt that it is important for the government to take active steps to suppress trafficking in illicit drugs. It is not clear, however, that either of these purposes is substantially furthered by the presumption provided for in section 21(1)(a)(i). See also 1996 1 SA 397: “In my view, section 21(1)(a)(i) of the Act cannot be justified in terms of section 33(1) of the Constitution. Although the need to suppress illicit drug trafficking is an urgent and pressing one, it is not clear how, if at all, the presumption furthers such an objective”.

1482 The court also observed that where a large quantity of dagga was found in the accused’s possession, an inference of dealing might in any event be justifiably drawn without any reliance to the presumption. See at 1996 1 SA 396.

1483 *S v Manamela* 2000 3 SA 1 (CC) 20.

1484 Curie and De Waal *The Bill of Rights Handbook* 183-184; Woolman *et al* (eds) *Constitutional Law* 34-85 and Van der Schyff *Limitation of Rights* 232: “It does not suffice to come to a conclusion as to the justification of an interference by simply considering the nature of the right at stake, as well as the importance of the purpose pursued and the extent and nature of the interference, without posing the question whether *less restrictive means* could have been employed in limiting a right. In other words, not an interference as such must be evaluated, but also its relation to other possibilities in securing the legitimate purpose being pursued”.

imprisonment, it is the latter, less restrictive method of achieving the purpose that must be preferred. For this reason, the death penalty was declared unconstitutional.¹⁴⁸⁵

Another case in which the “less restrictive means” element of the limitation clause was considered is *D v K*.¹⁴⁸⁶ The facts of this case were that the applicant had applied for an order of court compelling the respondent to subject himself to a blood test for the purpose of determining whether or not he could be excluded as the possible father of a minor child. The court found that the taking of blood samples without the consent of the respondent would violate his right to privacy by then guaranteed in section 13 of the *Interim Constitution*. On the question whether such violation would nonetheless be justified under the limitation clause, the court found that such compulsion to undergo a blood test to establish paternity could not be justified because there were less intrusive methods available to achieve the desired results.¹⁴⁸⁷ These less restrictive methods were identified as following from certain presumptions in the *Children Status Act*¹⁴⁸⁸ which can be relied on to prove paternity once the basic fact is proved, namely that sexual intercourse had taken place between the mother and the person alleged to be the father at the time the child was conceived.¹⁴⁸⁹

Applied to the proposed exception to the *ne bis in idem* rule, this requirement means that a second prosecution in a foreign State should be the least restrictive means to achieve the purpose of deterring and correcting sham trials. It may be argued that the State where the crimes were tried for the first time can, upon a request by the ICC Prosecutor, retry and correct the shams itself and that such a retrial in the home State would be “less restrictive” in the sense that it would not be as expensive in terms of costs incurred by the accused as a trial conducted in a foreign State. It may also be argued that a second trial in a foreign country is more stressful and traumatic than a second trial in the same country. As stated earlier,¹⁴⁹⁰ however, international crimes are often committed by States’ officials or in complicity with them. It can therefore not be

1485 *S v Makwanyane* 1995 3 SA 443-444 and 445. See also Curie and De Waal *The Bill of Rights Handbook* 184.

1486 *D v K* 1997 2 BCLR 209 (N).

1487 1997 2 BCLR 221.

1488 *Children Status Act* 82 of 1987.

1489 At 1997 2 BCLR 218. See also Jordaan *Aspects of Double Jeopardy* 696.

1490 See 1.1.2.4 above.

expected that if the first trial was a sham a second trial would not. The courts of other States are thus the proper avenue for such subsequent trials.

Without another means to achieve the purpose the proposed exception is designed to serve, it seems that the requirement of “less restrictive means to achieve the purpose” should be satisfied. It is accordingly concluded that the proposed exception would be constitutionally valid.¹⁴⁹¹

It is also noteworthy that South Africa would not be alone in having reformed the rule against double jeopardy. The next section will attempt to support the proposed exception by reference to the exceptions that already exist in foreign legislation.

5.6 Exceptions to the *ne bis in idem* rule in foreign law

5.6.1 England

An exception to the double jeopardy rule also exists in the United Kingdom where sections 54 to 57 of the *Criminal Procedure and Investigations Act* 1996 allow for an acquittal to be set aside if it is found that the acquittal was 'tainted' by “interference or intimidation”. Under this exception, an acquittal may be set aside (thus opening the way for a second trial) where a person has been convicted of an offence of interference with, or intimidation of, witnesses or jurors at the first trial (an “administration of justice offence”), and the acquittal appears to have resulted from that offence.¹⁴⁹² Furthermore, following the 2001 recommendations of the English Law Commission,¹⁴⁹³ the UK parliament passed the *Criminal Justice Act* 2003 which extended the powers of the

1491 In support of exceptions to the *ne bis in idem* rule, see the recommendations of the Law Reform Commission of New Zealand in Law Commission (New Zealand) “Acquittal Following Perversion of the Course of Justice” 14: “We recommend a limited and principled exception to it in cases where an accused has secured apparently unmerited acquittal in the most serious classes of case by perjury or other conduct designed to defeat the course of justice”. It is also worth referring to the HRC’s general comment on art 14(7), where the HRC observed that the reopening of criminal proceedings which is “justified by exceptional circumstances” does not infringe upon the *ne bis in idem* principle contained in art 14(7) of the ICCPR (HRC *General Comment No 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (art 14)* (13 April 1984) para 19). One may also mention art 4(2) of Protocol No 7 to the ECHR which expressly establishes an exception where there has been a “fundamental defect in the previous proceedings, which could affect the outcome of the case”. See also Stigen *The Principle of Complementarity* 209.

1492 For a detailed discussion of this exception see: The Law Commission (UK) “Double Jeopardy” 10-11.

1493 The Law Commission (UK) “Double Jeopardy”.

prosecution to reinstate charges against a person if the person is liable to be retried for a "qualifying offence"¹⁴⁹⁴ where there is "new and compelling"¹⁴⁹⁵ evidence pointing towards the guilt of the acquitted person, and a retrial is in the "interests of justice".¹⁴⁹⁶

The case of *R v Dunlop* provides an example of the application of the Criminal Justice Act 2003. In 1991, Billy Dunlop was charged with a murder allegedly committed in 1989. After two juries had failed to reach a verdict, he was acquitted. Later, while he was in prison for another offence, he confessed to a prison officer that he had committed the murder. This confession was made on other different occasions in letters with friends and in an interview.¹⁴⁹⁷ The application of the double jeopardy rule at that time meant that Dunlop could not be charged again with murder and Dunlop knew it. When the *Criminal Justice Act 2003* came into force in 2005, the prosecution applied to quash Dunlop's acquittal for murder on the basis that there was "new and compelling evidence" against him. The court granted leave for retrial.¹⁴⁹⁸ Mr Dunlop pleaded guilty and was sentenced to life imprisonment.¹⁴⁹⁹

Another case that illustrates the application of the exception to the double jeopardy rule under the *Criminal Justice Act 2003* is the one of Mark Weston. Mark Weston had been cleared of a charge of murder in 1995.¹⁵⁰⁰ After the 2003 Act came into force, Weston was retried on the basis of fresh evidence. He was found guilty and sentenced to life imprisonment.¹⁵⁰¹

1494 The "qualifying offences" are defined by reference to those listed in Part 1 of schedule 5 to the Act and are, by nature, serious offences. They are listed under the following categories: (a) Offences against the person, including murder, manslaughter, and kidnapping; (b) Sexual offences, including rape and intercourse with a girl under 13; (c) Drug offences, such as producing or being involved in the production of a Class A drug; (d) Criminal damage offences, such as arson endangering life; (e) War crimes and terrorism, including genocide, crimes against humanity and hostage-taking; (f) Conspiracy in relation to any of the qualifying offences.

1495 Section 78.

1496 Section 79.

1497 The Law Reform Commission of Hong Kong "Double Jeopardy" 47.

1498 "[t]his is a case where justice requires the application of the provisions of Part 10 that provide an exception to the rule against double jeopardy". *R v Dunlop* [2006] EWCA Crim 1354 (16 June 2006) para 46. Accessed at <http://www.bailii.org/ew/cases/EWCA/Crim/2006/1354.html> [12 April 2013].

1499 Unreported. See The Crown Prosecution Service 2010 http://www.cps.gov.uk/news/press_releases/155_06/

1500 The Guardian 2010 <http://www.theguardian.com/uk/2010/dec/13/double-jeopardy-murder-retrial-guilty>

1501 Unreported. See BBC 2010 <http://www.bbc.co.uk/news/uk-england-11987387>

5.6.2 *New Zealand*

Subsequent to the New Zealand Law Commission's proposals to amend the *ne bis in idem* rule in 2001,¹⁵⁰² New Zealand's Parliament passed the Crimes Amendment (No 2) Act 2008 which provides that the High Court may order a person who has been acquitted of a "specified offence"¹⁵⁰³ and who has subsequently been convicted of "an administration of justice offence"¹⁵⁰⁴ to be retried for the specified offence if it is satisfied that:

- (a) it is more likely than not that the commission of the administration of justice offence was a significant contributing factor in the person's acquittal for the specified offence;
- (b) no appeal or application in relation to the administration of justice offence is pending before any court; and
- (c) the retrial is in the interests of justice.¹⁵⁰⁵

Furthermore, the 2008 Act allows the Court of Appeal to order the retrial of a person previously acquitted of a "specified serious offence"¹⁵⁰⁶ if it is satisfied that:

- (i) there is new and compelling evidence to implicate the acquitted person in the commission of the specified serious offence; and
- (ii) a further trial of the acquitted person is in the interests of justice.

5.6.3 *Australia: Queensland*

Exceptions to the *ne bis in idem* rule also exist in Australia. The reforms in Australia were enacted after a period of intense lobbying and debates,¹⁵⁰⁷ subsequent to the case of *R v Carroll*.¹⁵⁰⁸ In 1985, Raymond John Carroll was tried by a jury and found guilty of the murder of Deidre Maree Kennedy in 1973. On appeal, the Court of Criminal Appeal set aside the conviction on the basis that a properly instructed jury could not have been satisfied beyond reasonable doubt on the evidence before them that the accused was

1502 Law Commission (New Zealand) "Acquittal Following Perversion of the Course of Justice".

1503 "Specified offence" means an offence punishable by imprisonment and for which the person has previously been acquitted and includes any offence for which the person may not be tried because of the acquittal. Section 378A(1).

1504 The administration of justice offences are those related to the corruption or intimidation of judges and witnesses. Section 378A(1)(b).

1505 Section 378A(2).

1506 A "specified serious offence" means an offence that is punishable by 14 years' imprisonment or more. Section 378B(1).

1507 Prakash 2003 *University of Queensland Law Journal* 267.

1508 *Carroll v R* (1985) 19 A Crim R 410.

guilty.¹⁵⁰⁹ Some years later, the Crown obtained some new and stronger evidence to support the charges against Carroll.¹⁵¹⁰ The Crown could not, however, reinstate the charge of murder against Carroll because such retrial was barred by the *ne bis in idem* rule under the Queensland's Criminal Code.¹⁵¹¹

In 1999, the Crown attempted to circumvent the *ne bis in idem* rule by bringing against Carroll a charge of perjury. It was alleged that during his murder trial Carroll had given evidence on oath that he had not killed the deceased, claiming that he was attending a course in South Australia at the time of the murder. The jury found Carroll guilty of perjury. He appealed to the Queensland Court of Appeal which quashed the conviction and entered a verdict of acquittal.¹⁵¹² The Crown was granted leave to appeal to the High Court but the appeal was dismissed.¹⁵¹³ The High Court unanimously held that the proceedings for perjury were “merely a second attempt to secure a conviction on a criminal charge”, and that the proceedings for perjury should have been stayed to prevent an “abuse of process”. The High Court held that:

[I]t is an abuse of process for the Crown to charge a person with an offence of perjury when proof of the charge necessarily contradicts or tends to undermine an acquittal of the accused in respect of another criminal charge. A perjury charge that has that effect is an abuse of process even if the evidence supporting the charge is different from the evidence that supported the prosecution case in respect of the charge on which the accused was acquitted. The long established policy of the law is that an acquittal is not to be contradicted or undermined by a subsequent charge that raises the same ultimate issue or issues as was or were involved in the acquittal. That is so even though the evidence proving perjury is unanswerable.¹⁵¹⁴

1509 *Carroll v R* (1985) 19 A Crim R 410.

1510 This evidence included an alleged confession by Carroll to a fellow inmate before the murder trial (which was not reported to police until 1997), evidence of a woman who claimed that she had seen Carroll in Ipswich, the area where the crime was committed, on the day of the murder and digital analysis of images scanned onto a computer to show that the marks on the victim's legs corresponded with a cast of Carroll's teeth. For further details on the facts of the case see Rowena “Double Jeopardy” 7-8.

1511 Sections 17 of the *Criminal Code Act* of 1899: “It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged”.

1512 *R v Carroll* [2001] QCA 394 (21 September 2001). Accessed at <http://www.austlii.edu.au/au/cases/qld/QCA/2001/394.html> [10 March 2013].

1513 *R v Carroll* [2002] HCA 55 (5 December 2002). Accessed at <http://www.austlii.edu.au/au/cases/cth/HCA/2002/55.html> [10 March 2013].

1514 *R v Carroll* [2002] HCA 55 (5 December 2002) para 118. The reasoning of the High Court has been paraphrased by Kirby as follows: “the logic of the Crown's submission that it might proceed against Mr Carroll for perjury involved the suggestion that it could secure a lesser punishment for what was, in substance, an accusation of the truth of the proposition that the accused was guilty of murder. It thus placed the prosecution in the invidious position of seeking

The prosecution's lack of a possibility to recharge Carroll for murder (because of the *ne bis in idem* rule) and the subsequent High Court's decision to reject the prosecution's attempt to prosecute Carroll for perjury sparked a significant public outcry against the *ne bis in idem* rule.¹⁵¹⁵ A series of debates ensued on whether the *ne bis in idem* principle should be amended to allow a possibility for a retrial in cases where new compelling evidence has come to light.¹⁵¹⁶ The outcry and the debates resulted in the adoption, in Queensland,¹⁵¹⁷ of the *Criminal Code (Double Jeopardy) Amendment Act 2007* which provides that the Court of Appeal¹⁵¹⁸ may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for the offence of murder where there is "fresh and compelling evidence" against the acquitted person in relation to the offence.¹⁵¹⁹ The amendment further provides that, on the application of the Director of Public Prosecutions, the Court may order an acquitted person to be retried for a "25 year offence"¹⁵²⁰ if it is satisfied that the acquittal is a "tainted acquittal".¹⁵²¹

to establish the falsity of the denial of guilt of murder but in circumstances where, proof of such falsity would only attract the punishment for perjury, not the punishment proper to murder itself". Kirby 2003 *Criminal Law Journal* 19. Kirby also argues that to put a person on trial on an accusation of perjury for giving false evidence in his trial would constitute a "weakening of the privilege against self-incrimination, itself a basic civil right". Kirby 2003 *Criminal Law Journal* 20.

1515 Prakash 2003 *University of Queensland Law Journal* 270.

1516 Prakash 2003 *University of Queensland Law Journal* 267.

1517 Reforms were also undertaken in other federal states throughout Australia. For example, in the state of New South Wales, the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 No 69 was enacted in December 2006 which, in Part 8, makes provision for the retrial of an acquitted person in respect of a "tainted acquittal", or "a life sentence offence" if the Court of Criminal Appeal is satisfied that there is "fresh" and "compelling" evidence. The definitions of the terms here are in substance similar to those adopted in the Queensland legislation, and accordingly, only the latter State's legislation will be discussed in this section.

1518 Section 678 (1) (b).

1519 Section 678B. Under section 678D, evidence is "fresh" if: (a) it was not adduced in the proceedings in which the person was acquitted; and (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence. On the other hand, evidence is compelling, if (a) it is reliable; and (b) it is substantial; and (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.

1520 A "25 year offence" is defined here as an "offence punishable by imprisonment for life or for a period of 25 years or more". Section 678(1) Criminal Code (Double Jeopardy) Amendment Act 2007

1521 Section 678C. Under section 678E, an acquittal is "tainted" if "(a) the accused person or another person has been convicted in this State or elsewhere of an administration of justice offence in relation to the proceedings in which the accused person was acquitted; and (b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted".

5.6.4 Protocol 7 to the European Convention for the Protection of Human Rights (ECPHR)

Article 4(2) of Protocol 7 to the ECPHR¹⁵²² also permits a case to be “reopened”, if there is “evidence of new or newly discovered facts”, or if there has been “a fundamental defect in the previous proceedings”, which could affect the outcome of the case. Since the decisions of the European Court of Human Rights (established by the ECPHR¹⁵²³) are legally binding,¹⁵²⁴ the provisions of the ECPHR can be considered as foreign law in support of the proposition made here that the *ne bis in idem* rule is not absolute¹⁵²⁵ and that an exception to this rule can be justified. What remains is to determine the potential scope and ambit of the proposed exception. This will be the subject of the next section.

5.7 The potential scope of the proposed exception

This section will attempt to delineate the contours of the proposed exception to section 35(3)(m) by analysing the different situations that a person who has already been tried for an international crime in a foreign State should be retried for the same crime in South African courts.

The proposed exceptions will be grouped under three categories. The first and second categories fall under the two situations contemplated in article 20(3) of the Rome Statute, namely where the proceedings at the national level were undertaken “for the purpose of shielding the person concerned from criminal responsibility”,¹⁵²⁶ or where such proceedings were conducted in a manner which, in the circumstances, was “inconsistent with an intent to bring the person concerned to justice”.¹⁵²⁷ The third category relates to two situations which do not fall under any of the two situations

1522 Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984).

1523 Art 19 ECPHR.

1524 Art 46 ECPHR.

1525 See also The Law Reform Commission of Hong Kong “Double Jeopardy” 33.

1526 Art 20(3)(a) Rome Statute.

1527 Art 20(3)(b) Rome Statute. See also Principle 26 (b) of the UN’s “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity”: “The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”.

contemplated in the Rome Statute. First there may be a situation where the “proceedings” were genuinely conducted and an appropriate sentence was imposed but the person concerned was later released from prison after serving only an insignificant part of his sentence. Secondly, there may be a case such as those discussed earlier in this chapter,¹⁵²⁸ where subsequent to the accused’s acquittal new and compelling evidence is brought to light which clearly points to his guilt.

5.7.1 *The proceedings were undertaken for the purpose of shielding the person concerned from criminal responsibility*

Situations where a foreign trial can be characterised as having been conducted with a purpose of “shielding” the accused from criminal responsibility are many and various. They may include fraudulent acquittals¹⁵²⁹ or, in case of conviction, situations where the accused was convicted but no sentence was imposed,¹⁵³⁰ where the sentence was imposed but not served¹⁵³¹ and where a derisory sentence was imposed.¹⁵³²

5.7.1.1 The accused was fraudulently acquitted

This situation refers to the cases of “fraudulent proceedings” conducted for the purpose of shielding the person concerned.¹⁵³³ In the Rome Statute a situation of this kind is governed by article 20(3)(a) which provides that a case shall be retried before the ICC if the proceedings at the national level:

[W]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.

In the context of the ICC this exception prevents a State from exploiting the *ne bis in idem* provision by using a sham trial to prevent a trial from being held before the ICC.¹⁵³⁴ When viewed in this light, the exception to the *ne bis in idem* rule contained in article 20(3)(a) of the Rome Statute fulfils a legitimate and important function. A State should not be able to collude with an individual accused of international crimes to shield that person from criminal responsibility. Allowing a sham trial in these cases would

1528 See 5.6 above.

1529 See 5.7.1.1 hereunder.

1530 See 5.7.1.2 hereunder.

1531 See 5.7.1.3 hereunder.

1532 See 5.7.1.4 hereunder.

1533 Spinellis 2002 *Revue Internationale de Droit Pénal* 1160.

1534 Finlay 2009 *University of California Davis Journal of International Law and Policy* 235.

undermine the purposes underpinning the establishment of the ICC, namely the fight against impunity.¹⁵³⁵

It is impossible to draw up an exhaustive list of all situations that may reflect a State's intention to shield a person from criminal responsibility in this way.¹⁵³⁶ This is a question which must be answered in view of the prevailing facts of each case.¹⁵³⁷ An example of these situations would be when the State conducts ineffective and "non-genuine" investigations in order for the accused to be acquitted in court.¹⁵³⁸ Other cases would include the cases where evidence emerges that the acquittals were secured as a result of intimidation or influence on the judges. Such acquittals may lead the ICC to consider the proceedings as having been conducted with the purpose of shielding the accused from criminal responsibility and make an order for a retrial. Such a possibility should also be available for South African courts which, under the complementarity principle, have primacy over the ICC.

It is however not always easy to prove that a trial was not genuine. This problem of proof may be illustrated by the trial of a number of officers, including a general and a major, of the Rwanda Defence Forces, by the Rwandan Military High Court in 2008. The officers were accused of complicity in the murder of 13 Catholic Church clergymen during the war in June 1994. When the general and the major were acquitted of the charges,¹⁵³⁹ Human Rights Watch lamented that the proceedings amounted to "a political whitewash and a miscarriage of justice".¹⁵⁴⁰ Besides making this allegation, however, Human Rights Watch did not support it with any tangible evidence. Of course, the fact the Rwandan government did not investigate and prosecute this case until 2008 (14 years after the crime was committed) casts doubt about the genuineness of the trial, but this fact itself is not sufficient to conclude that the proceedings amounted to "a political whitewash and a miscarriage of justice". Given the financial and psychological

1535 Finlay 2009 *University of California Davis Journal of International Law and Policy* 235.

1536 Zeidy *The Principle of Complementarity* 175. See also Finlay 2009 *University of California Davis Journal of International Law and Policy* 236: "It is difficult to precisely ascertain the types of cases that will, in practice, fall within this exception and where exactly the line will be drawn".

1537 Finlay 2009 *University of California Davis Journal of International Law and Policy* 236.

1538 Zeidy *The Principle of Complementarity* 175.

1539 Only two low-ranking soldiers were found guilty of the alleged crimes. Hirondele News Agency 2009 <http://www.hirondellenews.com/ictr-rwanda/409-rwanda-justice/22871-en-en-250209-rwandabishops-rwanda-military-court-confirms-acquittal-of-two-senior-officers1192211922>

1540 Human Rights Watch 2009 <http://www.hrw.org/news/2009/08/17/rwanda-tribunal-s-work-incomplete>

implications that a second trial entails, a characterisation by South African prosecutors of a foreign trial as having been conducted with the purpose of shielding a person from criminal liability should be made with the utmost caution and circumspection.

