

**THE RELATIONSHIP BETWEEN INTERNATIONAL CRIMINAL LAW AND
STATE SOVEREIGNTY IN AFRICA AS SEEN THROUGH THE LENS OF THE
APPLICATION OF THE PRINCIPLES OF UNIVERSAL JURISDICTION AND
PERSONAL IMMUNITIES**

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DECLARATION

I, Teedzai Linda Mushoriwa, declare that ‘The relationship between international criminal law and state sovereignty as seen through the lens of the application of the principles of universal jurisdiction and personal immunities’ is my own work and that all sources I have used or quoted have been indicated and acknowledged by way of complete references.

Signature

Date:13 July 2018

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DEDICATION

This thesis is dedicated to my children Chiwoniso Kimberley and Anesu Kyle Mushoriwa. My wish for them is not that they should follow in my footsteps, but that they should go further than I have ever imagined possible .

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION AND OVERVIEW

The issue of the relationship between the principles of universal jurisdiction and personal immunities has ignited a lot of debate in modern international law. This is mainly because of the uncertainty caused by inconsistencies in state practice with regards to universal jurisdiction.¹ It is therefore not clear as to what extent the immunities enjoyed by Heads of State and other high ranking state officials can be used as a bar to the prosecution of these individuals for international crimes such as genocide and war crimes.

This uncertainty is also caused by the contradictions in the structure of the two principles. Universal jurisdiction seeks to promote accountability for certain international crimes, regardless of the position of the alleged perpetrator, thereby assuming that sovereignty is no longer absolute in instances of heinous international crimes. The principle of personal immunities on the other hand seeks to exempt certain individuals such as Heads of State, on the basis of their official standing, from being held accountable before foreign courts, even for international crimes.² This suggests that sovereignty remains absolute regardless of the nature of the offence.

In recent years, the exercise of universal jurisdiction by European states against African state officials has often resulted in tensions between European states and African states. African

¹ See M-Cherif Bassiouni 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42: 1 *Virginia J of Int L* 81, 83 explaining that the relationship between universal jurisdiction and other principles of law is not clear because it is rarely used by national courts. See also C Gevers & P Vrancken 'Jurisdiction of States' in H Strydom (ed) *International Law* (2016) 234,236 explaining that '...there are numerous difficulties specifically associated with identifying the relevant jurisdiction rules under international law.' This is because there is no specific treaty on the subject of the exercise of jurisdiction by states so the rules are governed by customary international law.

² See the Dissenting Opinion of Judge Van den Wyngaert in the *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium hereinafter *Arrest Warrant Case*), explaining that the case '...was about balancing two divergent interests in modern international (criminal) law: the need for international accountability for such crimes as torture...and the principle of sovereign equality of states which presupposes a system of immunities.' para 5.

states have claimed that the exercise of universal jurisdiction over African state officials by European states is an abuse of the principle of universal jurisdiction and that when European states exercise universal jurisdiction against African state officials they disregard the sovereignty of the African states in question and the immunities that the state officials ought to enjoy at international law. According to the AU, this evokes memories of colonialism.³

African misgivings towards the application of international criminal law have also been directed at the distinct, but closely related, efforts by the International Criminal Court (ICC) to prosecute African leaders for alleged human rights violations. The deterioration of the relationship between African states and the ICC can be traced back to the indictment of the incumbent Sudanese President Omar al Bashir in 2009 and the confirmation of proceedings against Kenyan President Uhuru Kenyatta and his deputy William Ruto in 2012. African states under the auspices of the African Union (AU) have claimed that the ICC is violating the immunity of African leaders by indicting sitting African Heads of State; that the Court is unfairly targeting only African leaders and that it is neo-colonial.⁴

A study of the relationship between these two principles of universal jurisdiction and personal immunities in the African context and the attitude of African states towards the work of the ICC in Africa is of both academic and practical relevance. In recent years, European states have exercised universal jurisdiction against African state officials, leading to increased tensions between African states and European states.⁵ In addition some incumbent and former African Heads of State have been indicted, tried or convicted. As stated above, the ICC indicted Sudanese President Omar al Bashir in 2009 and confirmed charges against the incumbent Kenyan President Uhuru Kenyatta and his deputy William Ruto in 2012.⁶ The

³ AU-EU Expert Report on Universal Jurisdiction (Brussels 2009) para 37.

⁴ For a detailed overview of African misgivings towards the work of the ICC in Africa see generally C Jalloh 'Regionalising International Criminal Law?' (2009) 9:3 *Int Criminal LR* 445; J van der Vyver 'Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court' (2011)11 *African Human Rights LJ* 683; G Naldi & D Magliveras 'The International Criminal Court and the African Union: A Problematic Relationship' in C Jalloh & I Bantekas (eds) *The International Criminal Court and Africa* (2017).

⁵ See generally C Jalloh 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (2010) 21 *Criminal LF* 1.

⁶ *The Prosecutor v Omar Hassan Al Bashir* ICC-02/05-01/09 Pre Trial Chamber Decision on the Prosecution's application for a warrant of arrest; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kogsey and Joshua*

former Liberian President Charles Taylor was tried and convicted by the Special Court for Sierra Leone for war crimes and crimes against humanity in 2012, and in 2016 the Extraordinary African Chambers (EAC) sitting in Senegal tried and convicted former Chadian leader Hissene Habre for crimes against humanity.⁷ This was a landmark trial in that it was the first instance in which a domestic court in Africa had exercised jurisdiction based on the universality principle.⁸ These indictments and trials have had serious legal, policy and political implications for state sovereignty on the African continent.

A number of legal scholars have asserted that there is a doctrinal link between the principles of universal jurisdiction and personal immunities, and the doctrine of state sovereignty.⁹ One of the main purposes of the thesis is to critically examine the differences in conception of the sovereignty doctrine between African and European states respectively. The thesis submits that the tensions between African states and European states regarding the exercise of universal jurisdiction against African state officials by European states, and the concerns expressed by African states regarding efforts by the ICC to prosecute African leaders for alleged human rights violations, are a result of the different ways in which African states and European states have historically obtained, and enjoyed the protection of, the principle of sovereignty. It is asserted that this tension can best be understood through a critical analysis of Antony Anghie's theory on the colonial origins of international law.¹⁰

Arap Sang ICC 01/09-02/11-373 Decision on the Confirmation of Charges Pursuant to article 61 (7) a and b of the Rome Statute (23/01/2012).

⁷ *Prosecutor v Charles Ghankay Taylor* SCSL-03-1-T Judgment of 20/5/2012; J Perrez-Leon-Acevedo 'The conviction of Hissene Habre by the Extraordinary African Chambers in the Senegalese Courts: Bringing justice in cases of human rights violations in Africa' *Africlaw* (30/6/2016) available at <https://africlaw.com/2016/06/30/the-conviction-of-hissene-habre-by-the-extraordinary-chambers-in-the-senegalese> (accessed 27/6/2018).

⁸ See S Hogestol 'The Habre Judgment at the Extraordinary African Chambers: A Singular victory in the Fight against Impunity' (2016) 34:3 *Nordic J of HR* 147.

⁹ See for example C Ryngaert 'The Concept of Jurisdiction in International Law' in A Orakhelashvili (ed) *Research Handbook on Jurisdiction and Immunities in International Law* (2015) 50.

¹⁰ See generally A Anghie *Imperialism, Sovereignty and the Making of International Law* 2007 (hereinafter Anghie 2007).

It has been asserted that the principle of universal jurisdiction has been on the decline generally following the repeal of universal jurisdiction legislation in Belgium in 2003.¹¹ It shall be argued in the thesis that despite the assertion that universal jurisdiction is on the decline generally, it is very much alive in Africa as evidenced by the adoption of enabling legislation by African states starting with South Africa in 2002.¹² The thesis shall submit that there is a paucity of scholarship on the rise of universal jurisdiction in Africa due to the historically Eurocentric focus of international law. With respect to immunities, it has similarly been asserted that when African states seek to reassert the immunity of their Heads of State and state officials, they are deviating from the norm as the principle of immunities is on the decline.¹³ The thesis shall assert that contrary to the argument that immunities are on the decline generally, immunities are still available but they are being stripped from African leaders and remain in place for politically powerful states including European states. One way of understanding this discrepancy is to place it in the context of the different ways in which African states and European states have historically enjoyed sovereignty.

1.2 BACKGROUND AND OUTLINE OF THE RESEARCH PROBLEM

Universal jurisdiction is the exercise of jurisdiction over a crime by a state which has no territorial links with the crime itself, the victims or the alleged perpetrator.¹⁴ The Permanent Court of International Justice (PCIJ) in *The Lotus Case* ruled that, in the absence of a prohibitive rule, international law permits states to exercise jurisdiction over acts occurring outside their territories.¹⁵ One of the purposes of universal jurisdiction is to ensure that certain

¹¹ See for example A Cassese 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' 2003 (1) *J of Int Criminal Justice* 585, N Arajarvi 'Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?' 2011 (6) *Tilburg LR* 5,29.

¹² See the Implementation of the Rome Statute of the International Criminal Court Act 27 Of 2002 as amended by the Judicial Matters Act of 2005 (hereinafter ICC Act).

¹³ See for example Jalloh 'Universal Jurisdiction, Universal Prescription?' 49; and generally A Bianchi Immunity v Human Rights: The Pinochet Case' 1999 (10) *European J of Int L* 237.

¹⁴ The Princeton Principles on Universal Jurisdiction (Princeton University Program in Law and Public Affairs) 2001 principle 1(1).

¹⁵ PCIJ Series A no 10(1927). The Lotus case is generally considered to be the leading authority on the subject of jurisdiction (J Dugard *International Law A South African Perspective* 4th ed 2011 147). This is notwithstanding that it has been criticised by a number of scholars who suggest that the dictum in *Lotus* has been modified by subsequent practice (Gevers & Vrancken 'Jurisdiction of States' 236-238).

international crimes do not go unpunished due to territorial limitations in jurisdiction.¹⁶ The generally agreed list of crimes over which universal jurisdiction can be exercised include piracy; slave trading; war crimes; crimes against humanity; genocide and torture.¹⁷

Personal immunities are immunities which are accorded to high ranking state officials such as diplomats, Heads of State and foreign affairs ministers by virtue of the office which they occupy.¹⁸ The principle of personal immunities operates to exempt these individuals from the civil and criminal jurisdiction of foreign courts, and operates only for as long as they continue to hold office.¹⁹ The basis for conferring personal immunities is found in both treaty and customary international law.²⁰ The rules pertaining to diplomatic immunity are outlined in the Vienna Convention on Diplomatic Relations (1961), and the customary international law position pertaining to both diplomatic and Heads of State immunities was outlined by the International Court of Justice (ICJ) in the *Arrest Warrant Case*.²¹ The court explained that

in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high- ranking office in a state such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other states, both civil and criminal.²²

¹⁶ See M Du Plessis and S Bosch ‘Immunities and Universal Jurisdiction—the World Court Steps in (or on?)’ (2003) 28 *SAYIL* 242, and judge Van den Wyngaert’s dissenting opinion in *Arrest Warrant* para 46.

¹⁷ For an overview of the generally agreed list of crimes see A Colangelo ‘The Legal Limits of Universal Jurisdiction’ (2006-2007) 47:1 *Virginia J of Int L* 149, 151; A Addis ‘Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction’ (2009) 31 *Human Rights Q* 129,136; The Princeton Principles of Universal Jurisdiction principle 2; R O’Keefe *International Criminal Law* (2015) 23.

¹⁸ D Akande & S Shah ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2011) 21: 4 *European J of Int L* 815,818.

¹⁹ *Ibid* 825.

²⁰ J Brohmer ‘Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator’ (1999) 12 *Leiden J of Int L* 361, 363.

²¹ See article 31 of the Vienna Convention on Diplomatic Relations (1961) which provides that a diplomatic agent shall enjoy immunity from both the civil and criminal jurisdiction of the receiving state; and the *Arrest Warrant Case* para 51.

²² See para 51.

The rationale behind the principle of personal immunities is that of functional necessity i.e. to ensure that Heads of State and diplomats can carry out their duties effectively, and travel without the fear of being arrested or harassed in a foreign country.²³

As has been explained above, the two principles of universal jurisdiction and immunities are both doctrinally linked to the doctrine of state sovereignty. Sovereignty has been defined as the power of a state to exercise its functions of statehood within its territorial boundaries, independent of interference from other states. It also refers to the rights of a state at international law, including its right to claim immunity for its officials from the jurisdiction of foreign courts.²⁴ This thesis asserts that Antony Anghie's theory on the colonial origins of international law and the sovereignty doctrine is key to understanding the tensions between African states and European states regarding the exercise of universal jurisdiction by European states against African state officials, and the attitude of African states towards efforts by the ICC to prosecute African leaders for alleged human rights violations.

According to Anghie, there is a historical link between colonialism and sovereignty, and it is the colonial encounter of the 19th century which shaped international law.²⁵ During the colonial confrontation non-European communities were considered to be uncivilised and therefore non-sovereign. On this basis they were excluded from the realm of international law and the principles of international law such as that of immunities did not apply to them.²⁶ At the dawn of decolonisation, the newly independent non-European states sought to enforce the doctrine of sovereignty in order to avoid any post-colonial interference from their former colonisers.²⁷ The thesis argues in this vein that African states are still sensitive to their colonial past and that is why they have claimed that universal jurisdiction as exercised by

²³ See *Arrest Warrant Case* para 53-54; Akande & Shah 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' 818; M Tunks 'Diplomats or Defendants? Defining the Future of Head of Head of State Immunity' (2002) 52 *Duke LJ* 651, 656 explaining that, '...immunity from foreign jurisdiction has been recognized throughout human history as an essential tool in conducting foreign affairs. Head of State immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention or other treatment inconsistent with his role as the head of a sovereign state.'

²⁴ A Cassese *International Law in a Divided World* 1986 130.

²⁵ Anghie 2007 3. See also A Anghie 'Towards a Postcolonial International Law' in P Singh & B Mayer (eds) *Critical International Law* (2014) 123,130.

²⁶ Anghie 2007 55-56.

²⁷ *Ibid* 7-8. See also G Abi-Saab 'The Newly Independent States and the Rules of International Law: An Outline' 1962 *Howard LJ* 95,103.

European states ,and the work of the ICC in Africa are neo-colonial. Although colonialism is now a thing of the past, the colonial encounter remains central to the development of international law.²⁸

An examination of domestic legislative instruments on universal jurisdiction in selected European countries, and the regional and domestic instruments of selected African states on universal jurisdiction highlights that universal jurisdiction has gone through two different cycles in its application. The first cycle was the rise of the principle in Europe in the late 1990s, followed by its decline in 2003 when Belgium repealed its legislation on universal jurisdiction following political pressure from powerful states whose officials had been subject to investigation based on the legislation. The repeal of the Belgian legislation was also a result of the judgment in the *Arrest Warrant* case. The thesis shall examine the domestic instruments in Belgium; Spain; Germany; Netherlands and the United Kingdom (England and Wales) as it is considered that the application of universal jurisdiction in these selected countries best mirrors the rise and decline of the principle in Europe.

The second cycle was the rise of universal jurisdiction in Africa beginning in 2002 when South Africa became the first African country to enact legislation domesticating the provisions of the Rome Statute of the ICC.²⁹ When Belgium repealed its universal jurisdiction legislation in 2003, many scholars declared that this signalled the ‘death’ of universal jurisdiction. Despite the significance of instruments such as the AU Model Law on Universal Jurisdiction³⁰ and domestic universal jurisdiction legislation such as that passed in the Democratic Republic of Congo in 2016,³¹ and the recent trial of Hissene Habre by the Extraordinary African Chambers in Senegal, there has been scholarly silence on the rise of universal jurisdiction on the African continent. There is therefore a gap in the available knowledge on the rise of universal jurisdiction in Africa.

In this regard, this thesis seeks to contribute new knowledge by critically examining the rise of universal jurisdiction in Africa since 2002. The AU Model Law on Universal Jurisdiction,

²⁸ A Anghie ‘The Evolution of International Law: Colonial and Post-Colonial Realities’ (2006) 27:5 *Third World Quarterly* 739,748-749.

²⁹ dSee the ICC Act.

³⁰ See the AU (Draft) Model Law on Universal Jurisdiction over International Crimes (2012).

³¹ Law implementing the Rome Statute of the International Criminal Court (ICC) 2016 (Democratic Republic of Congo).

and the domestic legislative instruments on universal jurisdiction enacted by South Africa; Kenya; Uganda and Mauritius shall be critically reviewed.³² The thesis argues that the Model Law was adopted to provide an alternative to universal jurisdiction as practised by Western states, and the jurisdiction of the ICC. It is pertinent to note at this point that notwithstanding the relevance and significance of the Democratic Republic of Congo legislation to the thesis, a detailed overview is not included. This is because of the difficulties encountered in obtaining information pertaining to the instrument. The question to be asked is why there is a rise in universal jurisdiction in Africa at a time when African states have criticised the application of the principle by European states against African state officials. It shall be argued that the push for universal jurisdiction by the AU is an attempt by the regional body to reaffirm the sovereignty of its member states which they were historically denied, and avoid universal jurisdiction as practised by Western States, and the jurisdiction of the ICC.

African states have expressed concern that the exercise of universal jurisdiction against African state officials by European states and the indictment of African Heads of State by the ICC disregard the immunities that the state officials and Heads of State ought to enjoy at international law. A number of scholars have argued that by reclaiming absolute immunity, African states are deviating from the trend in customary international law to deny immunity from prosecution in instances of the most heinous international crimes.³³ An examination of the history of the principle of immunities however shows that contrary to the narrative that immunities are no longer absolute; they have always been a part of international law. Due to the history of subjugation of African states by European states during the colonial encounter as explained by Anghie, African states have historically not been able to claim immunities for their subjects. As Gevers and Vrancken have explained, European states used to claim immunity for their subjects when they travelled to non-European ‘territories’.³⁴ This immunity was however *de facto* immunity as the non-European ‘territories’ were excluded from the

³² ICC Act (South Africa) *ibid*; International Crimes Act 16 of 2008 (Kenya, hereinafter ICA); International Criminal Court Act 27 of 2010 (Uganda, hereinafter ICC Act); International Criminal Court Act 27 of 2011 (Mauritius, hereinafter ICC Act).

³³ See for example B Chok ‘Let the Responsible be Responsible: Judicial Oversight and Over-optimism in the *Arrest Warrant* Case and the fall of the Head of State Immunity Doctrine in International and Domestic Courts’ (2015) 30:3 *American Univ Int LR* 489; Jalloh ‘Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction’ 49.

³⁴ See Gevers & Vrancken ‘Jurisdiction of States’ 261.

realm of international law and therefore had no legal standing to grant immunity to the European subjects.³⁵

It shall be argued in the thesis that when African states claim immunities for their officials and Heads of State, they are simply claiming immunities which have always been available at international law but which they were unable to claim due to their colonial history. It shall be asserted that the reason why efforts by African states to reclaim immunities for their Heads of States and officials have been criticised is because of the international criminal law narrative which treats colonialism as being peripheral to the discipline. Efforts by African states to reclaim immunities therefore ought not to be dismissed as just political rhetoric, but they should be considered holistically in light of the impact that colonialism continues to have on present day international law.

It ought to be emphasised that the focus of the study is on domestic immunities and universal jurisdiction. However, this thesis also considers the immunity question before the ICC because although the jurisdiction of the ICC is distinct from that of domestic courts, the questions arising from efforts by the ICC to prosecute African leaders for alleged human rights violations are closely related to those arising from the application of the principles of universal jurisdiction and immunities by domestic courts. The discussion of the reaction by African states to the work of the ICC in Africa is therefore not a diversion from the focus of the study; but it highlights the importance of the thesis. This is particularly true in respect of the confusion over immunity at the ICC.

It is submitted that the tensions between African states and the ICC regarding the immunity issue make the question of immunity under domestic law, particularly with respect to the exercise of universal jurisdiction; more important in international law. This is because efforts by African states to avoid the jurisdiction of the ICC have resulted in a turn back to domestic prosecutions by African states as evidenced by the adoption of universal jurisdiction legislation by a number of African states; and to regional justice mechanisms through the proposed African Court of Justice and Human Rights which will have a criminal chamber with jurisdiction to try international crimes.³⁶ The trial of Hissene Habre by the EAC sitting

³⁵ *Ibid*, explaining that ‘In most instances, this restriction on jurisdiction did not amount to immunity proper as the ‘territories’ concerned were not considered to be sovereign.’

³⁶ See generally C Murungu ‘Towards a Criminal Chamber in the African Court of Justice and Human Rights’ 2011 (9) *J of Int Criminal Justice* 1067.

in Senegal is a good example of the turn away from the ICC and the turn to domestic and regional justice mechanisms by African states. This heightens the relevance and importance of the study of the issue of the relationship between universal jurisdiction and immunity, and state sovereignty.

At the recent 30th AU Summit of Heads of States and Government held in Addis Ababa in January 2018, the AU Assembly agreed to request the International Court of Justice (ICJ) for an advisory opinion on the issue of Head of State immunity before the ICC.³⁷ Earlier in 2012, the AU requested the Commission to consider seeking an advisory opinion of the ICJ on the matter.³⁸ The 2012 proposal did not get much support and no further action was taken in this regard. The request for an ICJ advisory opinion by the AU takes place against the backdrop of an increasingly deteriorating relationship between the AU and the ICC following the indictment of Sudanese President Omar Al Bashir in 2009 and the confirmation of charges against Kenyan President Uhuru Kenyatta and his deputy William Ruto in 2012. The charges against Kenyatta and Ruto were withdrawn in December 2014 and April 2016 respectively due to insufficient evidence, but the arrest warrants against Al Bashir remain a contentious issue.³⁹

The contradictory nature of the provisions of the Rome statute regarding the immunity of state officials before the ICC has contributed significantly to the tensions between the AU and the ICC. Article 27 (2) provides for the irrelevance of immunities before the ICC, whilst article 98 (1) provides that the Court must first obtain the cooperation of a third state for the waiver of immunity before proceeding with a request for arrest and surrender.⁴⁰ This has

³⁷ Decision on the International Criminal Court Assembly/AU/Dec.672 (XXX) para 5 (ii).

³⁸ Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Assembly/AU/Dec.397 (XVIII) para 10; D Akande 'The African Union's Response to the ICC's Decision on Bashir's Immunity: Will the ICJ Get another Immunity Case' *EJIL Talk* (8/2/2012) available at <https://www.ejiltalk.org/the-african-unions-response-tto-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/> (accessed 27/6/2018).

³⁹ See *The Prosecutor v Uhuru Muigai Kenyatta* ICC 01/09-02/11 Notice of Withdrawal of Charges (5/12/2014); *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC 01/09-01/11 Charges Vacated (5/4/2016).

⁴⁰ See article 27 (2) and article 98 (1) of the Rome Statute of the International Criminal Court (1998) 2187 U.N.T.S 1990. For a detailed overview of the contradiction between the two provisions see C Gevers 'Immunity and the Implementation Legislation in South Africa; Kenya and Uganda' in K Ambos & O Maunganidze (eds) *Power and Prosecution : Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (2012) 85,94-105; P Gaeta & P Labuda 'Trying Sitting Heads of State: The African Union

given rise to the question as to whether Al Bashir is immune from the jurisdiction of the ICC, and whether states are obliged to arrest and surrender him in cooperation with the ICC, as Sudan is not a party to the Rome Statute.

In 2009, the AU Assembly adopted a decision that no AU member state would cooperate with the ICC regarding the warrant of arrest that had been issued against Al Bashir, on the basis of article 98 (1).⁴¹ The ICC has rendered a number of decisions of non-cooperation against African countries following their failure to arrest Al Bashir when he visited their territories, on the basis that article 98 (1) of the Rome statute does not negate the obligation on state parties to arrest and surrender Al Bashir to the ICC.⁴² The jurisprudence of the ICC in this regard has not been consistent as the Court gave different reasons in the court decisions, with the result that there is still uncertainty with respect to immunities before the Court generally and the immunities of Al Bashir and the obligation of states to arrest and surrender him in cooperation with the Court specifically.⁴³

It is regrettable that the ICC has failed to provide clarity on the relationship between article 27 and 98 of the Rome statute, and this has further heightened the tension between the AU and the ICC regarding Heads of State immunity. The resulting tensions have led to significant developments in international criminal law in Africa. Notably, African states under the auspices of the AU have taken steps to regionalise international criminal law through the proposed African Court of Justice and Human Rights, which will have a criminal chamber with jurisdiction to try international crimes.⁴⁴ A number of scholars have argued that the proposed Court is a response by African states to the perceived unfair targeting of African

versus the ICC in the Al Bashir and Kenyatta Cases' in C Jalloh & I Bantekas (eds) *The International Criminal Court and Africa* (2017).

⁴¹ Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC) Assembly/AU/Dec 245 (XIII) July 2009 para 10.

⁴² Decision on non-cooperation by Malawi (15/11/2011) ICC-02/05-09-139; Decision on non-cooperation by Chad (13/12/2011) ICC-02/05-01/09-140; Decision on non-cooperation by the DRC (9/4/2014) ICC-02/05-01/09-195; Decision on non-cooperation by South Africa (6/7/2017) –ICC-02/05-01/09-302.

⁴³ See generally A Knottnerus 'The Immunity of Al Bashir: The Latest Turn in the Jurisprudence of the ICC' *EJIL Talk* (15/11/2017) available at <https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence> (accessed 27/6/2018).

⁴⁴ See article 3 (1) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27/6/2014).

officials by the ICC.⁴⁵ Whilst the establishment of the proposed Court is commendable in that it might help in addressing the concerns raised by African states that the ICC practices double standards and unfairly targets African leaders, there are a number of issues that need to be addressed before the proposed Court can be a viable alternative to the ICC.⁴⁶ A detailed examination of these issues is however beyond the scope of this thesis and for this reason they shall not be explored.

In June 2014, the AU Assembly adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.⁴⁷ The amendment contains a provision giving immunity to Heads of State and other senior state officials from the jurisdiction of the proposed court.⁴⁸ It is submitted that the immunity provision was a response by the AU to the perceived disregard of the immunities of the leaders and state officials of African states.

Du Plessis has asserted that the immunity provision was triggered by the confirmation of proceedings against Kenyan President Uhuru Kenyatta and his deputy William Ruto by the ICC in 2012. He notes that prior to this development, the draft Protocols on the proposed

⁴⁵ See for example M Du Plessis 'Implications of the AU Decision to give the African Court Jurisdiction over International Crimes' Institute for Security Studies Paper 235 June 2012 3; C Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *J of Int Criminal Justice* 1067,1068.

⁴⁶ See C Gevers 'Back to the Future? Civil Society and the 'turn to complementarity' (2016) 1 *Acta Juridica* 95,138 arguing that 'In principle, the 'turn to complementarity in Africa, by placing the impetus on African states to initiate their own international prosecutions should work against this double standard...' See also H Woolaver 'International and Domestic Implications of South Africa's Withdrawal from the ICC' *EJIL Talk* 24/2/2017 available at <https://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc> (accessed 27/6/2018) ,noting that '...there are significant caveats that must be addressed before the African Court can be a viable alternative to the ICC, including the severe lack of resources at the Court, the unclear scope of the proposed international criminal jurisdiction...' For a detailed overview of the perceived shortcomings of the proposed Court see Du Plessis *ibid*.

⁴⁷ See the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014).

⁴⁸ See article 46A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014) which provides that 'No charges shall be commenced or confirmed before the Court against any serving AU Head of States or Government or anybody acting or entitled to act in that capacity, or other senior officials based on their functions, during their tenure of office.'

court did not include immunity provisions.⁴⁹ The inclusion of the immunity provision in the 2014 amendment was a result of the 2013 AU Assembly Decision on Africa's Relationship with the ICC⁵⁰ which resolved that the cases against Kenyatta and Ruto must be stopped.⁵¹ The inclusion of Article 46A bis was therefore motivated by the AU's resolve to reclaim immunity for Heads of State and officials of its member states in order to counter the perceived disregard of their immunities by the ICC, and at the same time avoid the jurisdiction of the ICC.⁵²

In a move that clearly shows continuing African misgivings towards international criminal justice as administered by the ICC South Africa, Gambia and Burundi in 2016 announced their intentions to withdraw from the Rome statute of the ICC.⁵³ In the aftermath of the three countries notifying the UN of their intentions to withdraw, the Sudanese President Al Bashir then urged African countries to follow suit and withdraw from the Rome statute.⁵⁴ Although

⁴⁹ M Du Plessis 'Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders' Institute for Security Studies Paper 278 Nov 2014 9.

⁵⁰ See the Decision on Africa's Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1 Oct 2013.

⁵¹ See para 10 of the 2013 Decision stating that the AU Assembly had decided '(ii) That the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto who are the current serving leaders of the republic of Kenya, should be suspended until they complete their terms of office...(xi) That President Uhuru Kenyatta will not appear before the ICC until such a time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC.'

⁵² See Du Plessis 'Shambolic, Shameful and Symbolic' (note 49 above) 9-10.

⁵³ Burundi was the first country to initiate proceedings to withdraw from the Rome statute following an overwhelming vote by Parliament in favour of the withdrawal, with only two parliamentarians voting against the move (see Mail and Guardian Africa 19/10/2016 'Burundi: Pierre Nkurunziza signs law withdrawing Country's ICC membership' available at www.mgafrica.com/.../2016-10-19-burundi-pierre-nkurunziza-sign-law-withdrawing-coun (accessed 27/6/2018). South Africa's Instrument of Withdrawal was signed by the country's Minister of International Relations and Cooperation on the 19th of October 2016 (see Sunday Times 24/10/2016 'Withdrawal from the ICC:A Sad Day for South Africa and Africa' available at www.timeslive.co.za/.../Withdrawal-from-the-ICC-a-sad-day-for-South-Africa-and-Africa (accessed 27/6/2018). Gambia declared its intention to withdraw a few days after South Africa (see Independent 26/10/2016) 'Gambia pulls out of 'racist' ICC amid fears of a mass African Exodus' available at www.independent.co.uk/news/world/africa/gambia-international-criminal-court-south-africa-burundi-withdrawal-rome-statute-a7381336.html accessed 27/6/2018).

