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'The conflict between Articles 27 and 86 of the Rome Statute with respect to an accused incumbent head of state and its effect on the effectiveness of the trial process'

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All of the above were eager to help. The mistakes, however, are mine.

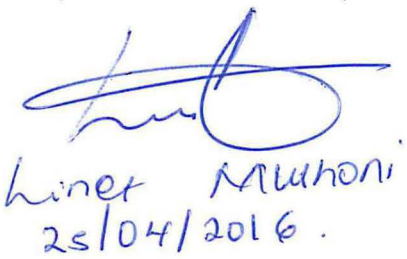
Declaration

I hereby certify that this dissertation constitutes my own product, that where the language of others is set forth, quotation marks so indicate, and that appropriate credit is given where I have used the language, ideas, expressions or writings of another.

I declare that the dissertation describes original work that has not previously been presented for the award of any other degree of any institution.

Kimani Patrick Mwangi

22 March 2016



Abstract

Under customary international law, incumbent heads of states are accorded certain immunities whose purpose is to ensure the smooth conduct of international relations of their state which, in turn, require an effective process of communication between states. It is safe, therefore, to say that immunities for sitting heads of states undergird the stability of the international community.

The development of international criminal law in the last seven decades has seen a gradual erosion of the integrity of immunities for heads of states. The journey from Nuremberg to The Hague has resulted in a permanent International Criminal Court established under the Rome Statute. Article 27(2) of this Statute disregards immunities as an effective bar to the jurisdiction of the International Criminal Court. Heads of states have been stripped off their "invisibility cloak" from international criminal prosecutions.

Establishing international criminal jurisdiction in a particular case is one thing. Conducting a successful international criminal trial is another. One of the core elements in the latter is the investigation process. The Rome Statute places its reliance on the situation state's authorities by imposing an obligation on the state to cooperate with the Court in its investigation and prosecution of crimes. This general obligation to cooperate, found under Article 86 of the Rome Statute, is determinative of not only the success of any trial process but also the legitimacy and credibility of the Court.

A special tension is noticeable in circumstances where an incumbent head of state is accused at the Court – which is now possible following the stripping of the "immunities cloak" – while his state is placed under the general cooperation obligation with the Court. This tension is clearly manifest, at least practically, in the two criminal processes against Uhuru Kenyatta and Omar Al Bashir. Bearing in mind the significant political muscle a sitting head of state wields in their state, it is quite unlikely and indeed evident from the two cases above, that the state authorities will be very reluctant to discharge their Article 86 obligation.

While the prosecution of former heads of states is possible and has actually happened, the prosecution of sitting heads of states remains a challenge. Is it time to rethink the structure of the Court or the implementation of the Rome Statute?

This dissertation is an analysis of the tension or conflict between the implication of Article 27 and the obligation under Article 86 of the Rome Statute with respect to a sitting head of state.

It is a qualitative research focused on some principles of international criminal law and their inter-relationship.

To heal the tension, I recommend in the last chapter, a redefinition of the structure of the Court. This redefinition entails significant reduction of the role the state may play in determining the success or direction of a criminal trial.

List of cases

1. *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, ICJ Reports 2002.
2. *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v. [1999] UKHL 17 (24th March, 1999)*
3. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France),* Judgment, ICJ Reports 2008.
4. *Prosecutor of the Tribunal against Slobodan Milosevic* (Amended Indictment "Bosnia and Herzegovina") IT-02-54-T.
5. *Prosecutor of the Tribunal against Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic & Vlajko Stojiljkovic* (Second Amended Indictment) IT-99-37-PT.
6. *Prosecutor v Charles Ghankay Taylor* also known as *Charles Ghankay Macarthur Dapkpana Taylor* (Indictment) SCSL-2003-01-I.
7. *Prosecutor v Laurent Koudou Gbagbo* (Initial Appearance) ICC-02/11-01/11-T-1.
8. *The Prosecutor v Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09).*
9. *The Prosecutor v Omar Hassan Ahmad Al Bashir, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir,* 13 December 2011.
10. *The Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11).
11. *Trial of the Major War Criminals before the International Military Tribunal (1947)*, Judgment, vol I, Nürnberg 1947.
12. *United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran)*

List of Abbreviations

ASP - Assembly of State Parties

AU – African Union

CLRV - Common Legal Representative of the Victims

ICC – International Criminal Court

ICJ – International Court of Justice

ICTY – International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

ILC - International Law Commission

UKHL – United Kingdom House of Lords

UNTS - United Nations Treaty Series

VCCR - Vienna Convention on Consular Relations

VCDR - Vienna Convention on Diplomatic Relations

1 Introduction

1.1 Background

Since the inception of the permanent International Criminal Court (hereafter "ICC" or "the Court") in 1998, only two sitting Heads of States have been subject to charges for international crimes under the Rome Statute[1]("Statute").[2] The two heads of states are Omar Hassan Ahmad Al Bashir and Uhuru Muigai Kenyatta. Uhuru Kenyatta became Kenya's head of state while still an indictee of the Court.[3] Omar Al Bashir was already a Head of State at the time an arrest warrant was issued by the International Criminal Court.[4] None of the two indictments has proceeded to trial. As matters stand, Omar Al Bashir is yet to honour his arrest warrant[5] while the criminal charges against Uhuru Kenyatta were withdrawn in December of 2014.[6] The fact that none of the two attempts at prosecuting incumbent heads of states has reached full trial; is enough to raise the alarm regarding the structure of the Court under the Statute.

The Prosecution has variously alleged non co-operation of the concerned State Party or other state parties with the ICC as a major cause for the stalling of proceedings.[7] Since,

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1 Rome Statute of the International Criminal Court (17 July 1998), United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org.) (hereinafter "Rome Statute").

2 The two include: President Omar Al bashir of Sudan (ICC-02/05-01/09 The Prosecutor v Omar Hassan Ahmad Al Bashir ("Bashir case") and President Uhuru Kenyatta of Kenya (ICC-01/09-02/11 The Prosecutor v. Uhuru Muigai Kenyatta) ("Kenyatta case"). One may also mention the case against William Ruto, the Deputy President of Kenya who in certain circumstances under the Kenyan Constitution assumes the role of head of state or government. The study, however, wishes to focus solely on de facto and de jure sitting heads of states.

3The summons to Mr Kenyatta to appear before the Court was issued on the 8th of March 2011. He was elected President two years later on the 4th of March 2013.

4 The first warrant of arrest of Mr Omar Bashir was issued by Pre-Trial Chamber 1 on the 4th of March 2009. The same Chamber issued a second warrant of arrest on 12th July 2010. Mr Bashir became the President of Sudan on 16th October 1993 and is the incumbent President.

5 A Pre-Trial Chamber of the ICC has ruled that Malawi and Chad failed to exercise their obligation to arrest and surrender Mr Bashir under Article 86 of the Rome Statute when he visited these countries.