Cases that would clearly point to a fraudulent acquittal are those where the accused or other persons acting on behalf of the accused have been convicted of a crime for bribing or intimidating prosecutors, witnesses or judges and the acquittal appears to have resulted from that offence. Under the law of England, such an offence is known as an “administration of justice offence”.¹⁵⁴¹ This would also be the case where, without having been convicted of such an offence, the accused has confessed to have secured his acquittal in a manner that constitutes an administration of justice offence. In cases such as these the accused’s expectation that the matter is finally settled has no legitimacy whatsoever because he has been part of or was aware of the circumstances that made the trial a sham.¹⁵⁴² A second trial would also not constitute an excessive use of judicial power against the individual because no such power was exercised at all in the first trial in his home State.¹⁵⁴³

5.7.1.2 The accused was convicted but no sentence was imposed

Another situation where a foreign trial should be seen as having been conducted for the purpose of shielding the person from criminal responsibility is where the accused was tried and convicted but no sentence was imposed.

Discussing this issue in the context of the Rome Statute, Bernard¹⁵⁴⁴ points out that in order for a judgment of a national court to block the case from being admissible before the ICC, the accused must have been “sufficiently punished”. In other words, he says, for the *ne bis in idem* principle to apply:

it is necessary not only that an initial judgment is handed down but that a sentence is also imposed.¹⁵⁴⁵

1541 See 5.6.1 above.

1542 Stigen *The Principle of Complementarity* 208.

1543 Finlay 2009 *University of California Davis Journal of International Law and Policy* 235: “In any event, a subsequent prosecution by the ICC does not violate the “spirit” of the *ne bis in idem* prohibition in these circumstances because a “sham trial” does not truly place an individual in jeopardy in the first place”.

1544 Bernard 2011 *Journal of International Criminal Justice* 16.

1545 Bernard 2011 *Journal of International Criminal Justice* 16.

The above interpretation of the *ne bis in idem* clause of the Rome Statute is the most consistent with the underlying purpose of the Rome Statute, i.e., to end impunity for international crimes.¹⁵⁴⁶ Without the possibility for the ICC to intervene where a person has been convicted but no sentence was imposed purposes of deterrence and prevention of future international crimes cannot be achieved. Yet, as stated earlier,¹⁵⁴⁷ the ICC alone cannot correct all sham trials that may take place around the world. South Africa's intervention in this regard is thus also needed.

5.7.1.3 The sentence was imposed but not served

Another situation where a trial should be seen as having been conducted with the intention of shielding the accused person from criminal accountability is where that person was sentenced but, owing to a State's policy, the sentence was not executed. In cases such as this, the Rome Statute's goal of ending impunity for the most serious violations of human rights cannot be achieved. Although not specific mention is made in the Rome Statute to the effect that the ICC would retry such cases, it appears that a situation of this kind would clearly fall under article 20(3)(a) of the Rome Statute. If States were allowed to try and convict but fail to execute the sentences imposed by their courts, it can never be said that the purpose of the trial was to bring the perpetrator to justice. Such a situation would also undermine the very purpose of the Rome Statute.¹⁵⁴⁸

A similar exception as the one suggested here is found in article 54 CISA, which stipulates that a person who has been tried and convicted in one Contracting Party may not be prosecuted in another Contracting Party for the same crime provided that, if a penalty has been imposed:

- i. it has been enforced,
- ii. is actually in the process of being enforced or
- iii. can no longer be enforced under the laws of the sentencing Contracting Party.

1546 Para 5 Preamble to the Rome Statute.

1547 See 1.1.2.3 above.

1548 Bernard 2011 *Journal of International Criminal Justice* 16: "Non-enforcement of a judgment does not explicitly constitute an exception to the principle of *ne bis in idem* but could be considered as a deficiency of the first trial. This tallies with the objective of 'fighting against impunity' pursued by the Rome Statute".

Except for the last element (iii) that even a sentence that is no longer susceptible of being enforced can bar a second prosecution in a foreign country, article 54 CISA supports the argument advanced in this study that a conviction followed by a sentence which was not enforced should not be a valid defence to retrial before South African courts where international crimes are concerned.

The reason for the argument that a sentence which was not enforced and can no longer be enforced under the laws of the sentencing State should not bar a retrial for international crimes is that such a rule would create a loophole which some States might exploit to “shield” criminals from criminal accountability both at home and abroad. This might be achieved, for example, by allowing their courts to conduct a genuine and independent trial, convict the culprits and sentence them to an appropriate sentence but then grant them presidential pardon or amnesty. The convicted persons would then be entitled to invoke the *autrefois convict* defence if they were subsequently charged with the same offence before South African courts in terms of the Implementation Act. In light of the purpose of ending impunity for international crimes,¹⁵⁴⁹ such an outcome is clearly not a desirable one.

5.7.1.4 Only a derisory sentence was imposed

The last situation where a trial can be characterised as having been conducted for the purpose of shielding the person concerned from criminal responsibility is where, under external pressure, a State conducts a trial in order to prevent the extradition of the said person to a foreign or international tribunal, but sentences that person to a derisory sentence.¹⁵⁵⁰

A typical example of such cases is the so-called “Leipzig trials”. These were a series of war crimes trials held by the German Supreme Court (*Reichsgericht*) in Leipzig

1549 See para 5 of the Preamble to the Rome Statute (which states that States Parties are “[D]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.) and the Preamble to the Implementation Act which provides that the Act was enacted “to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa”.

1550 See also Bernard 2011 *Journal of International Criminal Justice* 16 where the author discusses this issue in the context of the Rome Statute: “New procedures *in idem* will indeed be allowed, in spite of the principle, if the first initial procedure was deficient in a number of respects - amongst which is the situation where a too lenient sentence has been imposed. In other words, the imposition of mild sentences seems to be conceived as a sign of too much clemency being afforded to the accused”.

following the end of WWI as part of the penalties imposed on the German government under the Treaty of Versailles.¹⁵⁵¹

Initially the Allies wanted to prosecute German war criminals before their military tribunals,¹⁵⁵² but the Germans refused to extradite any German citizens to Allied governments, suggesting instead that they would try them before a German court.¹⁵⁵³

This proposal was accepted by the Allied leaders, and in May 1920 they handed the German government a list of 45 persons to be tried.¹⁵⁵⁴ As not all these people could be traced, however, only twelve individuals were brought to trial.¹⁵⁵⁵ The trials were held before the *Reichsgericht* in Leipzig from 23 May to 16 July 1921.¹⁵⁵⁶ Six persons were acquitted while six others were convicted of war crimes.¹⁵⁵⁷

1551 Zeidy 2002 *Michigan Journal of International Law* 872 and Thompson 2010 <http://forum.axishistory.com/viewtopic.php?f=6&t=161828>

1552 Kramer 2006 *European Review* 442; Schabas *An Introduction* 4; Zeidy 2002 *Michigan Journal of International Law* 872 and Mullins *The Leipzig Trials* 8. The actual wording of the clauses in the Treaty of Versailles which dealt with the trials of German officers guilty of war crimes was as follows:

“Article 228: The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such -persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office, or employment which they held under the German authorities.

Article 229: Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel.

Article 230: The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility”.

1553 Zeidy 2002 *Michigan Journal of International Law* 872; Schabas *An Introduction* 4 and Mullins *The Leipzig Trials* 8-9.

1554 Mullins *The Leipzig Trials* 9. The initial list contained 895 suspected war criminals to be tried by the Allied governments. This proposal was rejected by the German government, arguing that it (the German government) was not very stable and that honouring this demand would lead to its overthrow. Zeidy 2002 *Michigan Journal of International Law* 872.

1555 Mullins *The Leipzig Trials* 191.

1556 Mullins *The Leipzig Trials* 23.

1557 Parks 1973 *Military Law Review* 13.

The sentences that were imposed were as follows:

- i. Sergeant Karl Heynen, convicted of mistreating British prisoners of war. He was sentenced to a brief prison term of ten months.¹⁵⁵⁸
- ii. Captain Emil Müller, convicted of mistreating prisoners of war. He was sentenced to six months in prison.¹⁵⁵⁹
- iii. Private Robert Neumann, convicted of mistreating prisoners of war. He was sentenced to six months in prison.¹⁵⁶⁰
- iv. First Lieutenants Ludwig Dithmar and John Boldt, convicted of war crimes on the high seas. The accused were two officers of the submarine SM U-86 that had sunk the hospital ship *Llandovery Castle* and then attacked and killed survivors in lifeboats.¹⁵⁶¹ They were sentenced each to four years in prison.¹⁵⁶²
- v. Major Benno Crusius, convicted of ordering the execution of prisoners of war. He was sentenced to two years confinement.¹⁵⁶³

Outside Germany, the Leipzig trials were perceived, and rightly so, as a mockery of justice because of the too lenient sentences that the court imposed *vis-à-vis* the gravity of the crimes involved.¹⁵⁶⁴ In particular, if one considers the sentences imposed on those who were found guilty of murder (First Lieutenants Ludwig Dithmar and John Boldt and Major Benno Crusius), one must arrive at the conclusion that the trials were conducted for the sole purpose of preventing the accused persons from being extradited to the Allied governments as envisioned earlier in the Treaty of Versailles, where, they could have been sentenced to long terms of imprisonment. Germany's intention of shielding the war criminals from accountability becomes even clearer if one takes note of the fact that First Lieutenants Ludwig Dithmar and John Boldt spent only four months in prison (out of four years) as German authorities later announced that they had "escaped" from prison.¹⁵⁶⁵ In cases similar to the Leipzig trials, there clearly is an

1558 Anonymous 1922 *The American Journal of International Law* 674.

1559 Anonymous 1922 *The American Journal of International Law* 685.

1560 Anonymous 1922 *The American Journal of International Law* 696.

1561 Llandovery Castle was a Canadian hospital ship. It was sunk by a German submarine, U-86, on 27 June, 1918. a total of two hundred and fifty-eight persons were on board the ship. Three life boats survived the sinking of the vessel, however, and proceeded to rescue survivors from the water. The U-boat (U-86) then started firing at and sinking the life boats to kill all witnesses and cover up what had happened. Ultimately, only twenty four people survived the attack on the lifeboats. For a full account of this incident see Leroux 2010 <http://www.canadiangreatwarproject.com/writing/llandoveryCastle.asp>

1562 Anonymous 1922 *The American Journal of International Law* 709.

1563 Parks 1973 *Military Law Review* 13.

1564 Parks 1973 *Military Law Review* 14 and Mullins *The Leipzig Trials* 17 and 208. See also Schabas *An Introduction* 4: "[t]hose found guilty were sentenced to modest terms of imprisonment, often nothing more than time already served in custody prior to conviction. The trials looked rather more like disciplinary proceedings of the German army than any international reckoning".

1565 Leroux 2010 <http://www.canadiangreatwarproject.com/writing/llandoveryCastle.asp>

interest for the international community to step in and retry the perpetrators. South African courts should be empowered to play a role in this regard.

5.7.2 The Proceedings were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice

Cases falling under this category are those which relate to the situation where the foreign proceedings were conducted, not necessarily with a purpose of “shielding” the person concerned from criminal liability, but in another manner which is inconsistent with an intent to bring the person concerned to justice. The difference between the two situations consists in that in the first situation there is “a plan conceived in order to shield the accused”, while in the other situation are included other possible circumstances where a proceeding was not conducted with an intent to “punish” but without necessarily there being a “subjective” purpose to shield.¹⁵⁶⁶ In practical terms, however, the two situations do not differ much because they both result in the impunity of the perpetrator.¹⁵⁶⁷

A situation of this kind can best be illustrated by reference to the post-genocide *Gacaca* trials in Rwanda. After the 1994 genocide in Rwanda, the new Rwandan government struggled to bring the perpetrators of the genocide to justice but failed. By 30 November 1999, five years after the genocide, only 2,406 persons had been tried for genocide, out of the 121,500 in detention.¹⁵⁶⁸ Among those awaiting trial, an estimated 40,000 prisoners were still without files, let alone having appeared before a judge.¹⁵⁶⁹ It quickly became very clear that, considering also the fact that thousands of other suspects were still at large, it could take more than 100 years to complete the trials.¹⁵⁷⁰ The country thus needed a more expeditious means of delivering justice.

In response, Rwanda implemented the *Gacaca* system, a Rwandan traditional form of dispute resolution.¹⁵⁷¹ The pillars of this system were confessions accompanied by a

1566 Spinellis 2002 *Revue Internationale de Droit Pénal* 1160.

1567 Spinellis 2002 *Revue Internationale de Droit Pénal* 1160.

1568 UN “Report of the Special Representative” para 144.

1569 UN “Report of the Special Representative” para 146.

1570 Rupucci and Walker (eds) *Countries at the Crossroads* 500.

1571 “Named for the *Kinyarwanda* word for “grass”, *gacaca* was a traditional form of communal justice, whereby communal elders would resolve disputes by devising compensatory solutions aimed at restoring societal harmony”. Powers 2011 <http://www.asil.org/insights110623.cfm> See also Tiemessen 2004 *African Studies Quarterly* 58.

request for pardon in exchange for lenient sentences. It was hoped that this system would help to speed up the trials.¹⁵⁷² The *Gacaca* courts were launched on 18 June 2002 and closed on 18 June 2012 after trying more than 1.2 million cases,¹⁵⁷³ among which 25-30% resulted in acquittals.¹⁵⁷⁴

The law establishing the *Gacaca* courts¹⁵⁷⁵ divided the perpetrators of the genocide according to their responsibility into three categories:¹⁵⁷⁶

1st Category:

1° The person whose criminal acts or criminal participation place among planners, organisers, incitators, supervisors and ringleaders of the genocide or crimes against humanity, together with his or her accomplices;

2° The person who, at that time, was in the organs of leadership, at the national level, at the level of Prefecture, Sub-prefecture, Commune, in political parties, army, gendarmerie, communal police, religious denominations or in militia, has committed these offences or encouraged other people to commit them, together with his or her accomplices;

2nd Category:

1° The person whose criminal acts or criminal participation place among killers or who committed acts of serious attacks against others, causing death, together with his or her accomplices;

2° The person who injured or committed other acts of serious attacks with the intention to kill them, but who did not attain his or her objective, together with his or her accomplices;

3° The person who committed or aided to commit offences against persons, without the intention to kill them, together with his or her accomplices.

3rd Category:

The person who only committed offences against property.

The criminals who fall in the first category were excluded from the jurisdiction of the *Gacaca* courts and could be prosecuted only before the ordinary courts.¹⁵⁷⁷ *Gacaca* courts were thus able to try cases of Category 2 (which also included acts of murder) and category 3 crimes (crimes against property) and could issue sentences ranging

1572 Powers 2011 <http://www.asil.org/insights110623.cfm>

1573 Human Rights Watch "Country Summary: Rwanda" 2.

1574 Government of Rwanda Date Unknown <http://www.gov.rw/FACT-FILE-Gacaca-the-people-s-court>

1575 This law was amended several times. The latest version of it was the *Organic Law n° 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged With Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between 1 October 1990 and 31 December 1994* (Official Gazette n° special of 19/06/2004)

1576 Art 51 Organic Law n° 16/2004.

1577 Art 2(2) Organic Law n° 16/2004.

from 6 months imprisonment and “community work”¹⁵⁷⁸ to 30 year imprisonment.¹⁵⁷⁹ Those falling under the 3rd category could only be ordered to pay civil damages for what they have damaged.¹⁵⁸⁰

Gacaca has been credited with the swift delivery of results that could not possibly have been achieved by the ordinary courts.¹⁵⁸¹ On the other hand, however, *Gacaca* has been criticised for lacking a deterrent effect for future would-be perpetrators of international crimes. This stemmed from the inherent contradiction of using a “conciliatory process for a retributive purpose”.¹⁵⁸² In the context of international criminal law, deterrence emphasizes the need to demonstrate to would-be perpetrators that genocide and other serious violations of human rights will always be “punished”. This is the deterrent effect of punishment. People have complained, however, that *Gacaca* lacked such deterrent effect because the sentences handed to the perpetrators did not reflect the gravity of the crimes they had committed and confessed to.¹⁵⁸³ In particular,

1578 Art 73(2) Organic Law n° 16/2004: “Defendants falling within the second category referred to in part 3° of article 51 of this organic law, who : 3° confess, plead guilty, repent and apologise before the Gacaca Court of the Cell, draws up a list of perpetrators, incur a prison sentence ranging from one (1) to three (3) years, but out of the pronounced prison sentence, they serve half of the sentence in custody and the rest is commuted into community services on probation”.

1579 The long sentence of imprisonment (up to 30 years’ imprisonment) was applicable where the accused refused to plead guilty and apply for pardon and for those accused whose confessions were rejected and were subsequently convicted of a crime of genocide. Art 73(1): “Defendants falling within the second category referred to in points 1° and 2° of article 51 of this organic law, who: 1° refused to confess, plead guilty, repent and apologise, or whose confessions, guilty plea, repentance and apologies have been rejected, incur a prison sentence ranging from twenty five (25) to thirty (30) years of imprisonment”.

1580 Art 75 Organic Law n° 16/2004.

1581 Powers 2011 <http://www.asil.org/insights110623.cfm> and Clark 2011 <http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/> : [t]he experience of Rwanda’s gacaca community courts highlights the importance of delivering justice at the local level. Since their creation in 2001, the gacaca jurisdictions – despite sustained criticism by international human rights groups – have prosecuted 400,000 suspected perpetrators of the 1994 genocide and contributed substantially to community truth-telling and social cohesion. Nearly every Rwandan adult has been involved in the trials, including providing eyewitness accounts of genocide crimes. Village-level processes like gacaca attempt what the ICC and national courts can never do, namely delivering accountability for everyday citizens who participate in violence. For many Rwandan genocide survivors, the most important perpetrators are not the government officials who planned and incited mass murder, but rather the neighbour or family member who wielded the machete in 1994. Violence committed by community-level actors – which is increasingly common in diffuse forms of modern conflict – requires these new forms of community-level accountability”.

1582 Powers 2011 <http://www.asil.org/insights110623.cfm>

1583 De Brouwer and Ka Hon Chu 2012 <http://www.intlawgrrls.com/2012/04/as-end-of-gacaca-nears-looking-toward.html>

some people perceived the “community service” as insufficient punishment, given the gravity of the crimes committed during the genocide, such as murder.¹⁵⁸⁴

Of course, it cannot be said that the trial was conducted with the “purpose of shielding the person” from responsibility because the Government that put in place the *Gacaca* courts in Rwanda is the same government which stopped the genocide after defeating the *génocidaires*’ regime in 1994.¹⁵⁸⁵ This is the reason why the *Gacaca* cases cannot be put in the same category as the Leipzig trials. While the former were conducted with an intent to shield the accused persons from criminal accountability (i.e., to avoid the extradition of the accused persons to an international criminal tribunal as envisaged earlier in the Treaty of Versailles), the *Gacaca* trials were not.

But, can it also be said that a person who committed murder during the 1994 genocide and was subsequently sentenced to 3.5 years’ imprisonment (plus 3.5 years of community service) was tried with an “intent to bring the person to justice”?¹⁵⁸⁶ The answer falls to be “no”! The answer must be sought in the social-political and economic situation that was prevailing in Rwanda when the Government of the country decided to launch these courts. After the genocide, Rwanda did not have enough judges and prosecutors to conduct and finish the trials of the *génocidaires* within a reasonable time.¹⁵⁸⁷ As stated above, before the *Gacaca* courts were introduced, it had been anticipated that the genocide trials would take around 150 years to complete.¹⁵⁸⁸ The primary purpose of the *Gacaca* process was thus the expedition of the trials by conducting them at grass-roots level (involving around 160,000 “lay judges”)¹⁵⁸⁹ and by offering incentives to the accused persons to confess and plead guilty in order to

1584 Clark 2012 <http://thinkafricapress.com/rwanda/legacy-gacaca-courts-genocide>

1585 Hauschildt 2012 <http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/> : “The Rwandan Patriotic Army (RPA), the military arm of the Rwanda Patriotic Front (RPF) which consisted of Tutsis living in Ugandan exile, defeated the Rwandan Government Forces and ended the genocide”.

1586 In terms of art 73(1)(3^o) of Organic Law n° 16/2004, *Gacaca* courts were allowed to impose a sentence of 3.5 years imprisonment and 3.5 years of community service in murder cases.

1587 Out of the 785 judges that Rwanda had before the genocide, only 20 were still active after the genocide. Some had been killed during the genocide but the majority were in exile or were in prison on charges of genocide. Hauschildt 2012 <http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/>

1588 Hauschildt 2012 <http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/> Some say the trials could even take more than 200 years. Powers 2011 <http://www.asil.org/insights110623.cfm>

1589 AllAfrica 2012 <http://allafrica.com/stories/201206190550.html>

facilitate the collection of evidence.¹⁵⁹⁰ This has helped the country to conduct complete genocide trials in ten years instead of 150 years as initially anticipated.

Another consideration behind the *Gacaca* policy is that the administration and maintenance of the prisons placed enormous financial constraints on the government. By 30 November 1999, around 121,500 persons were in detention.¹⁵⁹¹ The costs for maintaining these prisoners were unbearable for a country like Rwanda.¹⁵⁹² The *Gacaca* rate of convictions was around 70%¹⁵⁹³ of the 1.200.000 persons brought to trial.¹⁵⁹⁴ This means that around 800.000 persons were convicted of genocide. The Rwandan government could simply not keep all these persons in prison. Although the Government never publicly mentioned this argument, it is obvious that *Gacaca*, with its sentences of community work (outside prison) and its reduced imprisonment sentences (up to only 3 months in prison) was meant to be a solution to this problem.

Given the above considerations, it seems clear that the purpose of *Gacaca* justice was not to punish the perpetrators of the genocide. Arguably, the *Gacaca* trials can be tolerated because the “first category” perpetrators of the genocide were prosecuted by ordinary courts and were sentenced to heavy sentences, including the death penalty,¹⁵⁹⁵ before it was abolished in 2007.¹⁵⁹⁶ It may happen, however, that in future another country ravaged by an internal conflict, such as Sudan,¹⁵⁹⁷ will attempt to resort to a process similar to *Gacaca*. It is also possible that sentences imposed in that process would be much more lenient than those imposed by the *Gacaca* courts. For instance, the sentence of 3.5 years imprisonment may be reduced to 3 months

1590 Under article 54(3)(20) of Organic Law n° 16/ 2004, for a guilty plea to be accepted that accused had also to “reveal the co-authors, accomplices and any other information useful to the exercise of the public action”.

1591 UN “Report of the Special Representative” para 144.

1592 Hauschildt 2012 <http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/>

1593 Government of Rwanda Date Unknown <http://www.gov.rw/FACT-FILE-Gacaca-the-people-s-court>

1594 Human Rights Watch “Country Summary: Rwanda” 2.

1595 In 1998, 22 people found guilty of genocide were sentenced to death and executed. See Hood and Hoyle *The Death Penalty* 75.