⁵⁴ See News24 (22/10/2016) 'Sudan's Bashir urges ICC African members to quit 'colonial' court' available at www.news24.com/Africa/News/Sudans-bashir-urges-members-to-quit-colonial-court-20161022 (accessed 27/5/2018). Gambia however withdrew its notice of intention to withdraw following a change of

South Africa and Gambia later revoked the intention to withdraw, the withdrawal of Burundi from the ICC took effect on the 27th of October 2017.⁵⁵

The South African Minister for Justice explained that South Africa would closely cooperate with other African countries to strengthen continental mechanisms including the African Court on Human and People's Rights. One of the reasons the minister gave for South Africa's intended withdrawal was that the ICC Act contradicts the provisions of the Diplomatic Immunities and Privileges Act (2001)⁵⁶ which provides for the immunities and privileges of diplomats and other foreign state officials. This is because both the Rome statute and its implementing domestic legislation, the ICC Act, require the arrest and surrender of a person who is wanted by the court but who may be immune from such arrest under customary international law.⁵⁷ South Africa's attempted withdrawal was arguably motivated by earlier domestic judgments of the North Gauteng High Court and Supreme Court of Appeal regarding South Africa's failure to arrest Al Bashir when he visited South Africa for an AU Summit in June 2015. Both the North Gauteng High Court and the Supreme Court of Appeal ruled that South Africa had breached its obligations under the Rome Statute and the ICC Act

government (see News 24 14/2/2017 'UN: Gambia formally reverses withdrawal from ICC' available at <https://www.news24.com/.../News/un-gambia-formally-reverses-withdrawal-from-icc> accessed 27/6/2018). South Africa also revoked its intention to withdraw following a court ruling that the withdrawal process was unconstitutional and invalid (see Mail and Guardian 8/03/2017 'South Africa revokes ICC Withdrawal' available at <https://mg.co.za/article/2017-03-08-south-africa-revokes-icc-withdrawal> accessed 27/6/2018). In December 2017 South Africa however indicated that it was still considering withdrawing from the Rome Statute (see Opening Statement by South Africa's Minister of Justice at the 16th Session of the Assembly of State Parties of the International Criminal Court 4-14-December 2017 available at www.justice.gov.za/m_statements/2017/20171208-ICC.html (accessed 27/6/2018)).

⁵⁵ See New York Times (27/10/2017) 'Burundi Quits International Criminal Court' available at <https://www.nytimes.com/2017/10/27/world/...burundi-international-criminal-court-htm> (accessed 27/6/2018).

⁵⁶ See Section 4 of the Diplomatic Immunities and Privileges Act 31 of 2001.

⁵⁷ See the full statement by the minister on 21/10/2016, available at www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc (accessed 27/6/2018). See also *DA V Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP) para 65 where the Court explained that 'The primary reason advanced by the national executive for delivering the notice of withdrawal is that the Rome Statute impedes its role in diplomatic and peacekeeping efforts on the continent as it is required to arrest, on its soil, sitting Heads of State against whom the ICC has issued warrants of arrest'.

by not arresting Al Bashir.⁵⁸ Following the High Court Judgment, the government indicated that it would consider withdrawing from the Rome Statute.⁵⁹

In light of these developments, it is imperative that a solution should be found to the impasse between the AU and the ICC on the immunity issue to avoid the further deterioration of the relationship between the AU and the ICC, and avoid possible withdrawals from the Rome Statute by African states other than Burundi. A number of options have been suggested in this regard, including that there should be a Decision from the ICC's Appeals Chamber which would bring finality to the matter; that the state parties to the ICC should indicate their interpretation of the application of article 27 and 98; and that the ICJ should render an advisory opinion on the issue of Head of State immunity before the ICC.⁶⁰ It shall be submitted in the concluding Chapter to the thesis that the solution to the tensions between African states and the ICC regarding the immunity question, and between African states and European states regarding the application of the principles of universal jurisdiction and immunities, lies at multiple levels.

In addition to the proposals made by scholars regarding the immunity question before the ICC, the thesis shall assert that African states can regionalise international criminal law by addressing the concerns raised regarding the proposed African Court of Justice and Human Rights to make it a viable alternative to the ICC; and that the AU should adopt a model law on immunities as it did when it adopted the AU Model Law on Universal Jurisdiction in 2012. As stated above, it has been argued that the proposed court is desirable in that it will address the allegations of double standards by Western states and the ICC.⁶¹ It has also been argued that the proposed criminal chamber would improve access to justice on the African

⁵⁸ See *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; *Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre* 2016(3) SA 317 (SCA).

⁵⁹ See Statement on the Cabinet Meeting of 24 June 2015 in which it was announced that the cabinet had resolved to review South Africa's continued participation in the Rome Statute (available at www.dirco.gov.za/docs/cabinet0624.htm (accessed 27/6/2018)).

⁶⁰ See for example Knottnerus 'The Immunity of Al Bashir: The Latest Turn in the Jurisprudence of the ICC'; D Akande 'An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue' *EJIL Talk* 31/3/2016 available at <https://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/> (accessed 27/6/2018).

⁶¹ See Gevers 'Back to the Future? Civil Society and the 'turn to complementarity' in Africa and some critical concerns' 138.

continent due to its proximity to victims of human rights violations.⁶² It shall therefore be recommended that the AU should address the concerns raised in respect to the proposed African Court of Justice and Human Rights so that it can effectively focus on domestic and regional application of international criminal law.

The trial and conviction of former Chadian leader Hissene Habre by the EAC sitting in Senegal has demonstrated to the world that Africa is capable of finding African solutions to African problems.⁶³ A purely domestic and regional approach to international criminal law in Africa is therefore possible if the concerns related to Africa's readiness to implement the proposed African Court of Justice and Human Rights are addressed.

1.3 LITERATURE REVIEW

The historical origins, evolution of and meaning of the doctrine of state sovereignty is a subject which has been canvassed by a number of scholars. As has been mentioned above, this thesis asserts that the reason why the exercise of universal jurisdiction by European states and the work of the ICC in Africa leads to tensions between African states and European states is because the two sides have a different understanding of the doctrine of state sovereignty. It has been explained by Perrez that sovereignty is arguably the most important doctrine of international law as nearly all international law principles are based on it.⁶⁴ Ferreira-Snyman and Bodley have also asserted that sovereignty is a fundamental aspect of international law.⁶⁵ The doctrine of state sovereignty has been defined in different ways by the different scholars who have canvassed this subject.⁶⁶ The most concise definition has arguably been given by Cassese, who said,

⁶² C Mabunda 'The Pros and Cons of the Criminal Jurisdiction of the Proposed African Court of Justice and Human Rights' Africa *Institute of South Africa* Briefing no 98 Nov 2013.

⁶³ See Hogestol 'The Habre Judgment at the Extraordinary African Chambers'.

⁶⁴ See Perrez *Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law I*. See also Anghie 2007 316, asserting that '...sovereignty is...the foundational concept of our discipline.'

⁶⁵ M Ferreira-Snyman 'The Evolution of State Sovereignty: A Historical Overview' (2006) 12:2 *Fundamina* 1; A Bodley 'Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the former Yugoslavia' (1998-1999) 3 *New York Univ J of Intl L & Politics* 417,418.

⁶⁶ For a definition of the doctrine of state sovereignty see H Kelsen 'Sovereignty and International Law' (1960) 48:4 *The Georgetown J of Int L* 627; J Crawford *The Creation of States in International Law* 1979 26; Bodley *ibid*.

Sovereignty, in addition to granting each State a set of powers relating to the territory under its jurisdiction, includes the following sweeping rights; first, that of claiming respect for the State's territorial integrity and political independence by other States; second, that of claiming sovereign immunity for state representatives acting in their official capacity...⁶⁷

The issue of the rise and decline of the notion of absolute sovereignty has ignited considerable debate in international law. One group of scholars has argued that the notion of absolute sovereignty is now obsolete due to the rise of international criminal law which places an emphasis on individual accountability for human rights violations.⁶⁸ On the other hand, other scholars argue that sovereignty is an absolute concept which cannot be limited.⁶⁹ It shall be submitted in the thesis that the notion of absolute sovereignty of states is indeed waning as evidenced by the exercise of universal jurisdiction against African state officials by European states; the indictment of Sudanese President Omar al Bashir by the ICC and the confirmation of charges against Kenyan President Uhuru Kenyatta and his deputy William Ruto by the same court.

Although there is vast literature available on the meaning and historical evolution of the doctrine of state sovereignty, it is submitted that there is a gap in the available literature on the relationship between international criminal law and state sovereignty. As has been rightly observed by Gevers, there is a complex relationship between international criminal law and state sovereignty.⁷⁰ The thesis shall attempt to address this gap in Chapter Two by examining the different ways in which European states and African states have historically obtained, and enjoyed the protection, of the principle of sovereignty and how this has resulted in them having a different understanding of the sovereignty doctrine. It shall be asserted that African states and European states respectively apply the doctrine of state sovereignty differently as a result of the colonial and racial history of international law, and that these differences are manifest in the application of the principles of universal jurisdiction and immunities.

The main jurisprudential theories on the development of the doctrine of state sovereignty: the natural law theory, the positivist theory and the Third World Approaches to International Law (TWAAIL) theory have been covered by a number of scholars. Francisco de Vitoria's *De Indis*

⁶⁷ See Cassese *International Law in a Divided World* (1986)130.

⁶⁸ See for example Ferreira-Snyman (note 61 above) 12-13; Bodley (note 61 above) 417.

⁶⁹ See for example M Dixon *Textbook on International Law* 7ed (2013) 161.

⁷⁰ C Gevers 'International Criminal Law and Individualism: An African Perspective' in C Schwöbel (ed) *Critical Approaches to International Criminal Law* (2014) 221.

Novitres Inventis (hereinafter *De Indis*) is considered to be the most significant to the thesis in examining the relevance of the natural law theory to the development of the sovereignty doctrine.⁷¹ *De Indis* enables us to trace the primitive development of the sovereignty doctrine through the colonial encounter, and it validates Anghie's argument that the colonial encounter was central to the development of the sovereignty doctrine. Moreover it highlights that non-European sovereignty has always been deficient.⁷² Vitoria whilst arguing that the Indians could not be classified as 'animals' and that the *ius gentium* should apply to them as it does to the Spanish people, goes on to articulate the reasons to justify why they cannot be regarded as sovereign.⁷³

Anghie has given an elaborate account of the positivist theory on the development of the sovereignty doctrine in his illuminating book *Imperialism, Sovereignty and the Making of International Law* which is arguably the most authoritative text on the colonial origins of international law.⁷⁴ Anghie explains how the positivist jurists of the 19th century sought to develop a doctrine of sovereignty that would account for relations between European states which were considered to be civilised and therefore sovereign, and the non-European states which were considered to be uncivilised therefore non-sovereign.⁷⁵ Literature from the 19th century is indicative of the role that colonialism played in shaping international law. As observed by Anghie, positivist jurists used demeaning and racial language to emphasise the backwardness of non-Europeans.⁷⁶ This was one of the methods employed by positivist jurists to justify the colonial encounter.⁷⁷ Texts by positivist scholars including Henry Wheaton, John

⁷¹ See F de Vitoria *De Indis et de Iure Belli Relectionis* 1917 (E Nys Ed, J Bate trans –a collection of de Vitoria's lectures *De Indis Novitres Inventis* (On the Indians Lately Discovered) and *De Iure Bellis Hispanorum in Barbaros* (On the Law of War Made by the Spaniards on the Barbarians)116.

⁷² Anghie 2007 5, arguing that 'The colonial confrontation, however, particularly since the nineteenth century when colonialism reached its apogee, was not a confrontation between two sovereign states, but rather between a sovereign state and a non-European society that was deemed by jurists to be lacking in sovereignty-or else, at best only partially sovereign.'

⁷³ Vitoria *De Indis* 127 (arguing that the Indians possessed human reason hence they cannot be classified as 'animals') and 181 (arguing that it was justified for the Spaniards to wage war on the Indians if they resisted Spanish occupation of their territory, because they were not sovereign).

⁷⁴ Note 10 above.

⁷⁵ *Ibid* 32-100.

⁷⁶ *Ibid* 40 foot note 19.

⁷⁷ Anghie 'The Evolution of International Law: Colonial and Post-Colonial Realities' 745.

Westlake, Thomas Lawrence and James Lorimer all highlight the subjugation of non-European states by European states during the colonial encounter.⁷⁸

In this regard, the thesis aims to introduce new knowledge by examining how despite colonialism having come to an end and all states now being free to participate equally as subjects in the international legal order, the colonial encounter continues to play a role in the development of international law. This shall be done through an examination of the reaction by African states to universal jurisdiction as practiced by Western states and efforts by the ICC to prosecute African leaders for alleged human rights violations.

Scholars belonging to the TWAIL school of thought have also dealt extensively with the history of the development of the sovereignty doctrine. The significance of TWAIL to the study is that it considers the role that colonialism has played in the shaping of international law, a theory that has arguably been best advanced by Anghie.⁷⁹ Anghie asserts that colonialism played a central role in the shaping of international law, particularly the sovereign doctrine, and that in order to understand the present day structure of international law, it is important to understand how the colonial confrontation of the 19th Century continues to impact upon relations between the former colonisers and the former colonies.⁸⁰ A number of scholars share the same view as Anghie in this regard and these include Abi-Saab; Mutua and Gathii.⁸¹ The thesis critically reviews the arguments advanced by Anghie, and places these arguments within the context of the application of the sovereignty doctrine in Africa as seen through the lens of the application of the principle of universal jurisdiction and that of personal immunities, and the reaction by African states to efforts by the ICC to prosecute African leaders.

The subject of the exercise of jurisdiction based on the universality principle has also been covered by a vast number of scholars. For instance Bassiouni, O'Keefe, Ryngaert, Coombes,

⁷⁸ See H Wheaton *Elements of International Law* 1866; J Westlake *Chapters on the Principles of International Law* 1866; J Lorimer *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities* 1883; T Lawrence *The Principles of International Law* 1894.

⁷⁹ See Anghie 2007.

⁸⁰ *Ibid* 3

⁸¹ See generally Abi-Saab 'The Newly Independent States and the Rules of International Law: An Outline'; M Mutua 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1994-1995) 16 *Michigan J of Int L* 1113; J Gathii 'Twail: A Brief History of its Origins, its Decentralised Network and a Tentative Bibliography' (2011) 3 *Trade, Law & Development J* 25.

Arajarvi, and Gevers and Vrancken have extensively dealt with the meaning, scope and rationale of the principle of universal jurisdiction.⁸² A number of aspects of universal jurisdiction including its origins and doctrinal basis, the crimes over which it can be exercised and whether or not the presence of an accused is required in the country exercising universal jurisdiction are controversial.⁸³ Kontorovich has asserted that the reason why universal jurisdiction is subject to controversy is because it transcends state sovereignty.⁸⁴ Despite the controversy surrounding universal jurisdiction however, the legality of its exercise is no longer subject to dispute. As observed by Gevers and Vrancken,

State practice over the past decade-and in particular the implementation of legislation by a number of states in respect of the Rome Statute of the International Criminal Court-suggests that the exercise of universal jurisdiction is *in principle* permissible under international law.⁸⁵

The rise of universal jurisdiction in Europe from the 1990s, and its decline in 2003 when Belgium repealed its universal jurisdiction legislation has been canvassed by a number of scholars. There is vast literature available on the domestic legislative instruments of European countries.⁸⁶ A lot has also been written on the repeal of the Belgian law on universal jurisdiction in 2003, and on the reform of the universal jurisdiction legislation in Spain in

⁸² M Cherif Bassiouni 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice'; O'Keefe 'Universal Jurisdiction: Clarifying the Basic Concept'; Ryngaert 'The Concept of Jurisdiction in International Law'; K Coombes 'Universal Jurisdiction: A Means to end Impunity or a Threat to Friendly Interstate Relations?' 2011 *George Washington Int LR* 420; N Arajarvi 'Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?' (2011) (16) *Tilburg LR* 5; Gevers & Vrancken 'Jurisdiction of States' 250-253.

⁸³ See Gevers & Vrancken *ibid* 250.

⁸⁴ E Kontorovich 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45: 1 *Harvard Int LJ* 183, 184.

⁸⁵ Gevers & Vrancken 'Jurisdiction of States' 250.

⁸⁶ See for example H Ascencio 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemala Generals*' (2003) 1 *J of Int Criminal Justice* 690; H Ascencio 'The Spanish Constitutional Tribunal's Decision in *Guatemala Generals*: Unconditional Universality is back' (2006) 4 *J of Int Criminal Justice* 586; N Bhuta & J Schurr (Human Rights Watch) 'Universal Jurisdiction in Europe: the State of the Art' 2006 Vol 5 (D); W Kaleck 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' (2009) 30 *Michigan J of Int Law* 395; R Rissing-van Saan 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the former Yugoslavia' (2005) 3 *J of Int Criminal Justice* 381; R Baker 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment' (2009) *ILSA J of Int & Comparative L* 141.

2009 and the 2014 reform which effectively removed universal jurisdiction from the Spanish legal system. Reydam's critically analysed the repealed Belgian legislation and argued that the repeal was a welcome development due to the controversy surrounding it.⁸⁷ Commentators writing on the universal jurisdiction legislation reform in Spain expressed the view that the reform is retrogressive for the fight against impunity. Fernandez argued that the reform is a setback to the fight against impunity and that it has diminished the hopes of victims of human rights violations of getting justice.⁸⁸

Notwithstanding the abundance of literature available on the rise and decline of universal jurisdiction in Europe, it is submitted that there is a gap in the available literature on why the exercise of universal jurisdiction against African state officials by African states has led to tensions between African states and European states. Scholars who have addressed the issue of African misgivings towards universal jurisdiction as practiced by European states have not looked at it from the perspective of the differences in understanding of the sovereignty doctrine between African states and European states. The general trend has been to analyse whether the claims made by African states can be justified. For instance, Jalloh has argued that the claim by African states that they have been singularly targeted in the exercise of universal jurisdiction by European states is not entirely true because European courts have exercised universal jurisdiction against state officials from outside the African continent.⁸⁹

When Belgium repealed its law on universal jurisdiction in 2003, a number of scholars expressed the view that the repeal of the Belgian law signalled the total demise of universal jurisdiction and wrote 'obituaries' for the principle. Cassese, for example, asserted that '[i]t would seem that the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes.'⁹⁰ Similarly, Arajärvi asked: 'All things considered, what usage may be left for universal jurisdiction? It is time to look back and return to the

⁸⁷ L Reydam's 'Belgium Reneges on Universality: the 5 August 2003 Act on Grave Breaches of International Humanitarian Law' (2003) 1: 3 *J of Int Criminal Justice* 679.

⁸⁸ R Fernandez 'The 2014 Reform of Universal Jurisdiction Legislation in Spain: From all to Nothing' (2014) 13 *ZIS* 717 available at www.zis-online.com/dat/artikel/2014_13_883.pdf (accessed 27/6/2018).

⁸⁹ See Jalloh 'Universal Jurisdiction, Universal Prescription?' 14-16, asserting that universal jurisdiction has been exercised against officials from other parts of the world, although cases from Africa make up the bulk of the cases.

⁹⁰ A Cassese 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *J of Int Criminal Justice* 589.

roots...Absolute universal jurisdiction over international crimes is on the way to meet its maker.⁹¹

This thesis submits that contrary to the assertions that the repeal of the Belgian legislation signalled the demise of the principle, universal jurisdiction has been on the rise in Africa since 2002 when South Africa became the first African country to enact legislation domesticating the provisions of the Rome Statute.⁹² The scholarly silence on the rise of universal jurisdiction in Africa is arguably as a result of the Eurocentric nature of international law. It is submitted that universal jurisdiction is considered to be legitimate only when it is exercised by Western States. Despite the significance of the AU Model Law on universal jurisdiction, and domestic legislation on universal jurisdiction such as legislation passed by African states including South Africa; Uganda; Kenya; Mauritius; Senegal and the Democratic Republic of Congo, literature on the rise of universal jurisdiction in Africa is scant, with only a few scholars paying attention to this development.

In this respect, Dube's article is arguably the most comprehensive analysis on the rise of universal jurisdiction in Africa.⁹³ Dube argues that the AU Model Law was adopted as a result of African states' misgivings towards universal jurisdiction as practised by Western states, and towards efforts by the ICC to prosecute African leaders for alleged human rights violations.⁹⁴ Katz, Du Plessis and Stone have provided a detailed overview of South Africa's ICC Act.⁹⁵ Okuta has analysed the Kenyan legislation on universal jurisdiction.⁹⁶ The Senegalese legislation enabling the Senegalese courts to exercise universal jurisdiction over

⁹¹ Arajarvi 'Looking Back from Nowhere: Is there a Future for Universal Jurisdiction over International Crimes?' 29.

⁹² See the ICC Act.

⁹³ A Dube 'The AU Model Law on Universal Jurisdiction: An African Response to Western Prosecutions based on the Universality Principle' (2015) 24 *Potchefstroom Electronic LJ* 450.

⁹⁴ *Ibid* summary.

⁹⁵ A Kantz 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa' (2003) 12: 4 *African Security Review* 27; M Du Plessis 'South Africa's Implementation of the Rome Statute: an African Example' (2007) 5 *J of Int Criminal Justice* 460; L Stone 'Implementation of the Rome Statute of the International Criminal Court in South Africa' in C Murungu & J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 305.

⁹⁶ A Okuta 'Legislation for the Prosecution of International Crimes in Kenya' (2009) 7: 5 *J of Int Criminal Justice* 1047.

international crimes has been reviewed by Niang.⁹⁷ Dube's work is however considered to be the most comprehensive because to date, no other scholar has reviewed the provisions of the AU model Law on Universal Jurisdiction.

There is therefore a paucity of literature with regards to the significance of the rise of universal jurisdiction in Africa. The scholars who have commented on the domestic legislative instruments in Africa have not examined the significance of the rise of universal jurisdiction in Africa in relation to the desire by African states to reassert their sovereignty and thereby avoid universal jurisdiction as practised by non-African states, and the jurisdiction of the ICC in Africa. It is this gap that the thesis seeks to address in Chapter Four.

The meaning, rationale and scope of the principle of immunities have been widely covered by a number of scholars who have analysed both functional and personal immunity. These scholars include Cassese; Du Plessis and Bosch; Akande and Shah; Tunks; and Foakes.⁹⁸ In line with the purpose of the thesis, the focus is on personal immunities. There is considerable debate as to whether personal immunities ought to apply before domestic courts where an individual is accused of having committed international crimes. This is notwithstanding that the ICJ outlined in *Arrest Warrant* that personal immunities apply before domestic courts even in the face of international crimes.⁹⁹

A number of scholars have asserted that personal immunities ought not to apply before domestic courts where an individual is facing charges of having committed international crime. Dugard and Abraham, for instance, have argued that it would not be sensible for a foreign head of state to be able to successfully plead personal immunity before the domestic courts of South Africa when they cannot do so before the ICC.¹⁰⁰ Similarly, Bianchi has argued that when an individual has allegedly committed international crimes, personal

⁹⁷ M Niang 'The Senegalese Legal Framework for the Prosecution of International Crimes' (2009) 7:5 *J of Int Criminal Justice* 1063.

⁹⁸ A Cassese 'When May Senior State Officials Be Tried for International Crimes?' (2002) 13 *European J of Int L* 853; Du Plessis & Bosch 'Immunities and Universal Jurisdiction-The World Court steps in (or on?)'; Akande & Shah 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts'; J Foakes 'Immunity for International Crimes? Developments in the Law on Prosecuting Heads of States in Foreign Courts' Chatham House Briefing Paper (November 2011) available at www.chathamhouse.org (accessed 27/6/2018).

⁹⁹ *Arrest Warrant* para 55.

¹⁰⁰ J Dugard & G Abraham 'Public International Law' (2002) *Annual Survey of SAL* 166.

immunities ought not to apply.¹⁰¹ However, another group of scholars has argued that personal immunities ought to apply even when an individual is alleged to have committed international crimes. Tunks and Kayitana have asserted that if personal immunities were to fall away when an individual is alleged to have committed international crimes, this would not have the effect of promoting accountability for atrocities. It would only hinder officials from travelling abroad and this would have a negative impact on interstate diplomacy.¹⁰²

Akande and Shah have given a number of examples where courts in Europe and America have upheld the personal immunities of Heads of State and senior state officials.¹⁰³ As O’Keefe has rightly observed, state practice shows that there is no customary international law exception to the application of personal immunities before domestic courts.¹⁰⁴ This is the same position that was enunciated in the *Arrest Warrant* case, which remains the leading authority on the subject of immunities of Heads of State and senior state officials. In this regard, this thesis argues that in line with the customary international law position on immunities as outlined in *Arrest Warrant*, personal immunities apply before domestic courts regardless of the gravity of the crime in question.

The application of personal immunities before domestic courts in Europe is another area which has been widely canvassed by scholars. A review of the domestic legislative instruments on immunities in Europe shows that with the exception of the 1993 Belgian universal jurisdiction legislation, the other countries’ legislation provided for the immunity of Heads of State and state officials.¹⁰⁵ Literature is however scant on the application of the

¹⁰¹ A Bianchi ‘Immunity v Human Rights: The Pinochet Case’ (1999) 10: 2 *European J of Int L* 237,261. See also Chok ‘Let the Responsible be Responsible: Judicial Oversight and Over-optimism in the *Arrest Warrant* Case and the fall of the Head of State Immunity Doctrine in International and Domestic Courts’.

¹⁰² Tunks ‘Diplomats or Defendants? Defining the Future of Head of State Immunity’ 678-679; E Kayitana ‘The Universal Jurisdiction of South African Criminal Courts and Immunities of Foreign State Officials’ (2015) 8:7 *Potchefstroom Electronic LJ* 2560, 2576.

¹⁰³ Akande & Shah ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ 820 fn 16.

¹⁰⁴ O’Keefe *International Criminal Law* 422.

¹⁰⁵ See for example Bhuta & Schurr ‘Universal Jurisdiction in Europe: the State of the Art’; Kaleck ‘From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008’; E David ‘The Belgian Experience’ in M. Cherif Bassiouni (ed) *International Criminal Law 2008 Vol III International Enforcement* 377; M Drumbl ‘Immunities and Exception’ in M. Cherif Bassiouni (ed) *International Criminal Law ibid Vol II Multilateral and Bilateral Enforcement Mechanisms* 231.

principle of immunities in Africa. The only comprehensive commentary on the enabling legislation on immunity in Africa is arguably that by Gevers. Gevers has given a detailed overview on immunity and the enabling legislation in South Africa, Kenya and Uganda both in respect to domestic prosecutions and arrest and surrender of suspects in cooperation with the ICC.¹⁰⁶ This thesis shall attempt to address the gap in the available literature by critically reviewing the enabling legislation on immunities in the selected African countries mentioned above.

African states have in recent years been making efforts to re-assert immunities for their Heads of State and state officials. This is evidenced by the fact that the AU Model Law on universal jurisdiction provides for the immunity of Heads of State and senior state officials in article 16.¹⁰⁷ In the 2013 AU Assembly Decision on Africa's Relationship with the International Criminal Court, the AU decided that in line with the customary international law position on immunities, and with the practice of national courts, no sitting African Head of State should be indicted by the ICC.¹⁰⁸ In addition, the Protocol on Amendments to the Protocol on the Statute of the African court of Justice and Human Rights grants immunity to Heads of State and senior state officials before the proposed court.¹⁰⁹ The AU has therefore been making efforts to re-assert immunities for the Heads of State and officials of its member states.

Scholars who have commented on efforts by the AU to reaffirm the immunities of the Heads of State and state officials of member states have argued that African states are deviating from the norm as immunities have fallen. Jalloh, for instance, argues that African states should not rely on the notion of immunities when expressing their concerns regarding the exercise of universal jurisdiction against African state officials by European states, because there is a decline in the principle.¹¹⁰ Similarly, Chok has criticised the judgment of the majority in *Arrest Warrant* and argued that the doctrine of Head of State immunity has

¹⁰⁶ Gevers 'Immunity and the Implementation Legislation in South Africa, Kenya and Uganda'.

¹⁰⁷ See article 16 of the AU (Draft) Model Law on Universal Jurisdiction.

¹⁰⁸ See the Decision on Africa's relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1 Oct 2013 para 10 (1).

¹⁰⁹ See article 46 A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014).

¹¹⁰ Jalloh 'Universal Jurisdiction, Universal Prescription?' 49.

declined on the basis that ‘...the international and domestic jurisprudence after *Arrest Warrant* suggests that head of state immunity doctrine has eroded.’¹¹¹

Contrary to the narrative that immunities have fallen, immunities have always been a part of international law and the principle is not on the decline. A critical review of ICC implementation legislation in the selected European states shows that in the exercise of universal jurisdiction by these states, African state officials make up the majority of those whose immunity was disregarded. Prosecutors in countries such as Germany used their prosecutorial discretion to determine that officials from European states and other politically powerful states such as China were immune from prosecution.¹¹² Using the same prosecutorial discretion however, it was determined that officials from African states were not immune from indictment and arrest in Germany.¹¹³

It is argued in the thesis that this is evidence of the double standard that arguably exists in the application of international criminal law. Immunities have not fallen universally, but state practice in Europe shows that immunities have arguably fallen only in respect to state officials from the politically weaker states, particularly those from Africa. This argument also applies to the ICC.

A review of the literature available on the history of immunities shows that African sovereignty (when it has been granted) has always been deficient, as principles of international law including immunities did not apply to non-European states who were considered to be uncivilised and therefore not sovereign. Özsü’s ‘Ottoman Empire’ unpacks the history of the capitulations granted to European states by the Ottoman Empire, which was a partially recognised ‘state’.¹¹⁴ The evolution of the capitulatory grants from being voluntary privileges granted to European traders to being one sided treaties which were used as a means to subjugate the partially recognised ‘states’ is evidence that the colonial encounter was

¹¹¹ Chok ‘Let the Responsible be Responsible’ 493.

¹¹² See Kaleck ‘From Pinochet to Rumsfeld’ 951, explaining that in 2003 the German Federal Prosecutor declined to exercise universal jurisdiction against former Chinese President Jiang Zemin on the basis that he enjoyed immunity.

¹¹³ See Jalloh ‘Universal Jurisdiction, Universal Prescription?’ 36, explaining that the Rwandan Chief of Protocol Rose Kabuye was arrested in Germany in November 2008 pursuant to French warrant of arrest, despite the Rwandan government having asserted immunity on her behalf.