6 See Notice of withdrawal of charges against Uhuru Muigai Kenyatta, ICC-01/09 – 02/11-983.

7 See ICC-01/09-02/11-982, ICC-01/09-02/11-940, and ICC-01/09-02/11-943 in the Kenyatta case. The Pre-Trial Chamber has taken the South African authorities regarding their failure to arrest and surrender Omar Al Bashir following his presence in South Africa from the 13-15 June 2015. At the time of writing this dissertation, proceedings under Article 87(7) had been started against South Africa with regards to its failure to cooperate with the Court.

cooperation is an essential element in successful trial proceedings at the ICC[8], and taking into account the significant influence an accused head of state might exert on this process[9], the expeditiousness of an international criminal trial process is likely to be prejudiced whether or not the accused sitting head of state is 'ultimately responsible' for the non-cooperation.

This study is an attempt to investigate the seemingly defective relationship between the stripping of immunities available to a head of state general obligation of state cooperation with the Court and the denial of immunity to a sitting head of state.

1.2 Statement of problem

The right of an accused sitting head of state to an expeditious trial appears to be prejudiced under international law by the conflict between two competing rules of international criminal law: the necessity of state cooperation in trial proceedings and the stripping of immunities for sitting heads of states under Article 27 of the Rome Statute.

This study is broadly themed into two elements of international law: firstly, the immunity of head of states and secondly, state cooperation with the Court which is a determining factor in assessing the efficiency of the Court. On the question of immunity of heads of states, it refers to Article 27[10] of the Rome Statute as well as its 'exception' under

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8 The Preamble to the Rome Statute affirms '[t]hat the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation...' (Emphasis added).

9 The Prosecution has argued in the Kenyatta case that the fact that the accused person was the Head of State of Kenya and thus 'constitutionally responsible" for ensuring Kenya's compliance with its international obligations made the accused 'ultimately responsible' for the Kenya Government's failure to cooperate with the ICC. See ICC-01/09-02/11-981 para 22.

10 The Article provides that:

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

Article 98[11] of the same Statute. The general obligation of a State to cooperate with the ICC is to be found under Article 86[12] of the Rome Statute.

The prosecution of sitting Heads of states under the International Criminal Court is marred by various challenges. While they are not entitled to any kind of immunity under the Rome Statute, investigations and prosecutions into their cases is heavily dependent on the state in question's fulfilment of its cooperation obligations under the Statute. The few attempts of the ICC at prosecuting heads of states seem to have been futile.[13]

A sitting Head of State may exert considerable influence in one form or another on the concerned State's general obligation of cooperation.[14] National authorities which in most cases, fall under the power of the sitting head of state would be reluctant to live up to the cooperation obligations commitment when it comes to that state's incumbent head. Indeed, the allegation has been raised at the ICC that an accused's position as head of state is particularly detrimental to the fulfillment of cooperation obligations. [15]

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11 Article 98 provides as follows:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

12 This Article is worded thus:

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

13 This is the case with regards to the Bashir and Kenyatta cases.

14 ICC-01/09-02/11-981, para 22.

15 'Geoffrey York: African Union Demands ICC exempt leaders from prosecution' The Globe and Mail Johannesburg, 12 October 2013 http://www.theglobeandmail.com/news/world/african-union-demands-icc-to-protect-leaders-from-prosecution/article14850866/ on 26 January 2015; 'Shane Hickey: African Union says ICC should not prosecute sitting leaders' The Guardian London, 12th October 2013 http://www.theguardian.com/world/2013/oct/12/african-union-icc-kenyan-president on 26 January 2015.

1.3 Statement of objectives

This study is an investigation into the effect of the conflict between state cooperation with the ICC and the stripping of heads of states immunity under the Statute. The effects of that conflict on the trial are also considered. To that end, the following objectives are necessary:

- To find out under what circumstances a conflict exists between State Cooperation with the ICC and the denial of immunity of, among others, a sitting head of state under Article 27 of the Rome Statute.
- To establish the effects of the conflict between state cooperation and Article 27(2), if it exists, on the effectiveness of a trial process.
- To determine which norm between state cooperation and the immunity is prior for an effective international criminal law regime.
- To suggest policy changes, where necessary, on how best to integrate the two norms so as to ensure the effectiveness of the trial process.

1.4 Theoretical Framework

In analyzing any conflict between principles of international criminal law, I will rely on Hans Kelsen's hierarchy of norms theory as a measure of the principles with regard to the grundnorm. 'The grundnorm is the norm which represents the reason for the validity of another norm ...All norms whose validity can be traced back to one and the same basic norm constitute a system of norms, a normative order. The basic norm is the common source for the validity of all norms that belong to the same order – it is their reason of validity.'[16]

To establish the grundnorm, one would essentially be seeking out the rationale of international criminal law. Certainly, the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal adopted in London on 8 August 1945 offer a starting point with regard to the principles of international criminal law. Although these are not the foundational documents

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16 Kelsen H, Pure Theory of Law, The Lawbook Exchange Limited, 2004 (Originally published 1967),195.

of international criminal law,[17] they have established certain principles which have served as precedents for international criminal tribunals, hybrid Courts and the Permanent ICC. Nuremberg confirmed that when cruelties, such as genocide, reached a magnitude that shocked the conscience of humankind, it should and could be punished as a crime against all of humankind.[18]

The continued occurrence of crimes against humanity required the creation of a permanent International Criminal Court (ICC) to bring to account those who threaten the peace and security of human beings anywhere; regardless of ethnicity, color, official status, religious or political persuasion. It seemed to many that the time had come to close a glaring gap in the international legal order.[19] The need to end impunity by bringing justice to victims and culprits to justice was imperative – the Rome Statute was, therefore, adopted.

International criminal law, in summary, is founded upon a common 'international morality'[20] which abhors particular crimes of such nature as contained in the Rome Statute.[21] As the former ICTR Prosecutor, Richard Goldstone aptly puts it:

> ...some crimes were so horrendous that they were crimes not only against the immediate victims or solely the people who lived in the country in which they were committed; they were truly *crimes against all mankind*.[22]

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17 Ferencz B,'The Evolution of International Criminal Law' S & F Foundation Hamburg Germany (1999) argues that

> Contrary to popular belief, the Nuremberg Charter was not something that was suddenly invented from whole cloth. The long list of precedents cited by the distinguished IMT jurists made plain that the Charter was not ex post facto justice. Its articulation of Crimes Against Humanity reflected and clarified emerging precepts expressed in the Conventions at The Hague and other international pacts where nations, groping, for a more humane order, relied on "the laws of humanity and the dictates of the public conscience.

18 Ferencz B,'The Evolution of International Criminal Law',

19 Ferencz B,'The Evolution of International Criminal Law', ...

20 This term was first used in the Treaty of Versailles to found the basis of the bringing to justice of Kaiser Wilhelm II.

21 In its Preamble the Statute makes reference to 'unimaginable atrocities that deeply shock the conscience of humanity.'