1596 Amnesty International 2007 <http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802>

1597 It is now alleged that war crimes and crimes against humanity have been committed in Darfur, Sudan, and it is on the basis of these allegations that in 2009 the ICC issued an international arrest warrant against President Omar Bashir. *The Prosecutor v Omar Hassan Ahmad Al Bashir Second Decision on the Prosecution's Application for a Warrant of Arrest* ICC-02/05-01/09-94 (12 July 2010).

imprisonment, and 3.5 years of community service may be reduced to 3 months of community service. Would such proceedings be regarded as “conducted with an intent to bring the person concerned to justice”? The present author believes that the answer should be “no”. The purpose (intent) of the proceedings could be something such as preserving the government’s resources (because keeping thousands of people in prison may cost a lot of money), but not to bring the criminals to justice. In cases such as these, especially where the lenient sentences would be applied to the “first category”¹⁵⁹⁸ offenders (which was not the case in Rwanda), the ICC may legitimately claim that the proceedings were not conducted with an intent to bring the perpetrators to justice and order that the case be retried before it.¹⁵⁹⁹ However, since the ICC does not have the means to retry all shams that may take place around the world,¹⁶⁰⁰ national courts of foreign States, including South African courts, are the proper avenues to conduct such trials.

The other exceptions which should be introduced in the proposed amendments to the Implementation Act are discussed below.

5.7.3 *Other situations not contemplated in the Rome Statute*

Situations that are discussed under this heading relate to two circumstances which do not fall under any of the two situations contemplated in the Rome Statute. First there may be a situation where the “proceedings” were genuinely conducted with an intent of bringing the person concerned to justice and an appropriate sentence was imposed but the person was later released from prison after serving only an insignificant part of his sentence. Secondly, there may be a case, such as those discussed earlier in this chapter,¹⁶⁰¹ where subsequent to the accused’s acquittal new and compelling evidence is brought to light which clearly points to his guilt. In these two cases, given the nature and gravity of the crimes defined in the Implementation Act, and given the need of

1598 It is meant here the “most responsible” such as high-ranking government officials who plan and execute genocides, crimes against humanity and war crimes.

1599 See also Carter where he says that “an extreme disparity between the sentence and the gravity of the [...] crime of which the accused is convicted” may cause the proceedings to be viewed as “a sham trial”. Carter 2010 *Santa Clara Journal of International Law* 195.

1600 Clark 2011 <http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/>: “The ICC operates on a minimal budget with a small staff who are usually involved in multiple conflict countries simultaneously. With limited resources to cover a global jurisdiction, the ICC relies on domestic states to investigate and prosecute [...]”.

1601 See 5.6 above.

ending impunity and ensuring deterrence for those crimes, the interests of justice that a second trial would serve clearly outweigh those interests that the *ne bis in idem* rule seeks to protect. These two situations are discussed hereunder.

5.7.3.1 The sentence was imposed but only an insignificant part of it was served

A situation where the accused was properly tried and sentenced to an appropriate punishment but then shortly released may materialise where, for example, the accused has been convicted and sentenced but then released from prison through executive measures such as presidential pardon,¹⁶⁰² or parole.¹⁶⁰³

Presidential pardon and parole may be abused and used to “shield” convicted criminals from accountability.¹⁶⁰⁴ This problem is far from being hypothetical. Schabas¹⁶⁰⁵ gives the example of the case of an American soldier, Lt William Calley who, in the early 1970s, was convicted of war crimes for an atrocious massacre in My Lai village, Vietnam, in which around 500 civilians were savagely massacred by American soldiers,

1602 Under section 84(2)(j) of the *Constitution*, for example, the President of the Republic has the power to pardon offenders and remit any sentence imposed by a court. Section 325 of the *Criminal Procedure Act* confirms this by providing that nothing contained in the said Act will affect the powers of the President to extend mercy to any person. For a detailed discussion of this topic see Joubert (ed) *Criminal Procedure* 439-444. In Rwanda, the President has similar powers by virtue of article 236 of the *Code of Criminal Procedure* which provides that: “The power to grant collective or individual pardon shall be exercised by the President of the Republic at his/her sole discretion and in public interests. Presidential pardon shall remit in whole or in part penalties imposed or commute them to less severe form of penalties”. See *Law N° 30/2013 of 24/5/2013 Relating to the Code of Criminal Procedure* (Official Gazette n° 27 of 08 July 2013).

1603 Parole is a mechanism that allows for the conditional release of offenders from a prison into the community prior to the expiration of their entire sentences of imprisonment, as imposed by a court of law. Department of Correctional Services: Republic of South Africa “Placement on Parole and Correctional Supervision” In South Africa, parole is allowed by section 73(4) of the Correctional Services Act 111 of 1998 which provides that: “In accordance with the provisions of this Chapter a prisoner maybe placed under correctional supervision or on day parole or on parole before the expiration of his or her term of imprisonment”. In Rwanda, the power to grant parole is entrusted to the Minister of Justice by article 245(1) which provides that: “A person who is sentenced to one or several imprisonment penalties or placed under the Government’s custody may be granted release on parole on the following conditions: 1° if he/she sufficiently demonstrates good behaviour and gives serious pledges of social rehabilitation; 2° if he/she suffers from serious and incurable disease approved by a medical committee composed of at least three (3) recognized doctors; 3° if he/she has already served his/her penalty for a period of time provided for under Article 246 of this Law depending on the offences of which he/she was convicted”.

1604 Sisk 2002 *Missouri Law Review* 19 and Orentlicher 1991 *The Yale Law Journal* 2606.

1605 Schabas *Introduction* 204.

and was duly sentenced to a term of life imprisonment but was then granted a pardon by President Richard Nixon after only a brief term of detention had been served.¹⁶⁰⁶

Another example may be the one of Schabir Shaik, a former business advisor to President Zuma, who had been sentenced to an effective 15 years' imprisonment for corruption and fraud on 8 June 2005 but was released on medical parole on 3 March 2009 after serving two years and four months, allegedly suffering from life-threatening ("final phase") severe hypertension.¹⁶⁰⁷ Some believe that the medical reasons advanced to release Mr Schabir Shaik from prison were mere pretence.¹⁶⁰⁸ They argue that Shaik was never "terminally ill" and that he was released only because of his personal and business ties with President Jacob Zuma.¹⁶⁰⁹ This scepticism undermined the credibility of the parole system in South Africa, prompting the enactment of the *Correctional Matters Amendment Act 5 of 2011*, under which a new framework for granting parole was introduced.¹⁶¹⁰

The lesson that must be learnt from William Calley and Schabir Shaik's cases is that trials are not enough to ensure that criminals are held accountable and that potential offenders are deterred from engaging in similar conducts in future. There must also be a legal framework that ensures that sentences are effectively executed.¹⁶¹¹

1606 On 16 March 1968, US soldiers led by Lt William Calley entered the Vietnamese village of My Lai on a search and destroy mission during the Vietnam War. Under Lt Calley's orders, the soldiers massacred around 500 civilians, including women and children. Many of the victims were raped, tortured, and/or mutilated. Lt Calley himself shot down and killed large groups of civilians with a machine gun. Rosenberg 2013 <http://history1900s.about.com/od/1960s/qt/mylaimassacre.htm>

1607 Bateman 2012 *South African Medical Journal* 212.

1608 See for example, Hlongwane 2012 <http://www.dailymaverick.co.za/article/2012-02-24-new-medical-parole-board-new-rules-correctional-services-moves-to-avoid-another-shaik-brouhaha/> and Bateman 2012 *South African Medical Journal* 212.

1609 Hlongwane 2012 <http://www.dailymaverick.co.za/article/2012-02-24-new-medical-parole-board-new-rules-correctional-services-moves-to-avoid-another-shaik-brouhaha/>

1610 This includes the appointment of a new Medical Parole Advisory Board (10 doctors) whose responsibility will be to assist in processing medical parole applications from offenders. The new Board was announced by Minister Nosiviwe Mapisa-Nqakula on 23 Feb 2012. See Government of South Africa "Minister announces new Medical Parole Advisory Board".

1611 See also Finlay 2009 *University of California Davis Journal of International Law and Policy* 240: "A strict application of the *ne bis in idem* prohibition would not allow consideration of subsequent issues of enforcement, with 'jeopardy' attaching to the conviction itself. This may, however, conflict with broader notions of justice, since the subsequent failure to enforce a sentence - whether through granting a pardon, commutating a sentence, or granting parole - would be clearly relevant when considering the overall punishment to which an individual has been subjected, and to the broader functioning of the criminal justice system".

With respect to international crimes, the potential for abusing executive powers by releasing criminals from prison is even higher because international crimes are often committed by political leaders or on their behalf in pursuance of State policy.¹⁶¹² A State that is under pressure from the international community¹⁶¹³ or from the ICC may institute a proceeding against the persons suspected of international crimes, convict them and send them to prison. However, as long as the government on behalf of which the crimes were committed is still in power, the convicted persons will stand a great chance to be released from prison very soon earlier than the interests of justice would otherwise require. In cases such as this there is need for an external forum where these criminals should be retried and appropriately punished.

The Rome Statute does not address this important question. The two admissibility thresholds in regard to the retrial of a case before the ICC concern only “proceedings in the other court”¹⁶¹⁴ which were conducted for “the purpose of shielding the person concerned from criminal responsibility”¹⁶¹⁵ or were otherwise “conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”.¹⁶¹⁶ These two provisions do not thus address the issue of a person who has been tried by an independent court and sentenced to an appropriately long term sentence but is later released from prison when, for example, a new government comes to power. If such a situation were to happen, it appears that the ICC would be barred from hearing such case for the purposes of ensuring that the person concerned is appropriately punished.¹⁶¹⁷

1612 Foakes “Immunity for International Crimes?” 2.

1613 Such as Senegal in regard to the trial of former Chadian dictator Hissène Habré. See 2.5.3 and 3.4.1.2.2.2.2 above.

1614 Art 20(3) Rome Statute. See also Fry 2012 *Criminal Law Forum* 51.

1615 Art 20(3)(a) Rome Statute.

1616 Art 20(3)(b) Rome Statute.

1617 See also Evans “Amnesties, Pardons and Complementarity” 6: “it would appear that the ICC would be prevented from retrying a person if they were pardoned after a genuine trial and conviction”. For a contrary view see Finlay 2009 *University of California Davis Journal of International Law and Policy* 240-241: “It is, however, incorrect to conclude that the failure to adopt these exceptions means that the ICC will be inevitably barred from intervening in a case where an individual is convicted but then immediately pardoned. If a state fails entirely to enforce a criminal sentence that has been duly imposed by a national court, this may be evidence that the proceedings were not actually genuine and that they were, in fact, designed to shield the individual from criminal responsibility. The ICC would then be able to prosecute that individual on the basis of the exception provided for under Article 20(3)(a). In such a case, “criminal proceedings that have commenced in a wholly appropriate manner may turn into a *de facto* sham trial at the stage of enforcement. In this way, while not expressly apparent from the

In fact, the case of Schabir Shaik illustrates this situation. When Shaik was tried, the trial was a genuine one. At that time, the proceedings were not undertaken to shield him from criminal liability or otherwise in any manner that is inconsistent with an intent to bring him to justice. Shaik was only released from prison after President Thabo Mbeki resigned from office on 20 September 2008,¹⁶¹⁸ while Jacob Zuma, with past strong business ties with Shaik, was the ANC President since 18 December 2007 and, as the ANC president, was poised to become the next country's president the next year after the elections.¹⁶¹⁹ Shaik was released during this transition. There is widespread suspicion that his political connections played a key role in the decision to release him from prison.¹⁶²⁰ This case, if the allegations made about it are true, clearly shows that a trial may well be conducted in good faith and independently but that that alone does not guarantee that impunity will not ensue. In the light of this fact, the admissibility threshold under article 20(3) of the Rome Statute should be extended to cover cases where the "proceedings" were conducted genuinely and a person was convicted but only an infirm portion of the sentence was served. It is also suggested that a similar provision should be introduced into the Implementation Act to allow South African courts, to retry the persons who were convicted of international crimes in foreign States but have served an insignificant part of their sentence.¹⁶²¹

text of the Rome Statute, a member state's manifest failure to enforce a criminal sentence imposed by a national court may expose the individual concerned to subsequent prosecution by the ICC. This is a further example of the broad nature of the exceptions to the *ne bis in idem* prohibition within the Rome Statute and a further illustration of the considerable discretion that the ICC has in reviewing domestic proceedings".

1618 Mbola 2008 <http://www.southafrica.info/about/government/mbeki-resigns.htm>

1619 After President Mbeki stood down, Kgalema Motlanthe was nominated by the ANC as the interim President until Jacob Zuma was sworn in on 9 May 2009.

1620 Mabuza 2012 <http://www.bdlive.co.za/articles/2011/03/17/shaik-released-back-on-medical-parole;jsessionid=FD984AB4F01892D53F33249800E4ADDC.present1.bdfm>

1621 Schabas *An Introduction* 204: "In a case where an individual is properly tried and convicted, but is subsequently pardoned, the Court would seem to be permanently barred from intervening". See also Evans "Amnesties, Pardons and Complementarity" 6: "[i]t would appear that the ICC would be prevented from retrying a person if they were pardoned after a genuine trial and conviction". For a contrary view see Finlay 2009 *University of California Davis Journal of International Law and Policy* 241: "[a] strict application of *ne bis in idem* would allow a state to protect an individual from the jurisdiction of the ICC by convicting that individual – which would bring them under the protection of Article 20 – and then failing entirely to enforce the imposed sentence. Allowing states to shield a person from subsequent prosecution by the ICC would make a mockery of the system of international criminal justice and would undermine the effectiveness of the ICC. Such an example demonstrates the need to strike a balance between the right of the accused to protection from double jeopardy and the interest of the international community in the effective enforcement of criminal justice".

It is not possible to provide precise criteria to determine when the period a person has passed in prison should be seen as an “insignificant part” of his sentence. But, it is submitted, a period that is less than the half of the sentence imposed by the court ought to be regarded as insignificant. Although international law does not prescribe to States the minimum length of imprisonment that States must impose to persons guilty of international crimes,¹⁶²² it would be a mistake to say that international law is indifferent to degree of severity of the penalties imposed and, as a matter of logic, served. The obligation to impose appropriate sentences is specifically reflected, for example, in art V of the Genocide Convention which requires member States to enact legislation providing “effective penalties for persons guilty of genocide”, and article 4 of the Torture Convention which requires States parties to make acts of torture “punishable by appropriate penalties which take into account their grave nature”. Although these conventions do not prescribe specific terms of imprisonment, their intent is obviously that persons convicted of genocide and torture get sentences that reflect the gravity of the offences.¹⁶²³ By analogy, the granting of pardon and the subsequent release of a person from prison before he has served a substantial part of the sentence (supposing that the sentence was itself appropriately long) would clearly deviate from a State’s obligation under international law, and a second trial in a foreign country would be a proper remedy. In the view of the present author, half of the sentence imposed should be an appropriate threshold.

Before passing to the next point, it is worth noting that in case of a second trial and conviction in a South African court, fairness would require that the sentence served in the foreign State be reduced from the sentence imposed by the South African court. This requirement of fairness is often expressed in the maxim *ne bis poena in idem*,¹⁶²⁴

1622 Orentlicher 1991 *Yale Law Journal* 2604: “Even when international law establishes a duty to prosecute particular offenses, it generally leaves the determination of penalties to the discretion of national governments”. See also Orentlicher “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” 411.

1623 Orentlicher 1991 *Yale Law Journal* 2605.

1624 Conway 2003 *International Criminal Law Review* 226. In the legal literature, this principle is invariably referred to as the “accounting principle”, the principle of “set-off”, the principle of “deduction”, or the principle of “taking into account”. Bockel *The Ne Bis in Idem Principle in EU Law* 35. For a similar provision see art 56 CISA which provides that: “If a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account”. See also Art 9(3) of the Statute of the ICTR which provides

which provides that sentences already served by an accused for the same offence should be discounted in the imposition of any subsequent sentence relating to the that offence.¹⁶²⁵

5.7.3.2 New and compelling evidence is brought to light after the completion of the original proceedings which points to the guilt of an acquitted defendant

The last situation where a retrial in South African courts of a person already tried for an international crime in a foreign country is needed and justified is where subsequent to that person's acquittal, new and compelling evidence is brought to light which undoubtedly points to his guilt.

The instances in which a situation of this kind may arise are many and various. Firstly, with the advances in recent years in scientific evidence, particularly DNA testing, it is now possible to obtain new and persuasive evidence which was not available at the time a person was tried and acquitted. Secondly, the person concerned may himself, subsequent to his acquittal, confess that he in fact committed the crime with which he was charged. Thirdly, any other type of evidence, a witness for example, may emerge after the person concerned has been acquitted and clearly point to the guilty of that person.

Despite the sound justifications for the rule against double jeopardy, a second trial would be justified.¹⁶²⁶ As stated earlier,¹⁶²⁷ from an accused person's rights perspective,

that: "In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served". The same article appears as art 9(3) in the Statute of the ICTY. See also art 78 of the Rome Statute which provides that "[T]he Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime".

1625 Conway 2003 *International Criminal Law Review* 226, 241 and Bockel *The Ne Bis in Idem Principle in EU Law* 35. See also Finlay 2009 *University of California Davis Journal of International Law and Policy* 242: "A principle closely related to ne bis in idem is ne bis poena in idem, which is the principle that any punishment already served by an accused should be deducted from any subsequent punishment imposed in relation to offenses based upon the same underlying conduct. This principle rests on the basic proposition that a person should not be punished twice for the same conduct. Its application may be one way of mitigating, at least to some extent, the consequences of an accused being placed in jeopardy on more than one occasion through the application of exceptions to the principle of ne bis in idem".

1626 Also see Kirby 2003 *Criminal Law Journal* 29: "An important reason, propounded for supporting a qualification or exception to the double jeopardy rule is the availability, in recent times, of DNA and other scientific evidence that may help to prove conclusively the guilt or innocence of an accused. [...] This is a new ingredient. It was not available for the resolution of earlier disputes

the *ne bis in idem* fulfils three functions. First, the principle protects the accused against “abusive” and “ill-intentioned” prosecutions.¹⁶²⁸ Secondly, the rule protects the accused against the anxiety and stress arising from multiple prosecutions.¹⁶²⁹ Finally, recognising that the accused cannot have enough resources to fight an endless legal battle (the trial), the rule protects the accused against a potential wrong conviction.¹⁶³⁰

It is submitted that an exception to the *ne bis in idem* rule that allows a second prosecution where new and compelling evidence is discovered may be accommodated in a way that does also care for the above functions of the rule. This can be achieved by limiting the exceptions to the only situations where the new evidence consists in scientific evidence, such as DNA testing, or confession from the accused person himself. In these two situations, the risks that the State could abuse its prosecutorial right by instituting malicious prosecutions against the accused as well as the risk of a wrong conviction are seriously minimised because of the quality of the evidence required. Scientific evidence is not easily manipulated and a confession cannot be easily fabricated.

The anxiety and stress of a second trial are also minimised because of the accuracy of these types of evidence. In any event, it must also be kept in mind that the rights of the accused must be weighed against the rights of the victims to see justice being done and the community’s interest in deterrence of future crimes.¹⁶³¹ As discussed earlier in this chapter,¹⁶³² the present author believes that the proposed exceptions to the *ne bis in idem* rule enshrined in section 35(3)(m) would be justified under the limitation clause.

about guilt. A rational legal system, so it is said, will be adjusted to permit the new ingredient to be taken into account whether the jury verdict was guilty or not guilty”.

1627 See 5.2.1 above.

1628 See 5.2.1.1 above.

1629 See 5.2.1.2 above.

1630 See 5.2.1.3 above.

1631 Finlay 2009 *University of California Davis Journal of International Law and Policy* 224: “[w]hile it is important for a criminal justice system to include safeguards designed to protect innocent people from wrongful conviction, it is also important to ensure that guilty people are convicted and punished. A criminal justice system that manifestly fails in this regard will quickly lose public confidence and respect. To this end, both victims of crime and the wider community, in certain circumstances, may see the rule against double jeopardy as preventing justice from being done”.

1632 See 5.5 above.

5.8 Conclusion

This chapter has considered the question whether, in view of the international law principle of “sovereignty” and its corollaries of “equality” and “non-intervention”, South African courts are allowed to retry cases concerning allegations of international crimes which were tried in foreign States, where it is established that the proceedings conducted in such foreign States were not conducted in good faith or in a manner inconsistent with an intent to bring the persons concerned to justice. It was found that international law does not oblige a State to recognise criminal judgements of foreign courts and that, accordingly, South African courts would retry such cases without violating the sovereignty of foreign States.

It was observed, however, that pursuant to the provision of section 35(1)(m), such a retrial is in fact not possible in South Africa, unless some amendments were to be made. This chapter has argued that this situation is not consistent with South Africa’s expressed commitment to “provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa”.¹⁶³³ It was argued that if such commitment must be taken as more than mere political rhetoric, South Africa ought to enact an exception to section 35(3)(m) to grant that power to its courts.

The analysis of the foreign law has also indicated that South Africa would not be alone in enacting an exception to the *ne bis in idem* rule¹⁶³⁴ and that the proposed exception is permissible under international law.¹⁶³⁵ It was further argued that the proposed exception would be justifiable under the limitation clause.¹⁶³⁶

In addition to the two situations contemplated in article 20(3) of the Rome Statute where the proceedings were conducted for the purpose of shielding the person concerned from criminal responsibility or were conducted in a manner which was inconsistent with an intent to bring the person concerned to justice, the study undertaken in this chapter has revealed two other situations where a retrial of the person concerned would also be justified. These are situations where a person was convicted and appropriately

1633 Preamble to the Implementation Act.

1634 See 5.6 above.

1635 See 5.3 above.

1636 See 5.5 above.

sentenced but only an insignificant part of the sentence was served¹⁶³⁷ and where subsequent to a person's acquittal, new and compelling evidence is brought to light after the completion of the original proceedings, which points to the guilt of an acquitted defendant.¹⁶³⁸ It has been argued that a retrial in these two situations is also needed in order to ensure that impunity for the most serious crimes is ended.

Ultimately, it has been suggested that a second trial should be allowed where:

- (1) The accused was fraudulently acquitted
- (2) The accused was convicted but no sentence was imposed
- (3) The sentence was imposed but not served
- (4) The accused was convicted but only a derisory sentence was imposed
- (5) The sentence was imposed but only an insignificant part of it was served
- (6) New and compelling evidence is brought to light after the completion of the original proceedings which points to the guilt of an acquitted defendant, and this new evidence is scientific evidence or a confession from the accused himself.