¹¹⁴ U Özsü ‘Ottoman Empire’ in B Fassbender & A Peters (eds) *The Oxford Handbook of the History of International Law* (2012) 429.

central to the development of international law. As explained by Anghie, European states insisted on the capitulations because,

For the European states, the local systems of justice were completely inadequate, and there was no question of submitting one of their citizens to these systems. Non-European states were thus forced to sign treaties of capitulation which gave European powers extra-territorial jurisdiction over the activities of their own citizens in these non-European states.¹¹⁵

On the basis of the history of capitulations, the thesis submits that contrary to the narrative that immunities have declined, immunities have always been a part of international law, but due to the colonial history, non-European communities could not claim them because they were not regarded to be sovereign. Consequently the principles of international law were deemed to be inapplicable to them.¹¹⁶ When African states seek to re-assert immunities for their Heads of State and state officials they are therefore not deviating from the norm, but they are simply claiming immunities which have always been available at international law, but which they were unable to claim due to their colonial history. In this regard, it is submitted that there is a gap in the available literature in that scholars have not focussed on the role that colonialism continues to play in the development of international law, as seen through the lens of the application of the principle of immunities in Africa. One of the purposes of the thesis is to address this gap.

As has been argued by Anghie, colonialism remains central to the development of international law although it has now been confined to history and all states can now participate freely as equal subjects of international law.¹¹⁷ This view is shared by Gevers and Megret. Gevers has argued that despite the international criminal law narrative that colonialism is a peripheral aspect of international law, it remains central to the discipline.¹¹⁸ Megret has asserted that the colonial encounter remains central to the development of international law because it contributed towards the shaping of some of the fundamental doctrines.¹¹⁹ In this regard, the thesis asserts that the push for universal jurisdiction by African states, and efforts by African states to reclaim immunities for their Heads of State and state

¹¹⁵ Anghie 2007 85. See also Özsü 'Ottoman Empire' 440.

¹¹⁶ Anghie 2007 59.

¹¹⁷ Anghie 'The Evolution of International Law: Colonial and Post-Colonial Realities' 748-749.

¹¹⁸ Gevers 'International Criminal Law and Individualism: an African Perspective' 242.

¹¹⁹ F Megret 'Where does the Critique of Human Rights Stand? An Exploration in 18 Vignettes' in J Beneyto & D Kennedy (eds) *New Approaches to International Law: The European and American Experiences* (2013) 3, 9.

officials are part of efforts by African states to reassert their sovereignty which they were previously deprived of, and that these developments ought to be understood against the background of Anghie's theory on the colonial origins of international law.

1.4 KEY RESEARCH OBJECTIVES

The key research objectives are as follows:

1. To trace the history of colonialism and sovereignty, through an analysis of the different jurisprudential theories on sovereignty and colonialism i.e. natural law theory, positivism, and the TWAIL theory as advanced by Anghie.
2. To examine how African states and European states historically obtained and enjoyed the protection of the principle of sovereignty in order to show why the two sides understand and invoke the doctrine differently.
3. To critically examine African discontent with regards to universal jurisdiction as exercised by European states, and efforts by the ICC to prosecute African leaders.
4. To critically examine the rise of universal jurisdiction in Africa in the context of the conception of the doctrine of sovereignty by African states.
5. To examine how the principle of immunities was historically used by European states to deprive African states of their sovereignty.

1.5 RESEARCH DESIGN AND THEORY

The thesis is a non-empirical desktop study, based on a critical literature review of the existing relevant sources of information. A literature review is an exercise in inductive reasoning which involves analysing a number of selected sources in order to develop a thorough understanding of a specific area of research.¹²⁰ This type of study was considered to be best suited to this thesis as a comprehensive review of the literature would give a good understanding of the application of the principles of universal jurisdiction and personal immunities in Africa and Europe, and why the application of these principles has often led to misunderstandings between the two sides.

¹²⁰ See J Mouton *How to Succeed in your Masters and Doctoral Studies* (2007) 179-180 and P Leedy & J Ormrod *Practical Research Planning and Design* (2010) 33.

A review of the literature detailing the historical link between the colonial confrontation and the development of the doctrine of state sovereignty provides useful insight into how European and non-European states have historically enjoyed sovereignty differently, leading to differences in the way they understand and apply the doctrine. It also enables us to understand how the differences in understanding of the sovereignty doctrine by African states and European states has led to misunderstandings regarding the application of the principles of universal jurisdiction and personal immunities, and the indictments of African leaders by the ICC.

The challenges associated with this research design include ‘...misunderstanding the source; selective interpretation to suit one’s viewpoint; poor organisation and integration of review.’¹²¹ These challenges can be overcome by a careful selection of sources based on the aim of the thesis, and relevance to the level of study. It is also important to ensure that the literature review is well integrated by organising the sources according to how best they answer the research questions posed in the thesis.

The primary sources relevant to the study include the customary international law position with regards to diplomatic and Heads of State immunities as outlined in the *Arrest Warrant Case* by the International Court of Justice. The *Arrest Warrant* case remains the leading authority on the subject of immunities and it is referred to extensively in the thesis. As was stated above, the main purpose of the thesis is to interrogate why the application of the principles of universal jurisdiction and personal immunities, and the work of the ICC in Africa, has led to tensions between African states and European states, and to a deterioration of the relationship between African states and the ICC respectively. In this vein, the study shall critically review domestic legislation on universal jurisdiction and immunities in the selected European countries mentioned above i.e. Belgium; Spain; Germany; Netherlands and United Kingdom (England and Wales).

The regional legislative instruments enacted by the AU which state the regional body’s commitment to fight impunity on the continent shall also be critically examined. This shall be done in order to show that despite repeated commitments by the AU to combat impunity on the continent, the AU has since 2000 been making efforts to reaffirm the sovereignty of its member states through the reclaiming of immunities. The instruments examined in this regard are the Constitutive Act of the African Union (2000); the African Union Protocol Relating to

¹²¹ Mouton *ibid* 180.

the Establishment of the Peace and Security Council of the African Union (2002); the Protocol on the Statute of the African Court of Justice and Human Rights (2008); and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014).

To address the scholarly silence on the rise of universal jurisdiction in Africa, the thesis shall examine the AU (Draft) Model Law on Universal Jurisdiction (2012) and the domestic legislative instruments on universal jurisdiction in South Africa; Uganda; Kenya; Senegal; and Mauritius. The provisions of the respective instruments relating to immunity before domestic courts and arrest and surrender in cooperation with the ICC shall also be critically reviewed. Other primary sources relevant to the study are also reviewed, including the relevant court decisions; treaties and conventions.

The secondary sources which shall be reviewed are the relevant AU Assembly decisions regarding the perceived abuse of the principle of universal jurisdiction by European states and the perceived unfair targeting of African leaders by the ICC. These include the Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction; the Decision on Africa's Relationship with the International Criminal Court (ICC); and the recent decision by the AU Assembly to request the ICJ to render an advisory opinion on the issue of Head of State immunity before the ICC (Decision on the International Criminal Court). Diplomatic statements by the AU, academic texts, and articles in journals and periodicals and online sources shall also be critically examined to show how African states and European states have historically experienced sovereignty differently; and to examine African states' discontent regarding the application of the principles of universal jurisdiction and personal immunities by European states, and efforts by the ICC to prosecute African leaders.

The principal research theory upon which this thesis is based is the Third World Approaches to International Law (TWAIL) theory as advanced by Antony Anghie. This theory is considered to be best suited to the thesis because it provides useful insight into the misunderstandings between African states and European states regarding the application of the principles of universal jurisdiction and personal immunities, and the attitude of African states towards the work of the ICC in Africa. Anghie's theory on the colonial origins of law enables us to interrogate why the application of the sovereignty doctrine, as seen through the lens of the application of the principles of universal jurisdiction and personal immunities, and

the reaction of African states to the jurisdiction of the ICC, leads to misunderstandings between African states and European states, and African states and the ICC.

The theory is also pivotal to understanding the role that colonialism continues to play in the shaping of international law, despite the fact that it is now a thing of the past and all states are now free to participate as equal subjects in the international legal order. In order to fully comprehend the role that colonialism played in the shaping of international law and thereby understand why African states are still sensitive to their colonial past, resulting in them claiming that the ICC and universal jurisdiction as practiced by Western states are neo-colonial, the thesis also critically examines other theories. These are the natural law theory and the positivism theory on the development of the sovereignty doctrine.

1.6 CHAPTER OUTLINES

Chapter One

This chapter provides the background and outline of the research problem and explains the rationale for undertaking the study. It is explained that the discussion on the relationship between international criminal law and state sovereignty in Africa as seen through the lens of the application of the principles of universal jurisdiction and personal immunities; and the relationship between Africa and the ICC, is of ongoing practical and academic relevance. This is because the recent indictments and trials of African state officials and Heads of State have had profound legal, policy and political implications on state sovereignty in Africa.

Chapter Two

This chapter shall trace the history of colonialism and sovereignty, through an analysis of the different jurisprudential theories on sovereignty and colonialism i.e. natural law theory, positivism, and the TWAIL theory as advanced by Anghie. Through a critical examination of Francisco De Vitoria's *De Indis Novitre Inventis* (On the Indians Lately Discovered), the chapter shall seek to show how non-European states were historically denied their sovereignty.

An analysis of the positivist theory highlights that the sovereignty doctrine developed as an attempt by the positivist jurists such as James Lorimer and Henry Wheaton to legitimise the colonial confrontation. Anghie's theory on the colonial origins of international law shall be examined at length and it shall be asserted that the reason why African states view universal

jurisdiction as exercised by European states, and the work of the ICC in Africa as neo-colonial, is because African states and European states have historically enjoyed sovereignty differently. They therefore understand and apply the doctrine differently.

Chapter Three

Chapter three shall examine the first cycle of universal jurisdiction i.e. the rise and decline of the principle in Europe. The domestic legislative instruments on universal jurisdiction in Belgium; Spain; Netherlands; Germany; and the United Kingdom (England and Wales) shall be critically reviewed. It shall be submitted in this chapter that the application of the principle of universal jurisdiction in the selected European countries is indicative of the existence of a double standard in the application of international criminal law. The majority of individuals against whom European states have exercised universal jurisdiction are from Africa.

The chapter shall also explain why the relationship between universal jurisdiction and personal immunities remains uncertain, and assert that the misunderstandings between African states and European states regarding the application of the principle of universal jurisdiction ought to be understood against the background of Anghie's theory on the colonial origins of international law.

Chapter Four

This chapter shall examine the second cycle of universal jurisdiction, the rise of universal jurisdiction in Africa. The regional instruments adopted by the AU which address the commitment by the regional body to combat impunity, starting from the Constitutive Act of 2002 shall be examined. The purpose of examining these instruments, which do not provide for the exercise of universal jurisdiction by member states, is to highlight the AU'S commitment to reassert the sovereignty and independence of member states, as the rise of universal jurisdiction in Africa arguably takes place against the background of these instruments.

The chapter shall also examine the AU Model Law on Universal Jurisdiction, and the domestic legislative instruments on universal jurisdiction for South Africa; Uganda; Kenya; Senegal; and Mauritius. It shall be asserted that the rise of universal jurisdiction in Africa is part of efforts by African states to reassert their sovereignty and strengthen their regional justice mechanisms in order to avoid the jurisdiction of the ICC, and universal jurisdiction as practised by non-African states.

Chapter Five

Chapter Five shall critically examine the historical evolution of the principle of immunities and its application by European states. The history of the principle of immunities shall be traced through a critical analysis of the Ottoman Empire capitulations, to show that non-European sovereignty, when it has been granted, has always been deficient, and that during the colonial encounter the principles of international law including immunities did not apply to non-European states as they were effectively considered to be non-sovereign.

The chapter shall also examine the application of the principle of immunities in Europe, through a critical analysis of the domestic legislative instruments providing for immunity in the selected European countries mentioned above. It shall be argued that contrary to the narrative that the principle of immunities has fallen universally, immunities have fallen only in respect of officials from the politically weaker states. A critical review of the application of the principle of immunities shows that African state officials make up the majority of those whose immunity has been disregarded in the exercise of universal jurisdiction by European states, and it shall be submitted that this is indicative of the double standard that arguably exists in the application of international criminal law.

Chapter Six

This chapter shall examine the application of the principle of immunities in Africa both at the regional and domestic level. The immunity provisions in the AU Model Law and the Protocol on amendments to the Protocol on the Statute of the African court of Justice and Human Rights shall be critically reviewed, followed by the immunity legislation in the selected African countries mentioned above.

The chapter shall seek to answer the question why African states are making efforts to re-assert immunities for their Heads of State and state officials, at a time when the principle of universal jurisdiction is on the rise in the continent. It shall be submitted that the reclaiming of immunities by African states is not a deviation from the norm as asserted by some scholars, but that African states are simply claiming the immunities which have always been available at international law, but which they were unable to claim due to their colonial history.

The chapter shall also attempt to address the scholarly silence on the impact that colonialism has had on the shaping of international law, as seen through the lens of the application of the

principle of immunities in Africa. It shall be argued that the push for immunities by African states ought to be understood against the background of Anghie's theory on the colonial origins of international law.

Chapter Seven

The concluding chapter shall give a summary of the research findings. It shall be asserted that:

- African sovereignty has always been deficient;
- The end of colonialism did not mean the end to colonial relations;
- The rise of universal jurisdiction and the reclaiming of immunities by African states are part of efforts to reassert their sovereignty;
- There is evidence of a double standard in the application of international criminal law.

The chapter shall also make proposals on the way forward regarding African states' misgivings towards the exercise of universal jurisdiction against African state officials by European states, and efforts by the ICC to indict African leaders. It shall be proposed that African states should focus on domestic and regional application of international criminal law, notwithstanding that the concerns that have been raised regarding the proposed African Court of Justice and Human Rights ought to be addressed first. It shall also be proposed that the AU should adopt a Model Law on immunities, and that Sudan and either South Africa or Kenya, whose courts have ruled that President Al Bashir is not immune from arrest and surrender in cooperation with the ICC; could register a dispute with the ICJ by consent regarding the issue of Al Bashir's immunities. In this regard, it shall be argued that the recent decision by the AU Assembly to request the ICJ to render an advisory opinion on the matter is commendable in that it is evidence that despite their misgivings towards the ICC, African states are still committed to the international criminal justice project. The focus has seemingly shifted from threats to withdraw from the Rome Statute of the ICC to efforts to finding solutions to the problems regarding the Court.

It shall be asserted that the recent successful trial and conviction of the former Chadian leader Hissene Habre by the Extraordinary African Chambers sitting in Senegal is evidence that African states are capable of dealing with impunity on the continent without interference from non-African states. The thesis shall conclude that the 'dynamic of difference' which was

prevalent during the colonial confrontation will always be a part of international law and that in assessing the validity of the concerns raised by the African states; consideration ought to be given to the colonial and racial nature of the history of international law.

POSTSCRIPT

This chapter shall examine South Africa's perspective on immunities before the ICC through a detailed analysis of the *Bashir Case* pertaining to his immunity from arrest and surrender to the ICC. The chapter shall also examine the changing attitude of South Africa from being an ardent supporter of the ICC at its inception, to an attitude which shows growing discontent with the Court as evidenced by its attempted withdrawal from the Court in 2016. It shall be argued that because of South Africa's influential position on the African continent, it must adopt a clear policy on the domestic application of international criminal law.

The detailed examination of South Africa's perspective on immunities before the ICC is considered relevant to the thesis because as explained above, the confusion regarding the issue has significantly contributed to the turn to domestic and regional justice mechanisms by African states. In addition, the policies adopted by South Africa in the application of international law have a significant policy and political impact on the rest of the African continent.

CHAPTER TWO

SOVEREIGNTY IN AN AFRICAN CONTEXT

2.1 INTRODUCTION

The issue that this thesis seeks to interrogate is why the application of international criminal law, particularly the principles of universal jurisdiction and personal immunities, and the distinct, but closely related, efforts by the International Criminal Court to prosecute African leaders for human rights violations, has led to tensions between African states and European states. The thesis asserts that there is a doctrinal link between the principles of universal jurisdiction and personal immunities, and state sovereignty. The main reason why the principles of universal jurisdiction and personal immunities have been applied differently by African states and European states, leading to tensions between the two is because African states have a different understanding of the doctrine of state sovereignty from that of European states.

Most of the concerns that have been raised by African states with respect to the exercise of universal jurisdiction against African state officials by European states have been centred on the doctrine of state sovereignty, with African states claiming that when European states exercise universal jurisdiction against African state officials they disregard the sovereignty that African states ought to enjoy at international law.¹²² African states have also expressed concern at the perceived unfair targeting and disregard of the immunities of African leaders by the ICC, and claimed that the court is neo-colonial.¹²³ It is submitted that the tensions between African states and European states stem from the different ways in which the two sides have historically enjoyed the doctrine of sovereignty, leading to a difference in the way they understand and invoke it. In this regard, these tensions can best be understood through a

¹²² AU-EU Expert Report on Universal Jurisdiction para 37.

¹²³ For an assessment of African states' misgivings towards the work of the ICC in Africa see generally Jalloh 'Regionalizing International Criminal Law?'

critical examination of Anghie's theory on the historical link between colonialism and sovereignty.¹²⁴

Anghie has argued that the colonial confrontation of the 19th Century was central to the development of international law, including the fundamental doctrine of state sovereignty. According to him,

colonialism was central to the constitution of international law in that many of the basic doctrines of international law –including, most importantly, sovereignty doctrine–were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.¹²⁵

An understanding of the historical link between colonialism and the doctrine of state sovereignty, as put forward by Anghie, is important because it provides a useful insight into why the doctrine of sovereignty is viewed differently by African and European states. Gevers has rightly observed by that there is a complex relationship that exists between sovereignty and international criminal law.¹²⁶ This relationship is arguably complicated by the differences in understanding of the doctrine of state sovereignty between Western states and the less developed states, in this context the African states. When Western states apply international criminal law, they purportedly do so in the interests of justice and in order to ensure that there is no impunity.¹²⁷ To African states however, the application of international criminal law, especially the principle of universal jurisdiction by European states against African state officials, is meant to disregard their sovereignty.¹²⁸

¹²⁴ See Anghie 2007 32-100.

¹²⁵ Anghie 2007 3. See also Anghie 'Towards a Post-Colonial International Law' 12. For a similar view see generally Mutua 'Why Redraw the Map of Africa: A Moral and Legal Inquiry'; M Craven 'Colonialism and Domination' in B Fassbender & A Peters (eds) *The Oxford Handbook of the History of International Law* (2012) 862.

¹²⁶ Gevers 'International Criminal Law and Individualism: an African Perspective' 221.

¹²⁷ See AU-EU Expert Report on Universal Jurisdiction para 39.

¹²⁸ The discussion on the history of colonialism and sovereignty shall highlight that colonialism denied African communities their sovereignty. However, with decolonisation, the newly independent African states sought to reinforce their sovereignty in order to guard against post-colonial interferences from their former colonisers. According to Evans, '...state sovereignty remains a passionate article of faith, particularly in the countries of the developing world.' See G Evans '1648-The Post-Westphalian State System and Universal Challenges' An Introductory speech delivered at a conference by the World Forum Organisation and the Commission on Globalisation (Brussels, 18-20 June 2003) available at www.tomspencer.info/america/cog/Speeches.pdf

This chapter shall trace the history of colonialism and sovereignty, through an analysis of the different jurisprudential theories on sovereignty and colonialism i.e. natural law theory, positivist theory, and the Third World Approaches to International Law (TWAIL) theory on the colonial origins of international law as advanced by Anghie. This shall be done in order to understand which theory best captures the reaction by African states to the exercise of universal jurisdiction by European states and to efforts by the ICC to bring African leaders to account for alleged human rights violations.

This analysis is of practical and academic relevance for a number of reasons. African discontent with regards to universal jurisdiction as exercised by European states, and to the work of the ICC in Africa appears to be growing now more than ever before. Recently African states under the auspices of the AU have expressed this discontent through a number of decisions passed by the AU Assembly. In these decisions, African states expressed their concern that universal jurisdiction was being abused by European states, and that the ICC was unfairly targeting African leaders.¹²⁹ On 12th October 2013, the AU held an extraordinary summit in Addis Ababa, Ethiopia to discuss the possible mass withdrawal of AU member states from the Rome statute of the ICC.¹³⁰ Although this summit did not result in the actual withdrawal of AU member states from the Rome statute, the General Assembly did pass a decision reiterating AU concerns regarding the perceived misuse of indictments against sitting African Heads of State.¹³¹

As was stated in Chapter One South Africa, Gambia and Burundi announced their intention to withdraw from the ICC in October 2016. Burundi formally withdrew from the Rome Statute in October 2017. It shall be asserted in this chapter that African discontent with the ICC, and with the application of universal jurisdiction and personal immunities, which has now manifested in the intended withdrawal from the Rome statute by some African

(accessed 28/6/2018). See also B Deng 'The Evolving Concept and Institution of Sovereignty: Challenges and Opportunities' *Africa Institute of SA(AISA)* Policy brief no 28 June 2010 2.

¹²⁹ For a detailed account of the Decisions of the AU General Assembly see generally D Tladi 'The African Union and the ICC: The battle for the soul of International Law' (2009) 34 *SAYIL* 57. For an assessment of African concerns regarding the perceived abuse of the principle of universal jurisdiction by African states, see generally Jalloh 'Universal Jurisdiction, Universal Prescription?'

¹³⁰ See S Derso 'The AU's Extraordinary Summit Decisions on Africa-ICC Relationship' *EJIL Talk* (28/10/2013) available at www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/ (accessed 28/6/2018).

¹³¹ See AU Assembly Decision on Africa's Relationship with the International Criminal Court (ICC).

countries, and the actual withdrawal by Burundi, is because African states are still very sensitive to the issue of colonialism.¹³² It shall be argued in the chapter that Anghie's theory on the historical link between colonialism and sovereignty is the one which best mirrors the position of African states who view international criminal justice as being neo-colonial.

It shall also be argued that the reason why African states have been turning away from the ICC and turning to universal jurisdiction on the continent is because the ICC has extended the application and understanding of the principle of complementarity. Rather than being a court of last resort which would give primacy to national courts, as initially envisaged during the negotiations on the Rome Statute and during the early days of the Court, the ICC is now actively selecting high profile cases to prosecute regardless of whether or not the domestic courts are unable or unwilling to prosecute.¹³³ This has arguably resulted in the efforts by African states to invoke domestic jurisdiction in order to avoid the jurisdiction of the ICC and its expanded understanding of complementarity.

2.2 THE MEANING OF STATE SOVEREIGNTY

In order to examine the relationship between international criminal law and sovereignty in Africa as seen through the lens of the application of the principles of universal jurisdiction and personal immunities, and the relationship between Africa and the ICC, it is important to first understand the historical origins, evolution of and meaning of the doctrine of state sovereignty.

The doctrine of state sovereignty is regarded as a fundamental rule of international law by a number of scholars. The significance of this doctrine in international law was summed up by Perrez, who argued that,

international law is based on the principle of sovereignty, that sovereignty is the most important if not the only structural principle of international law that shapes the content of nearly all rules of international law, that the international legal order is merely an expression of the uniform principle of external sovereignty, that sovereignty is the criterion for membership in the

¹³²See Jalloh 'Universal Jurisdiction Universal Prescription?' 62 arguing that 'Simply put, African states are highly sensitive about their relationship with former colonists such as France, Germany and Belgium...This point seems to be lost on the European judges and lawyers involved in universal jurisdiction cases.'

¹³³ For an overview of this issue see generally P McAuliffe 'From Watchdog to Workhorse: Explaining the ICC's Burden Sharing Policy as an Example of Creeping Cosmopolitanism' (2014)13 *Chinese J of Int L* 264.

international society, and that sovereignty in sum is the ‘cornerstone of international law’ and the ‘controlling principle’ of world order.¹³⁴

This view is shared by Ferreira-Snyman and Bodley, who have both asserted that the doctrine of state sovereignty is an important aspect of international law.¹³⁵ Although the importance of the doctrine itself is not in dispute, its meaning has been interpreted differently by a number of scholars, and it has undergone considerable transformation since its inception. One of the main reasons for this change is, according to Nagan and Haddad, because ‘...changes take place when the very concept itself means different things to different professions, disciplines and political cultures.’¹³⁶

The doctrine of state sovereignty has been defined differently by a number of scholars. According to Kelsen, sovereignty is ‘...a special quality of the state, the quality of being a supreme power or supreme order of human behaviour.’¹³⁷ Crawford defines the doctrine as the ‘...totality of international rights and duties recognised by international law.’¹³⁸ Bodley defines sovereignty as the inviolable rights which all states enjoy at international law by virtue of their statehood, and the status of equality with all other states.¹³⁹ Cassese concisely defined state sovereignty as the power of a state to exercise its functions of statehood within its territorial boundaries, independent of interference from other states, and the rights that states have at international law, including the right to claim immunity for their officials from the jurisdiction of foreign courts.¹⁴⁰

¹³⁴ Perrez *Cooperative Sovereignty from Independence to Interdependence in International Environmental Law* 13. See also A Anghie ‘LatCrit and Twail’ (2011) 42:2 *Art 5 California Western Int LJ* 312.

¹³⁵ Ferreira-Snyman ‘The Evolution of State Sovereignty: A Historical Overview’ 10; Bodley ‘Weakening the Principle of Sovereignty in International Law: the International Criminal Tribunal for the former Yugoslavia’ 417.

¹³⁶ W Nagan & A Haddad ‘Sovereignty in Theory and Practice’ (2011-2012) *San Diego Int LJ* 429, 438. See also Deng ‘The Evolving Concept and Institution of Sovereignty: Challenges and Opportunities’ 1, and Ferreira-Snyman *ibid* 2. This thesis is concerned with the meaning of sovereignty in the legal sense, although it is acknowledged that the doctrine is relevant to other disciplines such as international relations and political studies.

¹³⁷ Kelsen ‘Sovereignty and International Law’ 627.

¹³⁸ Crawford *The Creation of States in International Law* 26.

¹³⁹ Bodley ‘Weakening the Principle of Sovereignty in International Law’ 417.

¹⁴⁰ Cassese *International Law in a Divided World* 130. See also B Fassbender ‘Sovereignty and Constitutionalism in International Law’ in N Walker (ed) *Sovereignty in Transition* (2003) 115 explaining that

Sovereignty therefore constitutes both rights and duties for states. According to Bodley, for a state to be deemed sovereign it must satisfy the attributes of statehood which are ‘1) permanent population; 2) defined territory; 3) government; and 4) the capacity to enter into relations with other states.’¹⁴¹ When a state enters into relations with other states, its sovereignty in a sense becomes limited. It is pertinent to note that a distinction has been drawn between internal sovereignty and external sovereignty. Internal sovereignty refers to the power of the state to exercise its functions of statehood within its territory. External sovereignty on the other hand refers to the independence of a state from foreign interference in its exercise of statehood.¹⁴² In the *Island of Palmas* Case, the arbitrator Max Huber elaborated on the meaning of external sovereignty when he explained that ‘Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a State.’¹⁴³ In line with the purpose of this thesis the focus shall be on external rather than internal sovereignty.¹⁴⁴

2.2.1 The rise and decline of the concept of absolute sovereignty

The origins of the doctrine of sovereignty can be traced back to the 17th Century Peace of Westphalia. This comprised two treaties which were signed in Westphalia in 1648 to end a thirty year war in Europe and thereby achieve peace, security and political stability for the region.¹⁴⁵ The Westphalian state system had its basis on the absolute sovereignty of the

sovereignty refers to the rights and duties of a state, and J Maftai ‘Sovereignty in International Law’ (2015) 11: 1 *Acta Universitas Danubius Juridica* 54, 54-56.

¹⁴¹ Bodley ‘Weakening the Principle of Sovereignty in International Law’ 418 footnote 4. See also Deng ‘The Evolving Concept and Institution of Sovereignty’ 2 citing the basic characteristics of a state as permanent population, defined territory and functioning government.

¹⁴² Ferreira-Snyman ‘The Evolution of State Sovereignty’ 4; B Fassbender ‘Article 2 (1)’ in B Simma (ed) *The Charter of the United Nations: A Commentary* (2002) 84.

¹⁴³ RIAA (1928) 829, 839.

¹⁴⁴ Concerns raised by African states with respect to the application of the principle of universal jurisdiction by European states against African state officials, and international criminal law as a whole, have in part been based on the claim that European countries do not respect the sovereignty of African states thereby unduly interfering in the affairs of African states.

¹⁴⁵ See Ferreira-Snyman ‘The Evolution of State Sovereignty’ 9 (explaining that there were two treaties which were concluded in this respect, the Treaty of Munster and the Treaty of Osnabruck) and Deng ‘The Evolving Concept and Institution of Sovereignty’ 2.

individual member states.¹⁴⁶ It ought to be noted however that even before the Peace of Westphalia, some scholars were already writing on sovereignty. The 16th century scholar Jean Bodin, for instance, defined sovereignty as ‘...the absolute and perpetual power of a commonwealth...’ According to Bodin, this power could only be limited by ‘natural laws and the laws of God’¹⁴⁷

It has been argued that the origins of the notion of absolute sovereignty can be attributed to Bodin’s work.¹⁴⁸ The Peace of Westphalia was however a significant event in the development of the doctrine of state sovereignty as it established a system of governance based on the sovereign equality of states.¹⁴⁹ This was contrary to the previous situation where there was a hierarchy of states based on their religion and form of government. European States were hence considered to be of equal standing regardless of the form of religion practiced by their people or the type of government. This principle of the sovereign equality of states formed the basis of modern international law and was later codified in article 2(1) of the United Nations Charter.¹⁵⁰

There has been considerable debate amongst scholars as to whether or not absolute sovereignty is still a part of modern international law. Some scholars have considered sovereignty to be the absolute power possessed by the state. Jean Bodin argued that ‘...sovereignty, as the supreme power within a state, cannot be restricted except by the laws of God and by natural law.’¹⁵¹ Dixon defined sovereignty as ‘...the most extensive form of

¹⁴⁶ See Ferreira-Snyman *ibid* 9. See also Perrez *Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law* 22.

¹⁴⁷ See Nagan and Haddad ‘Sovereignty in Theory and Practice’ 438; Ferreira-Snyman *ibid* 5; J Franklin (Ed) 1992 *Bodin on Sovereignty*.