22 Goldstone R, 'Foreword – The role of law and justice in governance: Regional and global' in Thakur R and Malcontent P (eds), From sovereign impunity to international accountability: The search for justice in a world of states United Nations University Press, 2004, viii.

Certain crimes concern the entire international community and are consequently subject to universal jurisdiction. There is a normative requirement on States and the international community to put an end to impunity for the perpetrators of these crimes.[23] By this acknowledgement and determination, the international community seeks to address a threat that may peril its existence.

This normative requirement against impunity that 'deeply shock the conscience of humanity'[24] is the grundnorm of international law. It is the reason for the validity of all sub-norms contained in the Rome Statute – it is their rule and measure.

1.5 Research design and methodology

This study is a doctrinal theoretical exposition of norms in international criminal law and their relationship. Specifically, the study seeks to show that the likelihood of conflict has negative consequences on the effectiveness of an accused head of state's trial. It adopts a qualitative analysis as its research design being heavily reliant on writings and opinions of scholars and Courts on the norms under exposition. The international criminal regime under the Rome Statute is fairly recent and there is not much data or trend to infer from. This is even less so with regards to the prosecution of sitting heads of states. Minimal use will be made of primary sources of data. Secondary sources such as scholarly writings and publications will be especially relevant.

1.6 Limitations

I anticipate the following limitations on the study:

1. Limited cases regarding heads of States have been submitted to the ICC hence there is no adequate data to indicate a general trend or practice. More time might be needed to realize a practice.

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23 The Preamble to the Statute expresses the determination of the Assembly of State Parties 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes' and recalls the 'duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

24 Preamble to the Statute, para. 2.

2. Some of the secondary sources to be relied upon, especially documents from the ICC are redacted public versions hence crucial details informing those decisions might not be available for the purposes of this study.
3. The Rome Statute is fairly recent and in its early stages. Its implementation is not uniform and there are states which have expressed a negative attitude to its implementation or adoption. These are factors that may influence co-operation efforts with the Court.
4. Politics plays such an overarching role in international criminal prosecutions and often this proves difficult for an objective study into issues regarding these prosecutions. The Rome Statute was itself a political bargain as is any other international instrument.

2 Stripping of Heads of States Immunities

2.1 Immunities for heads of state

Two general types of immunities are recognized under international law: functional (immunity *ratione materiae*) and personal immunities (immunity *ratione personae*). The development of international criminal law has seen a gradual erosion of these types of immunities.

Functional immunities apply only to acts performed by persons in their official capacity. They may be relied on not only by serving state officials, but also by former officials with respect to official acts performed while in office.[25] In this category of immunities, reference is made 'to the nature of the acts in question rather than the particular office of the person who performed them.'[26]

Personal immunities 'attach to a particular office and are possessed only as long as the official is in office...They are limited to a small group of senior state officials, especially heads of state, heads of government, and foreign ministers.[27] Akande notes that, due to their role; personal immunities, where applicable, are commonly regarded as prohibiting absolutely the exercise of criminal jurisdiction by states. [28]

Head of state immunity, which is a special category of personal immunity, is regarded as being 'more comprehensive than diplomatic immunity or ordinary functional

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[25] Akande D, 'International Law Immunities and the International Criminal Court' *The American Journal of International Law* (2004) 407 – 433, 412.

[26] Foakes J, 'Immunity for International Crimes? *Developments in the Law on Prosecuting Heads of States in Foreign Courts' Chatham House Briefing Paper IL BP 2011/02* (2011), 4.

[27] Akande D, 'International Law Immunities and the International Criminal Court', 410.

[28] Akande D and Shah S, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *The European Journal of International Law Vol 21 No 4* (2011) 815-852, 819; Lord Browne-Wilkinson in Re Pinochet [*Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v. [1999] UKHL 17 (24th March, 1999)*] stated that "[I]mmunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae*."

immunities. The expansive nature of the immunity recognizes the functions of heads of states, which include high-level diplomacy, negotiations, and the pacific settlement of disputes.'[29]

Immunities are necessary for the smooth conduct of the international relations between states.[30] They contribute to the development of friendly relations among nations.[31] The International Court of Justice has made the observation that:

> There is no more fundamental prerequisite for the conduct of relations between states than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose. The institution of diplomacy has proved to be an instrument essential for effective co-operation in the international community, and for enabling states, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means.[32]

2.2 The suppression, subversion and excommunication of head of state immunity in international criminal law

The robust development of international criminal law in the past century has greatly weakened the application of immunity as a defence in criminal prosecutions at the international level. Specifically, functional and personal immunities appear to be no longer relevant to international criminal trials and prosecutions.

The suppression of immunity for head of states is a principle that was first enshrined in the Versailles Treaty signed during the Paris Peace Conference in 1919. The Allied and Associated Powers included a punitive clause under which they would arraign the German Kaiser William II of Hohenzollern 'for a supreme offence against international morality and the sanctity of treaties'.[33] Under this clause, a tribunal was to be constituted to guarantee the

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[29] Kiyani A, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 472-473; See also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, ICJ Reports 2008, 236-237, para 170 quoting from *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, ICJ Reports 2002, 21–22, para 53.

[30] Akande D, 'International Law Immunities and the International Criminal Court', 409-10; Fox H and Webb P, *The Law of State Immunity*, 3ed, Oxford University Press, New York, 2013, 1.

[31] Preamble, *VCDR* (1961) UNTS Volume Number 500; Preamble, *VCCR* (1963) UNTS Volume Number 596.

[32] *United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran)*

[33] Article 227, *Treaty of Peace with Germany (Treaty of Versailles)* (28 June 1919), Library of Congress, Senate Document 51.

right of defence of the would-be defendant. The Kaiser was never put to trial, partly because of the refusal by the Dutch authorities to extradite the Kaiser for prosecution.

The Pre-Trial Chamber 1 of the ICC made reference to the following recommendation by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties:

> In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.[34]

Immunity for heads of states and other officials was later and more clearly denounced in the Post World War II period. Article 7 of the Charter of the International Military Tribunal ("Nuremberg Charter") presented the thesis that neither a head of state nor a person acting under an official capacity could claim, validly, exemption from responsibility or punishment by the mere fact of their official position. The Tribunal, basing its decision on the above cited Article, held thus:

> The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot

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[34] Malawi Decision, para. 23 quoting the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties, '*Report Presented to the Preliminary Peace Conference, 29 March 1919*', American Journal of International Law, reprinted in (1920) 14, 116.

> shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[35]

In similar terms, Article 6 of the International Military Tribunal for the Far East Charter derecognized the applicability of official position as a valid defence to criminal responsibility. The Nuremberg and Tokyo tribunals, therefore, saw the declaration of an essential principle of international criminal law. The International Law Commission would include this principle as its third principle in the codification of what are popularly referred to as the Nuremberg Principles.[36] The Commission recalled this principle in its Draft Code of Crimes against the Peace and Security of Mankind of 1996. Article 7 of the Draft Code provides that:

> The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.[37]
>
> The third Nuremberg Principle was incorporated in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as Article 7(2). In the Blaskić case, the ICTY Appeals Chamber held thatAn identical provision is to be found under Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda.