Finally, it has been argued that in case of prior conviction and sentence, the sentence served in the foreign country, if any, should be deducted from the sentence to be imposed by the South African court.¹⁶³⁹ A deduction of the sentence already served in the foreign State would strike a fair balance between, on the one hand, the requirements of fairness to the accused and, on the other hand, the broader interests of the victims, the society and the international community at large.

1637 See 5.7.3.1 above.

1638 See 5.7.3.2 above.

1639 See 5.7.3.1 above.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

Many people who like universal jurisdiction like it because they think it allows States to extend their laws without any limitation to activity anywhere on the globe involving anyone. Thus, tyrants and terrorists are not immune from prosecution just because their home States refuse to prosecute them. People who dislike universal jurisdiction tend to dislike it for these very same reasons: because any State in the world can claim to exercise it over acts committed anywhere by anyone, universal jurisdiction invites easy manipulation for purely sensationalist or propagandist ends. Neither view is entirely correct.¹⁶⁴⁰

6.1 Introduction

This study has been concerned with the extent to which the international law principle of State sovereignty might be an obstacle to the universal jurisdiction of South African courts over international crimes committed in foreign States. It was assumed 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 was also assumed, however, that since the ICC is an international criminal tribunal, it may have some powers that international law, in particular in view of the principle of State sovereignty, does not grant to domestic courts.

Three issues were examined. Firstly, the question was asked whether South African courts are entitled, as the ICC is, to disregard immunities that international law ordinarily accords to State officials from the criminal courts of foreign States.¹⁶⁴¹ Secondly, it was asked whether South African courts are allowed, as the ICC is, to disregard amnesty laws passed by foreign States when, for example, such amnesties are designed to help quell rebellions or to allow peaceful transition from minority to majority rule.¹⁶⁴² Finally, the question was asked whether South African courts are allowed, as the ICC is, to retry persons who have already been tried in foreign States, when it is established that such

1640 Colangelo 2009 *Michigan Journal of International Law* 881-882.

1641 See Chapter 3 above.

1642 See Chapter 4 above.

trials were conducted in order to shield the accused persons or in any other manner that is inconsistent with an intent to punish.¹⁶⁴³ The conclusions reached as well as the recommendations that were addressed to the South African authorities and courts are summarised below.

6.2 General conclusions

6.2.1 Immunity

6.2.1.1 Immunities and international law

In order to determine whether, as a matter of international law, South African courts are, or are not, allowed to exercise their universal jurisdiction over foreign States officials accused of international crimes, a distinction has been made between immunity *ratione materiae* (or functional immunity) and immunity *ratione personae* (or personal immunity).

With regard to immunity *ratione materiae*, it was found that this immunity protects State sovereignty by preventing official acts carried out on behalf of a State from being questioned in the courts of foreign States.¹⁶⁴⁴ In other words, it was found that this immunity is applicable to conduct for which the State is entitled to claim immunity thus preventing a State's courts from indirectly exercising jurisdiction over acts of foreign States through proceedings against the officials who carry out States' activities. For this reason, it was found that immunity *ratione materiae* protects even low-level State officials and continues after a State official leaves office.¹⁶⁴⁵ However, with regard to international crimes over which South African courts have universal jurisdiction in terms of the Implementation Act, it was found that since such crimes are contrary to international law they cannot be regarded as "sovereign acts" of a State, the prosecution of which in foreign States would offend the dignity of the State concerned and that, accordingly, this immunity does not apply to these crimes. Accordingly, it was concluded that immunity *ratione materiae* may not be an obstacle to the universal

1643 See Chapter 4 above.

1644 See 3.4.1 above.

1645 See 3.4.1.1 above.

jurisdiction of South African courts over international crimes committed in foreign States.¹⁶⁴⁶

With regard to immunity *ratione personae*, it was found that this immunity is accorded to those persons holding the highest positions within a State and those who carry out representative functions in foreign States.¹⁶⁴⁷ It was argued that this immunity fulfils two important functions in international relations. Firstly, this immunity is necessary to allow certain State officials to carry out their international representative functions freely and without harassment by foreign States. Secondly, it was found that this immunity is necessary in order to avoid frictions among States, thereby contributing to the maintenance of international peace and security. It was also found that this immunity is absolute and it still applies even when State officials are accused of international crimes.¹⁶⁴⁸ Accordingly, it was concluded that, under international law, South African courts are not allowed to try foreign officials even when they are accused of international crimes.¹⁶⁴⁹

6.2.1.2 Immunities under South African law

In order to determine whether South African law relating to the issue of immunity of foreign States' officials is in harmony with international law, the provisions of the Implementation Act were analysed. Contrary to the views advanced by a number of commentators on this subject, who hold the view that the Implementation Act excludes both immunity *ratione materiae* and immunity *ratione personae*,¹⁶⁵⁰ the present author has argued that the Implementation Act does not address the question of immunity, both *ratione materiae* and *ratione personae*, of foreign officials accused of international crimes before South African courts. This argument was based on the view that the words "defence to a crime" contained in section 4(2)(a)(i) of the Implementation Act do not carry the same meaning as the defence of immunity (whether *ratione materiae* and *ratione personae*), which is a "jurisdictional defence", not a "substantive defence". It was argued that the words "defence to a crime" employed in section 4(2)(a)(i) of the Implementation Act refer to the defence generally known as "official status" or "public

1646 See 3.4.1 above.

1647 See 3.4.2.1 above.

1648 See 3.4.2.1 above.

1649 See 3.4.2 above.

1650 See 3.5 above.

authority”, in accordance with which public officials, acting in the performance of their duties, may commit acts that are *prima facie* unlawful but are not liable for those acts because those acts are “justified”.¹⁶⁵¹ On this view, it was concluded that the Implementation Act does not address the issue of immunities of foreign States’ officials accused of international crimes before South African courts.

The above conclusion led to the following question: if the Implementation Act is silent on the question of 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”.¹⁶⁵² In accordance with these provisions of the *Diplomatic Immunities and Privileges Act*, it was concluded that since under customary international law immunity *ratione materiae* does not apply when a State official is accused of international crimes before the courts of foreign States, this immunity may not be a bar to the universal jurisdiction of South African courts over foreign States’ officials accused of international crimes. With regard to immunity *ratione personae*, however, it was stated that, under customary international law, this immunity applies even when a foreign State’s official is accused of international crimes before the domestic courts of a foreign State and that, accordingly, South African courts, acting under the complementarity regime of the Rome Statute, are not allowed to try foreign States’ officials accused of international crimes. It was argued that the ICC is the proper avenue for prosecuting such officials. As to which officials are entitled to immunity *ratione personae*, it was argued that customary international law only grants this immunity to heads of State, heads of government, ministers, diplomats and officials on special missions.¹⁶⁵³

A final question which was considered in relation to immunity *ratione personae*, was whether this immunity should be extended to foreign officials on private visits in South Africa. To this question, it was answered that as a matter of customary international law

1651 See 3.5.2 above.

1652 Sections 4(1)(a) and 4(2)(a) *Diplomatic Immunities and Privileges Act*.

1653 See 3.5.3 above.

only a foreign head of State and a foreign head of government should be granted immunity *ratione personae* even when they are on South African territory for non-official purposes. It was found, however, that under the provisions of the *Diplomatic Immunities and Privileges Act*, foreign heads of governments are excluded from the benefit of such immunity when they are in South Africa on private visits.¹⁶⁵⁴ On this point, it was suggested that the *Diplomatic Immunities and Privileges Act* should be amended to bring it in line with international law.

Ultimately, it was concluded that if South African courts follow the approach proposed by the present author in relation to the immunities of foreign States officials, they will be acting consistently with international law. Conversely, it was argued that if section 4(2)(a)(i) of the Implementation Act was in fact negating both immunity *ratione materiae* and immunity *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 foreign States, just as Belgium did when it circulated an international arrest warrant against Mr Yerodia Ndombasi, then minister of foreign affairs of the DRC.¹⁶⁵⁵

6.2.2 Amnesty

On the question whether or not the doctrine of State sovereignty would be a bar to South African courts' universal jurisdiction over crimes that have been the subject of amnesty laws in foreign States, it was found that, under customary international law, South African courts have the power to disregard such foreign amnesties. Two arguments have been identified to support this proposition. First, it was found that international law imposes on States an obligation to prosecute and punish perpetrators of gross human rights violations. Amnesty for genocide, crimes against humanity and war crimes therefore constitute a breach of this duty and, accordingly, the granting of such amnesties cannot be regarded as a legitimate exercise of a State's sovereignty: international law does not regard as "sovereign" the acts that it prohibits.¹⁶⁵⁶ In accordance with this argument, it was concluded that a decision by South African courts

1654 See 3.5.4 above.

1655 See 3.6 above.

1656 See 4.4.1.1 above.

to disregard foreign amnesties in case of international crimes would not be regarded as a violation of the foreign State's sovereignty.¹⁶⁵⁷

Secondly, it was argued that South African courts can rely on the right to universal jurisdiction to trump foreign amnesties. It was argued that since the principle of universal jurisdiction grants to all States the right to exercise their jurisdiction over the crimes that the international community regards as universally condemnable, one State cannot dictate how other States should react to those crimes.¹⁶⁵⁸ Accordingly, it was concluded that, as a matter of customary international law, foreign amnesties may not be a bar to South African courts' jurisdiction over international crimes.¹⁶⁵⁹

However, it was argued that a decision by the National Director to disregard foreign amnesties and institute a prosecution in South African courts should be taken with the utmost circumspection. It was suggested that considerations of peace and democratic transition in the territorial State have to be seriously taken into consideration. It was argued that amnesty may be a legitimate price for peace. If one of the parties to a conflict insists on amnesty and is in a position to deprive the society of peace and democracy, amnesty becomes a necessary alternative to punishment.¹⁶⁶⁰ Furthermore it was argued that amnesties may legitimately be resorted to in order to allow regime change from oppression to democracy or from a minority regime to majority rule¹⁶⁶¹ and to protect a democratically elected government from military coups.¹⁶⁶² It was argued that amnesties designed to further such legitimate purposes should not be interfered with by the National Director. He should rather exercise his discretion to not prosecute as that would place the cost of achieving justice on the miserable people of the conflict-ridden State.¹⁶⁶³ *A contrario*, it was argued that amnesties that do not further any legitimate purpose, should be discouraged by instituting action in South African courts whenever a person who benefited from those amnesties is found on South African territory.¹⁶⁶⁴

1657 See 4.4.2.3.3.3 above.
1658 See 4.5 above.
1659 See 4.8 above.
1660 See 4.2.1 above.
1661 See 4.2.3 above.
1662 See 4.2.2 above.
1663 See 4.6 above.
1664 See 4.7 above.

6.2.3 *Ne bis in idem*

6.2.3.1 *Ne bis in idem* and international law

This last chapter of this study was concerned with the question whether, under customary international law, South African courts are empowered to retry cases concerning allegations of international crimes where it is established that the proceedings conducted in a foreign country were undertaken for the purpose of shielding the person concerned from criminal responsibility or, in any other manner, the person concerned was not adequately held accountable for the said crimes. It was found that this is quite permissible under international law. It was observed that there is no obligation under international law for a State which has an interest in ensuring the effective prosecution and punishment of an offender, to recognise a criminal judgment handed down by a foreign court. On the contrary, it was observed that far from requiring States to recognise criminal judgments of foreign courts, the principle of “sovereign equality” of States enshrined in article 2(1) of the UN Charter would rather support the contrary argument that “one State’s courts cannot bind the courts of another State”.¹⁶⁶⁵

Support for this argument was also found in the fact that all the existing major regional conventions containing a *ne bis in idem* rule limit its scope of application to the cases tried by the courts of the member States, excluding those handed down by the courts on non member States. On the strength of these arguments, it was concluded that, as a matter of international law, South African courts are permitted to retry cases concerning international crimes which were tried in foreign States but in a manner that is not consistent with an intent to punish.¹⁶⁶⁶

6.2.3.2 *Ne bis in idem* under South African law

Having established that a second retrial in South African courts of a case already tried in a foreign country would not violate the sovereignty of the foreign State, the study went on to determine whether pursuant to section 35(1)(m) of the Constitution, which provides that “every accused person” has a right to a fair trial, which includes the “right not to be tried for an offence in respect of an act or omission for which that person has

1665 See 5.3 above.

1666 See 5.3 above.

previously been either acquitted or convicted”, such retrial is possible in terms of South Africa’s own law. On this question, it was argued that pursuant to the provision of section 35(1)(m), such a retrial is not allowed. It was found that section 35(1)(m) does not make a distinction between a previous trial by a South African court or by a foreign court; what matters is that the “accused person” is being tried in respect of an act or omission for which was previously “acquitted” or “convicted”. Whether the previous trial was before a South African court or a foreign one is not a relevant consideration.¹⁶⁶⁷

In the light of the above finding, it was argued that this situation is not consistent with South Africa’s expressed commitment to “provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa”.¹⁶⁶⁸ It was argued that if such commitment must be taken as more than mere political rhetoric, South Africa must reform its law to allow its courts to retry cases concerning international crimes which were already tried in foreign countries but in a manner which would necessitate the ICC to intervene and retry the cases. It was said that the ICC may not have the capacity to deal with all “sham” trials around the world and that, accordingly, South African courts should be enabled to play a role in retrying such shams.¹⁶⁶⁹

The second question which fell to be considered in relation to the *ne bis in idem* rule under South African law, was whether the proposed exception would be justifiable under the limitation clause. This question was answered in the affirmative. It was found that the *Constitution* recognises that fundamental rights are not absolute; that the rights of others and the legitimate needs of the society may justify the imposition of restrictions on the exercise of fundamental rights. It was argued that the proposed exception would serve the important purpose of ending impunity for gross violations of human rights, a purpose which is compellingly important that it overrides any individual interest in not being tried twice for the same offence.¹⁶⁷⁰

In addition to the two situations contemplated in article 20(3) of the Rome Statute; namely where the proceedings were conducted for the purpose of shielding the person

1667 See 5.4 above.

1668 Preamble to the Implementation Act.

1669 See 5.4 above

1670 See 5.6 above.

concerned from criminal responsibility¹⁶⁷¹ or were conducted in a manner which was inconsistent with an intent to bring the person concerned to justice,¹⁶⁷² this study has identified two other situations where a retrial of a case tried in a foreign country concerned would also be justified. These are situations where a person was convicted and appropriately sentenced but only an insignificant part of the sentence was served¹⁶⁷³ and where subsequent to an acquittal, new and compelling evidence is brought to light after the trial, which points to the guilt of an acquitted defendant.¹⁶⁷⁴ It was argued that if impunity for perpetrators of international crimes is to be effectively dealt with, there is a need to extend the proposed exception to these two situations. A situation where the accused was appropriately tried and sentenced to a fitting punishment but then shortly released may materialise when, for example, the person in question is released from prison through executive measures such as presidential pardon, or parole.¹⁶⁷⁵ With regard to the instances where new evidence may emerge which clearly points to the guilt of a person previously acquitted of an international crime it was suggested, in order to protect the accused against an unwarranted and abusive second trial, that the second trial would only be allowed if the new evidence is scientific evidence (such as DNA) or a confession from the accused himself.¹⁶⁷⁶ It was also argued that these exceptions to the *ne bis in idem* rule would be justified under the limitation clause too.

6.3 Recommendations

6.3.1 Regarding immunities

On the question of immunities of foreign States' officials, it is recommended to South African courts, exercising universal jurisdiction over international crimes committed in foreign States:

- (1) not to uphold immunity *ratione materiae* to foreign States' officials accused of international crimes;

1671 See 5.7.1 above.
1672 See 5.7.2 above.
1673 See 5.7.3.1 above.
1674 See 5.7.3.2 above.
1675 See 5.7.3.1 above.
1676 See 5.7.3.2 above.

- (2) to uphold immunity *ratione personae* to foreign States' officials accused of international crimes;
- (3) to uphold immunity *ratione personae* only to the following foreign States officials: heads of State, heads of government, ministers, diplomats, and officials (including low-ranking officials) on special missions.

In case a foreign State official is on South African territory on a private visit, it is recommended that the *Diplomatic Immunities and Privileges Act* be amended in order to allow South African courts to uphold immunity *ratione personae* not only to foreign heads of State but also to foreign heads of governments.

6.3.2 *Regarding foreign amnesties*

With regard to amnesty laws passed by foreign States, it is recommended that:

- (1) Such amnesties should not be recognised by South African courts as a bar to their universal jurisdiction over an international crime;
- (2) However, the National Director should exercise his discretion not to institute a prosecution if:
 - (a) the amnesty was absolutely needed in order:
 - i. to end a civil war; or
 - ii. to allow a change in government from a minority or oppressive rule to a majority or democratic rule; or
 - iii. to protect a newly democratically elected government from the threat of a coup by the members of the security forces; and
 - (b) At the time when investigation or prosecution is contemplated, there are serious reasons to believe that the institution of proceedings in South African courts would impede the realisation of the objectives for which the amnesty was implemented.

6.3.3 *Regarding the retrial of cases already tried in foreign countries*

With respect to the *ne bis in idem* rule, the following recommendations are addressed to the South African law-making authorities:

- (1) The *ne bis in idem* rule should be maintained as a matter of principle,
- (2) However, as an exception to the general rule, South African law should be reformed to allow South African courts, dealing with international crimes committed in foreign countries in accordance with the complementarity regime of the Rome Statute, to retry a case which was already tried in a foreign country if:
 - i. the accused was fraudulently acquitted
 - ii. the accused was convicted but no sentence was imposed
 - iii. the sentence was imposed but not served
 - iv. the accused was convicted but only a derisory sentence was imposed
 - v. the sentence was imposed but only an insignificant part of it was served
 - vi. new and compelling evidence is brought to light after the completion of the original proceedings which points to the guilt of an acquitted defendant, and this new evidence is either scientific evidence or a confession from the accused himself.
- (3) In case of prior conviction and sentence, the sentence served in the foreign country, if any, should be deducted from the sentence to be imposed by the South African court.

It is hoped that South African authorities will act upon the above recommendations swiftly and in a timely fashion. As the Law Reform Commission of Hong Kong once remarked:

[O]ne should never wait until the problem has manifested itself in a significant number of cases before commencing the reform process. [...] It makes more sense to anticipate and prevent an anomaly, rather than only react after the event.¹⁶⁷⁷

1677 The Law Reform Commission of Hong Kong "Report: Double Jeopardy" 40.

BIBLIOGRAPHY

1 LITERATURE

1.1 Books

A

Acirokop *Accountability for Mass Atrocities*

Acirokop P *Accountability for Mass Atrocities: the LRA Conflict in Uganda* (LLD-thesis University of Pretoria 2012)

Adjei *Humanitarian Intervention*

Adjei E *The Legality of Humanitarian Intervention* (LLM-dissertation University of Georgia 2005)

Ambos "Crimes against Humanity and the International Criminal Court"

Ambos K "Crimes against Humanity and the International Criminal Court" in Sadat LN (ed) *Forging a Convention for Crimes Against Humanity* 1st ed (Cambridge University Press Cambridge 2011)

Aust *Handbook*

Aust A *Handbook of International Law* 2nd (Cambridge University Press Cambridge 2010)

B

Badr *State Immunity*

Badr GM *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff Publishers Leiden 1984)

Bantekas and Nash *International Criminal Law*

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

Bassiouni (ed) *International Criminal Law*

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

- Bassiouni “The Need for International Accountability”
 Bassiouni MC “The Need for International Accountability” in Bassiouni (ed)
International Criminal Law Vol II (Transnational Publishers, Inch New York 1986)
- Bellelli “The Establishment of the System of International Criminal Justice”
 Bellelli R “The Establishment of the System of International Criminal Justice” in
 Bellelli R (ed) *International Criminal Justice: Law & Practice from the Rome
 Statute to its Review* (Ashgate Publishing Limited Surrey 2000)
- Bergsmo and Yan “On State Sovereignty and Individual Criminal Responsibility for Core
 International Crimes in International Law”
 Bergsmo M and Yan L “On State Sovereignty and Individual Criminal
 Responsibility for Core International Crimes in International Law” in Bergsmo M
 and Yan L (eds) *State Sovereignty and International Criminal Law* (Beijing Torkel
 Opsahl Academic EPublisher 2012)
- Blakesley “Extraterritorial Jurisdiction”
 Blakesley CL “Extraterritorial Jurisdiction” in Bassiouni MC *International Criminal
 Law* (Transnational Publishers Dobbs Ferry 1986)
- Bockel *The Ne Bis in Idem Principle in EU Law*
 Bockel WB *The Ne Bis in Idem Principle in EU Law: A Conceptual and
 Jurisprudential Analysis* (PHD-thesis Leiden University 2009)
- Bourgon “Jurisdiction *Ratione Temporis*”
 Bourgon S “Jurisdiction *Ratione Temporis*” in Cassese A, Gaeta P and Jones JR
The Rome Statute of the International Criminal Court: A Commentary Vol I
 (Oxford University Press Oxford 2002)
- Brownlie *Principles*
 Brownlie I *Principles of Public International Law* 7th ed (Oxford University Press
 Oxford 2008)
- Bubenzer *Post-TRC Prosecutions*
 Bubenzer O *Post-TRC Prosecutions in South Africa: Accountability for Political
 Crimes after the Truth and Reconciliation Commission’s Amnesty Process*
 (Martinus Nijhoff Publishers Leiden 2009)

Burchell *Criminal Law and Procedure*

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

C

Calvo-Goller *The Trial Proceedings*

Calvo-Goller KN *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents* (Martinus Nijhoff Publishers Leiden 2006)

Cannizzaro "Fragmented Sovereignty?"