¹⁴⁸ Ferreira-Snyman *ibid* 9-10

¹⁴⁹ Ferreira-Snyman *ibid* 9-10; Nagan & Haddad ‘Sovereignty in Theory and Practice’ 446-447.

¹⁵⁰ Deng ‘The Evolving Concept and Institution of Sovereignty’ 2. Article 2(1) of the United Nations Charter (1945) 1 U.N.T.S XVI provides that ‘The organisation is based on the principle of the sovereign equality of all its members.’ In addition, Part 1 of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among states in accordance with the Charter of the UN (1970) GAR 2625 provides that ‘All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community notwithstanding differences of an economic, social, political or other nature.’

¹⁵¹ Franklin Bodin *on Sovereignty* Book I Chapter 8.

jurisdiction. In general terms, it denotes full and unchallengeable power over a piece of territory and all the persons from time to time therein.¹⁵²

It has been argued by Bodley that absolute sovereignty has never existed in the practical sense, but that it has only been part of international law in theory.¹⁵³ Bodley cites the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) as evidence that sovereignty is not absolute and that it is actually on the decline.¹⁵⁴ Ferreira-Snyman argues that the notion of absolute sovereignty is now obsolete, because since the beginning of the 20th Century, the accepted view is that absolute sovereignty threatens the peaceful coexistence of states.¹⁵⁵

It is submitted that state sovereignty is indeed weakening as a result of the rise of international criminal law whose emphasis is on ensuring individual accountability for human rights violations.¹⁵⁶ Those individuals such as Heads of State, who would previously not have been called to account for their actions on the basis that no state may interfere in the internal affairs of another, are increasingly coming under the spotlight for alleged atrocities. An example of this is the exercise of universal jurisdiction against African state officials by European states. For instance, in November 2006 a French investigative judge indicted nine Rwandan officials, three of whom were considered by the Rwandan government to be immune from such indictment.¹⁵⁷

In addition, the incumbent Sudanese President Omar Al Bashir was indicted by the ICC in 2009.¹⁵⁸ The ICC has also confirmed charges against the incumbent Kenyan President Uhuru

¹⁵² Dixon *Textbook on International Law* 161.

¹⁵³Bodley 'Weakening the Principle of Sovereignty in International Law' 419.

¹⁵⁴ *Ibid* 417.

¹⁵⁵ Ferreira-Snyman 'The Evolution of State Sovereignty' 1, and 12-13.

¹⁵⁶ Ferreira Snyman *ibid*, explaining that one of the reasons for the erosion of the idea of absolute sovereignty is '...the internationalization and universalization of human rights.' As has been explained by Bodley, the creation of International Criminal Tribunals such as the ICTY with the power to indict anyone regardless of their official status in their home country is evidence of the weakening of the notion of absolute sovereignty (see note 153 above).

¹⁵⁷ See generally Jalloh 'Universal Jurisdiction, Universal Prescription?' Jalloh details the exercise of universal jurisdiction against African state officials by European states and courts, and assesses the claims by the African Union that European courts and states seem to be targeting African officials only in their exercise of universal jurisdiction.

¹⁵⁸ See *The Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09.

Kenyatta and his deputy William Ruto.¹⁵⁹ Charges against Kenyatta were subsequently withdrawn in December 2014 due to lack of evidence, and the case against Ruto was terminated at the end of the prosecution case in April 2016.¹⁶⁰ African states under the auspices of the AU have raised a number of concerns with regard to the application of the principle of universal jurisdiction by European states, and have also voiced their discontent with the ICC following the indictment of Omar Al Bashir and the confirmation of charges against Uhuru Kenyatta and William Ruto.¹⁶¹

An examination of the concerns raised by African states with regard to the application of the principles of universal jurisdiction and personal immunities reflects how African states and European states respectively seem to have a different understanding of the doctrine of sovereignty. As Deng has explained, ‘...actors make sovereignty what they want it to be.’¹⁶² Although it is agreed that sovereignty is a fundamental doctrine in international law, it does not have a universal meaning as it is interpreted differently by different states. African states seem to understand sovereignty as an absolute concept which ought to prevail at all times regardless of the circumstances. In the context of the application of personal immunities, African states are seemingly of the view that personal immunities ought to apply regardless of the nature of the crime that an individual is alleged to have committed, thereby suggesting that sovereignty remains absolute.

¹⁵⁹ See *The Prosecutor v Uhuru Muigai Kenyatta* ICC 01/09-02/11 Decision on the Confirmation of Charges Pursuant to Article 61(7) a and b of the Rome Statute (26/01/2012) and *The Prosecutor v William Samoei Ruto, Henry Kiprono Kogsey and Joshua Arap Sang* ICC-01/09-01/11-373 Decision on the Confirmation of Charges Pursuant to Article 61(7) a and b of the Rome Statute (23/01/2012).

¹⁶⁰ See *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11 983 Notice of the Withdrawal of Charges against Uhuru Muigai Kenyatta (5/12/2014); *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC 01/09-01/11 (Charges Vacated -5/4/2016).

¹⁶¹ See the AU Assembly Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (Sharm al-Sheik, Egypt) Assembly/AU/14 (XI); Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction (Addis Ababa, Ethiopia) 1-Assembly/AU/3(XII) and Decision on the Abuse of the Principle of Universal Jurisdiction (Sirte, Libya) 1-3/7/2009 Doc. Assembly/AU/11(XIII). For a detailed account of the concerns raised by African states with regards to the perceived abuse of the principle of universal jurisdiction by European states, see generally Jalloh ‘Universal Jurisdiction, Universal Prescription?’ and E. Keppeler ‘Challenges for International Criminal Justice: Africa and the Role of Civil Society’ (2016) 1 *Acta Juridica* 66, 68.

¹⁶² Deng ‘The Evolving Concept and Institution of Sovereignty’ 3.

In the case of Al Bashir and Kenyatta, the AU raised a concern that the ICC had initiated proceedings against sitting Heads of State who are entitled to immunity both under customary international law and article 98 of the Rome statute.¹⁶³ European states on the other hand seem to be of the view that personal immunities ought to give way to principles promoting accountability such as universal jurisdiction in cases where an individual is alleged to have committed international crime.¹⁶⁴ This suggests that sovereignty is no longer absolute. It is pertinent to note at this point that one of the reasons why there is growing African discontent with the ICC is because African states have pushed unsuccessfully for the inclusion of an immunity provision in the Rome statute.¹⁶⁵

The difference in understanding of the sovereignty doctrine between African states and European states has led to tensions between the two sides, with African states claiming that universal jurisdiction, and international criminal law in general, is the new tool by which Western states seek to continue the legacy of colonialism in Africa.¹⁶⁶ This claim has however been discredited by a number of writers. Megret, for instance argues, within the context of indictments of African officials by the International Criminal Tribunal for Rwanda (ICTR), ICC and the Special Court for Sierra Leone (SCSL), that the claim that international criminal justice is neo-colonial is not justified because of, *inter alia*, ‘...the presence of many Africans at the tribunals, significant African public opinion and civil society support for their action...’¹⁶⁷

This does not however mean that the concerns raised by African states are completely baseless and ought to be dismissed without being given due consideration. In order to understand where African states are coming from, it is important to examine their concerns in the context of the history of colonialism and sovereignty. This shall be done through a

¹⁶³ See Du Plessis ‘Shambolic, Shameful and Symbolic: Implications of the African Union’s Immunity for African Leaders’ 9-10 and para 9 of the AU Assembly Decision on Africa’s Relationship with the ICC.

¹⁶⁴ AU-EU Expert Report on Universal Jurisdiction’ para 44.

¹⁶⁵Kepler ‘Challenges for International Criminal Justice: Africa and the Role of Civil Society’ 69-73.

¹⁶⁶ See Jalloh ‘Universal Jurisdiction, Universal Prescription?’ 5 and Kepler *ibid* 68. See also S Odero ‘Politics of International Criminal Justice; The ICC’s Arrest Warrant for Al Bashir and the African Union’s Neo-Colonial Conspirator Thesis’ in C Murungu & J Biegon (ed) *Prosecuting International Crimes in Africa* (2011) 147.

¹⁶⁷ See F Megret ‘International Criminal Justice: A Critical Research Agenda’ in C Schwöbel (ed) *Critical Approaches to International Criminal Law* (2014) 35.

critique of Anghie's theory on the historical link between colonialism and the development of the doctrine of sovereignty.

2.3 JURISPRUDENTIAL THEORIES ON THE HISTORY AND DEVELOPMENT OF THE DOCTRINE OF SOVEREIGNTY

The history of state sovereignty can best be understood from a jurisprudential analysis of the natural law theory, positivist theory and TWAIL theory on the subject, and a critique of the relevance of these theories to contemporary international law. Scholars belonging to the different schools of thought interpreted the meaning of sovereignty differently. This is because the different jurisprudential theories were prevalent at different periods of the development of international law, and each theory was developed in response to the events which were taking place at that time.¹⁶⁸

2.3.1 The natural law and positivist theories

The natural law theory was prevalent from the 16th century until approximately the 18th century. The main aspects of this theory were that it was closely linked to the principles of justice, it had its roots in religion and it was predicated upon the notion of the universality of law. Proponents of the natural law theory attributed sovereignty to human reason and to natural law, and asserted that law was administered by an overarching morality which all states had to obey.¹⁶⁹ Jean Bodin, a 16th century French jurist argued that sovereignty could only be limited by '...the laws of God and natural law.'¹⁷⁰ Francisco de Vitoria, a 16th century Spanish jurist, argued that the *ius gentium* derived from natural law and human reason hence it was applicable to all humans.¹⁷¹

Hugo Grotius, a 17th century Dutch scholar, attributed law to reason. Like Bodin and Vitoria, he argued that the *ius gentium* was the primary source of international law. Contrary to Bodin and Vitoria however, Grotius drew a distinction between the *ius gentium* and international

¹⁶⁸ Anghie 'The Evolution of International Law: Colonial and Post-Colonial Realities' 740.

¹⁶⁹ Anghie 2007 41-42. See also Anghie *ibid*.

¹⁷⁰ See Franklin *Bodin on Sovereignty*.

¹⁷¹ Ferreira-Snyman 'The Evolution of State Sovereignty' 6; Franciscus de Vitoria *De Indis et de Iure Belli Relectionis* (E Nys Ed, trans J Bate) 1917 151(a translation of Francisco de Vitoria's two lectures, *De Indis Novitre Inventis* (On the Indians Lately Discovered) and *De Jure Bellis Hispanorum in Barbaros* (On the War made by the Spaniards on the Barbarians) *De Indis et de Iure Belli Relectionis* (1696).

law based on the consent of states.¹⁷² Notwithstanding this, Grotius maintained that international law was applicable to all sovereign states even though its application depended upon the consent of states.¹⁷³ As rightly argued by Anghie therefore, ‘Nominally at least, under the system of naturalism both European and non-European societies were bound by the universal law which was the foundation of international law.’¹⁷⁴

Francisco de Vitoria’s lecture *De Indis Novitris Inventis* is arguably the most significant text in the context of the early history of the relationship between the development of the doctrine of sovereignty and colonialism. *De Indis* was based on the interactions between the Spanish people and the newly discovered Indians. Vitoria’s work was published before the signing of the Peace of Westphalia, hence religion played an important role in determining whether or not a state could be regarded as sovereign.¹⁷⁵ At that time, the discovery of the Indian people by Christopher Columbus and the ensuing encounter between the Spanish, who were considered to be sovereign, and the Indians, who were considered to be lacking in any rights because they were, among other things, ‘barbaric’, raised important questions including what law was the appropriate one to deal with the encounter between the two sides as their societies and cultures were totally different.¹⁷⁶

In dealing with this issue, Vitoria rejected the notion that non-Christians could not enjoy any rights or own property by virtue of their status as non-believers.¹⁷⁷ He argued that although the authority of the Pope was not applicable to the Indians as they did not practice the Christian faith, they were bound by natural law which applied to all human beings. Describing the Indians, Vitoria said

the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords,

¹⁷² Ferreira-Snyman *ibid* 8; A Campbell (translation 1814) *Grotius De Iure Belli ac Pacis* Book 1Ch 1 para 10-14.

¹⁷³ Ferreira-Snyman *ibid*.

¹⁷⁴ Anghie ‘The Evolution of International Law’ 745.

¹⁷⁵ Anghie ‘Towards a Postcolonial International Law’ 131.

¹⁷⁶ Anghie *ibid*.

¹⁷⁷ Anghie 2007 18. Vitoria argued in this regard that ‘Unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural or human law; therefore, they are not destroyed by want of faith’ See Vitoria *De Indis* 120(as cited by Anghie).

laws and workshops, and a system of exchange, all of which call for the use of reason: they also have a kind of religion. Further, they make no error in matters which are self-evident to others: this is witness to their use of reason.¹⁷⁸

Vitoria then proceeded to argue that because they possessed human reason, the Indians were bound by the *ius gentium*, which is the universal natural law applicable to all nations. Vitoria is regarded as a champion of indigenous and Indian rights for his refusal to treat the Indians as ‘animals.’ There is however a contradiction between his rejection of the notion that the Indians lacked any rights because they did not practice Christianity, and his assertion that they could not be classified as sovereign because although they possessed human reason, they did not meet the European standard of civilization.¹⁷⁹ For this reason, his work is considered to have been complicit in the invasion of Indian Territory by the Spanish.¹⁸⁰ In this regard, it is submitted that contrary to arguments advanced by some scholars that Vitoria’s *De Indis* established the notion of sovereignty beyond European states, his arguments concerning the Indian people’s standard of civilisation do not suggest that he regarded the Indians to be sovereign.¹⁸¹

On the contrary, Vitoria regarded the Indians as being non-sovereigns.¹⁸² In his discussion on the law of just war in *De Indis*, he explained that it would be justifiable for the Spaniards to wage war on the Indians on the basis of Indian resistance of the occupation of their territory by the Spaniards, as this would be a breach of the law of nations.¹⁸³ In this regard, Vitoria

¹⁷⁸ F De Vitoria *De Indis Novitre Inventis* (1532) 127, as cited by Anghie *ibid* 20.

¹⁷⁹ Anghie *ibid* 29.

¹⁸⁰ Anghie *ibid* 21, explaining that ‘While appearing to promote notions of equality and reciprocity between the Indians and the Spanish, Vitoria’s scheme must be understood in the context of the realities of the Spanish presence in the Indies. Seen in this way, Vitoria’s scheme finally endorses and legitimizes endless Spanish incursions into Indian society.’ See also Anghie ‘Towards a Postcolonial International Law’ 132.

¹⁸¹ See for instance L Valenzuela-Vermehren ‘Empire, Sovereignty, and Justice in Francisco De Vitoria’s International Thought: A Re-Interpretation of *De Indis* (1532)’ (2013) 40: 1 *Revista Chilena de Derecho* 259 262, arguing that one of the main arguments advanced by Vitoria in *De Indis* was that ‘...indigenous communities, in fact, possessed dominion or sovereign status.’ 265. It is not in dispute that Vitoria believed that by virtue of their human reason the Indians had dominion but he argued that their culture and society did not meet the universally accepted standards, in this case the Spanish standards. On this basis, they could not be classified as sovereign. (Anghie 2007 21-22).

¹⁸² Anghie 2007 26, asserting that ‘...the most unequivocal proposition Vitoria advances as to the character of the sovereign is that the sovereign, the entity empowered to wage a just war, cannot, by definition, be an Indian.’

¹⁸³ *Ibid* 24.

asserted that the laws of war which made it unlawful to enslave women and children were not applicable to the Indians.¹⁸⁴ According to Vitoria,

And so when the war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods is justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and women of Saracens into captivity and slavery.¹⁸⁵

Although Vitoria had earlier on argued that the Indians should not be classified as ‘animals’ as they were of sound mind and therefore the *ius gentium* ought to apply to them equally as it did to the Spaniards, he considered them to be excluded from the realm of international law due to their being non-sovereigns.¹⁸⁶ Anghie has asserted that Vitoria’s argument that the occupation of the Indian Territory by the Spaniards was justified was based on the notion of the cultural difference which existed between the Indians and the Spaniards, and it is this cultural difference which shaped his perception on the doctrine of sovereignty.¹⁸⁷ Anghie has noted in this regard that,

In summary, then, there are two essential ways in which sovereignty relates to the Indian: in the first place, the Indian is excluded from the sphere of sovereignty; in the second place, it is the Indian who acts as the object against which the powers of sovereignty may be exercised in the most extreme ways.¹⁸⁸

Vitoria’s refusal to consider the Indians as a sovereign people is indicative of how naturalists viewed non-European communities. With the exception of Vitoria, natural law jurists did not even raise the issue of whether non-European communities could be considered as sovereign or not. They did not even consider that non-European communities could have sovereignty

¹⁸⁴ *Ibid* 26.

¹⁸⁵ Vitoria *De Indis* 181 (cited by Anghie *ibid* 27).

¹⁸⁶ Anghie *ibid* 22.

¹⁸⁷ *Ibid* 29. Anghie explains that ‘...the Indian, possessing universal reason and yet backward, barbaric, uncivilised-is subject to sanctions because of his failure to comply with universal standards. It is precisely whatever denotes the Indian to be different-his customs, practices, rituals-which justify the disciplinary measures of war...These sanctions are administered by the sovereign Spanish to the non-sovereign Indians.’

¹⁸⁸ *Ibid* 27-28.

apply to them. To the naturalists, it was unimaginable that non-European states could be sovereign.

Vitoria's work is still important in tracing the development of the doctrine of sovereignty through the colonial encounter. *De Indis* gives credence to Anghie's assertion that the doctrine of sovereignty was constituted through colonialism. Although Vitoria first rejects the notion of regarding Indians as 'animals' and submits that the *ius gentium* should equally apply to them as it does to the Spanish people, he then goes on to elaborate on the reasons why they cannot be regarded to be fully sovereign and why they need to be transformed by the Spanish. It is submitted that, as has been rightly argued by Valenzuela-Vermehren, Vitoria's work is still as relevant in modern day international law as it was in the 16th century.¹⁸⁹ Through his lecture, *De Indis*, we are able to trace the primitive origins of the link between sovereignty and colonialism. As was aptly observed by Anghie, 'The colonial encounter is central to the formulation of Vitoria's jurisprudence whose significance extends to our own times.'¹⁹⁰

2.3.2 19th century: Positivism and the distinction between the civilised states and uncivilised communities

The jurisprudential theory of positivism has been prevalent from the 19th century, and it continues to be the dominant theory in international law, having emphatically replaced the natural law theory in the late 19th century.¹⁹¹ Contrary to the natural law theory which asserted that the law applied universally to non-European and European people, positivism insisted on drawing a distinction between civilised and uncivilised states. Positivist scholars rejected the notion postulated by natural law jurists that there was an overarching morality which administered the law to all sovereigns, and instead asserted that the law was the creation of the sovereign itself, which was regarded as the principle actor in international law.¹⁹² Positivist jurists also asserted that the sovereign could only be bound by those rules to which it had consented, and in this vein rejected the natural law theory on the basis that it did not take into account the will of states in international law.

¹⁸⁹ See Valenzuela-Vermehren (note 181 above) 262.

¹⁹⁰ Anghie 2007 30.

¹⁹¹ *Ibid* 33.

¹⁹² *Ibid* 41-42.

It is pertinent to note at this point that some positivist scholars tried to bridge the gap between the natural law theory and the positivist theory. For instance, James Lorimer, whilst acknowledging that international law was constituted by treaties and customs, went on to argue that the law had its basis on the law of nature and that its objective was that ‘...of securing and furthering liberty.’¹⁹³ According to Anghie, Lorimer emphasised on the interdependence of the law of nations and natural law. Jurists from the late 19th Century however, sought to reject all aspects of the natural law theory. One of the leading jurists of the time, Lassa Oppenheim, argued that it was no longer justifiable to continue with the teaching of natural law, due to its perceived shortcomings.¹⁹⁴

Positivist scholars insisted on drawing a distinction between the civilised (European) states and uncivilised (non-European) communities, asserting that the law applied only to the civilised states belonging to the family of nations.¹⁹⁵ In this regard, positivists rejected the natural law theory on the basis that it failed to make this distinction. The positivists regarded international law to be applicable only to the civilised states, thereby rejecting the naturalist theory’s notion that the *ius gentium*, derived from human reason, applied to all humankind. Henry Wheaton argued that the law did not apply equally to Europeans, who were considered to be civilised and therefore sovereign, and to non-Europeans, who were considered to be uncivilised and therefore not sovereign. In making this argument, Wheaton said,

Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been and still is, limited to the civilized and Christian people of Europe or to those of European origin.¹⁹⁶

Anghie has argued that the cultural and societal differences between the European and non-European people, which he refers to as the ‘dynamic of difference’ was evident to both the natural law and the positivist jurists. This is highlighted by Vitoria’s *De Indis*, in which Vitoria acknowledged the cultural differences between the Spanish people and the newly discovered Indians. However, it is the method by which the naturalists and positivists attempted to bridge this gap that is different. Vitoria, whilst asserting that the Indians did not

¹⁹³ Lorimer *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities* 23. See also Anghie *ibid* 43.

¹⁹⁴ L. Oppenheim ‘The Science of International Law: Its Task and Method’ (1908) 2 *The American J of Int L* 313, 328. See also Anghie *ibid*.

¹⁹⁵ Anghie *ibid* 53.

¹⁹⁶ Wheaton *Elements of International Law* 15. See also Anghie *ibid* 15

practice a standard of civilisation which measured up to that of the Spanish, rejected the notion that they were ‘animals’, insisting that they possessed human reason and that the *ius gentium* applied to them just as it applied to the Spanish. On the other hand, the positivist scholars asserted that the way to bridge the gap between the civilised Europeans and the uncivilised non-Europeans was by imposing the European law over the non-Europeans.¹⁹⁷ John Westlake, for example, justified the occupation of non-European people’s land by the Europeans by saying that, ‘The occupation by uncivilised tribes of a tract, of which according to our habits a small part ought to have sufficed for them, was not felt to interpose a serious obstacle to the right of the first civilised occupant.’¹⁹⁸

African political communities and other non-European communities were therefore excluded from the realm of international law because they were considered to be uncivilised and that they were too simple to comprehend the meaning of the concept of sovereignty. They were therefore not recognised as sovereign states.¹⁹⁹ During the 19th century, non-Europeans were referred to using derogatory language which was meant to emphasise their perceived backwardness and lack of civilisation. Derogatory words such as ‘barbarians’ and ‘savages’ were commonly used to refer to non-Europeans. Lorimer, for instance, writing on the subject of the partial recognition of non-European communities, said,

He[the international jurist]is not bound to apply the positive law of nations to savages, or even to barbarians ,as such; but he is bound to ascertain the points at which, and the directions in which, barbarians or savages come within the scope of partial recognition.²⁰⁰

This demeaning language, according to Anghie, was part of the positivist scholars’ strategy to subordinate non-European communities and thereby justify the colonial confrontation as

¹⁹⁷ Anghie *ibid* 54.

¹⁹⁸ J Westlake *Chapters on the Principles of International Law* (1894) 137.

¹⁹⁹ Anghie 2007 63, explaining that ‘Within the positivist universe, then, the non-European world is excluded from the realms of sovereignty, society, law; each of these concepts which acted as founding concepts to the framework of the positivist system was precisely tdefined, correspondingly, in ways which maintain and police the boundary between the civilized and uncivilized. The whole edifice of positivist jurisprudence is based on this initial exclusion, this determination that certain societies are beyond the pale of civilization.’ See also Gevers ‘Back to the Future?’ 122. On the assertion by positivist jurists that non-Europeans were too simple to comprehend the meaning of the sovereignty doctrine, see Anghie 2007 59 and Lawrence *The Principles of International Law* 58.

²⁰⁰ See Lorimer *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities* 102 as cited by Anghie *ibid* 76 footnote 132.

one which was legitimate, on the basis that the non-Europeans needed guidance as they were too backward to understand and manage legal systems.²⁰¹

As a result of this perception by European states of non-Europeans being ‘barbarians, savages’, non-Europeans were not consulted at all even on matters that affected them directly. A good example of this scenario is the Berlin Conference of 1884-1885. The main agenda of this conference was the partitioning of Africa, and how the European states were to deal with the scramble for Africa which was threatening to disrupt the peace between European states. Although this conference was about African would-be states, the Africans themselves were neither consulted nor informed that such a conference was to take place.²⁰² Africans were therefore considered to be irrelevant in the scheme of international law, their opinion was not important. Anghie has rightly argued that this distinction between civilised and uncivilised states was the positivists’ way of managing and justifying the colonial confrontation.²⁰³

2.3.3 Positivism and the definition of sovereignty

As has been discussed above, one of the main aspects of the positivist theory on law and sovereignty was that it regarded sovereignty to be central to the system of international law. In this regard, positivist jurists were preoccupied with trying to explain why the non-European communities which were considered to be uncivilised could not be sovereign. This is contrary to the natural law theory which, due to its focus on the law applying universally, was not concerned with defining sovereignty. According to Anghie, ‘Such a project of definition was not so fundamental to the naturalist framework as that jurisprudence outlined a system of law which applied to all human activity, whether of an individual or a sovereign.’²⁰⁴

²⁰¹ See Anghie ‘The Evolution of International Law’ 745 explaining that one of the main aspects of positivism in the 19th Century is the way positivist scholars came up with principles that employed ‘...explicitly racial and cultural criteria ...’ to distinguish between civilised states and the uncivilised communities. See also Gevers ‘Back to the Future?’ 119, explaining that on the basis that the non-European communities were considered as ‘barbarians’ they were totally excluded from the ‘emerging family of nations.’

²⁰² See U Umzurike *International Law and Colonialism in Africa* (1979) 26; Anghie 2007 91; Mutua ‘Why Redraw the Map of Africa’ 1127.

²⁰³ Anghie *ibid* 65-67.

²⁰⁴ *Ibid* 56.

Positivist jurists asserted in this regard that the criterion for statehood, and incidentally sovereignty, was that of control over territory.²⁰⁵ However, some of the non-European communities, such as the African would-be states of Benin, Mali and Ethiopia satisfied this criterion as they were highly sophisticated and had control over territory.²⁰⁶ To address this dilemma the positivists then added another criteria, that of society. Apart from control over a territory, a would-be state had to be civilised in order to be accepted in the family of nations.²⁰⁷

The distinction between the civilised states and uncivilised communities therefore played a central role in determining whether or not a would-be state could be accepted into the family of nations. It did not matter whether or not a non-European would-be state was considered to be completely backward or slightly advanced in terms of civilisation. If it had not been accepted into the family of nations that meant that it did not meet the criteria for statehood.²⁰⁸ In this vein, all non-European communities were excluded from the realm of international law as according to positivist jurisprudence, only European states were considered to be civilised and any progress by a would-be state in terms of civilisation had to be measured against the European standard. As a result, the family of nations was comprised of European states only. Commenting on the exclusion of non-Europeans from international law, Anghie asserts that the doctrine of sovereignty developed from this distinction. He argues that ‘...the constitution of sovereignty doctrine itself was based on this fundamental distinction because positivist definitions of sovereignty relied on the premise that civilised states were sovereign and uncivilised states were not.’²⁰⁹

It is submitted that it is this distinction between the civilised states and uncivilised communities by the positivist jurists which validates Anghie’s argument that the doctrine of

²⁰⁵ Anghie *ibid* 57-58; Lawrence *The Principles of International Law* 58, explaining that control over territory was so fundamental as a prerequisite for statehood that ‘...it would be impossible for a nomadic tribe, even if highly organised and civilised, to come under its provisions.’ For a detailed account of how states met the requirements of statehood and recognition, see generally Crawford *The Creation of States in International Law*.

²⁰⁶ Anghie *ibid* 58. See also T Elias *Africa and the Development of International Law* (1972) 136.

²⁰⁷ Anghie *ibid* 59. According to Anghie ‘The concept of society enabled positivists to develop a number of strategies for explaining why the non-European world was excluded from international law. One such strategy consisted of asserting that no law existed in certain non-European, barbaric regions. According to this argument, the distinction between civilised and uncivilised was too obvious to require elaboration.’

²⁰⁸ Anghie *ibid* 62.

²⁰⁹ Anghie *ibid* 63.

sovereignty was developed through the colonial confrontation. This is because having made this distinction between civilised states and uncivilised communities, the positivist scholars then articulated ways in which the uncivilised non-European communities could be brought into the realm of international law.²¹⁰

The positivists devised four basic doctrines by which non-European communities could be assimilated into the realm of international law. The non-European communities could be integrated into the family of nations through treaty making, colonisation, protectorate agreements, and independent non-European communities such as the then Japan and Siam could be accepted into the family of nations upon meeting the European standard of civilisation.²¹¹ When a non-European community was assimilated through colonialism, it was then subjected to the sovereignty of the European state which would have colonised it, and consequently any state which sought to enter into relations with the colonised community would deal not with the indigenous people but the colonisers.²¹² In this vein, it is asserted that the positivist jurisprudence played an active role in legitimising colonialism and the dispossession of the non-European communities of their territory by the Europeans.

The distinction made by positivist scholars between civilised European states and uncivilised non-European communities is now obsolete due to the doctrine of sovereign equality of states as codified in article 2 (1) the United Nations Charter. Notwithstanding this, there have been allegations of double standards regarding the application of international rules along colonial lines by scholars, and by the AU. Gevers has discussed this issue of double standards in the context of the complementarity provision in the Rome statute, which states that the ICC will only deal with a matter if a state is unable or unwilling to deal with it.²¹³ He notes that as all cases that the ICC has dealt with are from Africa, complementarity challenges have come from African states only and that the ICC has not dealt with this matter directly and argues that ‘...when one compares the fairly rigorous standards applied in these cases, to the casual manner in which the previous Prosecutor determined - in a sentence - that

²¹⁰ Anghie *ibid* 65.

²¹¹ Anghie *ibid* 67.

²¹² Anghie *ibid* 82.

²¹³ See Article 17 of the Rome Statute of the International Criminal Court.

British war crimes in Iraq were being investigated by the relevant authorities, concern might be warranted.²¹⁴

In terms of both domestic and international courts and tribunals therefore, it is evident that a higher standard of justice is placed on African states than on their European counterparts.²¹⁵ This highlights that although colonialism is now a thing of the past and all states now participate equally in international law, the impact of the positivist jurists' distinction between civilised and uncivilised states which then legitimised colonialism, conquest and dispossession of non-European states can still be felt in modern day international law. African states have claimed that when European states exercise universal jurisdiction against African state officials, this evokes memories of colonialism to them. All the aspects of the positivism theory including the standard of civilisation are therefore still relevant to modern day international law.