The prosecutions of various heads of states including Slobodan Milosević[38], Charles Taylor[39], Laurent Gbagbo[40] saw yet other encroachments at the concept of personal immunity. In a sense, the proceedings of Omar Al Bashir and Uhuru Kenyatta, constitute the

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[35] *Trial of the Major War Criminals before the International Military Tribunal (1947)*, Judgment, vol I, Nürnberg 1947, 223.

[36] *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, ILC 2nd Report, 1950, Official Records of the General Assembly, Fifth session, Supplement No 12 (A/1316), 375.

[37] *Draft Code of Crimes against the Peace and Security of Mankind*, ILC 48th Report, 1996, Official Records of the General Assembly, Fifty-first session, Supplement No 10 (A/5110), Article 7.

[38] See *Prosecutor of the Tribunal v Slobodan Milosevic* (Amended Indictment "Bosnia and Herzegovina") IT-02-54-T, *Prosecutor of the Tribunal v Slobodan Milosevic* (Second Amended Indictment "Croatia") IT-02-54-T, *Prosecutor of the Tribunal v Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic & Vlajko Stojiljkovic*(Second Amended Indictment) IT-99-37-PT

[39] See *Prosecutor v Charles Ghankay Taylor* also known as *Charles Ghankay Macarthur Dapkpana Taylor* (Indictment) SCSL-2003-01-I.

[40] See *Prosecutor v Laurent Koudou Gbagbo* (Initial Appearance) ICC-02/11-01/11-T-1-ENG ET.

final nail on the coffin of immunity *ratione personae*, at least in the context of international criminal law. Sitting heads of states are no longer protected from criminal jurisdiction.[41]

2.3 Article 27 of the Rome Statute

The heading of this Article (irrelevance of official capacity) indicates a continuation of the thesis expounded in the post-World War II tribunals, and indeed the history of suppression heads of states immunities above. The Rome Statute, however, goes beyond just a mere denunciation of official capacity. It provides, specifically, 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...'[42] Its sub-article 2 is to the effect 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.'

This Article abolishes any immunity before the ICC that incumbent heads of states have hitherto enjoyed. The ICC Pre-trial Chamber 1 considered that a state which becomes a party to the Rome Statute accepts 'having any immunity they had under international law stripped from their top officials...All of these states have renounced any claim to immunity by ratifying the language of article 27(2)'.[43] The Chamber found that 'the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction'.[44] It emphasized further that 'immunity for Heads of State before international

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[41] Kiyani A, 'Al-Bashir & the ICC: The Problem of Head of State Immunity' *Chinese Journal of International Law* (2013), 487-488.

[42] Article 27(1), *Rome Statute of the International Criminal Court* (17 July 1998) United Nations, Treaty Series vol 2187, No. 38544.

[43] Malawi Decision, para 40; See also Kiyani A, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 484; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, New York, 2010, 450; Kreß C and Prost K, 'Article 98 – Cooperation with respect to waiver of immunity and consent to surrender' in Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2ed, Hart/Beck, München, 2008, 1607.

[44] Malawi Decision, para 36.

courts has been rejected time and time again dating all the way back to World War 1.'[45] Finally, it made reference to the increased number of criminal prosecution of heads of states (Slobodan Milosevic, Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and Al Bashir) as evidence that 'initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.'[46]

The Pre-Trial Chamber 1 concluded as follows:

> For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes.[47]

Article 27(2) of the Statute is quite new and explicit – it states in no uncertain terms that immunities attaching to official positions may not bar the Court from exercising its jurisdiction over such persons. Akande notes that this provision 'conclusively establishes that state officials are subject to prosecution by the ICC and that provision constitutes a waiver by states parties of any immunity that their officials would otherwise possess vis-à-vis the ICC.'[48]

Heads of states, incumbent or otherwise, whose states are parties to the Rome Statute cannot claim immunity from criminal responsibility or punishment before the ICC. Their states have, by ratifying the Statute, renounced any immunities that their officials may have previously enjoyed.[49] This waiver of immunity, however, is limited to the context of the ICC.

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[45] Malawi Decision, para 38.
[46] Malawi Decision, para 39.
[47] Malawi Decision, para 42.
[48] Akande D, 'International Law Immunities and the International Criminal Court', 420.
[49] Kiyani A, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 484; see also Schabas W, *An Introduction to the International Criminal Court*, 3ed, Cambridge University Press, New York, 232. Schabas considers that the exception to the definitive nature of Article 27(2) in denouncing immunities, is in the case of non-State Parties to the Statute.

2.4 Irrelevance of Article 98

Article 98 addresses issues of conflict between the cooperation regime under the Statute and international obligations of a state under international law. Specifically, the Court is required to take into account any state or diplomatic immunities that may attach to any cooperation request and act in favor of the immunities' obligations.

Presently, our concern is with the sitting head of state immunity. Article 98, therefore which addresses distinct categories of immunities (state and diplomatic immunities) is not relevant at this point.

3 The role of State co-operation in the International Criminal Court

3.1 The ICC: a creature of consent

The ICC has been described as a creature of consent[50], and rightly so. The Court is established under the Rome Statute of 1998 which entered into force on the 1st of July 2002. As of January 2016, 123 members had ratified the Rome Statute although with a number of notable absentees including three members of the United Nations Security Council.[51] Membership to the Statute is open to all States. The Secretary-General of the United Nations remains the depositary of instruments of ratification, acceptance, approval or accession. State Parties have the option of withdrawing from the Statute by way of a written notification addressed to the Secretary-General of the United Nations.

Some scholars opine that Treaty-based institutions have the advantage of high "buy-in" by participating states. At the same time, their major weakness lies in the not-surprising fact that important states may choose not to participate thus 'weakening the strength and legitimacy' of those institutions. Further, the treaty-making process entails protracted negotiations between states which may result in significant structural limitations based on political compromises.[52]

Running counter to the position that the ICC is a purely consensual[53] Court is the argument that the intervention of the Security Council by way of referrals and deferrals introduces an element of coercion into the framework. This 'coercion', it is to be noted, is introduced at the level of operation of the Court. Many would agree that coercion at the point of creation is far different from coercion at the operational level. Indeed, at the operational

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[50] Schaack B & Slye R, *International Criminal Law: Essentials*, Aspen Publishers, New York, 2009, 51; see also Gaeta P, 'Does President Al Bashir enjoy immunity from arrest', *Journal of International Criminal Justice* 7 (2009) 315-332, 319.

[51] These include: The United States of America signed the Statute in 2000 but unsigned it in May 2002 before it became effective; Russian Federation is a signatory but has not ratified the Statute while China is a non-signatory.

[52] Schaak B & Slye R, *International Criminal Law: Essentials*, 52.