Cannizzaro E "Fragmented Sovereignty? The European Union and its Member States in the International Arena" in Conforti B *et al* (eds) *The Italian Yearbook of International Law* Vol XIII (Martinus Nijhoff Publishers Leiden 2003)

Cassese *International Criminal Law* 1st ed

Cassese A *International Criminal Law* (Oxford University Press New York 2003)

Cassese *International Criminal Law* 2nd ed

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

Cassese "From Nuremberg to Rome"

Cassese A "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court" in Cassese A, Gaeta P and Jones JR *The Rome Statute of the International Criminal Court: A Commentary* Vol I (Oxford University Press Oxford 2002)

Chandrasekharan *Double Jeopardy*

Chandrasekharan P *Double Jeopardy Protection: A Comparative Overview* (Mittal Publications Delhi 1998)

Chengyuan "The Connotation of Universal Jurisdiction"

Chengyuan M "The Connotation of Universal Jurisdiction and its Application in the Criminal Law of China" in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (Beijing Torkel Opsahl Academic EPublisher 2012)

Chirwa *Human Rights*

Chirwa DM *Human Rights under the Malawian Constitution* (Juta Cape Town 2011)

Cohen “The Personal Security of Businessmen and Trade Representatives”
Cohen JA “The Personal Security of Businessmen and Trade Representatives” in
Li VH *Law and Politics in China’s Foreign Trade* (University of Washington Press
Hong Kong 1977)

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 Publishers Leiden 2009)

Cryer *Prosecuting International Crimes*
Cryer R *Prosecuting International Crimes: Selectivity and the International
Criminal Law Regime* (Cambridge University Press Cambridge 2005)

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)

Curie and De Waal *The Bill of Rights Handbook*
Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (Juta Cape Town
2013)

D

De Lupis *International Law*
De Lupis ID *International Law and the Independent State* (Gower Publing
Compagn Vermont 1975)

Demeyele, Verhoeven and Wouters “The 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 Publishers Leiden 2009)

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

Dugard “Possible Conflicts with Truth Commissions”

Dugard J “Possible Conflicts with Truth Commissions” in Cassese A, Gaeta P and Jones JR *The Rome Statute of the International Criminal Court: A Commentary* Vol I (Oxford University Press Oxford 2002)

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)

Du Toit *et al Commentary*

Du Toit E *et al Commentary on the Criminal Procedure Act* (Juta Cape Town 1987)

F

Fenton *Understanding the UN Security Council*

Fenton N *Understanding the UN Security Council: Coercion of Consent?* (Ashgate Publishing Limited Hampshire 2004)

Ferreira-Snyman *State Sovereignty*

Ferreira-Snyman MP *The Erosion of State Sovereignty in Public International Law: Towards a World Law?* (LLD-thesis University of Johannesburg 2009)

Fox “International Law and Restraints”

Fox H “International Law and Restraints on the Exercise of Jurisdiction by National Courts of States” in Evans MD (ed) *International Law* (Oxford University Press 2003)

Fox *State Immunity*

Fox H *The Law of State Immunity* (Oxford University Press Oxford 2002)

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)

Frulli “Jurisdiction *Ratione Personae*”

Frulli M “Jurisdiction *Ratione Personae*” in Cassese A, Gaeta P and Jones JR
The Rome Statute of the International Criminal Court: A Commentary Vol I
(Oxford University Press Oxford 2002)

H

Haust *Handbook*

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

Hessler “State Sovereignty as an Obstacle to International Law”

Hessler K “State Sovereignty as an Obstacle to International Law” in May L and
Hoskins Z (eds) *International Law and Philosophy* (Cambridge University Press
Cambridge 2010)

Hiemstra *Criminal Procedure*

Hiemstra VG *Introduction to the Law of Criminal Procedure* 2nd ed (Butterworths
Durban 1985)

Hill “The Philosophy of the Law of Sovereign Immunity”

Hill RK “The Philosophy of the Law of Sovereign Immunity” in Cooper-Hill J *The
Law of Sovereign Immunity and Terrorism* (Oceana Publications Oxford 2006)

Hillier *Public International Law*

Hillier T *Sourcebook on Public International Law* (Cavendish Publishing Limited
London 1998)

Hurwitz “Universal Jurisdiction”

Hurwitz DR “Universal Jurisdiction and the Dilemmas of International Criminal
Justice: The Sabra and Shatila Case in Belgium” in Hurwitz DR and
Satterthwaite ML (eds) *Human Rights Advocacy Stories* (Thomson Reuters New
York 2009)

I

ICRC *Customary International Humanitarian Law*

ICRC *Customary International Humanitarian Law Vol I: Rules* (Cambridge
University Press Cambridge 2005)

J

Jackson *Sovereignty*

Jackson R *Sovereignty: The Evolution of an Idea* (Polity Press Cambridge 2010)

Jordaan *Aspects of Double Jeopardy*

Jordaan L *Aspects of Double Jeopardy* (LLD thesis Unisa 1997)

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)

Joubert (ed) *Criminal Procedure*

Joubert JJ (ed) *Criminal Procedure Handbook* 10th ed (Juta Cape Town 2011)

Jurdi *The International Criminal Court*

Jurdi NN *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate Surrey 2011)

K

Kemp, Terblanche and Watney *Criminal Procedure*

Kemp GP, Terblanche SS and Watney MM *Criminal Procedure Casebook* (Juta Cape Town 2010)

Kourula "Universal Jurisdiction for Core International Crimes"

Kourula E "Universal Jurisdiction for Core International Crimes" in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (Beijing Torkel Opsahl Academic EPublisher 2012)

Kruger Hiemstra's *Criminal Procedure*

Kruger A *Hiemstra's Criminal Procedure* (LexisNexis Durban 2013)

L

Lamprecht *Adjudication of International Crimes*

Lamprecht AA *Nullum Crimen Sine Lege (Iure) and Jurisdiction in the Adjudication of International Crimes in National Jurisdictions* (LLD-thesis UNISA 2010)

Lamprecht *International Law in the Post-1994 South African Constitutions*
Lamprecht AA *International Law in the Post-1994 South African Constitutions: Terminology and Application* (LLM-dissertation UNISA 2001)

Lansdown and Campbell *Criminal Law and Procedure Vol 5*
Lansdown AV and Campbell JC *South African Criminal Law and Procedure Vol 5*
(Juta Cape Town 1982)

Lee "Universal Jurisdiction"
Lee W "International Crimes and Universal Jurisdiction" in May L and Hoskins Z (eds) *International Criminal Law and Philosophy* (Cambridge University Press Cambridge 2010)

Lubbe *Successive and Additional Measures*
Lubbe HJ *Successive and Additional Measures to the TRC Amnesty Scheme in South Africa: Prosecutions and Presidential Pardons* (Intersentia Cambridge 2012)

Lulu "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law"
Lulu Z "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law" in Bergsmo M and Yan L (eds) *State Sovereignty and International Criminal Law* (Beijing Torkel Opsahl Academic EPublisher 2012)

M

Malanczuk *International Law*
Malanczuk P *Akehurst's Modern Introduction to International Law 7th ed*
(Routledge New York 1997)

Mitchell 2009 *Aut Dedere, aut Judicare*
Mitchell C *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law* (Graduate Institute of International and Development Studies Geneva 2009)

Muhire *Intervention*
Muhire GY *The African Union's Right of Intervention and the UN System of Collective Security* (PHD-thesis University of Utrecht 2013)

Mullins *The Leipzig Trials*

Mullins C *The Leipzig Trials: an Account of the War Criminals' Trials and a Study of German Mentality* (HF & G Witherby London 1921)

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)

O

Obura "Duty to Prosecute International Crimes Under International Law"

Obura "Duty to Prosecute International Crimes Under International Law" in Murungu C and Biegon J (ed) *Prosecuting International Crimes in Africa* (Pretoria University Law Press Pretoria 2011)

Ofei *The International Criminal Court*

Ofei PGS *The International Criminal Court and the Principle of Complementarity: A Comparison of the Situation in the Democratic Republic of the Congo and the Situation in Darfur* (LLM-dissertation University of Pretoria 2008)

Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime"

Orentlicher DF "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" in Kritiz N *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations* (US Institute of Peace Press Washington 1995)

O'Shea *Amnesty*

O'Shea A *Amnesty for Crime in International Law and Practice* (Kluwer Law International The Hague 2002)

P

Pellet "Entry into Force and Amendment of the Statute"

Pellet A "Entry into Force and Amendment of the Statute" in Cassese A, Gaeta P & Jones JR *The Rome Statute of the International Criminal Court: A Commentary Vol I* (Oxford University Press Oxford 2002)

R

Rakate *The Duty to Prosecute and the Status of Amnesties*

Rakate PTK *The Duty to Prosecute and the Status of Amnesties Granted for Gross and Systematic Human Rights Violations in International Law: Towards a Balanced Approach Model* (LLD-thesis UNISA 2004)

Reydams *Universal Jurisdiction*

Reydams L *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press Oxford 2003)

Robinson and Kirsch "Reaching Agreement at the Rome Conference"

Robinson D and Kirsch P QC "Reaching Agreement at the Rome Conference" in Cassese A, Gaeta P & Jones JR *The Rome Statute of the International Criminal Court: A Commentary Vol I* (Oxford University Press Oxford 2002)

Rupucci and Walker (eds) *Countries at the Crossroads*

Rupucci S and Walker C (eds) *Countries at the Crossroads: A Survey of Democratic Governance* (Freedom House Oxford 2005)

S

Sand "After Pinochet: the role of national courts"

Sands P "After Pinochet: the role of national courts" in Sands P (ed) *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press Cambridge 2003)

Schabas "International Crimes"

Schabas WA "International Crimes" in Armstrong D (ed) *Routledge Handbook of International Law* (Routledge London 2011)

Schabas *An Introduction*

Schabas W *An Introduction to the International Criminal Court* 4th ed (Cambridge University Press Cambridge 2011)

Schermers and Blokker *Institutional Law*

Schermers HG and Blokker NM *International Institutional Law* 5th ed ((Martinus Nijhoff Publishers Leiden 2001)

- Schoenbaum *International Relations*
Schoenbaum T J *International Relations-The Path Not Taken: Using International Law to Promote World Peace and Security* (Cambridge University Press Cambridge 2006)
- Shaw *International Law*
Shaw MN *International Law* 5th ed (Cambridge University Press Cambridge 2003)
- Snyman *Criminal Law*
Snyman CR *Criminal Law* 5th ed (LexisNexis Durban 2008)
- Sorgdrager *Criminal Procedure and Evidence*
Sorgdrager AM *Law of Criminal Procedure and Evidence Casebook* 2nd ed (Butterworths Durban 1997)
- Steynberg *et al Criminal Law*
Steynberg A *et al Criminal Law in South Africa* (Oxford University Press Southern Africa Cape Town 2012)
- Steytler *Constitutional Criminal Procedure*
Steytler N *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* (Butterworths Durban 1998)
- Stigen *The Principle of Complementarity*
Stigen J *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers Leiden 2008)
- Sunga "Reconciling Truth Commissions and Criminal Prosecutions"
Sunga LS "Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions" in Bassiouni MC, Gasser HP and Gorja J (eds) *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Publishers 2009)
- Swanepoel *The Emergence*
Swanepoel CF *The Emergence of a Modern International Criminal Justice Order* (LLD-thesis University of the Free State 2006)

V

Van den Wyngaert and Ongena "Ne bis in idem Principle, including the issue of Amnesty"

Van den Wyngaert C and Ongena T "Ne bis in idem Principle, including the issue of Amnesty" in Cassese A, Gaeta P and Jones JR *The Rome Statute of the International Criminal Court: A Commentary Vol I* (Oxford University Press Oxford 2002)

Van der Schyff *Limitation of Rights*

Van der Schyff G *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (Wolf Legal Publishers Nijmegen 2005)

Varushka *The Truth and Reconciliation Commission*

Varushka J *The Truth and Reconciliation Commission: success or failure?* (LLM-dissertation University of Pretoria 2008)

Villalpando and Condorelli "Relationship of the Court with the United Nations"

Villalpando S and Condorelli L "Relationship of the Court with the United Nations" in Cassese A, Gaeta P and Jones JR *The Rome Statute of the International Criminal Court: A Commentary Vol I* (Oxford University Press Oxford 2002)

W

Wallace *International Law*

Wallace RM *International Law* 4th ed (Sweet & Maxwell London 2002)

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)

Woolman *et al* (eds) *Constitutional Law*

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

Wouters, Verhoeven and Demeyere “The International Criminal Court’s Office of the Prosecutor”

Wouters J, Verhoeven S and Demeyere D “The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?” in Bassiouni MC, Gasser HP and Gorja J (eds) *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Publishers Leiden 2009)

Y

Yitiha *Immunity*

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

Z

Zeidy *The Principle of Complementarity*

Zeidy MM *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers Leiden 2008)

1.2 Journal articles

A

Abi-Saab 2003 *Journal of International Criminal Justice*

Abi-Saab G “The Proper Role of Universal Jurisdiction” 2003 *Journal of International Criminal Justice* 596-602.

Akande 2009 *Journal of International Criminal Justice*

Akande D “The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities” 2009 *Journal of International Criminal Justice* 333-352

Akande 2004 *American Journal of International Law*

Akande D “International Law Immunities and the International Criminal Court” 2004 *American Journal of International Law* 407-433

Akande 2003 *Journal of International Criminal Justice*

Akande D “The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits” 2003 *Journal of International Criminal Justice* 618-650

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

Akehurst 1973 *British Yearbook of International Law*
Akehurst M "Jurisdiction in International Law" 1973 *British Yearbook of International Law* 145-257

Ambos 1977 *Human Rights Law Journal*
Ambos K "Impunity and International Criminal Law: A case Study on Colombia, Peru, Bolivia, Chile and Argentina" 1977 *Human Rights Law Journal* 1-15

Anonymous 1922 *The American Journal of International Law*
Anonymous "German War Trials: Judgment in the Case of Karl Heynen" 1922 *The American Journal of International Law* 674-684

Anonymous 1922 *The American Journal of International Law*
Anonymous "German War Trials: Judgment in the Case of Emil Muller" 1922 *The American Journal of International Law* 684-696

Anonymous 1922 *The American Journal of International Law*
Anonymous "German War Trials: Judgment in the Case of Robert Neumann" 1922 *The American Journal of International Law* 696-704

Anonymous 1922 *The American Journal of International Law*
Anonymous "German War Trials: Judgment in Case of Lieutenants Dithmar and Boldt" 1922 *The American Journal of International Law* 708-724

Arsanjani 1999 *American Society of International Law*
Arsanjani MH "The International Criminal Court and National Amnesty Laws" 1999 *American Society of International Law* 65-68

B

Barker, Warbrick and McGoldrick 1999 *International and Comparative Law Quarterly*
Barker JC , Warbrick C and McGoldrick D "The Future of Former Head of State Immunity after ex parte Pinochet" 1999 *International and Comparative Law Quarterly* 937-949

Bateman 2012 *South African Medical Journal*

Bateman C "Tighter medical parole - no more 'Shaik, rattle and roll'" 2012 *South African Medical Journal* 210-212

Bassiouni 1993 *Duke Journal of Comparative and International Law*

Bassiouni MC "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" *Duke Journal of Comparative and International Law* 235-297

Bassiouni 1996 *Law and Contemporary Problems*

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

Bassiouni 1996 *Law and Contemporary Problems*

Bassiouni MC "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" 1996 *Law and Contemporary Problems* 63-74

Bassiouni 2001 *Virginia Journal of International Law*

Bassiouni MC "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" 2001 *Virginia Journal of International Law* 81-162

Bassiouni 2000 *University of Colorado Law Review*

Bassiouni MC "Combating Impunity for International Crimes" 2000 *University of Colorado Law Review* 409-422

Baxter 1966 *British Yearbook of International Law*

Baxter RR "Multilateral Treaties as Evidence of Customary International Law" 1966 *British Yearbook of International Law* 276-300.

Bianchi 1999 *European Journal of International Law*

Bianchi A "Immunity versus Human Rights: The Pinochet Case" 1999 *European Journal of International Law* 237-277

Belsky, Merva and Roht-Arriaza 1989 *California Law Review*

Belsky AC, Merva M and Roht-Arriaza R "Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law" 1989 *California Law Review* 365-415

- Benzing 2003 *Max Planck Yearbook of United Nations Law*
 Benzing M "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" 2003 *Max Planck Yearbook of United Nations Law* 591-632
- Bergsmo, Bekou and Annika 2010 *Goettingen Journal of International Law*
 Bergsmo M, Bekou O & Annika J "Complementarity After Kampala: Capacity Building and the ICC's Legal Tools" 2010 *Goettingen Journal of International Law* 791-811
- Bernard 2011 *Journal of International Criminal Justice*
 Bernard D "Ne bis in idem-Protector of Defendants' Rights or Jurisdictional Pointsman?" 2011 *Journal of International Criminal Justice* 1-18
- Bianchi 1999 *European Journal of International Law*
 Bianchi A "Immunity versus Human Rights: The Pinochet case" 1999 *European Journal of International Law* 237-277
- Boed 2000 *Cornell International Law Journal*
 Boed R 2000 "The Effect of a Domestic Amnesty on the Ability on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations" *Cornell International Law Journal* 297-329
- Brown 1998 *Yale Journal of International Law*
 Brown B S "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals" 1998 *Yale Journal of International Law* 383-436.
- Buchanan 2000 *Ethics*
 Buchanan A "Rawls's Law of Peoples: Rules for a Vanished Westphalian World" 2000 *Ethics* 697-721
- Burke-White 2005 *Leiden Journal of International Law*
 Burke-White WW "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo" 2005 *Leiden Journal of International Law* 557-590

Burke-White 2003 *ILSA Journal of International and Comparative Law*

Burke-White WW "The International Criminal Court and the Future of Legal Accountability" 2003 *ILSA Journal of International and Comparative Law* 195-205

Burke-White 2001 *Harvard International Law Journal*

Burke-White WW "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation" 2001 *Harvard International Law Journal* 467-533

C

Carter 2010 *Santa Clara Journal of International Law*

Carter LE "The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem" 2010 *Santa Clara Journal of International Law* 165-198.

Cassel 1996 *Law and Contemporary Problems*

Cassel D "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities" 1996 *Law and Contemporary Problems* 197-230

Cassese 2003 *Journal of International Criminal Justice*

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

Cassese 2002 *European Journal of International Law*

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

Cassese 1999 *European Journal of International Law*

Cassese A "The Statute of the International Criminal Court: Some Preliminary Reflections" 1999 *European Journal of International Law* 144-171

Cassese 1998 *European Journal of International Law*

Cassese "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" 1998 *European Journal of International Law* 2-17

Coffey 2007 *Dublin University Law Journal*

Coffey G "Evaluating the Common Law Principle against Retrials" 2007 *Dublin University Law Journal* 26-56

Colangelo 2005 *Virginia Journal of International Law*

Colangelo A "The Legal Limits of Universal Jurisdiction" 2005 *Virginia Journal of International Law* 1-51

Colangelo 2009 *Washington University Law Review*

Colangelo AJ "Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory" 2009 *Washington University Law Review* 769-857

Comment 1954 *Yale Law Journal*

Comment "The Jurisdictional Immunity of Foreign Sovereigns" 1954 *Yale Law Journal* 1148-1172

Conway 2003 *International Criminal Law Review*

Conway G "Ne Bis in Idem in International Law" 2003 *International Criminal Law Review* 217-244

Costa 1998 *University of California Davis Journal of International Law and Policy*

Costa JF 1998 "Double Jeopardy and Non Bis in Idem: Principles of Fairness" *University of California Davis Journal of International Law and Policy* 181-200

Costelloe 2011 *Washington University Jurisprudence Review*

Costelloe DG "Political Constructivism and Reasoning About Peremptory Norms of International Law" 2011 *Washington University Jurisprudence Review* 1-47

D

Dörmann 2003 *Max Planck Yearbook of United Nations Law*

Dörmann K "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations of the Elements of Crimes" 2003 *Max Planck Yearbook of United Nations Law* 341- 407

Dugard 1999 *Leiden Journal of International Law*

Dugard J "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *Leiden Journal of International Law* 1002-1015

Dugard 1997 *European Journal of International Law*

Dugard J "International Law and the South African Constitution" 1997 *European Journal of International Law* 77-92.

Dugard and Abraham 2002 *Annual Survey of South African Law*

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

Du Plessis 2007 *Journal of International Criminal Justice*

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

Du Plessis 2003 *South African Journal Criminal Justice*

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

Dyke and Berkley 1992 *Denvil Journal of International Law & Policy*

Dyke JM and Berkley GW "Redressing Human Rights Abuses" 1992 *Denvil Journal of International Law & Policy* 243-267

E

Edelenbos 1994 *Leiden Journal of International Law*

Edelenbos C "Human Rights Violations: A Duty to Prosecute?" 1994 *Leiden Journal of International Law* 5-21

Enache-Brown and Fried 1998 *McGill Law Journal*

Enache-Brown C and Fried A "Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law" 1998 *McGill Law Journal* 613-633.