2.3.4 Third World Approaches to International Law (TWAIL) and Anghie's Theory on the Colonial Origins of International Law

Third World Approaches to International Law (TWAIL) originated in the late 1990s.²¹⁶ Some of the fundamental aspects of TWAIL are drawn from the critical legal theory, whose main

²¹⁴ Gevers 'Back to the Future?' 125.

²¹⁵ Gevers *ibid* 124-125, *citing* the example of the rigorous conditions which Rwanda had to comply with in order for the ICTR to transfer cases to its domestic courts, compared with the transfer of cases from the ICTR to France and Netherlands which was not as complicated. It ought to be noted however that the different standards applied to African states and European states may be due to the fact that European courts are better able to guarantee the human rights of the accused persons when compared to their African counterparts. See for example para of the AU-EU Exert Report on Universal jurisdiction para 45, where the European experts noted that the reason why European states have in the past declined to extradite individuals accused of having committed international crimes to requesting African states is because of a failure by the requesting African states to guarantee the protection of fundamental human rights of the accused. However, because African states are still sensitive to their colonial past, they would view such refusals as an attempt by European states to continue the legacy of colonialism in Africa by dictating the acceptable standards of justice.

²¹⁶ See Gathii 'TWAIL: A Brief History of its Origins, its Decentralised Network, and a Tentative Bibliography' 26. It ought to be noted that some scholars have referred to the 1990s TWAIL as TWAIL II, arguing that there is an earlier generation of scholars whose writings greatly influenced the more recent TWAIL. These include Georges Abi-Saab, R Anand and Talism Elias. See in this regard A Anghie and B Chimni 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' 2003 *Chinese J of Int L* 77, 79. See also A Bianchi *International Law Theories: An Inquiry into New Ways of Thinking* (2016) 215-217. The focus of the thesis on this section is on the work of the contemporary TWAIL scholars.

focus is to show that international law concepts are neither natural nor neutral, but that they have been shaped by a history which highlights the reason why they are in their present state.²¹⁷ TWAIL scholars approach international law issues from a critical perspective.²¹⁸

The fundamental aspects of TWAIL have arguably been best articulated by Antony Anghie in *Imperialism, Sovereignty and the Making of International Law*.²¹⁹ The main focus of TWAIL is to bring politics to the centre of international law by examining the colonial origins of international law. According to Gathii and other adherents to TWAIL, ‘...while international law guarantees sovereign equality and self-determination, it carries forward the legacy of imperialism and colonial conquest.’²²⁰

Anghie has asserted that the colonial confrontation between Europeans and non-Europeans is the one which shaped international law, particularly the doctrine of sovereignty which is regarded as the founding doctrine of international law. He argues in this regard that ‘...no adequate account of sovereignty can be given without analysing the constitutive effect of colonialism on sovereignty. Colonialism was not an example of the application of sovereignty; rather, sovereignty was constituted through colonialism.’²²¹

The central aspect of Anghie’s theory is that in order to understand the present day structure of international law and international relations, it is important to fully consider the colonial history, particularly that of the 19th century, and how it had a lasting effect on relations between the former colonisers and those who were colonised. The doctrine of sovereignty can therefore not be fully understood without comprehending the history of the colonial encounter from the discovery of Africa to the decolonisation of the continent and other continents such as Asia which suffered the same fate. Anghie explains how the colonial encounter constituted sovereignty by critiquing Francisco de Vitoria’s *De Indis*, highlighting that the notion of the standard of civilisation originated long before the 19th Century, the

²¹⁷ See B Johnson (trans 1981) J Derrida *Dissemination* (Translator’s Introduction xv) explaining that ‘The critique reads backwards from what seems natural, obvious, self-evident or universal in order to show that these things have their history, their reason for being the way they are, their effects on what follows from them, and that the starting point is not a (natural) given but a (cultural) construct, usually blind to itself.’

²¹⁸ Bianchi (note 219 above) 217; Gathii (note 216 above) 43.

²¹⁹ This view is shared by Gathii *ibid*.

²²⁰ Gathii *ibid* 30-31.

²²¹ Anghie 2007 37-38

period during which it was legitimised by positivist jurisprudence prevalent at that time.²²² He then goes on to examine the theory of positivism and how it legitimised the colonial encounter by coming up with doctrines to explain the relations between the Europeans who were regarded to be civilised and therefore sovereign, and the non-Europeans who were considered to be uncivilised and therefore not sovereign.

Another important aspect of TWAIL is its rejection of the positivist jurists' Eurocentric perception of the origins of international law. Positivist scholars argued that international law originated in Europe and it was later spread to non-Europeans when they came into contact with the 'civilised' Europeans.²²³ TWAIL scholars however argue that the colonial encounter is the one which shaped international law, and that the history of international law is not complete without analysing the part played by colonialism in its development. Anghie argues that contrary to assertions by some scholars that international law was developed in Europe then assimilated in the non-European colonies; it is the colonial confrontation which shaped international law. He argues in the context of the development of the doctrine of sovereignty that, '...sovereignty was improvised out of the colonial encounter, and adopted unique forms which differed from and destabilised given notions of European sovereignty.'²²⁴

Anghie also asserts that Vitoria's *De Indis* is evidence that contrary to the traditionally accepted view, sovereignty was not extended to the non-European states in its Westphalian form.²²⁵ The peace of Westphalia was therefore not the defining moment for the doctrine of sovereignty, but it was the colonial encounter which had a profound effect on this doctrine. According to Anghie,

Clearly, then, Vitoria's work suggests that the conventional view that sovereignty doctrine was developed in the West and then transferred to the non-European world is, in important aspects, misleading. Sovereignty doctrine acquired its character through the colonial encounter. This is

²²² See also in this regard Gevers 'Back to the Future?' 119 explaining that before the positivist theory which distinguished between the civilised Europeans and the uncivilised non-Europeans, there was already a distinction drawn between the Christian Spaniards and the non-Christians who were referred to as barbarians. This resonates with Anghie's theory that the subordination of non-Europeans started long before the 19th Century, but was given prominence by the positivist jurists.

²²³ See for example J Verzijl *International Law in Historical Perspective* (1968) 435-436; See also Bianchi *International Law Theories* 217.

²²⁴ Anghie 2007 6. See also Gathii 'Twail: A Brief History of its Origins' 42.

²²⁵ Anghie *ibid* 29.

the darker history of sovereignty which cannot be explored or understood by account of sovereignty doctrine assuming the existence of sovereign states.²²⁶

The historical development of international law and its present day nature therefore cannot be divorced from the history of colonialism which played a significant part in shaping international law. This is so despite the fact that many scholars have attempted to downplay the role that colonialism played in shaping international law.²²⁷ Anghie has asserted that one of the reasons why the colonial encounter was regarded as being peripheral to the development of international law is because it did not take place between two sovereign states. Rather, it was an encounter between a European sovereign state and a non-European community, which would be regarded as not being sovereign and excluded from the realm of international law.²²⁸

Contrary to the traditional view that regarded colonialism as being peripheral to the development of international law however, colonialism has always been central to the subject of international law. According to Gevers, colonialism,

has and continues to shape international law's past, present and future in ways that are still being articulated today. This is equally true of international criminal law, where colonialism and the discipline's failure to come to terms with it not only haunts its past, but threatens its future.²²⁹

This assertion by Gevers resonates with Anghie's theory on the colonial origins of international law, particularly the doctrine of state sovereignty, which is the main focus of Anghie's book.

TWAIL focuses on the history of international law in order to show that there is a link between the older forms of domination particularly colonialism, and the newer forms of domination such as governmentality, which have arguably seen Third World countries being

²²⁶ *Ibid* 29-30.

²²⁷ *Ibid* 36.

²²⁸ *Ibid* 34.

²²⁹ Gevers 'International Criminal Law and Individualism' 242. See also Megret 'Where Does the Critique of International Human Rights Stand?' 9; explaining that colonialism is very much a part of international law as it shaped some of its most important doctrines.

subordinate to their First World counterparts.²³⁰ The prevailing trends in international law can therefore only be understood through an understanding of the historical relationship between the European states and non-European states. According to Anghie,

If, however, the colonial encounter, with all its exclusions and subordinations, shaped the very foundations of international law, then grave questions must arise as to whether and how it is possible for the postcolonial world to construct a new international law that is liberated from these colonial origins.²³¹

Anghie then explains, using what he terms the ‘dynamic of difference’ which refers to the way in which positivist jurists distinguished between civilised European states and uncivilised non-European communities, how the colonial encounter was legitimised by the positivist language and doctrines. In this regard, the doctrine of sovereignty was not developed entirely on a legal basis, but also on the basis of cultural and societal differences.²³² Anghie explains that although positivist scholars emphasised on the primacy of sovereignty, the concept of society was equally important to the civilising mission.²³³ Although the ‘standard of civilisation’ as articulated by the positivist scholars is now a thing of the past as all states freely participate in the international legal system as equal members, remnants of this distinction are still manifest in present day international law. Gevers has noted that despite the fact that the ‘standard of civilisation’ is now obsolete in international law, a number of scholars have pointed to the application of double standards in international criminal law, with different standards seemingly applying to the former colonisers and the former colonies respectively.²³⁴

Although colonialism is now a thing of the past, it continues to shape international law. This is evident in the way in which African states under the auspices of the AU have claimed that when European states exercise universal jurisdiction against African state officials, this invokes memories of colonialism to them. African states collectively view international criminal law as being neo-colonial. In the context of the indictments of incumbent African

²³⁰ Gathii ‘Twail: A Brief History of its Origins’34. See also Anghie and Chimni ‘Third World Approaches to International Law and Individual Responsibility in International Conflict’78, explaining that international law can only be properly comprehended in the context of the history of colonialism.

²³¹ Anghie 2007 8.

²³² Anghie *ibid* 55.

²³³ Anghie *ibid* 63.

²³⁴ Gevers ‘Back to the Future?’122-123.

leaders by the ICC, African states believe that they are being unfairly targeted because they are the politically weaker states. The Rwandan President Paul Kagame said regarding this issue, ‘This world is divided into categories, there are people who have the power to use international justice or international law to judge others, and it does not apply to them.’²³⁵

It is therefore important to examine the role that colonialism has played in influencing present day international law theories and international relations, as seen through the lens of the application of international criminal law in Africa. Central to this examination is the issue of the misunderstandings between African states and European states with regard to the application of the principles of universal jurisdiction and personal immunities, as a result of the different ways in which they understand and invoke the doctrine of state sovereignty, and the perceived unfair targeting and disregard of the immunities of African leaders by the ICC.

According to Anghie’s theory on the colonial origins of international law, historically non-European communities were not recognised as being sovereigns. This is because they were considered to be uncivilised. In this regard, international law applied only to the civilised states, and in the 19th Century this essentially meant international law only applied to European states.²³⁶ African communities were therefore considered to be, and treated as inferior to, their European counterparts.

This inferior position was manifest in a number of ways. In the context of immunities, Gevers and Vrancken have explained that European states used to ensure that their subjects were immune from foreign jurisdiction when they travelled to non-European communities. However, as these communities were not considered to be sovereign, the immunity was not immunity proper as the non-sovereign communities did not have the capacity to confer the immunity in question.²³⁷ It has further been explained that European states did not seek immunity only for state officials, but even for ordinary citizens. The non-Europeans on the other hand, were not entitled to this privilege.²³⁸ This shows that international law; in

²³⁵ See Africa Review (16/10/2013) ‘Rwanda’s Kagame Criticises ‘selective’ ICC Justice’ available at www.africareview.com/News/Kagame-hits-out-at-selective-ICC-justice/-979180/2034400/-slkdmf/-/index.html (accessed 28/6/2018).

²³⁶ Anghie 2007 53.

²³⁷ See Gevers & Vrancken ‘Jurisdiction of States’ 261.

²³⁸ See generally Özsu ‘Ottoman Empire’.

particular the doctrine of sovereignty did not apply universally to all states. It only became a universal doctrine as a result of colonial expansion, at the end of the 19th century.²³⁹

At the dawn of decolonisation, African states sought to reinforce the doctrine of sovereignty in order to avoid external influence on their new found independence. To African states therefore, sovereignty is an all-important concept which ought to be strengthened rather than eroded. The importance of the doctrine of state sovereignty to non-European states that were previously colonised was aptly summed up by Abi-Saab, who asserted that,

For the newly independent states, sovereignty is the hard won prize of the long struggle for emancipation. It is the legal epitome of the fact that they are masters in their own house. It is the legal shield against any further domination or intervention by stronger states. They are very aware of its existence and importance for, until recently, they were deprived of it.²⁴⁰

This argument by Abi-Saab resonates with arguments by African states that the perceived abuse of the principle of universal jurisdiction by European states against African officials is an affront to their sovereignty and that it evokes memories of colonialism to African states. With respect to the operation of the ICC, there has been controversy surrounding the purported immunity that is enjoyed by the five permanent members of the Security Council, and their allies such as Israel. African states are of the view that only African situations such as Sudan and Libya are being referred, but there is evidence of human rights abuses by countries such as America in Iraq and Israel in Gaza, yet these states seem to be untouchable to both the Security Council and the ICC²⁴¹

These misunderstandings highlight the effects that colonialism has had on the shaping of international law. Although the distinction between civilised and non-civilised states as advanced by positivist scholars is no longer relevant in modern day international law, it remains significant in that it is part of the history which shows that international law has not always been universal and neutral. Notwithstanding that international law now applies equally to all states, African states are of the view that international criminal law, in particular 'European' universal jurisdiction, and the ICC, are neo-colonial.

²³⁹ Anghie 2007 32.

²⁴⁰ Abi-Saab 'The Newly Independent States and the Rules of International Law: An Outline'103. See also Anghie *ibid* 196.

²⁴¹ See Gevers 'Back to the Future?'229; Megret 'Where Does the Critique of Human Rights Stand?'24; Du Plessis 'Shambolic, Shameful and Symbolic' 9.

As has been mentioned above, one of the aims of TWAIL is to show that the pattern of dominance which prevailed during the colonial era is still evident in contemporary international law.²⁴² In this vein, Anghie has asserted elsewhere that, ‘The end of colonialism, whilst extremely significant, did not result in the end of colonial relations. Rather, in the view of Third World societies, colonialism was replaced by neo-colonialism.’²⁴³

Positivist scholars created a doctrine which tried to make sense of the colonial encounter thereby legitimising it, and entrenching the idea that non-European peoples were uncivilised therefore inferior to the Europeans. African states are still sensitive to the issue of their colonial past, where Africans and other non-Europeans were referred to as ‘barbarians, savages, backward’ among other derogatory terms.²⁴⁴ It is important to mention at this point that when European states exercise universal jurisdiction, or when the members of the Security Council exercise their powers of referral under the Rome Statute, they do not tell African states that they have less sovereignty, or purport to do so by exercising universal jurisdiction against African states officials. However, because Africans have historically been deprived of their sovereignty, they then interpret these actions as showing that the West still has power over them, and that their sovereignty is not being respected. This is because due to the colonial history as discussed above, the African states’ understanding of international law doctrines particularly universal jurisdiction, personal immunities and state sovereignty is different from that of European states. As has been argued by Anghie, the exercise of sovereignty often mirrors the inequalities that were characteristic of the 19th Century.²⁴⁵

For this reason, African states’ discontent with international criminal law is likely to continue for the foreseeable future. Megret has rightly observed that, ‘The colonial moment will not go away that easily because it helped to forge some of the very basic concepts of international law.’²⁴⁶

²⁴² Bianchi *International Law Theories* 217.

²⁴³ Anghie ‘The Evolution of International Law’ 748-749.

²⁴⁴ See Anghie 2007 40, explaining that ‘The language of the period is replete with racial aspersions to the ‘uncivilised’, ‘natives’, ‘backward’ and so forth...’

²⁴⁵ *Ibid* 114.

²⁴⁶ Megret ‘Where Does the Critique of Human Rights Stand?’ 9 See also Gevers ‘Back to the Future?’ 122.

It would suffice in this regard to draw a conclusion that African states, weary of their colonial past, view international criminal law as a neo-colonial tool which is being utilised by Western states to assert their dominance over them.

As explained by Anghie, the decolonisation process itself was characterised by inequalities, and he brings out the continued subordination of the non-European people by giving a detailed account of the Mandate System of the League of Nations.²⁴⁷ The detailed history of colonisation, the partitioning of Africa and the Mandate system is beyond the scope of this thesis. However, it ought to be emphasised that all the phases of this history from the ‘discovery’ of Africa by the Europeans, until decolonisation, are important in unpacking the relationship between African states and European states in modern day international law.

2.4 CONCLUSION

The above discussion on the different jurisprudential theories on sovereignty has highlighted that African sovereignty has always been deficient. Non-European states were historically denied their sovereignty as they were considered to be uncivilised. At the dawn of decolonisation, the distinction between civilised and uncivilised became obsolete as all states became equal sovereigns. However, as argued by Anghie the end of colonialism did not result in the end to colonial relations. African states therefore sought to reclaim their sovereignty which they had been previously denied, as they regarded it as their shield against continued domination by their former colonisers.

When the Organisation of African Unity was formed in 1963, its main purposes included defending the territorial sovereignty of its member states and to end colonialism in all its forms, thereby ensuring total emancipation for its member states.²⁴⁸ Since the AU replaced the OAU in 2002, a number of instruments have been adopted which reiterate Africa’s commitment to fight impunity, and respect the sovereignty of its member states. The Constitutive Act of the African Union was adopted in 2000. This was the first instrument which addressed the issue of impunity on the continent, and provided for intervention in a member state where there were allegations of international crimes having been committed.²⁴⁹ The Protocol Relating to the Establishment of the Peace and Security Council of the AU was

²⁴⁷ For a detailed account see Anghie 2007 115-195.

²⁴⁸ See article II (2) (c) and (d) of the OAU Charter (1963).

²⁴⁹ See article 4 (h) of the Constitutive Act of the AU.

introduced in 2002. It provided for the establishment of the Peace and Security Council and empowered it to deploy a peacekeeping mission in a member state without approval from the UN Security Council.

In 2008, the AU introduced the Protocol on the African Court of Justice and Human Rights which proposed the merger of the African Court of Justice and the African Court on Human and Peoples Rights into a single regional court with a criminal chamber. This chamber would have the jurisdiction to try international crimes. The 2008 protocol was amended in 2014 to include an immunity provision for Heads of State and other senior state officials. These instruments, starting from the Constitutive Act, reiterate that the AU is guided by the principle for the respect of the sovereignty of its member states. Intervention in a member state is only warranted in cases where there is evidence of the crimes of genocide, war crimes and crimes against humanity having been committed, as provided in article 4 (h) of the Constitutive Act.

As has been explained in the introduction to this chapter, African states have expressed their concern in various decisions of the AU Assembly, on the perceived abuse of the principle of universal jurisdiction by European states. African states have claimed that the indictment of African state officials by European states has the effect of undermining their sovereignty.²⁵⁰ In addition, African states have also expressed their misgivings towards the perceived unfair targeting of African leaders by the ICC, which they view as neo-colonial. In order to avoid the jurisdiction of the ICC, and universal jurisdiction as practiced by European states, African states under the auspices of the AU have embarked on a project to reaffirm their sovereignty by strengthening their own justice systems. The stated commitment by the AU to fight impunity is therefore part of efforts by the AU to reassert sovereignty for its member states, by strengthening the justice mechanisms on the continent so that issues of impunity can be dealt with by African states without interference from non-African states.²⁵¹

As this thesis shall argue in Chapter Four, the push by African states for universal jurisdiction takes place against the background of Anghie's theory on the colonial origins of international law. The rise of universal jurisdiction in Africa since 2002 when South Africa became the first African country to domesticate the Rome Statute is a reaffirmation of sovereignty by African states in order to avoid unwarranted interferences in the name of

²⁵⁰ See AU-EU Expert Report para 37-38.

²⁵¹ These instruments shall be discussed in more detail in Chapter Four.

international criminal justice. Since 2002, a number of African states have enacted universal jurisdiction legislation and these include Kenya, Uganda, Mauritius, Senegal and the Democratic Republic of Congo. Senegal amended its Penal Code and Criminal Procedure Code in 2007 to provide a framework for the prosecution of Hissene Habre. This led to the establishment of the Extraordinary African Chambers in 2013 and ultimately to the successful trial and conviction of Habre in 2016, based solely on universal jurisdiction. Universal jurisdiction has therefore gained ground in Africa because African states want to reclaim their sovereignty.²⁵² As Williams has explained, ‘The AU has become increasingly opposed to international criminal justice in general, and places a strong emphasis on the sovereignty of its member states.’²⁵³

With respect to the perceived unfair targeting of African state officials by the ICC, the AU has also claimed that this undermines the sovereignty of its member states. In 2009, the AU Assembly adopted a decision on non-cooperation with the ICC following the indictment of incumbent Sudanese president Omar Al Bashir in 2009.²⁵⁴ As Africa’s discontent with the work of the ICC in Africa grows, there have been calls for a mass withdrawal from the Rome Statute by African states.

Following the confirmation of proceedings against Kenyan President Uhuru Kenyatta and his deputy William Ruto by the ICC, Kenya has been at the forefront of calling for African states to withdraw from the ICC. In 2016 South Africa, Gambia and Burundi announced their intention to withdraw from the Rome Statute of the ICC, and South Africa and Gambia later revoked their withdrawal notices in 2017. The question to be asked in this regard is why African states, which at the inception of the ICC were very supportive of the court, have become critical of the court and are now pushing for universal jurisdiction on the continent as an alternative to ICC jurisdiction. African states, which had at the inception of the court been very supportive of the court, are increasingly becoming weary of its efforts to deal with impunity on the continent and have indicated a desire to withdraw from this court. A project

²⁵² See Perrez-Leon-Acevedo ‘The conviction of Hissene Habre by the Extraordinary African Chambers in the Senegalese Courts’.

²⁵³ S Williams ‘The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?’ (2013)11 *J of Int Criminal Justice* 1139, 1148.

²⁵⁴ See Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec 245(XIII) July 2009. See also Tladi ‘The African Union and the ICC: The Battle for the Soul of International Law’ 57.

which was initially welcomed within the continent is now being viewed with scepticism as a neo-colonial tool.

It is submitted that the reason why African states welcomed the idea of an international criminal court at the beginning is because to African states, the ICC represented international justice that was not in any way influenced by Western states as it was envisaged to be an independent Court. To African states therefore, supporting the ICC was a way of reclaiming their sovereignty by avoiding universal jurisdiction as practiced by European states and subjecting themselves to a court which would give primacy to national courts through its principle of complementarity. During the negotiations on the Rome Statute, and in its early days, the emphasis lay on the court being a court of last resort. McAuliffe has explained that at the beginning, the primary role of the ICC would be to ensure that States fulfilled their obligations under the Rome Statute. However, although on paper the Court is a court of last resort, which is supposed to initiate proceedings only when domestic courts with jurisdiction are unable or unwilling to prosecute, in practice the court has ceased to play a monitoring role and is now actively selecting high level cases to prosecute, leaving the lower level cases to national jurisdictions.²⁵⁵

This policy shift is highlighted by the contrasting views expressed by two judges of the ICC. In 2004 the first President of the ICC Judge Philippe Kirsch asserted that,

It is only in extreme cases that the international community should intervene. Normally there should be no reason to intervene...The business of the court is not to second-guess domestic prosecutions. The ICC is not after prosecutions.²⁵⁶

In contrast, Judge Mario Politi in 2011 said,

What is then, the ultimate purpose of complementarity? There is no doubt that one important goal is to establish a division of labour between national jurisdictions and the ICC ,under which

²⁵⁵ See McAuliffe 'From Watchdog to Workhorse' 259-261. On the complementary role of the court see Article 17 Rome Statute, and for commentary see generally M Benzing 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity'(2003) 7 *Max Planck Yearbook of United Nations Law* 591.

²⁵⁶ See Council on Foreign Relations Briefing 'Accountability Versus the International Criminal Court' Federal News Service 16/01/2004 (cited by McAuliffe 262).

the Court should essentially concentrate on those who have major responsibility for the crimes involved.²⁵⁷

This reflects a policy shift from the ICC being a court of last resort with a monitoring role to one which circumvents the sovereignty of states and is actively involved in prosecutions regardless of whether or not the domestic courts have shown a willingness to prosecute international crimes. According to McAuliffe, 'The old orthodox that the court would operate in a merely residual manner as a 'last resort' or as a 'safety net' may now represent the minority view.'²⁵⁸

It is this shift in policy which has arguably resulted in the fallout between African states and the ICC, in addition to the perceived double standards on complementarity with respect to African states, as discussed above.

The question to be asked then in this regard is why when the ICC has had such bad press African states seem to be keen on universal jurisdiction. It is submitted that the answer to this question is that African states are pushing for universal jurisdiction because the ICC has failed them. The ICC has expanded the application and understanding of the principle of complementarity. It has ceased to play a monitoring role and has become actively involved in selecting high level cases to prosecute. The policy shift on the part of the ICC as explained above shows that the ICC just assumes that it can override the sovereignty of individual states. This does not sit well with African states because one of the main reasons why African states supported the ICC in the beginning was because they wanted to reaffirm their sovereignty by engaging with a court which they perceived to be free from the influence of the Western states and which would give primacy to domestic courts, thereby respecting their sovereignty. As the ICC has arguably done the opposite of this, African states are now seeking an alternative to the jurisdiction of the ICC as evidenced by the recent trial of Hissene Habre by the EAC in Senegal.

This chapter has examined the different jurisprudential theories on the development of the sovereignty doctrine. It is submitted that any discussion of the relationship between sovereignty and universal jurisdiction and personal immunities in Africa would be incomplete without a consideration of how the colonial confrontation played a role in the

²⁵⁷ See M Politi 'Reflections on Complementarity at the Rome Conference and beyond' in C Stahn & M El Zeidy *The International Criminal Court and Complementarity: From Theory to Practice* (2011) 142,145.

²⁵⁸ McAuliffe 'From Watchdog to Workhorse' 261-262.

development of the sovereignty doctrine, leading to a different understanding of the doctrine between African states and European states.

In view of the recent developments in international criminal law which have seen some African states indicating their intention to withdraw from the Rome statute of the ICC, it is therefore important to assess which of the jurisprudential theories that have been discussed above best resonates with the reaction of African states to international criminal law. In the wake of the notifications for the intended withdrawals by South Africa, Gambia and Burundi, a number of scholars have added their voice to the issue of what could be the reason behind why the ICC project, which enjoyed novel support from African countries at its inception, seems to be slowly crumbling due to African states' disillusionment with the project.²⁵⁹

Gevers has argued that in order to understand why Africa seems to have lost its zeal for international criminal law, it is important to seriously take into account the impact that the colonial and racial history of international law has had on contemporary international law.²⁶⁰ Any theory that deals with the relations between European states and non-European states, without considering international law's colonial and racial history, is therefore inadequate in terms of explaining why African states feel that they are being unfairly targeted. In this regard, it is submitted that Anghie's theory on the colonial origins of international law is the one which best resonates with African states' position regarding international criminal law, as seen through the lens of the application of the principles of universal jurisdiction and immunities, and the reaction to the work of the ICC in Africa.

Anghie's theory takes into account other theories in tracing the colonial origins of international law from Vitoria's *De Indis*, right through to the 19th Century 'dynamic of difference' as advanced by the positivist jurists. In so doing, Anghie enables us to answer the question as to how international law, which is supposed to be universal and to apply equally to all states regardless of their history as either the colonisers or the colonised, is understood differently by African and European states respectively.

African states have indeed taken a collective position that universal jurisdiction as practiced by European states, and the ICC are neo-colonial. The announcements by South Africa,

²⁵⁹ See for example Akande 'South Africa's Withdrawal from the International Criminal Court-Does the ICC Statute Lead to Violations of other International Obligations?' and Gevers 'South Africa and the ICC: Justice, or 'Just Us?'.

²⁶⁰ *Ibid.*

Gambia and Burundi of their intention to withdraw from the Rome statute of the ICC can be interpreted as a move to counter the perceived unfair targeting of African states by the West. Anghie's theory is in this regard the one which best mirrors the concerns raised by African states with regards to international criminal law. The intended withdrawals (and the actual withdrawal by Burundi) can also be inferred as the African states' way of reinforcing their sovereignty and avoiding external influence.

The South African Minister for Justice explained that South Africa would closely cooperate with other African countries to strengthen continental mechanisms including the African Court on Human and People's Rights. One of the reasons the minister gave for South Africa's intended withdrawal was that the ICC Act contradicts the provisions of the Diplomatic Immunities and Privileges Act (2001) which provides for the immunities and privileges of diplomats and other foreign state officials. This is because both the Rome statute and its implementing domestic legislation, the ICC Act, require the arrest and surrender of a person who is wanted by the court but who may be immune from such arrest under customary international law.²⁶¹

In concluding this chapter, it is submitted that the concerns raised by African states with respect to the exercise of universal jurisdiction by Western states against African officials, and the perceived unfair targeting of African leaders by the ICC, have to be taken clearly and given due consideration rather than be brushed away by Western states and the ICC respectively.²⁶² As the above examination of Anghie's theory on the colonial origins of international law has highlighted, the inequalities which were prevalent during the colonial era did not end with the end of colonialism, but the exercise of sovereignty in contemporary international law often mirrors the inequalities which were characteristic of the discipline of international law during the colonial confrontation.

As correctly argued by Gevers therefore, in considering the validity of the concerns raised by the African states, regard ought to be had to the colonial and racial nature of the history of international law.²⁶³ African states are still very sensitive to their colonial past hence their concerns ought to be evaluated in the context of this history which played a very significant part in shaping the important doctrines of international law. *Abi-Saab*, describing the attitude

²⁶¹ See the full statement by the minister.

²⁶² Gevers 'Back to the Future?' 105.