[53] The consensual and coercion models are used to describe the manner of creation of the international criminal tribunals. As Schaak B and Slye R explain, a coercion model best exemplified by the ICC, entails negotiations and agreement to establish a treaty-based institution. This would include even the creation of a hybrid tribunal from a bilateral treaty. The coercion model entails the exercise of a sovereign power – either international (usually the United Nations Security Council) or domestic (the nation-state itself).

level, there exists a consensual approach – state cooperation and judicial assistance – which is the primary focus of this chapter. I note that even in cases where the coercion model may be used at the operational level, there has been a tendency of incorporating the consensual approach in light of the general consensual nature of the Court.

Thus understood, we proceed to show that this consensual model of the Court is its major weakness when it is a question of international criminal proceedings against a sitting head of state. How will a state conscious and proud of its sovereignty consent to the stripping of the garments of its visible head and representative?

3.2 The duty to cooperate

State Parties to the ICC have a duty to cooperate fully with the Court in its investigatory and prosecutorial duties.[54] This is an obligation assumed at the moment of ratification of the Rome Statute. The Rome Statute establishes a permanent Court based on interstate consensus hence this Court must be contradistinguished by nature with the coercive tribunals and mixed or hybrid Courts.

Part 9 of the Rome Statute is dedicated to 'international cooperation and judicial assistance'. After the statement of the general obligation to cooperate, the Statute goes on to elaborate particular instances and elements of that cooperation including the following:

1. Availability of procedures under national law to facilitate cooperation with the Court;
2. Compliance with requests for arrest and surrender of persons to the Court;
3. Treatment of competing requests with the Court taking priority over non-State Parties and State Parties in specific circumstances;
4. Making a provisional arrest pending presentation of the request for surrender and the documents supporting such a request; and
5. Other forms of cooperation listed under Article 93 (1) (a – l)
    a. The identification and whereabouts of persons or the location of items;

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[54] Article 86, Rome Statute

b. The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
c. The questioning of any person being investigated or prosecuted;
d. The service of documents, including judicial documents;
e. Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
f. The temporary transfer of persons as provided in paragraph 7;
g. The examination of places or sites, including the exhumation and examination of grave sites;
h. The execution of searches and seizures;
i. The provision of records and documents, including official records and documents;
j. The protection of victims and witnesses and the preservation of evidence;
k. The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
l. Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

Chapter 11 of the ICC Rules of Procedure and Evidence elaborate the details of the contents of cooperation and judicial assistance requirements as provided under Part 9 of the Rome Statute. Although a state party has bound itself by way of ratifying the Rome Statute to cooperate with the Court when so required, it is contemplated that the ultimate decision to cooperate with the Court lies within the discretion of the State Party. Indeed, only then would the sanctions for non-cooperation enforced through the mechanism of the Assembly of Parties be relevant – where the state decides not to cooperate even when under an obligation to do so.

The Court in its 2013 report on cooperation, adopted the model of the Hague Working Group which focused on the following thematic areas:

i. *Arrest strategies;*
ii. *Voluntary agreements;*
iii. Agreement on Privileges and Immunities of the Court ("APIC"); and
iv. *Supporting, protecting and enhancing the Rome Statute system and its intrinsic cooperation needs, at the regional and international levels.*

The Court, however, emphasized that the priority given to these areas is without prejudice to the importance of other cooperation issues, 'including the identification, freezing and seizure of assets, discussed during last year's cooperation facilitation; and the availability of channels of communication and domestic procedures for dealing with Court cooperation requests.'[55] The priority areas are nevertheless important for a state faced with obligations of cooperation with the Court. It is expected that such a State will ensure that, at the very least, the priority areas are addressed before tending to the other cooperation issues.

In the same report, the Court observes the following:

> The impact of lack of strong, timely and consistent cooperation and assistance to the Court is multi-folded: it may lead to delays in the investigations activities and other Court proceedings and operations, thereby affecting the Court's efficiency and as a consequence increasing the running costs and the budget requirements of the Court. The delays may also affect the integrity of the proceedings.[56]

Further;

> From a more systemic perspective, *effective cooperation*, including in particular the execution of arrest warrants, *speak for the legitimacy and credibility of the Court and of the Rome Statute community as a whole*. The only way forward to consolidate the foundations of the Rome Statute, as the Court is expanding its activities, is to have an increasing number of States accepting to provide voluntary cooperation to

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[55] Assembly of State Parties: *Report of the Court on cooperation* Twelfth Session, The Hague (28-29 November 2013) (ICC-ASP 12/35) paras 4-5.
[56] Assembly of State Parties: *Report of the Court on cooperation* Twelfth Session, para. 63.

> the Court. The Court cannot indefinitely rely on the same States that accepted to enter into voluntary agreements years ago to support the new cases and situations before the Court.[57]

A state is placed under the obligation to cooperate by way of a cooperation request[58] either by the Court or by virtue of a referral (initiated by the United Security Council or the relevant State) to the Court.[59] The competent authorities of the State in question are obliged to address the cooperation request and put it into effect. Where the State identifies problems that may impede or prevent the execution of the request, it is required to consult with the Court in respect of those problems.[60] Article 87(7) of the Statute provides the non-cooperation procedures activated by the Court upon a State Party that has failed to undertake its obligations. The Court makes a finding to the effect of non-cooperation by the State and make a referral to the Assembly of State Parties or the United Nations Security Council where relevant. Cassese has decried the absence of penal consequences on a finding of non-cooperation against a state as an instance of the inadequacies of the Statute.[61]

In the *Malawi Decision*[62], the Court noted that the failure by the competent authorities of Malawi to either respond to a warning from the Court's Registrar regarding the contemplated visit by President Al Bashir or to arrest the suspect upon arrival in Malawi; constituted a breach of the general duty of cooperation under Article 86 of the Statute.[63] Further, the Court found Malawi had failed to cooperate with the Court in resolving the issue

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[57] Assembly of State Parties: *Report of the Court on cooperation* Twelfth Session, para. 66.
[58] Article 87 of the Statute, *Requests for cooperation: general provisions.*
[59] ICC-02/05-01/09 The Prosecutor v Omar Hassan Ahmad Al Bashir, *Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 13 December 2011 (hereafter "**Malawi Decision**"), para 1.
[60] Article 97, Statute.
[61] Cassese A, 'The Statute of the International Criminal Court: Some preliminary reflections' *European Journal of International Law* (1999), 166.
[62] ICC-02/05-01/09 The Prosecutor v Omar Hassan Ahmad Al Bashir, *Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 13 December 2011.
[63] Malawi became a State Party under the Statute on the 31st of December 2002.

regarding the immunity and privileges accorded by it to the suspect which issue formed one of the basis for its refusal to arrest the suspect.

The ICC Pre-Trial Chamber has taken the view that 'when cooperating with [the] Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to [the] Court when States have failed to prosecute those responsible for the crimes within its jurisdiction.'[64]The basis of state cooperation with the ICC is the absence, on the part of the Court, of enforcement mechanisms to effect its orders, rulings and judgments.