F

Ferencz 1998 *Pace International Law Review*

Ferencz BB "International Criminal Courts: The Legacy of Nuremberg" 1998 *Pace International Law Review* 203-235

Ferreira-Snyman 2006 *Fundamina*

Ferreira-Snyman MP "The Evolution of State Sovereignty: A Historical Overview"
2006 *Fundamina: A Journal of Legal History* 1-28

Finke 2010 *European Journal of International Law*

Finke J "Sovereign Immunity: Rule, Comity or Something Else?" 2010 *European Journal of International Law* 853–881

Finlay 2009 *University of California Davis Journal of International Law and Policy*

Finlay L "Does the International Criminal Court Protect against Double jeopardy: An Analysis of Article 20 of the Rome Statute" 2009 *University of California Davis Journal of International Law and Policy* 221-248

Fletcher 2003 *Journal of International Criminal Justice*

Fletcher GP "Against Universal Jurisdiction" 2003 *Journal of International Criminal Justice* 580-584

Forcese 2007 *McGill Law Journal*

Forcese C "De-immunizing Torture: Reconciling Human Rights and State Immunity" 2007 *McGill Law Journal* 127-169

Freeman 1988 *Criminal Law Journal*

Freeman CD "Double Jeopardy Protection in Canada: A Consideration of Development, Doctrine and a Current Controversy" 1988 *Criminal Law Journal* 3-27

Fry 2012 *Criminal Law Forum*

Fry E "Between Show Trials and Sham Prosecutions: The Rome Statute's Potential Effect on Domestic Due Process Protections" 2012 *Criminal Law Forum* 35–62

G

Garnett 1999 *Australian Year Book of International Law*

Garnett R "Should Foreign State Immunity be Abolished?" 1999 *Australian Year Book of International Law* 175-190

Gavron 2002 *International and Comparative Law Quarterly*
Gavron J "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court" 2002 *International and Comparative Law Quarterly* 91-117

Gioia 2006 *Leiden Journal of International Law*
Gioia F "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court" 2006 *Leiden Journal of International Law* 1095 -1123

Grosscup 2004 *Denvil Journal of International Law & Policy*
Grosscup S "The Trial of Slobodan Milosevic: the Demise of Head of State Immunity and the Specter of Victor's Justice" 2004 *Denvil Journal of International Law & Policy* 355-381

H

Hafner 1999 *European Journal of International Law*
Hafner G et al "A Response to the American View as Presented by Ruth Wedgwood" 1999 *European Journal of International Law* 108-123

Henrard 1999 *Michigan State University Detroit College of Law Journal of International Law*
Henrard K "The Viability of National Amnesties in view of the Increasing Recognition of Individual Criminal Responsibility at International Law" 1999 *Michigan State University Detroit College of Law Journal of International Law* 595-649

Higgins 1982 *Netherlands International Law Review*
Higgins R "Certain Unresolved Aspects of the Law of State Immunity" 1982 *Netherlands International Law Review* 265-276

J

Jackson 2007 *Tulane Journal of International Law & Comparative Law*
Jackson MM "The Customary International Law Duty To Prosecute Crimes Against Humanity: A New Framework" 2007 *Tulane Journal of International Law & Comparative Law* 117-156

Jackson 2003 *American Journal of International Law*

Jackson JH "Sovereignty-Modern: A New Approach to an Outdated Concept"
2003 *American Journal of International Law* 782-802

Jia 2012 *Journal of International Criminal Justice*

Jia BB "The Immunity of State Officials for International Crimes Revisited" 2012
Journal of International Criminal Justice 1303-1321

Jordaan 2000 *Fundamina*

Jordaan L "The Double Jeopardy Prohibition - A Historical Overview" 2000
Fundamina 86-114

Jordaan 1998 *South African Journal of Criminal Justice*

Jordaan L "Multiple Trials for Crimes Arising from the Same Facts and the
Constitutional Right of the Accused to be Protected against Double Jeopardy"
1998 *South African Journal of Criminal Justice* 21-50

Joyner 1998 *Denver Journal of International Law and Policy*

Joyner CC "Redressing Impunity for Human Rights Violations: The Universal
Declaration and the Search for Accountability" 1998 *Denver Journal of
International Law and Policy* 591-624

Joyner 1996 *Law & Contemporary Problems*

Joyner CC "Arresting Impunity: The Case for Universal Jurisdiction in Bringing
War Criminals to Accountability" 1996 *Law & Contemporary Problems* 153-172

K

King 2010 *George Washington International Law Review*

King EL "Amnesties in a Time of Transition" 2010 *George Washington
International Law Review* 577-618

Kirby 2003 *Criminal Law Journal*

Kirby M "Carroll, Double Jeopardy and International Human Rights Law" 2003
Criminal Law Journal 1- 47

Knushel 2011 *Northwestern Journal of International Human Rights*

Knushel S "State Immunity and the Promise of *Jus Cogens*" 2011 *Northwestern Journal of International Human Rights* 149 -183

Kramer 2006 *European Review*

Kramer A "The First Wave of International War Crimes Trials: Istanbul and Leipzig" 2006 *European Review* 441- 455

L

Lee 1999 *Virginia Journal of International Law*

Lee A S "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations" 1999 *Virginia Journal of International Law* 425 - 466

M

Manson 2010 *Criminal Law Forum*

Manson R "Identifying the Rough Edges of Kampala Compromise" 2010 *Criminal Law Forum* 417- 443

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

McGregor 2008 *The European Journal of International Law*

McGregor L "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty" 2008 *The European Journal of International Law* 903 - 919

Meintjes and Mendez 2000 *International Law Forum du Droit International*

Meintjes G and Mendez J E "Reconciling Amnesties with Universal Jurisdiction" 2000 *International Law Forum du Droit International* 76-97

Meron 1995 *American Journal of International Law*

Meron T "International Criminalization of Internal Atrocities" 1995 *The American Journal of International Law* 554-577

Motala 1995 *Comparative and International Law Journal of Southern Africa*

Motala Z "The Promotion of National Unity and Reconciliation Act, the Constitution and International Law" 1995 *Comparative and International Law Journal of Southern Africa* 338-362

Morosin 1995 *Nordic Journal of International Law*

Morosin M N "Double Jeopardy and International Law: Obstacles to Formulating a General Principle" 1995 *Nordic Journal of International Law* 261-274

N

Naqvi 2003 *International Review of the Red Cross*

Naqvi Y "Amnesty for war crimes: Defining the Limits of International Recognition" 2003 *International Review of the Red Cross* 583-625

Newman 2005 *American University International Law Review*

Newman GD "The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem" 2005 *American University International Law Review* 293-357

Newton 2001 *Military Law Review*

Newton MA "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court" 2001 *Military Law Review*

O

O'Donnell 2008 *Boston University International Law Journal*

O'Donnell KL "Certain Criminal Proceedings in France (Republic of Congo v France) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?" 2008 *Boston University International Law Journal* 375-416

O'Keefe 2004 *Journal of International Criminal Justice*

O'Keefe R "Universal Jurisdiction: Clarifying the Basic Concept" 2004 *Journal of International Criminal Justice* 735-760

Orakhelashvili 2002 *American Journal of International Law*

Orakhelashvili A "International Decisions" 2002 *American Journal of International Law* 677-684

Orentlicher 1991 *Yale Law Journal*

Orentlicher DF "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" 1991 *Yale Law Journal* 2539-2615

P

Parks 1973 *Military Law Review*

Parks W H "Command Responsibility for War Crimes" 1973 *Military Law Review* 1-104

Pensky 2008 *Ethics and Global Politics*

Pensky M "Amnesty on Trial: impunity, accountability, and the norms of international law" 2008 *Ethics and Global Politics* 1-40

Philippe 2006 *International Review of the Red Cross*

Philippe X "The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?" 2006 *International Review of the Red Cross* 375-398

Prakash 2003 *University of Queensland Law Journal*

Prakash N "R v Carroll: Double Jeopardy under Fire" 2003 *University of Queensland Law Journal* 267-171

R

Radosavljevic 2007 *Review of International Law and Politics*

Radosavljevic D "An Overview of the ICC Complementarity Regime" 2007 *Review of International Law and Politics* 96-115

Reiman 1995 *Michigan Journal of International Law*

Reiman M "A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v Federal Republic of Germany*" 1995 *Michigan Journal of International Law* 403-432

Reisman 1996 *Law & Contemporary Problems*

Reisman W M "Legal Responses to Genocide and Other Massive Violations of Human Rights" 1996 *Law & Contemporary Problems* 75-80

Reydams 2003 *Journal of International Criminal Justice*

Reydams L "Belgium Renegades on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law" 2003 *Journal of International Criminal Justice* 679-689

Robinson 2003 *European Journal of International Law*

Robinson D "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court" 2003 *European Journal of International Law* 481-505

Rodman 2006 *Ethics and International Affairs*

Rodman K "Compromising Justice: Why the Bush Administration and the NGOs Are Both Wrong about the ICC" 2006 *Ethics and International Affairs* 25-53

Roht-Arriaza 1996 *Law and Contemporary Problems*

Roht-Arriaza N 1996 "Combating Impunity: Some Thoughts on the Way Forward" *Law and Contemporary Problems* 93-102

Roht-Arriaza 1990 *California Law Review*

Roht-Arriaza N "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law" 1990 *California Law Review* 449-513

Rudstein 2008 *San Diego International Law Journal*

Rudstein DS "Retrying the Acquitted in England Part II: The Exception to the Rule against Double Jeopardy for "Tainted Acquittals" 2008 *San Diego International Law Journal* 217-292

S

Salmón 2006 *International Review of the Red Cross*

Salmón E "Reflections on International Humanitarian Law and Transitional Justice: Lessons to be Learnt from the Latin American Experience" 2006 *International Review of the Red Cross* 327-353

Schabas 2004 *Davis Journal of International Law & Policy*

Schabas WA "Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone" 2004 *Davis Journal of International Law & Policy* 145-169

Scharf 1996 *Law and Contemporary Problems*

Scharf M "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes" 1996 *Law and Contemporary Problems* 41-61

Scharf 1999 *Cornell International Law Journal*

Scharf MP "The Amnesty Exception to the Jurisdiction of the International Criminal Court" 1999 *Cornell International Law Journal* 507-527

Simma & Paulus 1999 *American Journal of International Law*

Simma B & Paulus A L "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View" 1999 *American Journal of International Law* 302-316

Sisk 2002 *Missouri Law Review* 19

Sisk GS "Suspending the Pardon Power during the Twilight of a Presidential Term" 2002 *Missouri Law Review* 1-15

Slye 2003 *Virginia Journal of International Law*

Slye RC "The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?" 2003 *Virginia Journal of International Law* 173-247

Spinellis 2002 *Revue Internationale de Droit Pénal*

Spinellis D Global Report "The *Ne Bis In Idem* Principle in "Global" Instruments" 2002 *Revue Internationale de Droit Pénal* 149-1162

Stahn 2008 *Criminal Law Forum*

Stahn C "Complementarity: a Tale of Two Notions" 2008 *Criminal Law Forum* 87-13

Stewart 2011 *Vanderbilt Journal of Transnational Law*

Stewart DP "The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property" 2011 *Vanderbilt Journal of Transnational Law* 1047-1071

Strauss 1970 *Annual Survey of South African Law*

Strauss SA "Criminal Procedure" 1970 *Annual Survey of South African Law* 362-387

Swanepoel 2007 *Journal for Juridical Science*

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

T

Tiemessen 2004 *African Studies Quarterly*

Tiemessen AE "After Arusha: Gacaca Justice in Post-Genocide Rwanda" 2004 *African Studies Quarterly* 57-76

Trumbull 2007 *Berkeley Journal of International Law*

Trumbull CP "Giving Amnesties a Second Chance" 2007 *Berkeley Journal of International Law* 283-345.

Tunks 2002 *Duke Law Journal*

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

V

Van Den Wyngaert and Stessens 1999 *International and Comparative Law Quarterly*

Van Den Wyngaert C and Stessens G "The International *Non Bis in Idem* Principle: Resolving Some of the Unanswered Questions" 1999 *International and Comparative Law Quarterly* 779-804

W

Warbrick 2004 *International and Comparative Law Quarterly*

Warbrick C “Current Developments: Public International Law-Immunity and International Crimes in English Law” 2004 *International and Comparative Law Quarterly* 769-774

Waynecourt-Steele 2002 *South African Yearbook of International Law*

Waynecourt-Steele T “The contribution of the Statute of the International Criminal Court to the enforcement of international law in the light of the experiences of the ICTY” 2002 *South African Yearbook of International Law* 1-63

Wirth 2002 *European Journal of International Law*

Wirth S “Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v. Belgium* Case” 2002 *European Journal of International Law* 877-893

Y

Yang 2005 *Chinese Journal of International Law*

Yang L “On the Principle of Complementarity in the Rome Statute of the International Criminal Court” 2005 *Chinese Journal of International Law* 121–132

Yee 2011 *Chinese Journal of International Law*

Yee S “Universal Jurisdiction: Concept, Logic, and Reality” 2011 *Chinese Journal of International Law* 503-530

Z

Zappalà 2001 *European Journal of International Law*

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 *European Journal of International Law* 595-612

Zeidy 2002 *Michigan Journal of International Law*

Zeidy M “The Principle of Complementarity: A New Machinery to Implement International Criminal Law” 2002 *Michigan Journal of International Law* 869-975

1.3 Internet sources

A

Abdulrahim Date Unknown <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/7-state-jurisdiction>

Abdulrahim W Date Unknown State Jurisdiction
<https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/7-state-jurisdiction> [22 March 2014]

African Commission on Human and Peoples' Rights Date Unknown
<http://www.achpr.org/instruments/achpr/ratification/>

African Commission on Human and Peoples' Rights Date Unknown Ratification
Table: African Charter on Human and Peoples' Rights
<http://www.achpr.org/instruments/achpr/ratification/> [24 March 2014]

Algeria-Watch 2001 <http://www.algeria-watch.de/farticle/kettani.htm>

Algeria-Watch 2001 *Algérie: Concorde Civile, Impunité et Droit International*
<http://www.algeria-watch.de/farticle/kettani.htm> [28 Aug 2013]

Algeria-Watch 2006 http://www.algeria-watch.org/en/articles/2006/algerian_amnesty.htm

Algeria-Watch 2006 Algerian amnesty draws in Islamists http://www.algeria-watch.org/en/articles/2006/algerian_amnesty.htm [28 Aug 2013]

AllAfrica 2012 <http://allafrica.com/stories/201206190550.html>

AllAfrica 2012 Rwandan Gacaca Genocide Courts Considered a Success
<http://allafrica.com/stories/201206190550.html> [25 Sept 2013]

Amnesty International 2007 <http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802>

Amnesty International 2007 Rwanda abolishes death penalty
<http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802> [20 March 2013]

Ankita Date Unknown <http://www.preservearticles.com/201106248492/what-are-the-implications-of-internal-and-external-sovereignty.html>

Ankita Date Unknown What are the implications of internal and external sovereignty? Date Unknown <http://www.preservearticles.com/201106248492/what-are-the-implications-of-internal-and-external-sovereignty.html> [27 Jan 2014]

Annan 2009 http://www.nytimes.com/2009/06/30/opinion/30iht-edannan.html?_r=0

Annan K 2009 Africa and the International Court http://www.nytimes.com/2009/06/30/opinion/30iht-edannan.html?_r=0 [20 Aug 2012]

Ansong 2012 http://works.bepress.com/alex_ansong/2

Ansong 2012 The Operation of the Concept of Sovereign Equality of States in International Law http://works.bepress.com/alex_ansong/2 [26 Feb 2013]

Asser Institute Date Unknown

http://www.asser.nl/default.aspx?site_id=9&level1=13336&level2=13374&level3=13463

Asser Institute Date Unknown International Humanitarian Law Applicable in Non-International Armed Conflicts

http://www.asser.nl/default.aspx?site_id=9&level1=13336&level2=13374&level3=13463 [10 April 2013]

B

BBC 2010 <http://www.bbc.co.uk/news/uk-england-11987387>

BBC 2010 “‘Double jeopardy’ man Mark Weston guilty of murder” <http://www.bbc.co.uk/news/uk-england-11987387> [2 March 2013]

Buys 2012 <http://www.asil.org/insights120911.cfm>

Buys CG 2012 *Belgium v Senegal*: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture <http://www.asil.org/insights120911.cfm> [26 September 2013]

C

Case Western Reserve School of Law 2003

<http://www.nesl.edu/userfiles/file/wcmemos/2003/harrah.pdf>

Case Western Reserve School of Law 2003 Memorandum for the Office of the Prosecutor: Trial of the 'Butare Four' in Belgium
<http://www.nesl.edu/userfiles/file/wcmemos/2003/harrah.pdf> [19 October 2012]

Clark 2012 <http://thinkafricapress.com/rwanda/legacy-gacaca-courts-genocide>

Clark P 2012 The Legacy of Rwanda's Gacaca Courts
<http://thinkafricapress.com/rwanda/legacy-gacaca-courts-genocide> [19 March 2013]

Clark 2011 <http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/>

Clark P The Limits and Pitfalls of the International Criminal Court in Africa 2011
<http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/> [12 September 2013]

China News Digest Date unknown <http://www.cnd.org/mirror/nanjing/NMTT.html>

China News Digest Date unknown The Tokyo War Crimes Trials
<http://www.cnd.org/mirror/nanjing/NMTT.html> [20 March 2014]

CNN 1999 <http://edition.cnn.com/WORLD/europe/9905/27/kosovo.milosevic.04/>

CNN 1999 Milosevic indictment makes history
<http://edition.cnn.com/WORLD/europe/9905/27/kosovo.milosevic.04/> [03 October 2013]

Coalition for the International Criminal Court Date Unknwon

<http://www.iccnw.org/?mod=court>

Coalition for the International Criminal Court Date Unknwon About the ICC
<http://www.iccnw.org/?mod=court> [15 March 2013]

Coalition for the International Criminal Court Date Unknown
<http://www.iccnw.org/?iduct=161&mod=country>

Coalition for the International Criminal Court Date Unknown Country Updates
<http://www.iccnw.org/?iduct=161&mod=country> [30 June 2012]

Coalition for the International Criminal Court Date Unknown
http://www.iccnw.org/documents/FS_CICC_Implementation_Legislation_en.pdf

Coalition for the International Criminal Court Date Unknown ICC Implementing
Legislation
http://www.iccnw.org/documents/FS_CICC_Implementation_Legislation_en.pdf
[30 April 2012]

Coalition for the International Criminal Court Date Unknown
<http://www.iccnw.org/?mod=icchistory>

Coalition for the International Criminal Court Date Unknown History of the ICC
<http://www.iccnw.org/?mod=icchistory> [28 August 2013]

Cobain and Black 2009 <http://www.theguardian.com/world/2009/sep/29/ehud-barak-war-crimes-israel>

Cobain I and Black I 2009 Israeli minister Ehud Barak faces war crimes arrest
threat during UK visit <http://www.theguardian.com/world/2009/sep/29/ehud-barak-war-crimes-israel> [30 September 2013]

D

De Brouwer and Ka Hon Chu 2012 <http://www.intlawgrls.com/2012/04/as-end-of-gacaca-nears-looking-toward.html>

De Brouwer A M and Ka Hon Chu S 2012 As end of gacaca nears, looking to
more attention to post-genocide trauma from sexual violence
<http://www.intlawgrls.com/2012/04/as-end-of-gacaca-nears-looking-toward.html>
[19 March 2013]

E

Encyclopædia *Britannica* *Date* *Unknown*
<http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC>

Encyclopædia Britannica *Date* *Unknown* Truth and Reconciliation Commission, South Africa (TRC) <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC> [28 August 2013]

EU *Date* *Unknown* http://ec.europa.eu/justice/glossary/exequatur_en.htm

EU *Date* *Unknown* Exequatur
http://ec.europa.eu/justice/glossary/exequatur_en.htm [8 March 2013]

F

FIDH 2013 <http://www.fidh.org/en/africa/Chad/Hissene-Habre-Case/senegal-hissene-habre-indicted-for-crimes-against-humanity-war-crimes-and-13629>

FIDH 2013 Senegal: Hissène Habré indicted for crimes against humanity, war crimes and torture <http://www.fidh.org/en/africa/Chad/Hissene-Habre-Case/senegal-hissene-habre-indicted-for-crimes-against-humanity-war-crimes-and-13629> [1 September 2012]

G

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 [23 October 2012]

Government of Rwanda *Date* *Unknown* <http://www.gov.rw/FACT-FILE-Gacaca-the-people-s-court>

Government of Rwanda *Date* *Unknown* Fact File-Gacaca–The People’s Court
<http://www.gov.rw/FACT-FILE-Gacaca-the-people-s-court> [19 March 2013]

H

Haass 2003 <http://2001-2009.state.gov/s/p/rem/2003/16648.htm>

Haass R 2003. "Existing Rights, Evolving Responsibilities" (Remarks at the School of Foreign Service and the Mortara Center for International Studies, George Town University) <http://2001-2009.state.gov/s/p/rem/2003/16648.htm> [20 October 2012].

Haaretz 2003 <http://www.haaretz.com/news/belgium-s-highest-court-throws-out-case-against-sharon-1.101075>

Haaretz 2003 "Belgium's highest court throws out case against Sharon" <http://www.haaretz.com/news/belgium-s-highest-court-throws-out-case-against-sharon-1.101075> [15 January 2013].

Haesler 2003

http://www.publicdefenders.lawlink.nsw.gov.au/pdo/public_defenders_rule_against_double_jeopardy.html

Haesler A 2003 The Rule against Double Jeopardy http://www.publicdefenders.lawlink.nsw.gov.au/pdo/public_defenders_rule_against_double_jeopardy.html [7 March 2013]

Hauschildt 2012 <http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/>

Hauschildt T Gacaca Courts and Restorative Justice in Rwanda 2012 <http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/> [16 September 2013]

Helou 2011 <http://gabrielhelou.blogspot.com/2011/05/piracy-international-crime.html>

Helou G 2011 Piracy: An International Crime <http://gabrielhelou.blogspot.com/2011/05/piracy-international-crime.html> [18 October 2012]

Hlongwane 2012 <http://www.dailymaverick.co.za/article/2012-02-24-new-medical-parole-board-new-rules-correctional-services-moves-to-avoid-another-shaik-brouhaha/>

Hlongwane S 2012 "New medical parole board, new rules â?? Correctional Services moves to avoid another Shaik 'brouhaha'" <http://www.dailymaverick.co.za/article/2012-02-24-new-medical-parole-board-new-rules-correctional-services-moves-to-avoid-another-shaik-brouhaha/> [13 September 2013].