²⁶³ Gevers 'Africa and the ICC: Justice or Just Us?'

of the former colonies to international law, averred that, ‘The newly independent states do not easily forget that the same body of international law that they are now asked to abide by sanctioned their previous subjugation and exploitation and stood as a bar to their emancipation.’²⁶⁴

It is therefore important for these concerns to be considered wholesomely to understand where the African states are coming from. In addition, it is important for the European states when they do exercise universal jurisdiction, to strive to strike a balance between ensuring accountability and respecting the basic tenets of the doctrine of state sovereignty. This would address the allegations of double standards in the application of the principle of universal jurisdiction by European states. With regards to the ICC, it is hoped that the court will seriously consider the recommendations and concerns raised by African states. Perhaps, as argued by Woolaver, continued engagement between the Court and African states, particularly on the issue of immunities of Heads of State, might result in African states reconsidering their stance on withdrawal from the Rome statute.²⁶⁵

It is hoped that the resolutions adopted by the AU Assembly in its latest decision to request the ICJ to render an advisory opinion on immunities before the ICC will help to resolve the impasse between the AU and the ICC on this issue. The decision also resolved to request African state parties to the ICC to request the Assembly of State parties to convene a working group of experts to clarify the relationship between article 27 and 98 of the Rome statute, which has been the main source of contention between the AU and the ICC regarding the issue of immunities before the Court.²⁶⁶ This is evidence that African states are not totally opposed to the ICC but they want their concerns regarding the operation of the Court to be taken seriously.

Discussions within the AU on the mass withdrawal of African states from the Court have been ongoing for some time, with reports of a non-binding decision on a mass withdrawal strategy having been made at the AU summit in Addis Ababa, Ethiopia on the 31st of January

²⁶⁴ Abi-Saab ‘The Newly Independent States and the Rules of International Law: An Outline’ 100.

²⁶⁵ Woolaver ‘International and Domestic Implications of South Africa’s Withdrawal from the ICC.’ Woolaver explains that South Africa (and other African states) is of the position that Bashir is immune from prosecution by the ICC, whilst the Rome statute stipulates that he is not. This impasse is therefore likely to continue for a long time to come, diminishing any hopes that African states and the ICC may reach a compromise on the matter.

²⁶⁶ See Assembly/AU/Dec.672 (XXX) para 5 (i-iii).

2017. It was however reported that there was no general consensus on the issue, with Senegal and Nigeria being opposed to the withdrawal.²⁶⁷ The African Union also wants to engage the United Nations on the issue of reforming the ICC. It cannot therefore be concluded that African states are totally against the ICC as they are divided on the issue of withdrawal. It is however clear that they want their own justice mechanisms which would result in them not having to defer matters to the ICC always.²⁶⁸

In this vein, it is submitted that whilst it would be commendable for Africa to strengthen its own justice mechanisms, there are many issues that need to be addressed before the proposed African Court of Justice and Human Rights can effectively prosecute international crimes.²⁶⁹ In the meantime, it would be in the interest of justice for African states and the ICC to cooperate in order to effectively combat atrocities on the continent. In this regard, it is argued that the ICC should take the views of African states seriously in order for African states to cooperate with it. As ICC Judge Eboe-Esuji has warned, ‘It is...not only naïve for the judges and Prosecutor of this Court to ignore the views of Heads of State in important questions of the day in international affairs, but it is also possibly wrong, as a matter of law, to do so.’²⁷⁰

It is pertinent to note that the ICC does not practice universal jurisdiction, but it is a court of last resort. However, an examination of the African states’ reaction to the work of the ICC is important because it mirrors the attitude of African states which collectively view international criminal law as neo-colonialism. Finally, the discussion on the history of colonialism and sovereignty has clearly highlighted that the reason why the application of international criminal law has resulted in misunderstandings between African states and European states are a result of the two different sides not giving the doctrine of sovereignty cognisance to the same extent

²⁶⁷ See BBC News 1/2/2017 ‘African Union Back Mass Withdrawals from ICC’ available at www.bbc.com/news/world-africa-38826073 (accessed 28/6/2018).

²⁶⁸ See The Guardian 31/1/2017 ‘African leaders plan mass withdrawal from International Criminal Court’ available at <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court> (accessed 28/6/2018).

²⁶⁹ See H Woolaver ‘International and Domestic Implications of South Africa’s Withdrawal from the ICC.’ *EJIL Talk* (24/10/2016) available at www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc (accessed 28/6/2018).

²⁷⁰ *ICC-The Prosecutor v Uhuru Muigai Kenyatta* Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09-02/11- 830, Separate Further Opinion of Judge Eboe-Esuji. See also Gevers ‘Back to the Future?’ 105

CHAPTER THREE

THE RISE AND FALL OF UNIVERSAL JURISDICTION IN EUROPE

3.1 INTRODUCTION

The principle of universal jurisdiction has gone through different phases in its implementation. In the 1990s there was the first phase which saw the rise of the principle in Europe, then its decline from 2003 following the repeal of universal jurisdiction legislation in Belgium. Just as the application of universal jurisdiction was declining in Europe, there was a second phase which was the rise of the principle in Africa, beginning in 2002 with the enactment of domestic legislation to implement the Rome Statute in South Africa.²⁷¹ This chapter shall examine the first phase of universal jurisdiction, the rise and decline of the principle in Europe.

It has been argued by some scholars that the reason why the exercise of universal jurisdiction has often resulted in tensions between states is because universal jurisdiction transcends state sovereignty. According to Kontorovich, because universal jurisdiction supersedes the concept of state sovereignty, its exercise could lead to conflict between states as the state with traditional jurisdiction over a crime may claim that a state exercising universal jurisdiction is infringing its sovereignty.²⁷² This has been the situation between African states and European states. African states have claimed that the exercise of universal jurisdiction over African state officials by European states is an abuse of the principle and that European states disregard the sovereignty that African states ought to enjoy at international law.²⁷³

²⁷¹ See the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. For an overview of domestic legislation on universal jurisdiction in Africa; see generally Dube 'The AU Model Law on Universal Jurisdiction'.

²⁷² Kontorovich 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' 184. For a similar view see N Strapatsas 'Universal Jurisdiction and the International Criminal Court' (2002) 11 *Manitoba LJ* 1, 5.

²⁷³ For an overview of the AU concerns regarding the application of the principle of universal jurisdiction by European states, see the AU-EU Expert Report on Universal Jurisdiction; and Observations submitted by the

It is submitted that the tensions between African states and European states regarding the principle of universal jurisdiction ought to be understood in the context of Anghie's theory on the colonial origins of the doctrine of state sovereignty which has been discussed in detail in Chapter Two. As there is a doctrinal link between universal jurisdiction and state sovereignty, the misunderstandings stemming from the application of universal jurisdiction are arguably a result of the differences in understanding of the doctrine of sovereignty between African and European states respectively. African states are of the view that the exercise of universal jurisdiction against African state officials by European states is an infringement of their sovereignty, and has the effect of evoking memories of colonialism.²⁷⁴ In addition, they have raised concern that they have been unfairly targeted by European states in their exercise of universal jurisdiction. According to AU experts,

African states take the view that they have been singularly targeted in the indictment and arrest of their officials and that the exercise of universal jurisdiction by European States is politically selective against them. This raises a concern over double standards...²⁷⁵

The concerns raised by African states under the auspices of the AU with regards to the perceived abuse of the principle of universal jurisdiction have ignited considerable debate amongst scholars who have expressed contrasting views as to whether they are justified. It shall be argued in this chapter that these concerns should not be dismissed without being given due consideration. An examination of the rise and decline of the principle of universal jurisdiction in Europe shows that African state officials make up the majority of those against whom universal jurisdiction has been exercised by European states.²⁷⁶ In this vein, it is submitted that there is indeed evidence of a double standard in the application of international criminal law. This perceived double standard has arguably contributed significantly to the tension between African states and European states, and between African states and the ICC, regarding the application of international criminal justice. It has also contributed to the desire by African states to reaffirm their sovereignty by strengthening their

African Union to the Secretary General, *The Scope and Application of the Principle of Universal Jurisdiction*, Report of the Secretary –General (U. N. Doc. A 66/93, 20/6/2011) para 101-109.

²⁷⁴ See the AU-EU Expert Report on Universal Jurisdiction para 37.

²⁷⁵ *Ibid* para 34.

²⁷⁶ See Jalloh 'Universal Jurisdiction, Universal Prescription?'¹⁴ explaining that between the late 1990s and 2009, courts in Europe have indicted and investigated several African leaders and officials.

regional justice mechanisms in order to avoid the jurisdiction of the ICC, and universal jurisdiction as practiced by Western states.²⁷⁷

An examination of the rise and decline of the principle of universal jurisdiction in Europe is of both academic and practical relevance. The implementation of the principle of universal jurisdiction by European states contributed significantly to the rise of universal jurisdiction in Africa, as African states sought to avoid universal jurisdiction as practiced by European states.²⁷⁸ In order to examine the first wave of universal jurisdiction in Europe, jurisdiction in its broad sense and the meaning, scope and rationale of the principle of universal jurisdiction shall be discussed briefly first.

3.2 THE MEANING, SCOPE AND RATIONALE OF UNIVERSAL JURISDICTION

Universal jurisdiction is the exercise of jurisdiction over a crime by a state which has no territorial links with the crime itself, the victims or the alleged perpetrator.²⁷⁹ The rationale behind the principle of universal jurisdiction is to ensure that certain international crimes do not go unpunished due to territorial limitations in jurisdiction.²⁸⁰ Of all the grounds upon which a state may exercise jurisdiction in international law, the exercise of jurisdiction based on the universality principle is the most controversial. As has been explained by Gevers and Vrancken, many aspects of universal jurisdiction including its origins, conditions for its exercise and the crimes over which it can be exercised are controversial.²⁸¹

²⁷⁷ This issue shall be discussed in detail in chapter four.

²⁷⁸ See for example Dube 'The Au Model Law on Universal Jurisdiction (summary) asserting that '...the political and selective use of the principle of universality by foreign states to prosecute perpetrators of these crimes was seen as causing conflicts and undermining peace efforts, reconciliation and regional stability ...This prompted the AU to produce its own model law on UJ, which African states could adapt to their own socio-political circumstances and legal context.'

²⁷⁹ For a definition of the principle of universal jurisdiction see Coombes 'Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly Interstate Relations?' 423-424; Princeton Principles on Universal Jurisdiction principle 1(1); AU-EU Expert Report para 8.

²⁸⁰ See Du Plessis and Bosch 'Immunities and Universal Jurisdiction-The World Court steps in (or on?)'242; Judge Van den Wyngaert's dissenting opinion in *Arrest Warrant*, para 46.

²⁸¹ See Gevers & Vrancken 'Jurisdiction of States' 250. It is pertinent to note from the outset that notwithstanding the controversy surrounding many aspects of universal jurisdiction, it has become well settled in international law that its exercise is permissible.

3.2.1 The *Lotus* Case

The territorial principle is the primary ground upon which jurisdiction is exercised by states. Notwithstanding this, international law permits states to exercise jurisdiction in respect of conduct occurring beyond their territorial boundaries.²⁸² The PCIJ ruled in the *Lotus Case* that states are allowed to exercise extraterritorial jurisdiction in the absence of a prohibitive rule.²⁸³ The court said regarding this permissive rule,

It does not however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law...it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules...²⁸⁴

This dictum in *Lotus* has been the subject of controversy, with scholars expressing conflicting views as to its continued validity in contemporary international law. Some have argued that it is the source of all the confusion surrounding the subject of jurisdiction. Gevers and Vrancken, for instance, argued that, ‘This *Lotus* case, and its legacy, is the source of much of the uncertainty regarding the exercise of jurisdiction by states under international law.’²⁸⁵

Most of the criticism around the *Lotus* Case has been based on the argument that the PCIJ did not consider the importance of the doctrine of state sovereignty in making its dictum on the ‘permissive’ rule, thereby giving states unbridled jurisdictional powers.²⁸⁶ It has also been criticised by a number of scholars who suggest that the dictum in *Lotus* has been modified by subsequent practice.²⁸⁷

²⁸² Other grounds upon which states are permitted to exercise jurisdiction are the nationality principle; passive personality principle; effects principle; protective principle and the universality principle. For a detailed overview of the jurisdictional grounds see Gevers & Vrancken ‘Jurisdiction of States’ 242-252.

²⁸³ France v Turkey 1927 PCIJ Series A no 10 19.

²⁸⁴ See page 19 of the Judgment.

²⁸⁵ Gevers & Vrancken ‘Jurisdiction of States’ 236.

²⁸⁶ *Ibid.*

²⁸⁷ See for example C Ryngaert *Jurisdiction in International Law* (2008) 29. For a similar view see A Bianchi ‘Reply to Professor Maier’ in K Meessen (ed) *Extraterritorial Jurisdiction in Theory and Practice* (1996) 74. For a conflicting view see for example P Kuiper ‘The European Community and the U. S. Pipeline Embargo: Comments on Comments’ (1984) *German Yearbook of Int L* 1984 72,93 asserting that ‘...insufficient research

It is submitted that the controversy regarding the permissive approach in *Lotus* is *not* likely to be settled anytime soon. This is because there is no specific treaty which governs the exercise of jurisdiction by States hence reliance is had on State practice, which is itself inconsistent.²⁸⁸ As jurisdiction is closely linked to state sovereignty, it is unlikely that States will reach an agreement in treaty form on the subject of jurisdiction in the foreseeable future because states would view the limiting of their jurisdiction as an infringement of their sovereignty. Notwithstanding the controversy emanating from the *Lotus* Case, it remains the leading authority on the subject of jurisdiction, and arguably the starting point for any discussion on jurisdiction.²⁸⁹

3.2.2 The definition of universal jurisdiction

There is no consensus amongst legal scholars as to the exact definition of universal jurisdiction. A number of scholars have defined this term in different ways. Judge Van den Wyngaert noted in her dissenting opinion in *Arrest Warrant* that, ‘There is no generally accepted definition of universal jurisdiction in conventional or customary international law...Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning.’²⁹⁰In A similar vein, Scheffer asserted that, ‘...any attempt to identify a universally acceptable definition of universal jurisdiction, the crimes it covers and its enforceability remains a largely futile exercise .There are simply too many variables to permit any definitive approach to the issue.’²⁹¹

has been done so far to decide with a degree of certainty whether or not the *Lotus* decision has been set aside by subsequent developments in customary international law.’ A detailed discussion as to which approach is more convincing is beyond the scope of this thesis. As argued by O’Keefe , ‘ ...it arguably does not matter whether the so-called ‘*Lotus* presumption’ in general or in a specific context of criminal jurisdiction is correct or accepted in principle...all that is required is that, instead of the accepted heads of prescriptive jurisdiction as permissive rules against a backdrop of a general prohibition, we think of them as residual presumptive permission in the interest of specific prohibitions’ O’Keefe ‘Universal Jurisdiction: Clarifying the Basic Concept’ 738 footnote 12.

²⁸⁸ See Gevers & Vrancken ‘Jurisdiction of States’238-239, explaining the challenges of relying on state practice and *opinio juris* to ascertain rules of jurisdiction.

²⁸⁹ The ICJ has since *Lotus* systematically declined to address the issue of extraterritorial jurisdiction. See Dugard *International Law: A South African Perspective* 147; Gevers & Vrancken *ibid* 238.

²⁹⁰ Para 44-45.

²⁹¹ D Scheffer ‘The Future of Atrocity Law’ (2002) 25 *Suffolk Transnational LR*389, 422.

Gevers and Vrancken have explained that the term universal jurisdiction has been defined both in the positive and negative sense.²⁹² The Princeton Principles on Universal Jurisdiction described it as

criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.²⁹³

O’Keefe has defined universal jurisdiction negatively as ‘...the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.’²⁹⁴ As thoughtfully argued by O’Keefe,

the absence of a customary or conventional definition and the supposed plurality of doctrinal definition of universal jurisdiction does not mean that no single soundest definition of universal jurisdiction cannot be given.²⁹⁵

In this regard, this thesis is based on the definition of universal jurisdiction as given in the Princeton Principles on Universal Jurisdiction.

3.2.3 The rationale for the exercise of universal jurisdiction

Historically, universal jurisdiction originated in the 16th Century to enable states to prosecute the crimes of piracy and to a lesser extent, the slave trade which occurred in locations over which no single state had territorial jurisdiction. Piracy²⁹⁶ and the slave trade were committed in the high seas where no state had territorial jurisdiction.²⁹⁷ The rationale for the exercise of

²⁹² Gevers & Vrancken ‘Jurisdiction of States’ 250.

²⁹³ Princeton Principles on Universal Jurisdiction *Principle 1* (1). See also Institut de Droit International (IDI) 2005 Resolution on Universal Criminal Jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes. Paragraph 1 defines universal jurisdiction as ‘...the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive personality, or other grounds of jurisdiction recognised by international law.’

²⁹⁴ O’Keefe ‘Universal Jurisdiction: Clarifying the Basic Concept’ 745. See also L. Reydams *Universal Jurisdiction: International and Municipal Legal Perspectives* (2004) 5 and H Ascencio ‘Are Spanish Courts Backing Down on Universality?’ 699.

²⁹⁵ O’Keefe *ibid* 744-745.

²⁹⁶ See *United States v Layton* 509 F.Supp.212, 223(N.D Cal 1981) where the court explained that, ‘Universal jurisdiction had its origins in the special problems and characteristics of piracy’.

²⁹⁷ See Arajarvi ‘Looking Back from Nowhere’ 8.

universal jurisdiction was therefore that serious crimes should not go unpunished due to territorial limitations on jurisdiction. In recent times however, as explained by Arajarvi, all parts of the globe fall under the jurisdiction of States, although in some cases the jurisdiction might be subject to dispute between States.²⁹⁸ The United Nations Convention on the Law of the Sea (UNCLOS) now governs the issue of jurisdiction over high seas.²⁹⁹

3.2.4 The piracy analogy

The piracy analogy has been invoked by a number of scholars to explain the expansion of the scope of crimes over which states can exercise universal jurisdiction to include crimes other than piracy, such as war crimes and crimes against humanity. In terms of the piracy analogy, the expansion of the scope of crimes over which universal jurisdiction could be exercised came about as a result of the recognition that these crimes such as war crimes were as heinous as piracy itself.³⁰⁰ Orentlicher, for instance, argued that,

One rationale for universal jurisdiction that is equally applicable to pirates and human rights violators is that both offenders commit acts so antithetical to the common standards of civilisation that they have, in effect, renounced the right to be protected by its laws.³⁰¹

Reliance on the heinous nature of the crime as a basis for expanding the scope of universal jurisdiction has however been refuted by many scholars. According to Kontorovich, there is no evidence to suggest that piracy was considered to be more heinous than all other crimes.³⁰² Megret argued that the reliance on the heinous nature of the crime as a rationale for the exercise of universal jurisdiction is contentious. He asserted in this regard that the rationale

²⁹⁸ *Ibid.*

²⁹⁹ 1982 21 ILM (1982) 1261; Arajarvi *ibid.*

³⁰⁰ For a detailed account of the piracy analogy, see generally Kontorovich 'The Piracy Analogy' and Arajarvi *ibid* 9-14

³⁰¹ D Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991)100 *Yale LJ* 2537, 2557 fn 78 (cited by Kontorovich *ibid* 205 fn 126). See also W Cowles 'Universality of Jurisdiction over war crimes' (1945) 33:2 *California LR* 177,217-18, advocating for the expansion of universal jurisdiction to war crimes because they were as serious as piracy.

³⁰² Kontorovich *ibid* 233.

that ‘...certain crimes are so heinous that they ‘shock the conscience of mankind’ is questionable as ‘In practice what shocks some does not necessarily shock others’.³⁰³

The expansion of the scope of crimes over which universal jurisdiction can be exercised has also been explained on the basis of the *hostis humani generis* formulation which was supposedly associated with piracy. It has been asserted by some scholars that pirates were considered to be *hostis humani generis*, enemies of all mankind, hence all states had a duty to prosecute them. In terms of the piracy analogy therefore, those alleged to have committed international crimes are also to be treated as enemies of mankind. In the civil case of *Filartiga v Pena-Irala*, the United States Second appeals court drew an analogy between piracy and torture and noted that, ‘The torturer has become, like the pirate and slave trader before him, *hostis humani generis*, an enemy of all mankind.’³⁰⁴

Bassiouni explained in this regard that ‘... a state exercising universal jurisdiction carries out an actio popularis against persons who are *hostis humani generis*.’³⁰⁵ Dugard asserted that when exercising universal jurisdiction, ‘...the national court acts as the agent of the international community in the prosecution of an enemy of all mankind in whose prosecution all states have an equal interest.’³⁰⁶ The treatment of the pirate as an enemy of all mankind has however been convincingly questioned by a number of scholars including Kontorovich who argued that, ‘No one supposed the pirate to actually be the enemy of all mankind; it was a legal fiction...and no part of the legal definition.’³⁰⁷

It is submitted that both the reliance on the heinousness of the crime and the *hostis humani generis* formulation as a rationale for the exercise of universal jurisdiction have been convincingly discredited. This thesis therefore asserts that the rationale for the exercise of universal jurisdiction in its expanded scope is to ensure that certain international crimes do not go unpunished.³⁰⁸

³⁰³ F Megret ‘The Elephant ‘in the Room’ of Universal Jurisdiction: Diasporas, Duties of Hospitality and the Constitution of the Political’ (2015) 6:1 *Transnational Legal Theory* 89.

³⁰⁴ 630 F.2d 876 Cir 1980.

³⁰⁵ M.Cherif Bassiouni ‘Universal Jurisdiction for International Crimes’ 96.

³⁰⁶ Dugard *International Law-a South African Perspective* 154.

³⁰⁷ Kontorovich ‘The Piracy Analogy’ 235.

³⁰⁸ Du Plessis and Bosch ‘Immunities and Universal Jurisdiction-The World Court steps in (or on?)’; *Arrest Warrant* Dissenting Opinion of Judge Van den Wyngaert para 46 asserting that ‘...the *ratio legis* of universal

3.2.5 The scope of universal jurisdiction

The generally agreed list of crimes over which universal jurisdiction can be exercised include piracy, slave trading, war crimes, crimes against humanity, genocide and torture.³⁰⁹ The list of crimes is not exhaustive. This is because as the crimes are derived from customary international law which is made up of state practice and *opinio juris*, the generally agreed crimes could change with changes in state practice.³¹⁰

In the *Arrest Warrant* case the judges in their separate opinions expressed different views on the crimes over which universal jurisdiction is applicable. The Judge President Guillaume and Judge Rezek expressed the view that true universal jurisdiction applies only in respect of piracy.³¹¹ On the other hand, Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion asserted that universal jurisdiction can also be lawfully exercised over war crimes and crimes against humanity, in addition to piracy. This view was shared by Judge Koroma in his separate opinion, and Judge Van Den Wyngaert in her dissenting opinion.³¹² As noted by O’Keefe, these statements did not form part of the *ratio decidendi* as the court was not required to rule on the legality and scope of universal jurisdiction. State practice and *opinio juris* shows, contrary to the arguments advanced by Judge President Guillaume and Judge Rezek that states are allowed to exercise universal jurisdiction in respect of crimes other than that of piracy.³¹³

jurisdiction is based on the international reprobation for certain very serious international crimes such as war crimes and crimes against humanity. Its *raison detre* is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third countries.’

³⁰⁹ Colangelo ‘The Legal Limits of Universal Jurisdiction’151; Addis ‘Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction’136; Princeton Principles on Universal Jurisdiction (Principle 2); AU-EU Expert Report on Universal Jurisdiction para 9 and Arajarvi ‘Looking Back from Nowhere’7.

³¹⁰ Coombes ‘Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly Interstate Relations’432 footnote 70. For an overview of the generally agreed crimes over which states may exercise universal jurisdiction, see O’Keefe *International Criminal Law* 17-25.

³¹¹ *Arrest Warrant* separate opinion of Judge President Guillaume para 16; and separate opinion of Judge Rezek Para 10. See also O’Keefe *ibid* 22-23.

³¹² *Arrest Warrant* Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal para 65; separate opinion of Judge Koroma para 9; and dissenting opinion of Judge Van Den Wyngaert para 59; O’Keefe *ibid*.

³¹³ O’Keefe *ibid* 22-23.

3.2.6 The presence requirement

There has been considerable debate regarding the legality of exercising universal jurisdiction in *absentia* (pure universal jurisdiction). Some scholars have argued that the requirement of the presence of the accused person in the territory of the State seeking to exercise jurisdiction on the basis of the universality principle must be met in order for the exercise of universal jurisdiction to be lawful (conditional universal jurisdiction). Cassese, an ardent proponent of conditional universal jurisdiction, commenting on the assertion that piracy is the only crime under customary international law over which states are permitted to exercise universal jurisdiction, argued that universal jurisdiction over piracy can only be exercised when the accused is present in the territory of the state seeking to exercise jurisdiction.³¹⁴ Elsewhere, he argued that

universality may be asserted subject to the condition that the alleged offender be on the territory of the prosecuting state. It would seem contrary to the logic of current state relations to authorize any state of the world to institute criminal proceedings...against any foreigner or foreign state official allegedly culpable of serious international crimes.³¹⁵

On the other hand there are scholars who have asserted that presence of the accused is not a requirement for the exercise of universal jurisdiction.³¹⁶ In the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal argued in their Joint Separate Opinion that the commencement of investigations in the absence of the accused person does not amount to a violation of the immunity which that individual might be entitled to at international law.³¹⁷

Gevers and Vrancken have attributed the debate over the presence requirement to a conflation of prescriptive jurisdiction and enforcement or adjudicative jurisdiction. They note that universal jurisdiction is a type of prescriptive jurisdiction and as states are permitted at international law to exercise jurisdiction to prescribe extraterritorially, it is lawful for a state

³¹⁴ Cassese 'When May Senior State Officials Be Tried for International Crimes?' 857.

³¹⁵ Cassese 'Is the Bell Tolling for Universality?' 592.

³¹⁶ See C Kres 'Universal Jurisdiction over International Law and the *Institut de Droit International*' (2006) 4 *J of Int Criminal Justice* 561,577 arguing that '...there is, certainly, also insufficient state practice to assert the creation of a rule that would specifically prohibit any investigative act in the absence of a suspect based (only) on universal jurisdiction.'

³¹⁷ See paragraph 59 of the Joint Separate Opinion.

to exercise universal jurisdiction even in the absence of the accused.³¹⁸ On the other hand, the issue of the requirement of the presence of the suspect on the territory of the state exercising universal jurisdiction is related to enforcement and adjudicative jurisdiction. As has been explained by Gevers and Vrancken, prescriptive jurisdiction and enforcement jurisdiction are two distinct forms of jurisdiction, therefore it does not necessarily follow that when a state has prescriptive jurisdiction it can also exercise enforcement jurisdiction.³¹⁹ In this vein, O’Keefe has noted that,

A state’s jurisdiction to prescribe its criminal law and its jurisdiction to enforce it do not always go hand in hand. It is often the case that international law permits a state to assert the applicability of its criminal law to given conduct but, because the author of the conduct is abroad, not to enforce it.³²⁰

The debate about the presence requirement therefore seems to be not a matter of law, but a matter of policy and practical considerations by individual states. As has been noted by Ryngaert, state practice has not been consistent on this issue. Some states have included a presence requirement in their enabling legislation whilst others have not.³²¹ In this regard, this thesis submits to the assertions by Gevers and Vrancken, and by O’Keefe, that the presence of the accused is not a requirement for the exercise of universal jurisdiction to be deemed lawful. According to O’Keefe, ‘...if universal jurisdiction to prescribe criminal laws is internationally lawful in any given instance, so too is so called universal jurisdiction in *absentia*.³²²

3.3 THE FIRST PHASE OF UNIVERSAL JURISDICTION: RISE AND DECLINE IN EUROPE

Before the 1990s, universal jurisdiction was seldom exercised by states. In the 1990s however, there was a rise in the application of the principle by European states, particularly Belgium and Spain. The universal jurisdiction legislation in these two countries was

³¹⁸ Gevers & Vrancken ‘Jurisdiction of States’ 251. See also O’Keefe *International Criminal Law* 17, explaining that universal jurisdiction is jurisdiction to prescribe.

³¹⁹ Gevers & Vrancken *ibid* 251.

³²⁰ O’Keefe ‘Universal Jurisdiction: Clarifying the Basic Concept’ 740; Arajärvi ‘Looking Back from Nowhere’ 14.

³²¹ Ryngaert *Jurisdiction in International Law* 120. See also Gevers & Vrancken ‘Jurisdiction of States’ 252.

³²² Gevers & Vrancken *ibid* 251-2; O’Keefe *International Criminal Law* 17. See also Ryngaert *ibid* 122-125 for arguments in favour of the exercise of universal jurisdiction in *absentia*.

unconditional in that it did not require the existence of any pre-existing conditions in order for the courts to exercise universal jurisdiction, and in the case of Belgium immunities of state officials were not considered. The courts in Belgium and Spain proceeded to exercise universal jurisdiction based on this legislation.³²³ This included cases involving high profile individuals such as complaints brought before the Belgian courts against former United States President George Bush for alleged war crimes. In Spain, high profile cases included the *Tibet* case which involved a number of Chinese leaders including former Chinese President Hu Jintao.³²⁴

Following diplomatic pressure from politically powerful states including China and the United States, and as a result of the ruling by the ICJ in *Arrest Warrant*, Belgium and Spain amended their universal jurisdiction laws so as to require some pre-existing conditions such as presence of the accused. Despite these amendments to the legislation, diplomatic pressure persisted and Belgium consequently repealed its legislation in 2003.³²⁵ In 2014 Spain amended its legislation further, effectively removing universal jurisdiction from the Spanish legal system.³²⁶

Following the repeal of the Belgian legislation, the general consensus amongst scholars was that this repeal had signalled the ‘death’ of universal jurisdiction and a number of ‘obituaries’ were written in this regard. Admittedly, following the decision in *Arrest Warrant* and the subsequent repeal of the Belgian legislation, there was a noticeable decline in the application of universal jurisdiction by European states, most notably Spain which had been hailed as being the most welcoming forum for universal jurisdiction. It is submitted however that contrary to assertions that the demise of the universal jurisdiction legislation in Belgium led to the death of the principle, universal jurisdiction is very much alive as evidenced by its increased adoption and application in Africa. There is however scholarly silence on the rise

³²³ See Act of 16 June 1993 Concerning the Punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977, as amended by the Act of 10 February 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law (Belgium). For the Spanish legislation see Organic Law no 6 /1985.

³²⁴ Bhuta & Schurr ‘Universal Jurisdiction: State of the Art’ 37; Arajarvi ‘Looking Back from Nowhere’ 20. For a detailed overview of some of the high-profile cases see generally J Panakova ‘Law and Politics of Universal Jurisdiction’ (2011) 3:3 *Amsterdam LF* 49.