The Assembly of State Parties has, on various occasions, 'recognized the negative impact that the non-execution of Court requests can have on the ability of the Court to execute its mandate.'[65]It has stressed that 'effective cooperation remains essential for the Court to carry out its activities.'[66]

Antonio Cassese while commenting on the structure of the ICC opines thus:

> The decisions, orders and requests of international criminal courts can only be enforced by others, namely national authorities (or international organizations). Unlike domestic criminal courts, international tribunals have no enforcement agencies at their disposal: without the intermediary of national authorities, they cannot execute arrest warrants; they cannot seize evidentiary material, nor compel witnesses to give testimony, nor search the scenes where crimes have allegedly been committed. For all these purposes, international courts must turn to state authorities and request them to take action to assist the courts' officers and investigators. Without the help of these authorities, international courts cannot operate. Admittedly, this holds true for all international institutions, which need the support of states to be able to operate. However international criminal courts need the support of states more, and more urgently, than any other international institution, because their

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[64] Malawi Decision, paragraph 46.
[65] The ninth to thirteenth Assembly of State Parties decisions have made such a recognition: ICC-ASP/9/Res 3, para 12 9th session (2010), ICC-ASP/10/Res 5, para 9 10th session 2011, ICC-ASP/11/Res 8, para 10 11th session 2012, ICC-ASP/12/Res 8, para 10 12th session 2013, ICC-ASP/13/Res 5, paras 14 and 15 13th session 2014.
[66] ICC-ASP/5/Res 3, para 30 (2006); ICC-ASP/6/Res 2, para 27 (2007); ICC-ASP/7/Res 3, para 29 (2008); ICC-ASP/8/Res 2 para 3 (2009); ICC-ASP/10/Res 2 (2011);

> actions have a direct impact on individuals who live on the territory of sovereign states and are subject to their jurisdiction.[67]

Cooperation is, therefore, an essential feature of the ICC. It is necessary for the effective functioning of the Court and may affect the legitimacy and credibility of the Court either positively (where there is effective cooperation) or negatively (where States fail to honour their cooperation obligations under the Statute). The Court is comparable, in a limited way, to a hybrid tribunal such as the ICTY which found itself, two decades ago, struggling at the cooperation hurdle. As the then President of the ICTY, Antonio Cassese, lamented to the United Nations General Assembly; '[The] Tribunal is like a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the State authorities; without their help the Tribunal cannot operate.'[68]

Much the same could be said about the role of cooperation in the ICC regime. The difference would be that the artificial limbs, in the context of the ICC, are donated not by coercion but by consent. Further, the dimensions, extension and nature of the cooperation would have to be determined in each particular situation or circumstance. Unfortunately, there are no clearly-spelt consequences of a finding of non-cooperation against a state. These circumstances appear to significantly weaken the reach of the limbs that are ever so necessary for the effective functioning of the ICC.

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[67] Cassese A, 'The Statute of the International Criminal Court: Some preliminary reflections', 164.
[68] Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia to the United Nations General Assembly, 7 November 1995.

4 The Conflict between cooperation and immunities regimes under the Statute

4.1 The Incumbent head of state

The conflict between the cooperation and immunities regime under the Rome Statute is noticeable with respect to a sitting head of state alleged to have committed crimes within the jurisdiction of the Court and who is thereby facing a criminal prosecution under the Statute.

We have alluded, in Chapter Three above, to the specific cooperation requirements under the Statute. We noted, there, that state cooperation with the Court is essential to the effectiveness of the Statute. Consequently, states that are parties to the Statute or with whom the Court has entered into special agreements are bound by specific obligations. States that default on these obligations would practically be "hijacking" international criminal justice.

An incumbent head of state has significant powers in meeting the cooperation obligations. While it is acknowledged that the principle of separation of powers is largely upheld in most states in the world, a head of state in a parliamentary democracy who wields significant political power may influence the legislative arm of government.[69] In this regard, there is a strong argument for the case that the incumbent head of state is a major determinant of the direction of any criminal investigation or prosecution that has an "international" tone to it. For a long period during the development of international law, a state and its rulers were undistinguishable. This is no longer the case. The distinction between the state and its head is especially emphasized in the concept of individual criminal responsibility in international criminal law. This distinction, however, is still not crystal clear.

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[69] In Kenya, the majority of members of Parliament belong to the President's coalition of parties, Jubilee Party. The Kenyan Parliament has voted to withdraw from the Rome Statute.

Sir Arthur Watts has written that the head of state:

> Personifies the state, representing its persona to the outside world. As a matter of international law a Head of State possesses the ius repraesentationis omnimodae, that is the right to represent the State internationally in all respects, and the competence to act for it internationally, with all his legally relevant acts being attributable to the State.[70]

Incumbent heads of states permanently represent their state and its unity in foreign relations.[71] According to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations.[72] Undoubtedly, the head of state is the primordial figure through which the state acts in its international relations. The state cooperation obligations under the Rome Statute are primarily fulfilled through the positive act of the sitting head of state as the symbol of the state.[73] This is true not only at a theoretical level but also at the practical level. The ratification of the Statute, and hence the assumption of the state cooperation obligations is a function heavily dependent on the political will of the executive which is normally headed by the incumbent head of state. The very fulfillment of these obligations, similarly, lies at the hands of the executive branch. With few exceptions, the executive branch rides on the political will of the head of state since in most cases, the members of the executive are direct appointees of the sitting head of state. They are pawns at the hands of the leviathan.

Even if it was disputed that the head of state does not have such a significant role in meeting the state obligations, it may be argued that he or she has a significant say in the running of the government. Such a stake may arise from the very appointment of the members who constitute the governing body or the executive branch. It is not uncommon, outside monarchical systems, that a head of state is simultaneously the head of government.

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[70] Watts A, 'Heads of State' *Max Planck Encyclopedia of Public International Law* (2010), para. 5 < http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1418?prd=EPIL> on 30 January 2015.

[71] Fox H, 'The Law of State Immunity' (3rd edn, 2013), 542.

[72] *Case Concerning Application of The Convention On The Prevention And Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* Judgment, ICJ Reports 1996, 44.

[73] Watts A, 'Heads of State', para 5.

This ultimately, gives him or her the prior right or substantial claim to any exercise of power or fulfillment of obligation in their jurisdiction.[74]

Immunities are granted to heads of states and other state officials in cognizance of 'independence and equality of states and the resulting view that no state should claim jurisdiction over another.'[75] As Foakes observes, immunities 'have developed to enable officials to carry out their public business free from interference by the exercise of jurisdiction by another state, and thereby to secure the effective and peaceful conduct of international relations.'[76] The position in customary international law is that 'when in the territory of a foreign state, the person of the head of state is inviolable.' This position is reflected in domestic laws where the head of state is shielded from national investigations and prosecutions so that they can perform their constitutional functions more effectively.