Human Rights Watch 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> [30 October 2012]

Human Rights Watch 2004 <http://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted>

Human Rights Watch 2004 Netherlands: Congolese Torturer Convicted <http://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted> [30 September 2013]

Human Rights Watch 2001 <http://www.hrw.org/news/2001/03/20/senegal-bars-charges-against-ex-chad-dictator>

Human Rights Watch 2001 Senegal Bars Charges Against Ex Chad Dictator <http://www.hrw.org/news/2001/03/20/senegal-bars-charges-against-ex-chad-dictator> [26 September 2013]

I

ICC Date Unknown http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx

ICC Date Unknown Situations and cases http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [24 March 2014]

Khen Date Unknown <http://www.alma-ihl.org/opeds/hillyme-nonbisinidem>

Khen H Date Unknown Internationalizing Non Bis in Idem: Towards a unified concept of double jeopardy in the application of universal jurisdiction over international core crimes <http://www.alma-ihl.org/opeds/hillyme-nonbisinidem> [25 September 2013]

Klip and Harmen 2004 <http://arno.unimaas.nl/show.cgi?fid=7993>

Klip & Harmen 2004 AIDP – Non Bis in Idem: Report for the Netherlands <http://arno.unimaas.nl/show.cgi?fid=7993> [20 November 2012]

Kohn 2009 <http://www.policyarchive.org/handle/10207/bitstreams/15807.pdf>

Kohn I 2009 Averting Abuse of Universal Jurisdiction <http://www.policyarchive.org/handle/10207/bitstreams/15807.pdf> [30 October 2012]

L

Leroux 2010 <http://www.canadiangreatwarproject.com/writing/llandoveryCastle.asp>

Leroux M 2010 “The sinking of the Canadian Hospital Ship” <http://www.canadiangreatwarproject.com/writing/llandoveryCastle.asp> [15 September 2013]

M

Mabuza 2012 <http://www.bdlive.co.za/articles/2011/03/17/shaik-released-back-on-medical-parole;jsessionid=FD984AB4F01892D53F33249800E4ADDC.present1.bdfm>

Mabuza 2012 Shaik released back on medical parole <http://www.bdlive.co.za/articles/2011/03/17/shaik-released-back-on-medical-parole;jsessionid=FD984AB4F01892D53F33249800E4ADDC.present1.bdfm> [25 Sept 2013]

Mason and Talbot 2000 <http://www.wsws.org/en/articles/2000/05/sier-m09.html>

Mason B and Talbot C 2000 Sierra Leone: Britain sends crack troops as hostage crisis worsens <http://www.wsws.org/en/articles/2000/05/sier-m09.html> [13 September 2013]

McKinley 1998 <http://www.nytimes.com/1998/09/05/world/ex-rwandan-premier-gets-life-in-prison-on-charges-of-genocide-in-94-massacres.html>

McKinley 1998 Ex-Rwandan Premier Gets Life in Prison on Charges of Genocide in 94 Massacres <http://www.nytimes.com/1998/09/05/world/ex-rwandan-premier-gets-life-in-prison-on-charges-of-genocide-in-94-massacres.html> [28 March 2014]

Mbola 2008 <http://www.southafrica.info/about/government/mbeki-resigns.htm>

Mbola B 2008 Thabo Mbeki resigns as President <http://www.southafrica.info/about/government/mbeki-resigns.htm> [13 September 2013]

McKinley 1997 <http://www.nytimes.com/1997/11/21/world/on-1994-blood-bath-in-rwanda-tribunal-hews-to-a-glacial-pace.htm>

McKinley JC 1997 On 1994 Blood Bath in Rwanda, Tribunal Hews to a Glacial Pace <http://www.nytimes.com/1997/11/21/world/on-1994-blood-bath-in-rwanda-tribunal-hews-to-a-glacial-pace.html> [28 March 2014]

N

Nessler Date Unknown <http://robbenessler.efoliomn.com/sharpevillemassacre>

Nessler R Date Unknown The Sharpeville Massacre <http://robbenessler.efoliomn.com/sharpevillemassacre> [8 April 2014]

News 24 2004 <http://www.news24.com/xArchive/Archive/Mugabe-immune-to-arrest-20040114>

News 24 2004 Mugabe 'immune' to arrest <http://www.news24.com/xArchive/Archive/Mugabe-immune-to-arrest-20040114> [31 January 2013]

Nguyen 2013 <http://allafrica.com/stories/201308050032.html>

Nguyen K Uganda: Kony's LRA Rebel Group Weakened By Defections, Low Morale - Report <http://allafrica.com/stories/201308050032.html> [27 August 2013]

O

Open Society Justice Initiative 2013 <http://www.icckkenya.org/background/>

Open Society Justice Initiative 2013 The International Criminal Court: Kenya Monitor <http://www.icckkenya.org/background/> [1 September 2013]

Organisation of American States 2012 http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

Organisation of American States 2012 Multilateral Treaties http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm [24 March 2014]

P

Perspective Monde Date Unknown
<http://perspective.usherbrooke.ca/bilan/servlet/BMEve?codeEve=932>

Perspective Monde Date Unknown 19 septembre 1999: Tenue d'un référendum sur la politique d'amnistie en Algérie <http://perspective.usherbrooke.ca/bilan/servlet/BMEve?codeEve=932> [28 August 2013]

Powers 2011 <http://www.asil.org/insights110623.cfm>

Powers SE 2011 Rwanda's Gacaca Courts: Implications for International Criminal Law and Transitional Justice <http://www.asil.org/insights110623.cfm> [19 March 2013]

R

Rosenberg 2013 <http://history1900s.about.com/od/1960s/qt/mylaimassacre.htm>

Rosenberg J 2013 My Lai Massacre The Massacre Conducted by U.S. Soldiers in My Lai During the Vietnam War <http://history1900s.about.com/od/1960s/qt/mylaimassacre.htm> [20 September 2013]

Ruwanthika 2011 <http://ruwanthikagunaratne.wordpress.com/2011/04/22/lesson-2-4-formation-of-cil-opinio-juris/>

Ruwanthika G 2011 What is Opinio Juris Sive Necessitatis? <http://ruwanthikagunaratne.wordpress.com/2011/04/22/lesson-2-4-formation-of-cil-opinio-juris/> [1 March 2013]

S

Sangeetha Mugunthan Date Unknown
<http://www.legalserviceindia.com/articles/dhuman.htm>

Sangeetha Mugunthan Date Unknown Diplomatic Immunity in the Context of International <http://www.legalserviceindia.com/articles/dhuman.htm> [29 January 2013]

Schimizzi 2009 <http://jurist.org/paperchase/2009/11/italy-judge-convicts-23-former-cia.php>

Schimizzi C 2009 Italy judge convicts 23 former CIA agents in rendition trial <http://jurist.org/paperchase/2009/11/italy-judge-convicts-23-former-cia.php> [30 September 2013]

Simons 2004 <http://www.nytimes.com/2004/04/08/world/world-briefing-europe-the-netherlands-congo-man-convicted-of-torture.html>

Simons M World Briefing/ Europe: The Netherlands: Congo Man Convicted of Torture 2004 <http://www.nytimes.com/2004/04/08/world/world-briefing-europe-the-netherlands-congo-man-convicted-of-torture.html> [30 September 2013]

Snyder 1995

<http://cyber.law.harvard.edu/evidence99/pinochet/HistoryGeneralArticle.htm>

Snyder EC 1995 The Case of Pinochet <http://cyber.law.harvard.edu/evidence99/pinochet/HistoryGeneralArticle.htm> [21 October 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> [31 January 2013]

Swarup Date unknown www.manupatra.com/roundup/330/Articles/Article%201.pdf

Swarup M Date unknown Kelsen's Theory of Grundnorm
www.manupatra.com/roundup/330/Articles/Article%201.pdf [10 March 2014]

T

The Crown Prosecution Service 2010

http://www.cps.gov.uk/news/press_releases/155_06/

The Crown Prosecution Service 2010 William Dunlop sentenced in first double jeopardy case http://www.cps.gov.uk/news/press_releases/155_06/ [11 March 2013]

The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression Date Unknown <http://crimeofaggression.info/role-of-the-icc/>

The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression Date Unknown Role of the ICC
<http://crimeofaggression.info/role-of-the-icc/> [1 April 2014]

The Guardian 2010 <http://www.theguardian.com/uk/2010/dec/13/double-jeopardy-murder-retrial-guilty>

The Guardian 2010 "Man convicted of murder in 'double jeopardy' retrial"
<http://www.theguardian.com/uk/2010/dec/13/double-jeopardy-murder-retrial-guilty>
[2 March 2013]

The Guardian 2004 <http://www.guardian.co.uk/world/2004/jan/08/zimbabwe.uk>

The Guardian 2004 Tatchell asks court to issue arrest warrant for Mugabe

<http://www.guardian.co.uk/world/2004/jan/08/zimbabwe.uk> [31 Jan 2013]

The Levin Institute-The State University of New York 2014

<http://www.globalization101.org/the-issue-of-sovereignty/>

The Levin Institute-The State University of New York 2014 The Issue of Sovereignty <http://www.globalization101.org/the-issue-of-sovereignty/> [27 Jan 2014]

The Telegraph 2002 <http://www.telegraph.co.uk/news/uknews/1408509/Colombian-is-charged-with-Tesco-murder.html>

The Telegraph 2002 Colombian is charged with Tesco murder

<http://www.telegraph.co.uk/news/uknews/1408509/Colombian-is-charged-with-Tesco-murder.html> [29 Jan 2013]

Track Impunity Always 2013 <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/477/action/show/controller/Profile/tab/legal-procedure.html>

Track Impunity Always 2013 Bernard Ntuyahaga <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/477/action/show/controller/Profile/tab/legal-procedure.html>
[30 Sept 2013]

Thompson 2010 <http://forum.axishistory.com/viewtopic.php?f=6&t=161828>

Thompson 2010 “Leipzig Trials: The Dover Castle Case”
<http://forum.axishistory.com/viewtopic.php?f=6&t=161828> [14 Sept 2013]

U

UN Date Unknown http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-3&chapter=3&lang=en

UN	Date	Unknown	Treaty	Collection
				http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-3&chapter=3&lang=en [31 January 2013]

UN 2008 <http://www.un.org/en/members/nonmembers.shtml>

UN	2008	Permanent	Observers
			http://www.un.org/en/members/nonmembers.shtml [30 May 2013]

US Department of State 2005 <http://2001-2009.state.gov/p/io/44388.htm>

US Department of State 2005 “Explanation of Vote by Ambassador Anne W. Patterson, Acting U.S. Representative to the United Nations, on the Sudan Accountability Resolution, in the Security Council, March 31, 2005” <http://2001-2009.state.gov/p/io/44388.htm> [13 March 2013]

US Legal Date Unknown <http://uslegal.com/international-law/>

US Legal Date Unknown International Law <http://uslegal.com/international-law/>
[06 September 2013]

V

Volqvartz 2005 <http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/>

Volqvartz J 2005 ICC under fire over Uganda probe
<http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/> [16 April 2013]

Votava 2012 <http://jurist.org/paperchase/2012/09/italy-high-court-upholds-sentences-of-23-former-cia-agents-in-rendition-case.php>

Votava J Italy high court upholds sentences of 23 former CIA agents in rendition case 2012 <http://jurist.org/paperchase/2012/09/italy-high-court-upholds-sentences-of-23-former-cia-agents-in-rendition-case.php> [30 September 2013]

W

Website of the British Government Date Unknown <https://www.gov.uk/government/how-government-works>

Website of the British Government Date Unknown How Government Works
<https://www.gov.uk/government/how-government-works> [31 January 2013]

Website of the Israel Ministry of Foreign Affairs 2013
<http://mfa.gov.il/mfa/aboutisrael/state/democracy/pages/office%20of%20the%20president.aspx>

Website of the Israel Ministry of Foreign Affairs 2013 Office of the President
<http://mfa.gov.il/mfa/aboutisrael/state/democracy/pages/office%20of%20the%20resident.aspx> [25 September 2012]

1.4 Reports and other documents

1.4.1 UN Reports

ILC “Documents of the thirty-first session”

ILC “Documents of the thirty-first session” (excluding the report of the Commission to the General Assembly) A/CN.4/SER.A/1979/Add.I *Yearbook of the International Law Commission* Volume II Part One (1979)

ILC “Report of the International Law Commission on the Work of Its Forty-Sixth Session”

ILC “Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May–22 July 1994” A/49/10 *Yearbook of the International Law Commission* Vol II(2) (1994)

ILC “Report of the International Law Commission on its forty-eighth session”

ILC “Report of the International Law Commission on its forty-eighth session, 6 May - 26 July 1996” A/51/10 *Yearbook of the International Law Commission* Vol II(2) (1996)

ILC “Report of the International Law Commission covering its second session”

ILC “Report of the International Law Commission covering its second session” A/1316 *Yearbook of the International Law Commission* Vol II (1950)

ILC “Second report on immunity”

ILC “Second report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur” UN Doc A/CN 4/631 (10 June 2010)

ILC “Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentaries”

ILC “Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentaries” in *Report of the International Law Commission on the Work of Its Fifty-third Session* UN Doc A/56/10 (2001)

UN ESC “Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights”

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 (21 June 1985)

UN ESC/CHR “Updated Set of principles for the protection and promotion of human rights through action to combat impunity”

UN ESC/CHR “Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher: Updated Set of principles for the protection and promotion of human rights through action to combat impunity” E/CN4/2005/102/Add.1 (8 February 2005)

UN “Report of the Special Representative”

UN “Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda” UN Doc A/55/269 (4 August 2000)

UN Secretary General “Annual Report of the Secretary-General on the Work of the Organisation-1998”

UN Secretary General “Annual Report of the Secretary-General on the Work of the Organisation-1998” UN Doc A/53/457 (27 August 1998)

UN “World Conference on Human Rights”

UN “World Conference on Human Rights: Vienna Declaration and Programme of Action” A/CONF 157/23 (25 June 1993)

1.4.2 Other Reports and documents

A

Amnesty International “Chile: Legal brief”

Amnesty International “Chile: Legal brief on the incompatibility of Chilean decree law No 2191 of 1978 with international law” (1 January 2001). Accessed at <http://www.refworld.org/docid/3c29deef0.html> [10 May 2012]

Amnesty International “Universal Jurisdiction”

Amnesty International “Universal Jurisdiction: The duty of states to enact and implement legislation-Chapter Fourteen” (AI Index: IOR 53/017/2001 Distr: SC/CO/PG/PO 8 September 2001). Accessed at <http://www.amnesty.org/ar/library/asset/IOR53/017/2001/en/3098db44-d8ef-11dd-ad8c-f3d4445c118e/ior530172001en.pdf> [10 February 2013]

Amnesty International “The International Criminal Court: Checklist for Effective Implementation”

Amnesty International “The International Criminal Court: Checklist for Effective Implementation” (IOR 40/11/00 31 July 2000). Accessed at <http://www.amnesty.org/en/library/info/IOR40/011/2000/en> [1 Aug 2012]

C

Chok “The Struggle”

Chok BM “The Struggle between the Doctrines of Universal Jurisdiction and Head of State Immunity” (2013). Accessed at http://works.bepress.com/brian_chok/1/ [2 October 2013]

Council of the European Union “The AU-EU Expert Report”

Council of the European Union “The AU-EU Expert Report on the Principle of Universal Jurisdiction” (2009). Accessible at http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf [2 October 2013]

D

Daniels “*Non Bis in idem*”

Daniels RN “*Non Bis in Idem* and the Rome Statute of the International Criminal Court” (International Criminal Law Research Paper Northwestern University School of Law Date Unknown). Accessed at <http://law.bepress.com/cgi/viewcontent.cgi?article=6282&context=expresso> [23 September 2013]

D' Argent "Immunity of State Officials and Obligation to Prosecute"

D' Argent P "Immunity of State Officials and Obligation to Prosecute" (Cahier du CeDIE Working Paper N° 2013/04). Accessed at <https://www.google.rw/#q=immunity+ratione+personae+and+immunity+ratione+materiae+and+the+obligation+to+prosecute> [18 March 2014]

Department of Correctional Services: Republic of South Africa "Placement on Parole and Correctional Supervision"

Department of Correctional Services: Republic of South Africa "Placement on Parole and Correctional Supervision: How the Process Affects the Offender" (2012). Accessed at <http://www.dcs.gov.za/docs/landing/Parole%20public%20pamphlet%202012%20Eng.pdf> [13 September 2013]

Du Plessis "Implications of the AU decision"

Du Plessis "Implications of the AU decision to give the African Court jurisdiction over international crimes" (Institute for Security Studies Paper No 235 June 2012). Accessed at <http://www.issafrica.org/uploads/Paper235-AfricaCourt.pdf> [11 October 2013]

Du Plessis, Maluwa and O'Reilly "Africa and the International Criminal Court"

Du Plessis M, Maluwa T & O'Reilly A "Africa and the International Criminal Court" (2013). Accessed at http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf [1 September 2013]

Du Plessis "The International Criminal Court that Africa Wants"

Du Plessis M "The International Criminal Court that Africa Wants" (Institute for Security Studies Pretoria 2010). Accessed at <http://www.issafrica.org/uploads/Mono172.pdf> [12 October 2013]

E

Evans “Amnesties, Pardons and Complementarity”

Evans RD “Amnesties, Pardons and Complementarity: Does the International Criminal Court Have the Tools to End Impunity?” Accessed at <http://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2005/amnestiespardonscomplementarity.pdf> [12 October 2013]

F

Farbstein “The Issue of Complementarity”

Farbstein SH “The Effectiveness of the Exercise of Jurisdiction by the International Criminal Court: the Issue of Complementarity” (European Centre for Minority Issues (ECMI) 2001). Accessed at <http://www.ecmi.de/publications/detail/12-the-effectiveness-of-the-exercise-of-jurisdiction-by-the-international-criminal-court-the-issue-of-complementarity-184/> [17 January 2014]

Foakes “Immunity for International Crimes?”

Foakes J “Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts” (2011). Accessed at http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf [13 September 2013]

G

Gevers “Immunity”

Gevers C “Immunity and the Implementation Legislation in South Africa, Kenya and Uganda”. Accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975788&download=yes [5 November 2013]

Government of South Africa “Minister announces new Medical Parole Advisory Board”

Government of South Africa “Minister announces new Medical Parole Advisory Board” (2012). Accessed at <http://www.dcs.gov.za/UploadedFiles/medical%20paroleboard.pdf> [13 September 2013]

H

Hoover “Universal Jurisdiction”

Hoover DV “Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court” (2011). Accessed at http://scholarship.law.cornell.edu/lps_clacp/52/ [2 April 2014]

Human Rights Watch “The Case of Hissène Habré”

Human Rights Watch “The Case of Hissène Habré before the Extraordinary African Chambers in Senegal: Questions and Answers” (2013). Accessed at http://www.hrw.org/sites/default/files/related_material/Q&A%20-%20The%20Habre%20case.pdf [26 September 2013]

Human Rights Watch “Country Summary: Rwanda”

Human Rights Watch “Country Summary: Rwanda” (World Report January 2012). Accessed at http://www.hrw.org/sites/default/files/related_material/rwanda_2012.pdf [12 January 2013]

I

ICCLR “International Criminal Court”

ICCLR “International Criminal Court: Checklist of Implementation Considerations and Examples Relating to the Rome Statute and the Rules of Procedure & Evidence” (A supplement to the “Manual for the Ratification and Implementation of the Rome Statute” April 2002). Accessed at <http://www.iccnw.org/documents/ICCLR-Checklist.pdf> [7 October 2013]

ICRC “How is the Term “Armed Conflict” Defined in International Humanitarian Law?”

ICRC “How is the Term “Armed Conflict” Defined in International Humanitarian Law?” (Opinion Paper, March 2008). Accessed at <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm> [20 Jan 2014]

Institute of International Law “Universal Criminal Jurisdiction”

Institute of International Law “Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes” (Krakow Session 2005). Accessed at www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf [8 Jan 2013]

International Commission of Inquiry on Darfur “Report to the Secretary-General”

International Commission of Inquiry on Darfur “Report to the Secretary-General” (Geneva 25 January 2005). Accessed at http://www.icc-cpi.int/NR/ronlyres/F87E244D-B27C-4A0A-BE1B-D27CECB5649E/278008/Report_to_UN_on_Darfur.pdf [1 September 2013]

International Peace Institute “The Relationship between the ICC and the Security Council

International Peace Institute “The Relationship between the ICC and the Security Council: Challenges and Opportunities” (March 2013). Accessed at http://www.regierung.li/fileadmin/dateien/botschaften/ny_dokumente/IPI_E-Pub-Relationship_Bet_ICC_and_SC_2_01.pdf [23 March 2014]

J

Jessica “Human Rights”

Jessica CL “Human Rights” (Peace Operations Training Institute 2012). Accessed (upon registration) at <http://www.peaceopstraining.org/courses/> [1 January 2013]

K

Kittichaisaree “Piracy: International Law & Policies”

Kittichaisaree K “Piracy: International Law & Policies” (Paper Presented at the AALCO Seminar at the UN Headquarters on 16 March 2011). Accessed at <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Piracy-InternationalLawAndPolicies.pdf> [2 April 2014]

L

Law Commission (New Zealand) “*Acquittal Following Perversion of the Course of Justice*”

Law Commission (New Zealand) *Acquittal Following Perversion of the Course of Justice* (Report 70 2001). Accessed at http://www.lawcom.govt.nz/sites/default/files/publications/2001/03/Publication_77_166_R70.pdf [24 September 2013]

Law Reform Commission of Hong Kong “Executive Summary”

Law Reform Commission of Hong Kong “Consultation Paper on Double Jeopardy: Executive Summary” (March 2010). Accessed at http://www.hkreform.gov.hk/en/docs/doublejeopardy_se.pdf [12 Sept 2013]

M

Macedo *et al* “Princeton Principles”

Macedo S *et al* “The Princeton Principles on Universal Jurisdiction” (Princeton University Princeton 2001). Accessed at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf [15 October 2013]

Mallinder “Uruguay’s Evolving Experience of Amnesty”

Mallinder L “Uruguay’s Evolving Experience of Amnesty and Civil Society’s Response” (Working Paper No 4 Queen’s University Belfast 21 March 2009). Accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1387362 [10 September 2012]

Manuel and Garvey “Prosecutorial Discretion in Immigration Enforcement: Legal Issues”

Manuel KM and Garvey T “Prosecutorial Discretion in Immigration Enforcement: Legal Issues” (Report prepared for members and committees of the Congress 27 Dec 2013). Accessed at <https://www.fas.org/sgp/crs/misc/R42924.pdf> [8 April 2014]

Moreno-Ocampo “Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC”

Moreno-Ocampo L “Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC” (June 16, 2003). Accessed at <http://www.iccnw.org/documents/MorenoOcampo16June03.pdf> [28 March 2014]

Murungu “Judgment”

Murungu CB “Judgment in the First Case Before the African Court on Human and Peoples’ Rights: A Missed Opportunity or Mockery of International Law in Africa?” Accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526539 [27 September 2013]

P

Penal Reform International “Research Report on *Gacaca* Courts”

Penal Reform International “Research Report on *Gacaca* Courts-PRI: *Gacaca* and Reconciliation: Kibuye Case Study” (May 2004). Accessed at http://www.essex.ac.uk/armedcon/story_id/000864.pdf [21 June 2012]

Redress “Immunity v Accountability”

Redress “Immunity v Accountability: Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes” (2005). Accessed at http://www.redress.org/downloads/publications/Immunity_v_Accountability.pdf [20 Nov 2012]

Redress-FIDH “Universal Jurisdiction in the European Union: Country Studies”

Redress-FIDH “Universal Jurisdiction in the European Union: Country Studies” (2001). Accessed at <http://www.redress.org/downloads/conferences/country%20studies.pdf> [19 October 2012]

Pham P, Vinck P & Stover E “Abducted: The Lord’s Resistance Army and Forced Conscription in Northern Uganda”

Pham P, Vinck P & Stover E “Abducted: The Lord’s Resistance Army and Forced Conscription in Northern Uganda” (Human Rights Center University of California, Berkeley & Payson Center for International Development Tulane University June 2007). Accessed at <http://hhi.harvard.edu/sites/default/files/publications/publications%20-%20evaluation%20-%20abducted.pdf> [15 February 213]

R

Rowena “Double Jeopardy”

Rowena J Double Jeopardy (NSW Parliamentary Library Research Service Briefing Paper No 16/03 15 August 2003). Accessed at [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/89c20d04902f4102ca256ecf00098187/\\$FILE/16-03.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/89c20d04902f4102ca256ecf00098187/$FILE/16-03.pdf) [20 March 2013]

Ryngaert “The International Criminal Court”

Ryngaert C “The International Criminal Court and Universal Jurisdiction” (Working Paper N^o 46 - March 2010 Leuven Centre for Global Governance Studies). Accessed at https://ghum.kuleuven.be/ggs/publications/working_papers/.../wp46.pdf%E2%80%8E [8 January 2013]

S

Scheffer “Non Bis in Idem and the Rome Statute of the International Criminal Court”

Scheffer D “Non Bis in Idem and the Rome Statute of the International Criminal Court” (International Criminal Law Research Paper: RN Daniels 2006). Accessed at <http://law.bepress.com/cgi/viewcontent.cgi?article=6282&context=expresso> [12 September 2013]