³²⁵ See generally Reydams ‘Belgium Reneges on Universality: the 5 August 2003 Act on Grave Breaches of International Humanitarian Law’.

³²⁶ See Fernandez ‘The 2014 Reform of Universal Jurisdiction Legislation in Spain: From all to nothing’.

of universal jurisdiction in Africa and it is submitted that this is due to the historically Eurocentric focus of international law.

As the discussion below shall show, many European states have amended their legislation to include the requirement that some pre-existing conditions must be met before the courts can exercise universal jurisdiction. This can be attributed to the desire by states to avoid political tensions with other states as a result of the exercise of universal jurisdiction, as was the case between Spain and China when Spain exercised universal jurisdiction against some high ranking current and former Chinese officials. The diplomatic spat following this exercise of universal jurisdiction is what led to the amendment of Spain's Organic Law on universal jurisdiction in 2009 and 2014.³²⁷ Apart from Belgium and Spain; other European countries have also enacted universal jurisdiction legislation and included conditions for its exercise. These include Netherlands, United Kingdom and Germany.

This section shall examine the first phase of universal jurisdiction, which is the rise and decline of universal jurisdiction in Europe. The examination shall be limited to the practice of universal jurisdiction in Belgium, Spain, Germany, United Kingdom (England and Wales) and Netherlands as it is considered that the practise of universal jurisdiction in these selected states best mirrors the rise and decline of universal jurisdiction in Europe. It ought to be noted that at present there is no European state that is actively applying universal jurisdiction. However, the examination of this phase of the application of universal jurisdiction in Europe is relevant to the thesis because it contributed significantly to the rise of universal jurisdiction in Africa.

3.3.1 Belgium

The Belgian legislation conferring universal jurisdiction upon Belgian courts for war crimes came into effect in 1993.³²⁸ It was amended in 1999 to include the crimes of genocide and crimes against humanity. In addition, the Code of Criminal Procedure allowed victims to initiate a criminal investigation based on the universality principle.³²⁹ The 1993 law provided that immunity did not apply where an individual was accused of having committed war

³²⁷ *Ibid.*

³²⁸ M Langer 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 *American J of Int L* 1, 26.

³²⁹ Bhuta & Schurr 'Universal Jurisdiction: State of the Art' 37. See also art 7 of the Code of Criminal Procedure of 1878.

crimes, and the 1999 amendment expanded this to include crimes against humanity and genocide.³³⁰ Another notable feature of the 1999 amendment was that it removed the defence of immunity, in compliance with article 27 of the Rome Statute of the ICC.³³¹

The Belgian law was applied without incident in the *Butare Four* case, in which four Rwandans were tried and convicted for their role in the 1994 Rwandan genocide.³³² However, this law later became subject to controversy when its provisions were relied upon to bring complaints against high profile individuals from other states. In April 2000, a Belgian investigative magistrate issued and circulated a warrant of arrest against the then Foreign Affairs Minister for the Democratic Republic of Congo, based on the Belgian law. The issuing of this warrant resulted in a dispute between the two countries which was then brought before the ICJ.³³³ The court ruled that the arrest warrant violated the immunity and inviolability that Mr. Ndombasi was entitled to enjoy as a Foreign Affairs Minister.³³⁴

Following the ICJ's decision in the *Arrest Warrant* case, and political pressure from powerful states whose high ranking officials had been the target of investigations in Belgium based on its law, Belgium amended the law in April 2003. The amended law included immunity provisions to bring it in conformity with international law, and the right of victims to initiate investigations based on universal jurisdiction was removed.³³⁵ Complaints had been filed against a number of high profile individuals including former United States President George Bush and former Secretary of Defense Dick Cheney and others for having allegedly committed war crimes during the 1991 Gulf war; and then Israeli Prime Minister Ariel Sharon and others for crimes allegedly committed in the Sabra and Shatila massacre, as well

³³⁰ See the Law Concerning the Punishment of Grave Violations of International Humanitarian Law (1999) 38 ILM 918; N Roht-Ariaza 'Universal Jurisdiction: Steps Forward, Steps Back' (2004) *Leiden J of Int L* 335,383.

³³¹ Langer 'The Diplomacy of Universal Jurisdiction' 26.

³³² For a detailed overview of the case see L Reydams 'Belgium's First Application of Universal Jurisdiction: the *Butare Four* case' (2003) 1 *J of Int Criminal Justice* 428.

³³³ For the background to the case see the Judgment in *Arrest Warrant*.

³³⁴ See para 56 of the Judgment of the majority in *Arrest Warrant* (outlining the customary international law position with regards to immunities).

³³⁵ Arajarvi 'Looking Back from Nowhere'18; Bhuta & Schurr 'Universal Jurisdiction: State of the Art'37. For the amendments see the unofficial English translation available in *International Legal Materials* 2003 (42) 749

as against U.S. General Tommy Franks for war crimes allegedly committed whilst he was army commander during the 2003 Iraq war.³³⁶

The United States and Israel had raised concern that Belgium's universal jurisdiction legislation was a threat to state sovereignty.³³⁷ Following increased diplomatic pressure, the Act was repealed in August 2003, and a new law on extraterritorial jurisdiction was enacted.³³⁸ The provisions of the repealed act dealing with international crimes were incorporated into the Criminal Code, hence Belgian courts now exercise jurisdiction over war crimes, crimes against humanity and genocide based on the passive personality and active personality grounds of jurisdiction.³³⁹ The courts can exercise extraterritorial jurisdiction over international crimes provided that one of the requirements that the accused must be resident in Belgium; the victim must have lived in Belgium for a minimum of three years; and that Belgium must be required to exercise jurisdiction over the crime by treaty, has been met.³⁴⁰

3.3.2 Spain

Spain's Organic Law 6/1985 conferred universal jurisdiction on Spanish courts. Article 23:4 provides that the courts shall have universal jurisdiction over the crimes of genocide, terrorism, and any other crimes which Spain is obliged to prosecute in terms of international

³³⁶ Bhuta & Schurr *ibid* 37 footnote 141; Kaleck 'From Pinochet to Rumsfeld' 933-934; Roht-Ariaza 'Universal Jurisdiction: Steps Forward, Steps Back' 384-388.

³³⁷ Kaleck *ibid* 933.

³³⁸ See the 5 August 2003 Act on Grave Breaches of International Humanitarian Law. See also Reydam's 'Belgium Reneges on Universality' 679. For a detailed commentary on the rise and fall of absolute universal jurisdiction in Belgium, see generally M Verhaeghe 'The political Funeral Procession for the Belgian UJ Statute' in W Kaleck *et al* (eds) *International Prosecution of Human Rights Crimes 2007* 139 and D Tallman 'Universal Jurisdiction: Lessons from Belgium's Experience' in J Stromseth (ed) *Accountability for Atrocities: National and International Responses* 2003 357.

³³⁹ Bhuta & Schurr 'Universal Jurisdiction: State of the Art' 37; See also the Criminal Code of 1867 art 136 bis incorporating the provisions of the repealed act on international crimes; and the Preliminary Title of the Code of Criminal Procedure Chapter II art 6(1), 7(1) and 10(5) conferring upon Belgian courts jurisdiction to exercise jurisdiction over war crimes, crimes against humanity and genocide on the basis of the passive personality and active personality grounds of jurisdiction.

³⁴⁰ Arajarvi 'Looking Back from Nowhere 17: Bhuta & Schurr *ibid*.

treaties or conventions.³⁴¹ The Spanish Criminal Code was amended in 2004 to give the courts universal jurisdiction over crimes against humanity.³⁴²

The Spanish Courts relied on the Organic Law of 1985 to exercise universal jurisdiction in a number of cases. The first case to be based on the principle of universality was the *Pinochet Case* in 1998, where an investigative judge requested the arrest and extradition of the former Argentinian ruler Augusto Pinochet from the United Kingdom.³⁴³ Subsequently, the Spanish National Court exercised universal jurisdiction in the *Scilingo Case* in 2005. Scilingo, a former Argentinian military officer, was found guilty of attempted genocide and other crimes he perpetrated during the dirty war in Argentina.³⁴⁴ Universal jurisdiction was also relied on in the trial of another former Argentinian military officer Ricardo Cavallo in 2003. He was however extradited to Argentina to stand trial in 2008 hence the proceedings were not completed in Spain.³⁴⁵

Spain's Organic Law of 1985 did not require any pre-existing link between Spain and either the accused or the victim for the exercise of universal jurisdiction. The presence of the accused was only required at the trial stage, thus investigations could be initiated even when

³⁴¹ Arajarvi *ibid* 15; Bhuta & Schurr *ibid* 86; Article 23;4 of the Organic Law 6/1985 as amended by Organic Law no 11/1999. The treaties include the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment (G. A. Res 39/46 U.N.Doc A/39/51(1984) and the Four Geneva Conventions and their First Additional Protocol.

³⁴² Spanish Criminal Code 1995 Article 607 bis. See also Bhuta & Schurr *ibid*. The Audencia Nacional based its jurisdiction in the *Scilingo Case* on the principle of universality in 2005. It held that it had jurisdiction to hear the matter concerning crimes against humanity notwithstanding that they were committed before the amendment of the Criminal Code to include crimes against humanity on the list of crimes over which the courts could exercise universal jurisdiction. (See Bhuta & Schurr 86) The Supreme Court subsequently confirmed the ruling of the *Audencia Nacional* on appeal in 2008.

³⁴³ See the Writ of the Instructing Court Accepting Jurisdiction in the *Pinochet Case* (20/9/1998) Summary Proceedings 1/98-J available at <http://www.dereches.org/nizkor/chile/jucio/jurie.html> (accessed 29/6/2018). For a summary and commentary of the case, see generally N Roht-Ariaza *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2005) and R Van Alebeek 'The *Pinochet Case*: International Human Rights Law on Trial' (2000) LXXI *British Yearbook of Int L* 29.

³⁴⁴ National Court Criminal Chamber 19/4/2005; Kaleck 'From Pinochet to Rumsfeld' 955-956. For a detailed summary and commentary on the case see generally G Pinzauti 'An Instance of Reasonable Universality: The *Scilingo Case*' (2005) 3 *J of Int Criminal Justice* 1092.

³⁴⁵ See Kaleck *ibid* 956.

the accused was not physically present.³⁴⁶ The Constitutional Tribunal held in the *Guatemala Generals* appeal that the presence of the accused in Spain was not required at the investigative stage.³⁴⁷ The country's universal jurisdiction legislation was hailed by a number of commentators as being progressive due to its unrestricted form. Kaleck, for instance, argued that Spain was the most convenient forum for those seeking to pursue cases of human rights violations, owing to its '...expansive legislation and independent judiciary.'³⁴⁸

It ought to be noted that the exercise of universal jurisdiction by Spanish courts against African officials based on this law contributed significantly to the tensions between African states and European states regarding the application of the principle of universal jurisdiction. In February 2008 a French investigative judge issued arrest warrants against forty current and former high ranking officials from Rwanda. They were accused of having committed genocide, crimes against humanity, war crimes and terrorism in the period between 1990 and 2002.³⁴⁹ Rwanda then claimed that the European states were seeking to recolonise Africa through their exercise of universal jurisdiction against African officials, and the AU Assembly adopted a decision which raised concern about the perceived abuse of the principle of universal jurisdiction.³⁵⁰ This was the first in a series of decisions adopted by the AU on the subject of universal jurisdiction. The AU Assembly resolved in this Decision that 'The political nature and abuse of the Principle of Universal Jurisdiction by judges from some non-African states against African states, particularly Rwanda, is a clear violation of their sovereignty and territorial integrity.'³⁵¹

Diplomatic pressure led to Spain reforming its legislation on universal jurisdiction. In 2009, the Spanish Congress passed a law restricting the jurisdiction of the Audencia Nacional in

³⁴⁶ See Article 23(4) of the Organic Law; Bhuta & Schurr 'Universal Jurisdiction: State of the Art' 87.

³⁴⁷ See Ascencio 'The Spanish Constitutional Tribunal's Decision in *Guatemala Generals*' 586-587.

³⁴⁸ See Kaleck 'From Pinochet to Rumsfeld' 954.

³⁴⁹ See J Geneuss 'Universal Jurisdiction Reloaded? Fostering a Better Understanding of Universal Jurisdiction: a Comment on the AU-EU Expert Report on Universal Jurisdiction' (2009) 7 *J of Int Criminal Justice* 945, 946. See also Jalloh 'Universal Jurisdiction, Universal Prescription?' 21. Jalloh explains that the 2006 indictment of 9 Rwandese officials by a French investigative magistrate and the Spanish magistrate's indictment of the forty officials in 2008 are the two incidents that sparked tensions between African and European states. The Rwandan case in Spain was however stayed in 2015 following a 2014 reform of the legislation (see discussion below).

³⁵⁰ Geneuss *ibid.* See also the AU Assembly Decision on the Report of the Commission on the abuse of the Principle of Universal Jurisdiction Assembly/AU/ Dec.199 (XI).

³⁵¹ See paragraph 5 (ii) of the AU Decision *ibid.*

respect of international crimes as provided for in Organic Act no 6/1985. In terms of Organic Act no 1/2009, jurisdiction over international crimes could only be exercised in cases where the victims are Spanish, there is a relevant link between the crime and Spain, or the accused is present in Spain.³⁵² This amendment also introduced the requirement of subsidiarity. Article 23 (4) (h) provides that the courts can only exercise jurisdiction where ‘...no other competent country or international court has initiated proceedings including an effective investigation and, where appropriate, prosecution of, such crimes.’³⁵³

The 2009 amendment led to the termination of proceedings in the *Tibet 2* case, which was one of the most contentious cases arising from Spain’s universal jurisdiction legislation. Notwithstanding this, many other cases remained open.³⁵⁴ In 2013, the issuing of arrest warrants against several former Chinese state officials led to renewed diplomatic tensions between Spain and China, which resulted in a further reform of Spain’s universal jurisdiction legislation in 2014.³⁵⁵ Organic Act no 1/2014 retained the pre-existing conditions requirements in Organic Act no 1/2009. In addition, it further limited the right to commence an action in cases of international crimes to the victims and the Public Prosecution Service.³⁵⁶

In terms of the 2014 amendment, ‘Proceedings relating to the offences referred to in this Act that are in progress at the time of its entry into force shall be stayed until it can be verified that the requirements established therein have been met.’³⁵⁷ This retrospective application of the amendment resulted in proceedings in a number of cases including *Tibet 1*, *the Falun Gong Case* and the *Rwanda Case* being stayed.³⁵⁸ Spain and Belgium’s experience with universal jurisdiction is therefore illustrative of the rise and fall of universal jurisdiction in

³⁵² See art 23(4) (h) of Organic Act no 1/2009 .See also Arajarvi 18;Ministry of Foreign Affairs Spain ‘Spain – The Scope and application of the principle of universal jurisdiction’(Contribution of Spain to the topic ‘The scope and application of the principle of universal jurisdiction’) available at www.un.org/en/ga/sixth/71/universal_jurisdiction/sain_e.pdf (accessed 29/6/2018) .For a detailed commentary on the 2009 amendment see I de Rasilla del Moral ‘The Swan Song of Universal Jurisdiction in Spain’(2009) 9:5 *Int Criminal LR* 777,801-805.

³⁵³ See article 23 (4) (h) Organic Act no 1/2009.

³⁵⁴ See Fernandez ‘The 2014 Reform of Universal Jurisdiction Legislation in Spain: From all to nothing’718.

³⁵⁵ Fernandez *ibid*; J Alvarez ‘The Reform of Universal Jurisdiction in Spain: For Whom the Bell Tolls?’ (2013-2014) 18 *Spanish Yearbook of Int L* 207,212.

³⁵⁶ See ‘Spain-the Scope of Universal Jurisdiction’7.

³⁵⁷ *Ibid* 8.

³⁵⁸ *Ibid*.

Europe. Fernandez, commenting on the 2014 amendment, asserted that ‘Together with it universal jurisdiction virtually disappeared from the Spanish legal system.’³⁵⁹ Spain, which was once hailed as the most progressive state in terms of preventing impunity through its expansive universal jurisdiction legislation, has done away with universal jurisdiction from its legal system through the 2014 amendment.

It is submitted that although this reform has been viewed by a number of scholars as being retrogressive for the fight against impunity, the universal jurisdiction legislation in its broad form was problematic. As argued by Jalloh, the universal jurisdiction laws in Belgium and Spain promoted forum shopping. In addition, Jalloh notes that, ‘Their very attractiveness to victims with few links to the national territory also rendered them susceptible to abuse for political purposes that are not co-extensive with the imperative of justice.’³⁶⁰

Commenting on the 2003 repeal of the Belgian law, Reydamas noted that one of the reasons given for the repeal was that the provisions of the Act were open to political abuse.³⁶¹ According to Reydamas, ‘The most important lesson to be drawn from the Belgian experience is that a system of universal jurisdiction that is not principled is doomed to fail.’³⁶²

3.3.3 United Kingdom (England and Wales)

In the United Kingdom, the Geneva Conventions Act of 1957 provides for the exercise of universal jurisdiction over certain war crimes. These include grave breaches of the Four Geneva Conventions and their Additional Protocol.³⁶³ The Criminal Justice Act of 1988 authorises the courts in England and Wales to exercise universal jurisdiction over the crime of torture.³⁶⁴ The exercise of jurisdiction over the crimes of genocide and crimes against humanity is only permitted if the crimes were committed after the enactment of the International Criminal Court Act (ICC Act) of 2001.³⁶⁵ The ICC Act provides for the exercise

³⁵⁹ Fernandez ‘The 2014 Reform of Universal Jurisdiction Legislation in Spain’718.

³⁶⁰ Jalloh ‘Universal Jurisdiction, Universal Prescription?’17.

³⁶¹ Reydamas ‘Belgium Reneges on Universality’679.

³⁶² *Ibid* 689.

³⁶³ See section 1,1A of the Geneva Conventions Act 1957; Bhuta & Schurr ‘Universal Jurisdiction: State of the Art’93; Langer ‘The Diplomacy of Universal Jurisdiction’15.

³⁶⁴ Section 134 (1) of the Criminal Justice Act 1988; Bhuta & Schurr ‘Universal Jurisdiction: State of the Art’93; Langer *ibid*.

³⁶⁵ See section 50 of the International Criminal Court Act 2001; Bhuta & Schurr *ibid* 93.

of universal jurisdiction over the crimes of genocide, crimes against humanity and certain war crimes.³⁶⁶

The United Kingdom rarely exercised universal jurisdiction despite implementing legislation permitting the courts to exercise jurisdiction based on the universality principle. To date, the only successful prosecutions based on universal jurisdiction have been the prosecution of the Afghan militia leader Faryadi Zardad, who was convicted and sentenced to twenty years in prison for torture and hostage-taking committed in Afghanistan in the 1990s, and that of Anthony Sawoniuk who was convicted in 1999 of the murder of two Jewish women in Belarus in 1942. He was sentenced to life in prison.³⁶⁷

Prior to the enactment of the Police Reform and Social Responsibility Act in September 2011, the Prosecution of Offences Act allowed for the issuing of arrest warrants for private prosecutions on the basis of universal jurisdiction.³⁶⁸ The warrant could be issued without the consent of the Crown Prosecution Services or Attorney General, although prosecution could be halted if the Crown Prosecution Services or Attorney General opposed it.³⁶⁹ This provision became controversial following the issuing of arrest warrants against Israeli Major General Doron Almog in 2005 on behalf of Palestinian victims, and former foreign Affairs Minister Tzipi Livni in 2009 for war crimes allegedly committed in Gaza.³⁷⁰ Although neither of the warrants led to arrest, the United Kingdom noted that the provision on arrest warrants could be exploited to the detriment of the United Kingdom. Consequently, in September 2011 the Police Reform and Social Responsibility Act was enacted.

The Act restricts the issuing of warrants of arrests for private prosecutions by requiring the consent of the Director for Public Prosecutions.³⁷¹ It has however been argued that this reform on universal jurisdiction law in the United Kingdom is of little practical significance because the category of persons against whom arrest warrants could be issued was limited

³⁶⁶ See Section 51 and 68 of the ICC Act 2001; Bhuta & Schurr *ibid*; Langer 'The Diplomacy of Universal Jurisdiction' 15

³⁶⁷ Bhuta & Schurr *ibid* 93; Langer *ibid* 16.

³⁶⁸ See section 6 (1) of the Prosecution of Offences Act 1985; Bhuta & Schurr 97.

³⁶⁹ Bhuta & Schurr 'Universal Jurisdiction: State of the Art' 97.

³⁷⁰ See International Law- 'UK Adds Barrier to Private Prosecution of Universal Jurisdiction Crimes-Police Reform and Social Responsibility Act,2011 c.13(U. K)' (2012) 125 *Harvard LR* 1554,1555.

³⁷¹ See section 153 of the Police Reform and Social Responsibility Act 2011.

under the previous law.³⁷² Although the reform was criticised by some NGOs as promoting impunity, scholars including Williams have asserted that it was necessary to address the diplomatic relations and evidentiary problems that arose from the previous law.³⁷³

The reform of the universal jurisdiction legislation in the United Kingdom, as well as Belgium and Spain, has been attributed to the realisation by states that broad universal jurisdiction laws are unsustainable and impractical due to the damage caused to diplomatic relations.³⁷⁴

3.3.4 Germany

In terms of the German Code of Crimes against International Law of 2002 (CCAIL), German Courts can exercise universal jurisdiction over the crimes of genocide, war crimes and crimes against humanity.³⁷⁵ Before the coming into force of the CCAIL, the German Criminal Code conferred courts with universal jurisdiction over the crime of genocide and those international crimes which Germany was obliged to prosecute by treaty.³⁷⁶ The courts required the presence of the accused and the existence of a 'legitimising link' between Germany and the crime.³⁷⁷ The CCAIL does not require the presence of the accused in Germany. It provides for absolute universal jurisdiction in section 1 which states that, 'This Act shall apply to all criminal offenses against international law designated under this Act, to

³⁷² S Williams 'Arresting Developments? Restricting the Enforcement of the United Kingdom's Universal Jurisdiction Provisions' (2012) 75: 3 *The Modern LR* 368.

³⁷³ Williams *ibid*.

³⁷⁴ International Law 'UK Adds Barrier to Private Prosecution on Universal Jurisdiction Crimes' 1557.

³⁷⁵ See Act Introducing the Code of Crimes against International Law (BGBl) 2002 I, P 2254 (Federal Law Gazette of the Federal Republic of Germany) official English translation available at <http://www.inscrim.mpg.de/forsch/legaltext/vstgbleng.pdf> (accessed 29/6/2018).

³⁷⁶ Kaleck 'From Pinochet to Rumsfeld' 49 footnote 161. For a detailed account of the prosecution of international crimes in Germany prior to 2002, see generally R Rissing-van Saan 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia' (2005) 3 *J of Int Criminal Justice* 381.

³⁷⁷ Bhuta & Schurr 'Universal Jurisdiction: State of the Art' 63-64; Kaleck *ibid* 949; Rissing-van Saan 'The German Federal Supreme Court and the Prosecution of Crimes Committed in the former Yugoslavia' 384-388. See also *Nikola Jorgic* (Appeals) 3 StR 215/98(30/4/1999) Federal Supreme Court of Germany (English translation available at <http://www.legal-tools.org/doc/85b784/> (accessed 29/6/2018).

serious criminal offenses designated therein even when the offense was committed abroad and bears no relation to Germany.³⁷⁸

The Criminal Procedure Code which was enacted simultaneously with the CCAIL however allows the federal prosecutor to exercise discretion as to whether or not to initiate an investigation if the presence of the accused in Germany is not expected.³⁷⁹ For this reason, a number of cases against high profile individuals from politically powerful states have not been investigated. These include the cases against the former U.S Defence Secretary Donald Rumsfeld and former Chinese President Jiang Zemin.³⁸⁰

The arrest of the then Rwandan chief of Protocol, Rose Kabuye, in Germany in November 2008 pursuant to a warrant of arrest issued earlier by a French magistrate drew widespread criticism from African states.³⁸¹ In its various decisions on the exercise of universal jurisdiction, the AU Assembly expressed concern that the exercise of universal jurisdiction by European states against African state officials amounts to an abuse of the principle of universal jurisdiction. Seen against the backdrop of the arrest of Rose Kabuye, in contrast to the prosecutor exercising his discretion and choosing not to prosecute in cases involving individuals from powerful states particularly USA, it can be argued that African states are indeed justified in asserting that their officials have in the past been unfairly targeted by European states.

3.3.5 Netherlands

Netherlands enacted the International Crimes Act (ICA) in 2003.³⁸² The Act confers the Dutch courts with universal jurisdiction over international crimes which include torture, genocide, war crimes and crimes against humanity.³⁸³ The courts in Netherlands have exercised universal jurisdiction over a number of cases. These include the case of Sebastian Nzapali, a former Congolese military colonel who was tried and convicted for torture perpetrated in the

³⁷⁸ Bhuta & Schurr *ibid* 64.

³⁷⁹ Para 153 (f) 2 of the Code of Criminal Procedure (2002). See also Bhuta & Schurr *ibid* 64 and Kaleck 'From Pinochet to Rumsfeld' 951.

³⁸⁰ Bhuta & Schurr *ibid* 63. For more details see Kaleck *ibid* 951-953.

³⁸¹ See Jalloh 'Universal Jurisdiction, Universal Prescription?' 36.

³⁸² See International Crimes Act 270 of 2003.

³⁸³ See section 2 (1) a-c; 2(3) as read with section sections 3-8 and 10, with definitions of the crimes. See also Bhuta & Schurr (note 388 above) 71; Kaleck 'From Pinochet to Rumsfeld' 942.

Democratic Republic of Congo. The court exercised universal jurisdiction based on Netherland's obligations in terms of the Convention against Torture.³⁸⁴

Although the Netherlands' criminal procedure permits trials in absentia, in terms of section 2(1) (a) of the ICA, the voluntary presence of the accused in Netherlands is a prerequisite for an investigation to be initiated where the universality principle forms the basis of the exercise of jurisdiction.³⁸⁵ In this vein, the courts declined to exercise universal jurisdiction in the case of Desire Bourtese on the basis that the presence of the accused was required for the trial to commence, and that the provisions of the Convention against Torture could not be applied retroactively.³⁸⁶ Kaleck has explained that the inclusion of the presence requirement in the ICA was mainly a response to the decision in *Arrest Warrant* and Belgium's experience with absolute universal jurisdiction.³⁸⁷

The Belgian experience has had a significant impact on the decline of universal jurisdiction in Europe. Most European states which have enacted universal jurisdiction legislation have included conditions for its exercise. The exercise of conditional universal jurisdiction serves to guard against frivolous complaints, and to ensure that the principle of universal jurisdiction is not abused for malicious and political purposes, such as what was supposedly happening in Belgium before the repeal of the universal jurisdiction legislation. As observed by Vandermeersch,

³⁸⁴ Rotterdam District Court 7/4/2004 AO 7287, Rotterdam 00050-30 official English translation available at <https://www.coeid.de/dokumente/NL-Nzapali-judgment.pdf> (accessed 29/6/2018) See also Kaleck *ibid*; Human Rights Watch 'Netherlands: Congolese Torturer Convicted'(7/4/2004) available at <https://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted> (accessed 29/6/2018).

³⁸⁵ Bhuta & Schurr 'Universal Jurisdiction; State of the Art) 72; Kaleck' From Pinochet to Rumsfeld'943.

³⁸⁶ Supreme Court of the Netherlands nr .00749/01,18/09/2001, XXXII NYIL 282-96; Arajarvi 'Looking Back from Nowhere'18; Kaleck *ibid* 942.For a summary and commentary of the case see generally P Schimmelpennick van der Oije and S Freeland 'Universal Jurisdiction in the Netherlands-the right approach but the wrong case? Bourtese and the December murders' (2001) 7: 2 *Australian J of Human Rights* 89.

³⁸⁷ Kaleck *ibid* 943.

in the absence of filtering safeguards to ascertain that those complaints were *a priori* founded, certain alleged victims gave the appearance of availing themselves Belgian justice by abusing political procedures to pursue political objectives that did not include justice.³⁸⁸

3.4 CONCLUSION

This chapter has examined the domestic legislative instruments on universal jurisdiction in selected European countries, and the decline of the principle beginning from 2003 when Belgium repealed its universal jurisdiction legislation. The decline of the principle of universal jurisdiction in Europe led to scholars declaring that the principle had met its final demise with the repeal of the Belgian legislation.³⁸⁹ It shall be argued in Chapter Four that contrary to the assertions that the repeal of the Belgian legislation was the final ‘death knell’ for the principle of universal jurisdiction, the principle is very much alive as evidenced by its rise in Africa since 2002. However due to the historically Eurocentric focus of international law, the rise of universal jurisdiction in Africa is not being given the scholarly attention it deserves.

The examination has highlighted that the majority of individuals against whom universal jurisdiction was exercised by European states are from Africa. The main concerns raised by African states regarding the application of the principle of universal jurisdiction by European states have been that European states seem to be unfairly targeting African state officials; and disregarding the immunities that these officials ought to enjoy at international law. African states also argued that,

Indictments issued by European states against officials of African states have the effect of subjecting the latter to the jurisdiction of European states, contrary to the sovereign equality and independence of states. For African states, this evokes memories of colonialism.³⁹⁰

It is submitted that one of the reasons why the exercise of universal jurisdiction is subject to controversy is because of the uncertain nature of its relationship with other principles of international law. M. Cherif Bassiouni has asserted that because universal jurisdiction is rarely invoked by national courts, its relationship with other principles of law such as that of

³⁸⁸ D Vandermeersch ‘Prosecuting International Crimes in Belgium’ (2005) 3 *J of Int Criminal Justice* 400,410 (explaining that petitioners in the Bush case gave press conferences outside the courthouse explaining that they were motivated by the impending new war in Iraq).

³⁸⁹ See for example Cassese ‘Is the Bell Tolling for Universality?’ 589.