4.2 The conflict

Let us suppose that the head of state an indictment is made against an incumbent head of a state part to the Statute. By ratification of the Statute, such a state has voluntarily surrendered the immunities proper to its officials and undertaken the cooperation obligations with the Court. That is as far as the theory goes. Tremendous difficulties are encountered throughout the process of investigation and prosecution of the head of state supposing that he or she remains the legitimate head during these processes.

It is not illogical to observe that if such a head of state has sufficient political hold on the executive branch of government, he or she may frustrate any positive cooperation efforts by that arm of government. The assumption that the head of state has sufficient political might over the executive branch is particularly strong where he or she is democratically elected. It would take a very 'politically independent' executive to comply with the cooperation obligations where it is likely that the head of that executive branch

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[74] Lassa Oppenheim and Hersch Lauterpacht describe a head of state as 'having an "exceptional position" amongst those who may claim some sort of immunity.' Oppenheim L and Lauterpacht H, 'International Law: A Treatise' (8th Edn., 1955), 358 as quoted by Kiyani A, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 473 at text to note 20.

[75] Foakes J, 'Immunity for International Crimes? *Developments in the Law on Prosecuting Heads of States in Foreign Courts*', 4.

[76] Foakes J, 'Immunity for International Crimes? *Developments in the Law on Prosecuting Heads of States in Foreign Courts*', 4.

maybe subject to proceedings under the Court. It is rather difficult for an executive appointed by the head of state to shoot itself in the foot, let alone in the head.

Indeed, the Kenyan situation in the ICC has presented the clearest instance of this conflict. The question of Kenya's cooperation with the ICC gained even greater concern with the election of Uhuru Kenyatta and William Samoei Ruto as president and deputy president respectively. During the Status Conference of Uhuru Kenyatta's case, the Common Legal Representative of the Victims (CLRV) alleged in his submissions that,

> The Accused is Head of State and Head of Government. He has simultaneously presided over ...a policy of obstruction of access to evidence by the International Criminal Court (ICC) which has impeded the emergence of truth at the international level, the deliberate non-prosecution of post-election violence crimes in Kenya.[77]

The Prosecution has made the following allegations in Uhuru Kenyatta's respect,

> [U]nder the Kenyan Constitution, the Head of State is responsible for compliance with international obligations; Mr Kenyatta is therefore ultimately responsible for the Kenyan Government's failure to cooperate with the Court.[78]

In response, the Kenyan Government asserted that it had complied with its obligations under the Rome Statute in good faith and in a practical and effective manner and that it was in full compliance with its obligations under the Rome Statute.[79]

The ICC Trial Chamber V(B) made the observation that the political influence of a head of state and their constitutional functions as such may be valid factors 'worthy of serious consideration in circumstances where it had been established thst there is a realistic prospect of sufficient, concrete evidence being secured.' By this observation, the Trial Chamber acknowledges that a relationship may be established between an accused head of

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[77] *Prosecutor v Uhuru Muigai Kenyatta* (Status Conference) ICC-01/09-02/11-T-27-ENG ET, 5 February 2014, 17-39.

[78] *Prosecutor v Uhuru Muigai Kenyatta* (Decision on Prosecution's application for a further adjournment) ICC-01/09-02/11, 3 December 2014.

[79] Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative. Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, in the case of *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11 (8 April 2013) paras 6, 23.

state and the cooperation obligations of their state merely on the nature of the evidence sought.

There is something to be said about the separation of the person from the office of the head of state which is at the basis of the distinction between immunity *ratione personae* and immunity *ratione materiae*. This distinction appears at first glance to offer a solution to the conflict highlighted above with regards to an incumbent head of state. This distinction has a similar bears a similar rationale with individual criminal responsibility which we have highlighted in the Chapter on Immunity. The difficulty, however, arises from a practical point of view. When does this distinction occur? An international criminal trial process as envisaged by the Rome Statute encompasses various stages such as preliminary examination, investigation, prosecution, trial, appeal and post-appeal processes. It is quite difficult to ascertain when the distinction between the person of the head of state and the office of the head of state occurs during the international criminal process? Does it only arise at the time of issuing an indictment to the sitting head of state or does it arise during the investigatory stages?

The denial of immunity under the Rome Statute causes serious tension with the equally important cooperation obligations. This tension is especially manifest with respect to an incumbent head of state, the foremost person upon whom, the obligations of the state (including the cooperation obligations) and the same person with the greatest entitlement to the immunities within the state.

Finally, regional and international politics aggravates the perceived conflict. It will be noted that the ICC has had its fair share of political mudslinging. Kiyani observes that, 'Concerns about the neutrality and impartiality of the ICC pre-date and exist independently of the Darfur situation.'[80] There have been accusations against the ICC of bias and impropriety in its functions with the Al-Bashir case offered as a case-in-point.[81] Amnesty International, for instance, criticized the Court's decision not to investigate alleged Israeli war crimes referred to it by the Palestinian Authorities and said that this 'opened the court

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[80] Kiyani A, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 493.
[81] Kiyani A, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 494.

to accusations of political bias.'[82] The African Union has contested on a number of occasions the decisions of the Court and stated that its members would not cooperate with the ICC.[83] Threats of mass withdrawal from the Statute are not strange at the ICC. Such political contests between the Court and states or regional bodies is likely to attenuate the conflict especially when a head of state whose state belongs to the regional body is sought to be indicted. Such conflicts are to be observed with respect to the al-Bashir and Kenyatta as well cases.

4.3 The effect of the conflict

The tension highlighted above puts into prejudice the fair trial rights of an accused head of state. One of the fair trial rights guaranteed under Article 63 of the Rome Statute is the right to be tried without undue delay. This right requires as a corollary, expeditious investigation and presentation of evidence to the Court. It demands a speedy and efficient judicial process.

It is not easily denied that the head of state bears immense political weight both within and usually without their state. Any judicial process that proposes to involve a head of state has to take into consideration the political consequences that may result from such

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[82] See Kiyani A, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 494 note 126.
[83] See Kiyani A, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 494 text to note 128 making reference to the following decisions:

- Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.243 (XIII) (3 July 2009) (AU Dec. 243) and
- Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC), Doc. Assembly/AU/ Dec.245 (XIII) (3 July 2009) (AU Dec. 245);
- Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC), Doc. Assembly/AU/Dec. 270 (XIV) (2 February 2010) (AU Dec. 270);
- Decision on the Progress Report of the Commission on the Implementation of Decision On the Second Ministerial Meeting on the Rome Statute of The International Criminal Court (ICC), Doc. Assembly/AU/Dec. 296 (XV) (27 July 2010) (AU Dec. 296);
- Decision on the Implementation of the Decisions on the International Criminal Court, Doc. Assembly/AU/Dec. 334 (XVI) (31 January 2011) (AU Dec. 334);
- Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. Assembly/AU/Dec.366 (XVII) (1 July 2011) (AU Dec. 366); and
- Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Doc. Assembly/AU/Dec. 397 (XVIII) (30 January 2012) (AU Dec. 397).

an action. It is almost impossible to distinguish the accused person of the head of state from the central political piece of a state's political matrix. Not only is a proposed judicial process against a sitting head of state a perceived threat against the political sphere but it may also be perceived as a threat against the state itself.