Scottish Government “Double Jeopardy”

The Scottish Government *Double Jeopardy: Consultation Paper* (March 2010). Accessed at <http://www.scotland.gov.uk/Publications/2010/03/22113128/0> [10 April 2013]

T

The Institute of International Law “Immunity from Jurisdiction”

The Institute of International Law Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes (2009). Accessed at http://www.idi-iiil.org/idiE/resolutionsE/2009_naples_01_en.pdf [02 October 2013]

The Law Commission (UK) “Double Jeopardy”

The Law Commission (UK) “Double Jeopardy and Prosecution Appeals: Report on two references under section 3(1)(e) of the Law Commissions Act 1965” (Law Commission n° 267 March 2001). Accessed at http://lawcommission.justice.gov.uk/docs/lc267__Double_Jeopardy_Report.pdf [14 March 2013]

The Law Reform Commission of Hong Kong “Double Jeopardy”

The Law Reform Commission of Hong Kong “Report: Double Jeopardy” (February 2012). Accessed at <http://www.legco.gov.hk/yr11-12/chinese/panels/ajls/papers/aj0423-rpt20120228-ec.pdf> [14 March 2013]

Truth and Reconciliation Commission of South Africa “Report” Vol I

Truth and Reconciliation Commission of South Africa “Report” Vol I (29 October 1998). Accessed at <http://www.justice.gov.za/trc/report/> [12 June 2012]

W

Wingfield “Conflict and the Enforcement of Foreign Judgments”

Wingfield DR “Conflict and the Enforcement of Foreign Judgments” (Presentation to the OECS Bar Association 5th Regional Law Fair St Lucia 12 Sept 2008). Accessed at http://www.eccourts.org/static/jei_doc/2008/cpr2000/ComityandtheEnforcementofForeignJudgmentsbyDavidWingfield.pdf [06 October 2013]

Wouters “The Obligation to Prosecute”

Wouters J “The Obligation to Prosecute International Law Crimes”. Accessed at <http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf> [2 May 2013]

2 CASE LAW

2.1 Case law of international tribunals

2.1.1 International Criminal Court

Situation in the Republic of Mali Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II ICC-01/12-1 (19 July 2012)

Situation in the Republic of Côte d'Ivoire Request for authorisation of an investigation pursuant to article 15 ICC-02/11 (23 June 2011)

Situation in the Republic of Kenya Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ICC-01/09-19-Corr 73 (31 March 2010)

The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-02/11-96 (30 May 2011)

Situation in the Republic of Kenya Request for authorisation of an investigation pursuant to Article 15 ICC-01/09-3 (26 November 2009)

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)

The Prosecutor v Omar Hassan Ahmad Al Bashir Second Decision on the Prosecution's Application for a Warrant of Arrest ICC-02/05-01/09-94 (12 July 2010)

The Prosecutor v Uhuru Muigai Kenyatta ICC-01/09-02/11

The Prosecutor v Laurent Gbagbo ICC-02/11-01

The Prosecutor v Simone Gbagbo ICC-02/11-01/12

The Prosecutor v Charles Blé Goudé ICC-02/11-02/11

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

The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen
ICC-02/04-01/05

The Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06

The Prosecutor v Bosco Ntaganda ICC-01/04-02/06

The Prosecutor v Germain Katanga ICC-01/04-01/07

The Prosecutor v Mathieu Ngudjolo Chui ICC-01/04-02/12

The Prosecutor v Callixte Mbarushimana ICC-01/04-01/10

The Prosecutor v Sylvestre Mudacumura ICC-01/04-01/12

The Prosecutor v Jean-Pierre Bemba Gombo ICC-01/05 -01/08

2.1.2 International Court of Justice

Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite 2012
ICJ 422 (20 July 2012)

Belgium v Spain Barcelona Traction, Light and Power Co Ltd Judgement 1970 ICJ 3 (5
February 1970)

*Bosnia and Herzegovina v Yugoslavia Case Concerning Application of the Convention
on the Prevention and Punishment of the Crime of Genocide Preliminary Objections*
Judgment 1996 ICJ 595 (11 July 1996)

*Democratic Republic of the Congo v Rwanda Case Concerning Armed Activities on the
Territory of the Congo (New Application: 2002) Jurisdiction and Admissibility* Judgment
2006 ICJ 6 (3 February 2006)

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

Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000 Dissenting opinion of Judge *ad hoc* Van den Wyngaert 2002 ICJ 3 (14 February 2002)

Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000 Separate Opinion by judges Higgins, Kooijmans and Buergenthal 2002 ICJ 3 (14 February 2002)

Federal Republic of Germany v Denmark and the Netherlands North Sea Continental Shelf Cases Judgement 1969 ICJ 3 (20 February 1969)

Germany v Italy (Greece intervening) Jurisdictional Immunities of the State Judgement 2012 ICJ 99 (3 February 2012)

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

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Advisory Opinion 1951 ICJ 15 (28 May 1951)

United States of America v Iran Case Concerning United States Diplomatic and Consular Staff in Tehran Judgement 1980 ICJ 3 (24 May 1980)

2.1.3 International Criminal Tribunal for Rwanda

The Prosecutor v Jean Kambanda Judgment and Sentence ICTR 97-23-S (4 September 1998)

2.1.4 International Criminal Tribunal for the former Yugoslavia

Prosecutor v Slobodan Milosevic Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlatko Stojiljkovic Decision on review of indictment and application for consequential orders ICTY IT-05-87-PT (24 May 1999)

Prosecutor v Dusko Tadic aka "Dule" Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ICTY IT-94-1 (2 October 1995)

Prosecutor v Anto Furundzija Judgement ICTY IT-95-17/1-T (10 December 1998)

2.1.5 International Military Tribunal at Nuremberg

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

2.1.6 International Military Tribunal for the Far East

International Military Tribunal for the Far East Judgment of 4 November 1948 (APA-University Press Amsterdam 1977)

2.1.7 Permanent Court of International Justice

France v Turkey The Case of the SS "LOTUS" Dissenting Opinion by Mr Moore PCIJ Series A No 7 (27 Sept 1927)

National Decrees in Tunis and Morocco Advisory Opinion N° 4 1923 PCIJ Series B04 24 (7 February 1923)

2.1.8 Special Court for Sierra Leone

Prosecutor v Charles Ghankay Taylor Decision on Immunity from Jurisdiction SCSL-2003-01-AR72(E) (31 May 2004)

Prosecutor v Kallon and Kamara Decision on Challenge to Jurisdiction: Lomé Accord Amnesty Case Nos SCSL-2004-15-AR72(E); SCSL-2004-16-AR72(E) (13 March 2004)

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

2.2 Case law of international and regional human rights institutions

2.2.1 African Court of Human and Peoples' Rights

Malawi African Association and Others v Mauritania Nos 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (11 May 2000)

Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire ACHPR Case N° 246/02 (29 July 2008)

Zimbabwe Human Rights NGO Forum v Zimbabwe ACHPR Case N° 245/02 (15 May 2006)

2.2.2 European Court of Human Rights

Al-Adsani v The United Kingdom ECHR Application N° 35763/97 (21 November 2001)

Al-Adsani v The United Kingdom ECHR Application No 35763/97 Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic (21 November 2001)

Bankovic v Belgium (2002) 123 ILR 94

2.2.3 European Court of Justice

Criminal Proceedings v Hüseyin Gözütok Klaus Hans Fritz Brügge ECJ Joined Cases C-187/01 and C-385/01 Opinion of Advocate General Colomer (19 September 2002)

2.2.4 Human Rights Committee

A P v Italy Communication N° 204/1986 (2 November 1987)

Baboeram v Suriname Communication Nos 146-1983 and 148-154-1983 HRC CCPR/C/24/D/154/1983 (4 April 1985)

Barbato v Uruguay Communication N° 84/1981 HRC CCPR/C/OP/2 at 112 [1990] (21 October 1982)

Bautista de Arellana v Colombia Communication N° 563/1993 HRC CCPR/C/55/D/563/1993 [1995] (27 October 1995)

Eduardo Bleier v Uruguay Communication N° R7/30 HRC Supp N° 40 (A/37/40) at 130 [1982] (29 March 1982)

Quinteros v Uruguay Communication N° 107/1981 HRC CCPR/C/OP/2 at 138 [1990] (21 July 1983)

HRC *Comments on Peru* UN Doc CCPR/C/79/Add67 (25 July 1996)

HRC *Concluding Observations of the Human Rights Committee: France*
CCPR/C/79/Add.80 (4 August 1997)

HRC *Concluding observations of the Human Rights Committee: Lebanon*
CCPR/C/79/Add.78 (04 January 1997)

HRC *Concluding observations of the Human Rights Committee: Argentina*
CCPR/C/79/Add.46 (04 May 1995)

HRC *General Comment N° 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (art 14)* (13 April 1984)

HRC *General Comment N° 07: Torture or cruel, inhuman or degrading treatment or punishment (Art 7)* (30 May 1982)

2.2.5 Inter-American Court of Human Rights

Garay Hermosilla et al v Chile Inter-Am CHR Report N° 36/96 Case N° 10.843 (15 October 1996)

Lucio Parada Cea and others vs El Salvador Inter-American CHR Report N° 1/99 Case 10.480 (27 January 1999)

Masacre Las Hojas v El Salvador Inter-American CHR Report N° 26/92 Case N° 10.287 (24 September 1992)

Mendoza et al v Uruguay Inter-Am CHR Report N° 29/92 Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (2 October 1993)

Velásquez Rodríguez case Inter-American CHR Judgment Case N° 4 [1988] (29 July 1988)

2.3 Judgements of South African courts

AZAPO v President of the Republic of South Africa 1996 4 SA 671 (CC).

D v K 1997 2 BCLR 209 (N)

Director of Public Prosecutions, Transvaal v Mtshweni 2007 2 SACR 217 (SCA)

DPP v Viljoen 2005 1 SACR 505 (SCA)

Glenister v President of the Republic of South Africa and Others 2011 3 SA 347 (CC)

Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique 1980 2 SA 111 (T)

Kaffraria Property v Government of the Republic of Zambia 1980 2 SA 709 (E)

National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre 2014 2 SA 42 (SCA)

National Director of Public Prosecutions v Zuma 2009 1 SACR 361 (SCA)

Plaatjies v Director of Public Prosecutions, Transvaal 2013 JDR 1055 (SCA)

R v Neumann 1949 3 SA 1238 (SCC)

Rex Respondent v Manasewitz Appellant 1933 AD 165

S v Basson 2007 1 SACR 566 (CC)

S v Basson 2004 1 SACR 285 (CC)

S v Bhulwana, S v Gwadiso 1996 1 SA 388 (CC)

S v Katoo 2005 1 SACR 522 (SCA)

S V Makwanyane and another 1995 3 SA 391 (CC)

S v Manamela and another (Director-General of Justice Intervening) 2000 3 SA 1 (CC)

S v Mharapara 1986 1 SA 556 (ZS)

S v Moodie 1962 2 SA 587 (A)

S v Mthetwa 1970 2 SA 310 (N)

S v Naidoo 1962 4 SA 348 (A)

S v Nzuza 1963 4 SA 856 (A)

S v Pokela 1968 4 SA 702 (E)

S v Walters 2002 4 SA 613 (CC)

S v Zuma and Others 1995 2 SA 642 (CC)

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

The Citizen 1978 (Pty) Ltd and others v McBride (Johnstone and Others, Amici Curiae) 2011 4 SA 191 (CC)

2.4 Judgements of foreign courts

2.4.1 Australia: Queensland

Pearce v The Queen (1998) HCA 57 (10 September 1998)

R v Carroll [2002] HCA 55 (5 December 2002)

R v Carroll [2001] QCA 394 (21 September 2001)

2.4.2 Belgium

Prosecutor v Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera Brussels Cour d'Assises (8 June 2001)

Re Sharon and Yaron Court of Appeal of Brussels 26 June 2002; Court of Cassation 12 Feb 2003 [2005] 127 ILR 110

2.4.3 Canada

Bouzari v Iran 2002 OJ N^o 1624 Court File N^o 00-CV-201372 (1 May 2002)

R v Munyaneza Superior Court (Quebec) Canada Case N^o 500-73-002500-052 (29 Octobre 2009)

2.4.4 England

Al-Adsani v Government of Kuwait CA 12 March 1996 107 ILR 536

Application for Arrest Warrant against General Shaul Mofaz Decision of District Judge Pratt, Bow Street Magistrates' Court (12 February 2004)

Re Bo Xilai Bow Street Magistrates' Court 8 November 2005 [2007] 128 ILR 713

Re Amphyll Peerage [1977] AC 547 (1 January 1977)

Re Mugabe Bow Street Magistrates' Court 14 January 2004 ILDC 96 (UK 2004)

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

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (N^o 2) [1999] 1 All ER 577

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (N^o 3) [1999] 2 All ER 97

R v Dunlop [2006] EWCA Crim 1354 (16 June 2006)

Zoernsch v Waldock [1964] 1 WLR 675 692

2.4.5 France

Ely Ould Dah case Cour de Cassation *Bulletin Criminel* n^o 195 (23 October 2002)

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

2.4.6 Germany

Prosecution v Nikola Jorgić Federal Court of Justice Case N^o 3 StR 215/98 (30 April 1999)

Prosecution v Maksim Sokolović Higher Regional Court (Oberlandesgericht) of Dusseldorf Case N^o 2 StE 6/97 (29 November 1999)

Prosecution v Djuradj Kusljić Bavarian Higher Regional Court Case No 6 St 1/99 (15 December 1999)

2.4.7 Israel

Attorney General of the Government of Israel v Adolf Eichmann District Court of Jerusalem Case N° 40/61 (11 December 1961)

2.4.8 Senegal

Cour d'Appel de Dakar Tribunal Régional Hors Classe de Dakar Cabinet de Mr Demba Kandji Juge d'instruction N° du Parquet 482 N° de l'instruction 13/2000

2.4.9 Switzerland

Prosecutor v Fulgence Niyonteze Tribunal Militaire d'Appel Geneva Switzerland (26 May 2000)

2.4.10 The Netherlands

Her Majesty's Advocate v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhima The High Court of Justiciary Case N° 1475/99 (30 January 2001)

Trial of Washio Awochi Netherlands Temporary Court-Martial at Batavia (25 October 1946) 1997 LRTWC 122-125

2.4.11 USA

Caminetti v United States 242 US 470 (15 January 1917)

Chuidian v Philippine National Bank 912 F 2d 1095 1101 (29 August 1990)

Filartiga v Pena-Irala 630 F 2d 876 2nd Cir (30 June 1980)

Green v United States 355 US 184 (16 December 1957)

Heath v Alabama 474 US 82 [1985] (3 Dec 1985)

Herbage v Meese Civ A N° 89-0645 747 F Supp 60 (20 December 1990)

Lafontant v Aristide 844 F Supp 128 (27 January 1994)

Letelier v Republic of Chile Chile 502 F Supp 259 (5 November 1980)

Moore v People 55 U S 13 [1852] (December Term 1852)

Princz v Federal Republic of Germany Dissenting opinion of Circuit Judge Wald 26 F3d 1166 307 US App DC 102 (1 July 1994)

Siderman de Blake v the Republic of Argentina 965 F 2d 699 (22 May 1992)

United States v Lanza 260 US 377 [1922] (11 December 1922)

United States v Tunis (n° 2) 681 F Supp 896 (1988) 82 ILR 344

2.4.12 Zimbabwe

Mharapara 1985 4 SA 42 (ZH)

S v Mharapara 1986 (1) SA 556 (ZS)

3 LEGISLATION

3.1 South African legislation

Constitution of the Republic of South Africa, 1996

Children Status Act 82 of 1987

Criminal Procedure Act 51 of 1977

Criminal Procedure Act 56 of 1955

Correctional Matters Amendment Act 5 of 2011

Correctional Services Act 111 of 1998

Foreign States Immunities Act 87 of 1981

Diplomatic Immunities and Privileges Act 37 of 2001

Interim Constitution, Act 200 of 1993

National Prosecuting Authority Act 32 of 1998

Promotion of National Unity and Reconciliation Act 34 of 1995

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

3.2 Foreign legislation

3.2.1 Algeria

Loi N° 99-08 du 29 Rabie El Aouel 1420 Correspondant au 13 juillet 1999 Relative au Rétablissement de la Concorde Civile (Official Journal of the Republic of Algeria N° 46 of 13 July 1999)

Décret Présidentiel N° 2000-03 du 4 Chaoual 1420 Correspondant au 10 Janvier 2000 Portant Grace Amnistiante (Official Journal of the Republic of Algeria N° of 12 January 2000)

3.2.2 Argentina

Due Obedience Law (Ley de Obediencia Debida) N° 23.521 of 4 June 1987

Full Stop Law (Ley de Punto Final) N° 23.40 of 23 December 1986 (Official Bulletin of 29 December 1986)

Decree 158/83 of 12 December 1983 (Official Gazette of 15 December 1983)

3.2.3 Australia

3.2.3.1 New South Wales

Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 N° 69.

3.2.3.2 Queensland

Criminal Code Act of 1899

Criminal Code (Double Jeopardy) Amendment Act 2007

3.2.4 Belgium

Law of 5 August 2003 Relating to Grave Breaches of International Humanitarian Law (Belgian Official Journal of 7 August 2003)

Law of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law of 10 February 1999 (Belgian Official Journal of 23 March 1999)

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 05 August 1993)

3.2.5 Canada

State Immunity Act 1982 21 ILM (1982) 798

3.2.6 Chile

Decree Law N° 2191 (Official Gazette N° 30 042 of 19 April 1978)

3.2.7 East Timor

Regulation N° 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2000)

3.2.8 England

Criminal Procedure and Investigations Act 1996

Criminal Justice Act 2003

State Immunity Act 1978 17 ILM (1978) 1123

3.2.9 Germany

Control Council Law N° 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity 20 December 1945 (Official Gazette of the Control Council for Germany N° 3, 31 of January 1946)

3.2.10 New Zealand

International Crimes and International Criminal Court Act of 2000

Crimes Amendment (No 2) Act of 2008

3.2.11 Rwanda

Law N° 30/2013 of 24/5/2013 Relating to the Code of Criminal Procedure (Official Gazette n° 27 of 08 July 2013)

Organic Law n° 01/2012 of 02/05/2012 Instituting the Penal Code (Official Gazette n° Special of 14 June 2012)

Organic Law n°16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying The Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed Between 1 October 1990 and 31 December 1994 (Official Gazette n° special of 19/06/2004)

3.2.12 Senegal

Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990 of 2 September 2013

3.2.13 Uganda

Amnesty Act of 2000

3.2.14 USA

Foreign Sovereign Immunities Act 28 USC §§ 1330 1602–1611

4 INTERNATIONAL AND REGIONAL LEGAL INSTRUMENTS

A

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (1951)

Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (1945)

AU Protocol on Amendment to the Constitutive Act of the African Union (2003)

C

Charter of the International Military Tribunal for the Far East (1946)

Charter of the International Military Tribunal Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (1945)

Charter of the United Nations (1945)

Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (1990)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

Convention on Special Missions (1970)

Convention on the Prevention and Punishment of the Crime of Genocide (1948)

G

Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (1949)

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)

Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949)

Geneva Convention (IV) Relative to the Treatment of Prisoners of War (1949)

H

Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907)

Hague Declaration (IV,3) concerning Expanding Bullets (1899)

I

Instrument of Surrender Annex No A-2 to the Judgment of the International Military Tribunal for the Far East (1945)

International Covenant on Civil and Political Rights (1952)

International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)

International Convention for the Unification of Certain Rules Concerning the Immunities of State-Owned Ships (1926)

N

Negotiated Relationship Agreement between the International Criminal Court and the United Nations (2004)

New York Pact of 16 July 1993 (Annex to the Report of the Secretary-General on the Situation in Haiti 13 Aug 1993 (S/26297))

O

OAU Constitutive Act of the African Union (2000)

P

Proclamation Defining Terms for Japanese Surrender Annex No A-1 to the Judgment of the International Military Tribunal for the Far East (1945)

Protocol N° 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984)

Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977)

Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977)

Protocol (III) Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (2005)

Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925)

R

Report of the Meeting of the Ministers of Foreign Affairs of the Union of Soviet Socialist Republics, the United States of America and the United Kingdom Annex No A-3 to the Judgment of the International Military Tribunal for the Far East (1945)

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

Rome Statute of the International Criminal Court (1998)

S

Special Proclamation by the Supreme Commander for the Allied Powers, Establishment of an International Tribunal for the Far East Annex No A-4 to the Judgment of the International Military Tribunal for the Far East (1946)

T

Treaty of Peace between the Allied and Associated Powers and Germany (1919)

U

UN Convention on Jurisdictional Immunities of States and their Property (2004)

V

Vienna Convention on the Law of Treaties (1969)

Vienna Convention on Consular Relations (1963)

Vienna Convention on Diplomatic Relations (1961)

5 UN RESOLUTIONS AND DECLARATIONS

UN GA Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (36/103) of 9 December 1981

UN GA Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ((2625 (XXV)) of 24 October 1970

UN GA Resolution 3074(XXVIII) of 3 December 1973

UN GA Resolution 2840(XXVI) of 18 December 1971

UN GA Resolution 95(I) of 11 December 1946

UN GA Resolution 216 B (III) of 9 December 1948

UN ECOSOC Resolution 1503-(XLVIII) of 27 May 1970

UN SC Resolution 1973 of 17 March 2011

UN SC Resolution 1970 of 26 February 2011

UN SC Resolution 1688 (S/RES/1688 (2006)) of 16 June 2006

UN SC Resolution 1593 of 31 March 2005

UN SC Resolution 1315 of 14 August 2000

UN SC Resolution 955 of 8 November 1994

UN SC Resolution 827 of 25 May 1993

UN SC Resolution 731(1992) of 21 January 1992

Statement of the President of the Security Council at the 48th Session UN Doc S/INF/49 (1993)

6 PRESS RELEASES, CORRESPONDENCES AND OTHER ADMINISTRATIVE DOCUMENTS

AU Decision on Africa's Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1 (12 October 2013)

AU Letter of the African Union to the President of the ICC BCU/U/1657.09.13 (10 September 2013)

AU Press Release n° 119/2010 on the Decision of the Pre-Trial Chamber of the ICC Informing the UN Security Council and the Assembly of the States Parties to the Rome Statute About the Presence of President Omar Hassan Al-Bashir of The Sudan in the Territories of the Republic of Chad and the Republic of Kenya (29 August 2010)

AU Press Release n° 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan (9 January 2102)

ICC Letter by Second Vice-President Judge Cuno Tarfusser to the AU 2013/Press/00295-4/VPT/MH (20 September 2013)

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

ICC Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya ICC-02/05-01/09 (27 August 2010)