Amidst these perceived threats, national authorities and responsible government departments are unwilling to cooperate with the requests of the Court. This has an adverse impact to the investigation efforts by the Prosecution which means that pending cases may stall until such a time when proper and 'comprehensive investigations' are made. Pending cases before a Court of such international character as the ICC is rather discomforting to the political situation of a sitting head. It may cause anxiety in the state. It may disturb foreign relations or engagements with other states. Even more importantly, and for the purpose of this dissertation, the expeditious trial rights of the head of state regarded as the subject of protection under the Article 67 of the Rome Statute and the International Covenant on Civil and Political Rights; maybe forgotten or ignored in the tension referred to above.

5 Conclusion and Recommendations: Resolving the conflict

5.1 The prior norm

The norms in conflict here are recognized in international law. Immunities and privileges are instruments at the service of foreign relations and international comity. The cooperation obligations are an essential feature in the configuration of the international criminal justice system. As we have highlighted above, there appears to be serious tension between these norms with respect to an incumbent head of state who is at the same time an accused head of state.

In the theoretical framework, under Chapter 1 above, I noted that I would consider the Kelsenian grundnorm in assessing the relative weight of the two regimes that are in tension. As regards the grundnorm, I referred to the Preamble of the Rome Statute as setting out the normative requirement against impunity which response is necessary in the face of horrendous 'crimes that shock the conscience of humanity.'

The two regimes represent two norms of international law: the norm of head of state immunity recognized under customary international law and state cooperation with the Court, a recent norm so fundamental to the effectiveness of the international criminal model as we know it today, recognized by the Rome Statute. These norms are to be measured against the grundnorm - the positive action against impunity for international crimes. The principle of the measurement is the relationship between any of the competing norms and the grundnorm.

It appears that the cooperation regime (cooperation norm) is more directly related to the grundnorm as it ensures the effectiveness of the machine established for the very purpose of curing the disease of impunity. The immunities regime is less so related since its aim is actually contrary to the basic tenets of the grundnorm – the immunities norm exempts the relevant persons to whom it applies from the reach of the mechanism against impunity. This, however, does not take for granted the fundamental importance of the immunities norm in preserving smooth foreign relations and international comity. This argument however does not materially alter the relation of the immunities norm to the grundnorm vis-à-vis the cooperation regime. In most cases it will be found that the cooperation regime if successfully

applied may be more effective in sustaining peace and international comity by 'bringing justice to victims and bringing the abusive regime to justice.'

In my view, the cooperation norm ranks prior to the immunities regime at least in the context of the international law of the present days (from which we cannot alienate the developing corpus of international criminal law) and must give way to it. The cooperation regime is a recent innovation under international criminal law and which, therefore, can be said to be more attuned to the necessities of this day and age. The immunities regime which has developed extensively under customary international law may not have anticipated such crimes as international crimes being committed by those in the high seats of power. These crimes that are appalling to the conscience of humankind and are a direct threat to humanity as such, place an obligation on all states to condemn them and effectuate all mechanisms to bring those culpable to justice.

The fight against impunity demands that sacrifices be made at the level of the State Party to the Rome Statute. State cooperation with the International Criminal Court is an essential aspect towards this object. In this manner, the Statute proves to be 'too deferential to the prerogatives of state sovereignty.' [84] The very attempt, however, to prosecute incumbent heads of states introduces an anticipated tension which not only defeats cooperation efforts with the state in question but seriously prejudices the incumbent head of state's right to an expeditious trial.

5.2 Recommendation

To avoid the undesirable situation of stalling cooperation efforts and the resultant delays and uncertainty attending pending investigations and prosecutions at the Court, the structure of the Court as it stands must be remodeled to ensure that the grundnorm of fighting impunity of international crimes is most effectively achieved. Otherwise, a different prosecution strategy should be adopted as a matter of policy to ensure that comprehensive investigations are undertaken in a situation country without serious political obstacles.

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[84] Cassese A, *The Statute of the International Criminal Court:* Some Preliminary Reflections (1999) EJIL.

The recommended model is one that radically reduces the role of the situation state in the investigation and prosecution of international crimes. As explained above, the result of the cooperation regime under the Statute is to give the state a significant stake in determining the direction of the international criminal trial process. This should be reversed – the State in question should have minimal, if any, involvement in the process. The following points should be taken into consideration in drafting such a model:

1. To preserve the independence and impartiality of the Court, it is necessary to ensure that adequate resources are channeled to the institution.
2. The Assembly of State Parties should establish an institution within the Court Registry solely charged with the investigative functions in situation countries. This institution should be funded by donations, grants and contributions from state parties as well as any other states or organizations that identify with the cause of the Statute.
3. The cooperation procedures and obligations under the Statute should be replaced with the provisions regarding the operation of the institution recommended to be established above.
4. Every state party should be required, at the time of ratification or later, to establish a liaison office with the institution which is funded through a joint partnership with the state.

It will be noted that, at a practical level, what is proposed here is akin to an entirely new international organization with its own "arms" and "limbs". It is rather difficult to imagine an organization that does not depend on states for funding of its operations. Ultimately, states and the entire international community retain the say on how such a structure would be run and organized.

This challenge could be addressed by the practice of issuing sealed indictments[85] by the ICC to ensure that the highest level of confidence is maintained. This means that the

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[85] This practice of issuing sealed indictments was adopted by the ICTY Prosecutor's office upon realizing that publishing indictments and generating media attention proved to be ineffective, as did the practice of announcing indictments in open proceedings designed to highlight failures to arrest suspects. When accused learned of the existence of warrants for their arrest, it was not uncommon for them to go into

Prosecution would proceed with the investigation into a situation or case without disclosing the details of the indictees to the situation country. After thorough investigations, the indictments can be unsealed at which point the prosecution would ready for trial. Prosecution strategies may also need to be restructured to ensure that cases are prosecuted from the direct perpetrators to the superiors to ensure that cooperation with the situation state is secured beforehand. The Prosecution may, subsequently, link the superiors by using the evidence proving the culpability of the direct and indirect perpetrators – tracing the command structure of the alleged crimes.

It is hoped that these recommendations would have the effect of annulling the state's role in the international criminal trial process and hence the likelihood of hijacking such a process. By setting up an independent institution within the Court's structure to undertake investigations for the Court, the role of the state would have been effectively reduced to ratification of the Statute and the establishment of the liaison office. This would avoid any conflict between competing rules in international law and allow for the attainment of the grundnorm of international criminal law.

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hiding, sometimes in territories where they received protection. See ICTY in conjunction with UNICRI, *ICTY Manual on Developed Practices*, 2009, 41-42.

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