³⁹⁰ AU-EU Expert Report on Universal Jurisdiction para 37.

immunities is not altogether clear.³⁹¹ The uncertainties regarding the exercise of universal jurisdiction are caused partly by a lack of a specific treaty governing the subject of jurisdiction, and inconsistencies in state practice.³⁹²

In *Arrest Warrant*, Judge Van den Wyngaert in her Dissenting Opinion noted that the implementation of domestic legislation on universal jurisdiction by States has not been done in a consistent manner.³⁹³ It is regrettable that the ICJ has not yet given authoritative guidance on the scope of universal jurisdiction, as the uncertainty in the nature of the relationship between the two principles of universal jurisdiction and personal immunities is likely to continue for as long as there is no pronouncement from an international court or tribunal on this contentious issue. The uncertainty regarding the relationship between universal jurisdiction and personal immunities both generally and in the African context is problematic in that it undermines the importance of universal jurisdiction as a principle of international law.

The tensions between African states and European states regarding the application of the principle of universal jurisdiction ought to be understood against the background of Anghie's theory on the colonial origins of international law and the sovereignty doctrine. The problems arguably arise due to differences in conception of the doctrine of state sovereignty by African states and European states respectively. As Anghie has explained, colonialism denied African states their sovereignty as they were deemed to be uncivilised and therefore incapable of managing legal systems. At the dawn of decolonisation, African states sought to reinforce the doctrine of sovereignty in order to guard against post-colonial interferences.³⁹⁴

Due to their history of colonialism and subjugation African states seem to view sovereignty as an absolute concept which ought to apply regardless of the circumstances. Any exercise of jurisdiction over their leaders and state officials by European states, is therefore viewed by African states as an infringement of their sovereignty. On the other hand, European states view sovereignty, and incidentally the principle of personal immunities, as principles which are on the decline and which ought to give way to the notions of accountability and respect for human rights. This is arguably because they have never been deprived of their

³⁹¹ M.Cherif Bassiouni 'Universal Jurisdiction for International Crimes' 83.

³⁹² Gevers & Vrancken 'Jurisdiction of States' 236.

³⁹³ Para 44 of the dissenting opinion.

³⁹⁴ See Anghie 2007 196-198.

sovereignty hence they do not need to reassert it .It is this difference in conception of the sovereignty doctrine which has led to the rise of universal jurisdiction in Africa in recent years despite a decline in its application in Europe, with African states determined to reassert their sovereignty by strengthening their justice mechanisms, thereby avoiding the jurisdiction of non-African states and that of the ICC.³⁹⁵

In concluding this chapter on the rise and decline of universal jurisdiction in Europe, it is submitted that although universal jurisdiction is a controversial principle, its legality has not been contested and therefore it is a well settled principle of international law. However, the tensions between African states and European states arising from the exercise of universal jurisdiction against African state officials by European states are likely to continue for the foreseeable future. This is because of the legacy of colonialism which rendered non-European states non-sovereign and inferior to their European counterparts. Although colonialism is now confined to history, its effects can still be felt in modern day international relations. As argued by Anghie,

the nineteenth century is very much an integral part of contemporary international law. At a material level, the systems of economic and political inequality which were created by colonialism under the auspices of nineteenth-century international law continue to operate despite the ostensible change of the legal regime.³⁹⁶

African states are still sensitive to their colonial past, and that explains why they view international criminal justice as practiced by Western states as neo-colonialism. To African leaders, much of international criminal law looks too much like the colonial encounter, and this explains why they have expressed concerns regarding the exercise of universal jurisdiction by European states against African state officials. When European states exercised universal jurisdiction against African states officials, it can be argued that African states had to relive the trauma of colonialism, a period during which they were treated as objects rather than subjects of international law.

³⁹⁵ See Dube 'The AU Model Law on Universal Jurisdiction' (summary) arguing that the AU Model Law was developed as a result of African states' misgivings towards universal jurisdiction as practiced by Western states and the perceived unfair targeting of African leaders by the ICC.

³⁹⁶ Anghie 2007 111.

CHAPTER FOUR

THE RISE OF UNIVERSAL JURISDICTION IN AFRICA

4.1 INTRODUCTION

When Belgium repealed its law on universal jurisdiction in 2003, many scholars wrote ‘obituaries’ for universal jurisdiction, asserting that the repeal of the law was the final death knell for the principle.³⁹⁷ This thesis asserts that the decline of universal jurisdiction in Europe did not signal the complete demise of the principle. There has been a rise of universal jurisdiction in Africa since 2002 when South Africa became the first African country to enact legislation domesticating the Rome Statute of the ICC thereby enabling its courts to exercise universal jurisdiction. Uganda, Kenya, Senegal; Mauritius and Democratic Republic of Congo have also enacted enabling legislation.

In 2012, the AU adopted the AU Model Law on Universal Jurisdiction, which can be adapted by states to suit their domestic situations. It is submitted that the rise of universal jurisdiction in Africa is driven by the African states’ desire, under the auspices of the AU, to reaffirm their sovereignty. Contrary to the widely held view that universal jurisdiction is on the decline globally, it is very much alive in Africa, but it is not being given scholarly attention due to the Eurocentric focus of international law.

This chapter shall examine this phase of the rise of universal jurisdiction in Africa, and attempt to address the gap in the existing literature on the rise of universal jurisdiction in Africa. It shall be argued that the reason why the rise of universal jurisdiction in Africa has not been considered important, or worthy of academic commentary and attention, is because of the double standard in international law. As argued in chapter two, there is evidence of a double standard applied in international law along colonial lines, with the general view that African states are incapable of putting in place effective justice mechanisms. According to Gevers,

³⁹⁷ See for example Cassese ‘Is the Bell Tolling for Universality?’ 589 asserting that the principle of universal jurisdiction had met its demise. See also generally Verhaeghe ‘The political funeral procession for the Belgian UJ Statute’.

the double standard claim persists. In particular, recent practice in the field of complementarity...suggests that a new double standard may be emerging with similar colonial undertones: namely that there is a different standard applied to potential domestic prosecutions by African states, than that applied to the prosecutions by (i) international or (ii) European courts, as the case may be.³⁹⁸

The argument of the existence of a double standard in the application of international criminal law resonates with Anghie's argument that the end of colonialism did not result in the end of colonial relations.³⁹⁹ In this regard, it is submitted that the rise of African universal jurisdiction has not been given much attention because universal jurisdiction is considered to be legitimate when it is practised by European states as opposed to African states.

As recently as 2016, the Democratic Republic of Congo passed legislation on universal jurisdiction, which was hailed by NGOs as a progressive step in the fight against impunity.⁴⁰⁰ However, literature on this legislation is scant, with scholars hardly paying attention to it. The same applies to the AU Model Law on Universal Jurisdiction, which is such a significant instrument, but not much has been written about it.⁴⁰¹ This is in sharp contrast to the attention that was accorded to the legislation in European states especially Belgium and Spain.⁴⁰² There is therefore a gap in the existing literature on the rise of universal jurisdiction in Africa, and it is this gap which this chapter shall attempt to address by examining both the regional and domestic African legislative instruments on universal jurisdiction.

³⁹⁸ Gevers 'Back to the Future?' 124.

³⁹⁹ Anghie 'The Evolution of International Law' 748-749.

⁴⁰⁰ See Parliamentarians for Global Action 4/1/2016 'PGA welcomes the enactment of the Implementing legislation for the Rome Statute of the ICC by the Democratic Republic of Congo' available at www.pgaction.org/news/pga-welcomes-enactment-drc-implementing.html (accessed 29/6/2018). As explained in Chapter One, this thesis does not examine the legislation in detail due to difficulties encountered in obtaining information pertaining to it.

⁴⁰¹ To date, the only comprehensive scholarly article on the Model Law is one by Angelo Dube (See Dube 'The AU Model Law on Universal Jurisdiction: An African Response to Western Prosecutions Based on the Universality Principle').

⁴⁰² There is vast literature available on the practice of universal jurisdiction by European states. See for example Reydam's 'Belgium's First Application of Universal Jurisdiction: the *Butare Four Case*'; Reydam's 'Belgium Reneges on Universality: the 5 August 2003 Act on Grave Breaches of International Humanitarian Law'; Kaleck 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' 2009 ; R Rissing-van Saan 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia'; J Alvarez 'The Reform of Universal Jurisdiction in Spain: For Whom the Bell Tolls?'

It shall be argued that the rise of universal jurisdiction in Africa ought to be understood against the background of Anghie's theory on the colonial origins of the sovereignty doctrine. As argued by Anghie, the colonial confrontation was central to the development of international law including fundamental doctrines such as state sovereignty. In this vein, it is submitted that the efforts by the AU and the individual African states to strengthen universal jurisdiction mechanisms on the continent are a way of reasserting African sovereignty. As was discussed in Chapter Two, after decolonisation the previously colonised states sought to enforce the doctrine of sovereignty in order to guard against post-colonial interferences.

African states have reiterated through the various decisions adopted by the AU that the exercise of universal jurisdiction by European states against African officials, and the indictment of African Heads of States by the ICC, is a violation of their sovereignty. It is submitted in this regard that the push for universal jurisdiction by African states is a way to reclaim their sovereignty and thereby avoid universal jurisdiction as practiced by European states, and the jurisdiction of the ICC. The adoption of the Model Law, as well as the assertion by the AU of the right to initiate peacekeeping missions on the continent without the involvement of the AU in the Protocol relating to the Establishment of the Peace and Security Council, is a reaffirmation of the sovereignty of African states by the AU.⁴⁰³

The provisions of instruments introduced by the AU starting from the Constitutive Act of the African Union which was adopted in 2000 shall be examined in detail. The Constitutive Act provides for intervention in a member state where there is evidence that genocide, war crimes or crimes against humanity may have been committed.⁴⁰⁴ The 2002 African Union Protocol relating to the Establishment of the Peace and Security Council; the 2008 Protocol on the Statute of the African Court of Justice and Human Rights and its 2014 amendment; and the 2012 AU Model Law on Universal Jurisdiction shall also be examined. Domestic legislative instruments in South Africa; Kenya; Uganda; Mauritius and Senegal shall also be examined to show that universal jurisdiction is indeed on the rise in Africa.

⁴⁰³ See Article 7 of the African Union Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002)

⁴⁰⁴ See article 4 (h) of the Constitutive Act (2000).

4.2 THE SECOND PHASE: THE RISE OF UNIVERSAL JURISDICTION IN AFRICA

Since 2000, the African Union has stated its commitment to dealing with impunity for international crimes on the continent. A number of instruments have been introduced, and they all reiterate the AU's commitment to fighting impunity and to defending the sovereignty of its member states. It is submitted that these instruments were introduced by the AU as part of efforts to consolidate the sovereignty of its member states and thereby avoid undue influence from non-African states. The instruments, starting with the Constitutive Act of the African Union shall be examined below in order to show that their introduction resonates with the argument advanced in chapter two that the colonial confrontation was central to the development of international law, particularly the sovereignty doctrine. African states, weary of their colonial past, are making efforts to reassert their sovereignty and put their own international justice mechanisms in place to ensure that there is no unwarranted external interference by Western states. It is pertinent to mention at this point that the AU as a regional body does not enjoy sovereignty, but the actions taken by the AU are aimed at reinforcing the sovereignty of the individual member states.

4.2.1 African regional instruments on the punishment of international crimes

4.2.1.1 The Constitutive Act of the African Union (2000).

The Constitutive Act of the African Union was adopted in Lome, Togo on the 11th of June 2000. It replaced the Charter of the Organisation of African Unity (OAU Charter) of 1963 following the replacement of the Organisation of African Unity by the African Union. The Constitutive Act outlines the objectives of the African Union, and one of them is to defend the sovereignty and independence of member states. It states in article 3 that, 'The objectives of the Union shall be to... (b) defend the sovereignty, territorial integrity and independence of its Member States.'⁴⁰⁵

The issue of sovereignty has always been of paramount importance to African states. The OAU Charter states in its preamble that the Heads of States and Government agreed to the Charter, '...Determined to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states and to fight against neo-colonialism in

⁴⁰⁵ See article 3 (b) of the Constitutive Act.

all its forms.’⁴⁰⁶ In a similar vein, The Constitutive Act provides in article 4 (a) that, ‘The Union shall function in accordance with the following principles (a) sovereign equality and interdependence among member states of the Union.’⁴⁰⁷

One of the primary goals that the AU seeks to achieve is therefore to ensure that the sovereignty of its individual member states is respected. This resonates with arguments by Anghie and other scholars such as Abi-Saab who have asserted that after decolonisation, the newly independent states sought to safeguard their hard won sovereignty. Abi-Saab said of the previously colonised states,

Once they have achieved independence and reacquired sovereignty, they are very reluctant to accept any limitation of it. They consider such limitations as indirect means to achieve what was achieved earlier by outright domination.⁴⁰⁸

Article 4 (h) of the Constitutive Act is arguably the most significant provision in the context of the AU’s stated commitment to fight impunity on the continent. It provides for ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.’⁴⁰⁹ This provision is evidence that the AU as a regional body is committed to deal with impunity on the continent and it thus provides for intervention in Member States where there are allegations of the core crimes of genocide, war crimes and crimes against humanity having been committed. This is a noticeable shift from the OAU Charter which provided in its article III (2) that, ‘The member States...solemnly affirm and declare their adherence to the following principles...Non-interference in the internal affairs of states.’⁴¹⁰

The shift in focus is attributable to a shift in the priorities of the African Union. As all African states had become independent from colonialism by the time the AU replaced the OAU, the goal of African states shifted from that of eradicating all colonial forms to that of ensuring the protection of human rights and it was determined that intervention in member states was possible. However, the OAU Charter’s provision on non-intervention became a

⁴⁰⁶ See the Preamble to the OAU Charter (1963), and article III (1) which states the sovereign equality of all states as one of the guiding principles of the organisation.

⁴⁰⁷ See article 4 (a) of the Constitutive Act.

⁴⁰⁸ Abi-Saab ‘The Newly Independent States and the Rules of International Law: An Outline’ 103-104.

⁴⁰⁹ See article 4 (h) of the Constitutive Act of the African Union (2000)

⁴¹⁰ See article III (2) Charter of the Organisation of African Unity (adopted 25/5/1963).

stumbling block to the protection of human rights and the fight against impunity by African states; hence this necessitated the inclusion of article 4 (h) in the Constitutive Act.⁴¹¹

Although the Constitutive Act does not provide for the exercise of universal jurisdiction, article 4 (h) is indicative of the regional body's commitment to ensure accountability for international crimes.⁴¹²

4.2.1.2 The African Union Protocol on Peace and Security Council (2002).

In 2002 the AU adopted the Protocol relating to the Establishment of the Peace and Security Council. The Peace and Security Council has the power to deploy a peace keeping mission to a member state. In this Protocol, the AU reiterates that the Peace and Security Council shall be guided by the principle of '...respect for the sovereignty of Member States.'⁴¹³ Article 4 (j) of the Protocol provides that the Peace and Security Council shall also be guided by the principle of the right to intervene in Member States pursuant to article 4 (h) of the Constitutive Act. Article 7 outlines the Powers of the Peace and Security Council. It has the power to undertake peace building missions, recommend to the Assembly intervention in a Member State pursuant to article 4 (h) of the Constitutive Act and approve the modalities for such intervention.⁴¹⁴

It is significant that the Protocol makes no mention of the United Nations Security Council, which is mandated with the maintenance of peace and the deployment of peacekeeping missions by the United Nations. The fact that the AU has given itself the power to deploy peacekeeping missions without authority from the UN is indicative of African states' desire to find African solutions to African problems. By mandating the Peace and Security Council with deployment of peace keeping missions without deferring to the UN Security Council for approval, the AU has asserted the sovereignty of its member states. This is achieved by ensuring that there are mechanisms in place to deal with problems on the continent without interference from non-African states.

⁴¹¹ See H Hestermeyer 'African Union replaces Organization of African Unity'2002 (3) *German Law Journal* 11 available at <http://www.germanlawjournal.com/index.php?pageID=11&artid=173> (accessed 29/6/2018).

⁴¹² See Dube 'The AU Model Law on Universal Jurisdiction'457 explaining that '...the AU has consistently noted the utility of UJ in ending impunity, especially in light of article 4 (h) of the Constitutive Act of the AU.'

⁴¹³ See Article 4 (e) of the Protocol Relating to the Establishment of the Peace and Security Council (2002).

⁴¹⁴ See Article 7 (b)-(f) of the Protocol.

It is worth noting that no African State is a permanent member of the UN Security Council, and concerns have been raised about the purported immunity and perceived double standards of the Security Council.⁴¹⁵ The Protocol Relating to the Establishment of the Peace and Security Council therefore makes for a strong argument that African states are reclaiming their sovereignty through strengthening their own mechanisms for justice and peace building on the continent. Article 4 (h) of the Constitutive Act becomes the central principle which guides subsequent instruments on universal jurisdiction and regional peace keeping efforts. Although the respect for sovereignty and independence of States is of paramount importance to the AU, intervention is warranted where core crimes have allegedly been committed.

4.2.1.3 Protocol on the Statute of the African Court of Justice and Human Rights (2008), and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014)

The Protocol on the Statute of the African Court of Justice and Human Rights was adopted in 2008. It proposed the merging of the African Court on Human and People's Rights and the Court of Justice of the African Union into a single regional court, the African Court of Justice and Human Rights. This court, whose establishment now awaits ratification by 15 countries, will have jurisdiction to try international crimes through the establishment of a criminal chamber.⁴¹⁶ The protocol states in its Preamble that the member states of the AU have made a commitment, '...to take all the necessary measures to strengthen their common institutions and to endow them with the necessary powers and resources to carry out their missions effectively.'⁴¹⁷ It is submitted that this reflects on the African states' desire to reaffirm their sovereignty by putting in place effective justice mechanisms.

A number of scholars have argued that the proposed Court is a response by African states to the perceived unfair targeting of African officials by the ICC. Du Plessis, for example, argued that,

While those involved in its drafting explain that the protocol has been motivated by reasons other than anti-ICC sentiment, this explanation rings hollow when considering the recent tension between African States, the UN Security Council and the ICC; and when...the protocol is

⁴¹⁵ See generally D Tladi 'The African Union and the International Criminal Court: The battle for the soul of International Law' (2009) 34 *SAYIL* 57.

⁴¹⁶ See article 2 of the Protocol.

⁴¹⁷ See the Preamble to the Protocol.

studiously silent on any relationship between the African Court with its expanded criminal jurisdiction, and the ICC.⁴¹⁸

It is submitted that contrary to this assertion by Du Plessis, there is evidence to suggest that there were reasons for the adoption of the protocol which are not related to the negative perception of the ICC. The idea of an African court with a criminal chamber was first proposed in 2004 by the then Chairperson of the AU Assembly, former Nigerian President Olusegun Obasanjo. In January 2005 a panel of legal experts met in Addis Ababa to consider this proposal.⁴¹⁹ This happened before the indictment of Al Bashir by the ICC and before the relationship between African states and the ICC deteriorated.

The main reason why the court was proposed was to cut the operating costs of the AU by avoiding duplication of its institutions. Another significant reason for the proposal to establish the merged court was to find a mechanism to try leaders such as Hissene Habre.⁴²⁰ During the Hissene Habre debacle, Senegal had indicated that it did not have the financial means to conduct the trial. At the same time, the AU did not have a competent court to try Hissene Habre, although it had been agreed by member states that they should find an African solution to this ‘African problem’.⁴²¹

Apart from the practical reasons, the underlying notion that triggered the proposal of the establishment of the court was to strengthen African sovereignty, by strengthening African justice mechanisms and to avoid African leaders such as Habre facing trial in non-African states. Long before the deterioration of the relationship between African states and the ICC; the AU had already embarked on a project to reclaim the sovereignty of African states, beginning with the Constitutive Act in 2000, and more significantly the establishment of a Peace and Security Council with the power to deploy a peacekeeping mission without UN approval in 2002.

⁴¹⁸ M Du Plessis ‘Implications of the AU Decision to give the African Court Jurisdiction over International Crimes’ 3.

⁴¹⁹ See Coalition for an Effective African Court on Human and People’s Rights ‘The African Court of Justice’ <http://www.africancourtcoalition.org/index.php?option=com...&id=6:afr-court-integrate&catid=7:african-union&Itemid=12> (accessed 29/6/2018).

⁴²⁰ See C Murungu ‘Towards a Criminal Chamber in the African Court of Justice and Human Rights’ (2011)9 *J of Int Criminal Justice* 1067, 1075.

⁴²¹ See K Magliveras ‘Fighting Impunity Unsuccessfully in Africa: A Critique of the African Union’s Handling of the Hissene Habre Affair’ (2014) 22 *African J of Int & Comparative L* 420,431.

It has been argued that there are practical and legal problems associated with the proposed establishment of the criminal chamber.⁴²² Gevers has however convincingly argued that the establishment of the criminal chamber in the proposed court is a welcome development as it might work against the perceived double standard in international criminal law. A number of scholars and African leaders have claimed that the ICC practises double standards. The former AU Chairperson Jean Ping said that, ‘We are not against the ICC...But we need to examine their manner of operating. There are double standards. There seems to be some bullying against Africa.’⁴²³

4.2.1.4 The AU Model Law on Universal Jurisdiction

African states have in the past expressed concern regarding the application of the principle of universal jurisdiction by European states. These concerns have been expressed in the various decisions of the AU Assembly on the subject of universal jurisdiction. Notwithstanding this, both at the regional and domestic level, African states have shown an acceptance of the legality of this principle.⁴²⁴ In 2012 the AU Assembly adopted the AU (Draft) Model Law on Universal Jurisdiction over International Crimes. The model law provides a framework for the application of the universality principle in AU member states which can be adapted by states to suit their domestic legal frameworks.⁴²⁵ The AU Model Law on Universal Jurisdiction provides for the exercise of universal jurisdiction over certain international crimes including the core crimes of genocide, war crimes and crimes against humanity and other serious crimes including piracy and terrorism.⁴²⁶

⁴²² For an overview of the pros and cons of establishing a criminal chamber in the proposed court, see generally Murungu ‘Towards a Criminal Chamber in the African Court of Justice and Human Rights’; Du Plessis ‘Implications of the AU Decision to give the AU Court Jurisdiction over International Crimes’; M Matasi & J Brohmer ‘The Proposed International Criminal Chamber Section of the African Court of Justice and Human Rights’ (2012) 37 *SAYIL* 248.

⁴²³ Sudan Tribune 24/7/2010 ‘The AU Chief challenges ICC to arrest Sudanese President’ available at <http://www.sudantribune.com/spip.php?article3574> (accessed 29/6/2018).

⁴²⁴ Gevers ‘Back to the Future?’ 112.

⁴²⁵ Dube ‘The AU Model Law on Universal Jurisdiction’ 457.

⁴²⁶ See Section 8 of the African Union (Draft) Model Law on Universal Jurisdiction over International Crimes (2012); Gevers ‘Back to the Future?’ 112; Dube ‘The AU Model Law on Universal Jurisdiction’ 458.

As has been explained in Chapter Three, the legality of the exercise of universal jurisdiction is no longer a subject of dispute in international law.⁴²⁷ What remains controversial is the scope of universal jurisdiction, in particular the crimes over which universal jurisdiction can be exercised and their definitions; whether or not the presence of a suspect is required in the territory of a state seeking to exercise universal jurisdiction, and the issue of immunities of state officials in relation to the exercise of universal jurisdiction.⁴²⁸ In this regard, both the AU Model Law and the domestic instruments (which shall be examined below) address these questions, although not all of them provide clarity on all the contentious issues related to universal jurisdiction.

With regard to the definition of core crimes, the Model Law mainly gives the same definition as that given in the Rome Statute.⁴²⁹ This is with the exception of the definition of genocide, which is defined differently in the AU Model Law and the disputes surrounding the definitions of the expanded crimes including aggression, terrorism as well as the recently recognised crimes such as the unconstitutional change in government.⁴³⁰

In terms of the requirement that the accused must be present in the territory of the state seeking to exercise universal jurisdiction, the Model Law provides for the presence of the accused person at the beginning of the trial, therefore the presence of the suspect is not required for stages prior to trial such as investigations.⁴³¹ It is pertinent to note at this point that for practical reasons, the AU Model Law and other sub-regional instruments which deal with the prosecution of international crimes provide for mutual legal assistance between states in the event that there is competing jurisdiction between states.⁴³² In the context of securing the presence of the accused for trial, the model law provides that all the crimes provided for are ‘extraditable offences.’⁴³³ In this vein, the SADC Protocol on Mutual Legal Assistance in Criminal Matters; the ECOWAS Convention on Mutual Assistance in Criminal

⁴²⁷ Gevers & Vrancken ‘Jurisdiction of States’ 250.

⁴²⁸ Gevers ‘Back to the Future?’ 112.

⁴²⁹ See the Definitions section of the AU Model Law, which gives the same definitions as those in articles 6, 7 and 8 of the Rome statute of the International Criminal Court. See also Gevers *ibid* 113.

⁴³⁰ On the definition of genocide, see AU Model Law section 9(2) (f), and on the dispute surrounding the expanded list of crimes see Gevers *ibid*.

⁴³¹ See section 4 and 5 of the AU Model Law, Gevers *ibid*; Dube ‘The AU Model Law on Universal Jurisdiction’ 464.

⁴³² Section 18 AU Model Law, Gevers *ibid* 114-115.

⁴³³ Section 17(1) AU Model Law, Gevers *ibid* 115.

Matters and the Great Lakes Protocol on Genocide, War Crimes and Crimes against Humanity, all provide for an undertaking of mutual legal assistance by their member states.⁴³⁴

In addition to providing that the crimes in the AU model law shall be extraditable offences, the instrument refers to a number of other measures which may be taken to assist other states such as the collecting of evidence and making it available to the state seeking to exercise jurisdiction, as well as the identifying and tracing of the proceeds of crime.⁴³⁵ It is submitted that the provisions relating to mutual legal assistance in the AU Model Law and in the sub-regional instruments are in sync with the AU's stated commitment to combating impunity for atrocities.⁴³⁶

The instruments discussed above, with the exception of the AU Model Law on Universal Jurisdiction, do not provide for the exercise of universal jurisdiction. They are however relevant to this thesis because they reiterate the AU'S commitment to reassert the sovereignty and independence of member states, as well as to prevent impunity on the continent. The rise of universal jurisdiction in Africa arguably takes place against the background of the above instruments.

4.3 AFRICAN UNIVERSAL JURISDICTION: ICC IMPLEMENTATION EGISLATION IN SELECTED AFRICAN STATES

At the domestic level, a number of African states have implemented legislation enabling their courts to exercise universal jurisdiction whilst at the same time implementing the provisions of the Rome Statute of the ICC. These include South Africa; Uganda; Mauritius; Kenya; the Democratic Republic of Congo and Senegal. Senegal amended its Penal Code in 2007 to incorporate the core crimes of genocide, war crimes and crimes against humanity. The country also simultaneously enacted a law to update its criminal procedure. This was done to

⁴³⁴ See article 2(1) SADC Protocol on Mutual Legal Assistance in Criminal Matters (adopted on 1 March 2007); article 2(1) ECOWAS Convention on Mutual Assistance in Criminal Matters (adopted on 29 July 1992); and article 13 and 20 of the Great Lakes Protocol on Genocide, War Crimes and Crimes against Humanity (adopted in 2006). See also Gevers *ibid*. The Great Lakes Protocol does not provide for universal jurisdiction, but it nevertheless provides for mutual legal assistance in the exercise of universal jurisdiction. In addition to this, it does not oblige member states to extradite their nationals, but obliges them to prosecute should they choose not to extradite.

⁴³⁵ Section 18 (2) AU Model Law; Gevers *ibid* 114-115.

⁴³⁶ See section 3 (a) AU Model Law (objectives section).

enable the Senegalese courts to exercise universal jurisdiction for international crimes and to provide a framework for the trial of Hissene Habre as well as the country's cooperation with the ICC.⁴³⁷

4.3.1 South Africa

In South Africa, the provisions of the Rome Statute of the International Criminal Court have been implemented in domestic legislation through the enactment of the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (ICC Act). The ICC Act confers jurisdiction upon South African courts over the core crimes in the Rome Statute i.e. genocide, war crimes and crimes against humanity.⁴³⁸ In addition to this, South Africa has also domesticated the provisions of the Geneva Conventions of 1949 and their Additional Protocols through the *Implementation of the Geneva Conventions Act 8 of 2012* (hereinafter the Geneva Conventions Act).⁴³⁹ These legislative instruments shall be examined in turn in order to highlight South Africa's perspective on the application of the principle of universal jurisdiction.

It is important to note at this point that South Africa is a dualist country, and this means that international treaties only become part of international law after they have been domesticated by an Act of Parliament.⁴⁴⁰ For this reason, before the enactment of the ICC Act in 2002, South African courts did not have jurisdiction over crimes against humanity, war crimes and torture.⁴⁴¹

⁴³⁷ See Niang 'The Senegalese Legal Framework for the Prosecution of International Crimes' 1047.

⁴³⁸ See Section 4 of the ICC Act. See also H Woolaver 'Partners in Complementarity: The role of civil society in the investigation and prosecution of international crimes in South Africa' (2016) 1 *Acta Juridica* 129,131.

⁴³⁹ See Woolaver *ibid* 132-133; C Gevers 'International Criminal Law in South Africa' in E de Wet *et al* (eds)*The Implementation of International Law in South Africa* (2015) 403,419-425, L Chenwi 'Universal Jurisdiction and South Africa's Perspective on the Investigation of International Crimes' (2014) 31 *SALJ* 27, 28-29.

⁴⁴⁰ Dube 'The AU Model Law on Universal Jurisdiction' 467. See also section 231 (4) of the Constitution of the Republic of South Africa Act 108 of 1996 which provides that 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation...'

⁴⁴¹ See Section 3 of the ICC Act. See also Woolaver 'Partners in Complementarity'131; Chenwi (note 439 above) 34.

4.3.1.1. The *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*

The ICC Act enabled South African Courts to exercise jurisdiction over the core crimes of war crimes, crimes against humanity and genocide.⁴⁴² The main purpose of the Act was to enable South Africa to fulfil its obligations under the Rome Statute of the ICC, which it ratified in November 2000.⁴⁴³ With regards to the definitions of the crimes, the ICC Act incorporates the definitions as they are given in the Rome statute of the ICC, in Schedule 1.⁴⁴⁴ In terms of section 4(3), there are four jurisdictional bases upon which South African courts may exercise jurisdiction over the core crimes. The courts may exercise jurisdiction where the accused is a South African citizen; accused is ordinarily resident in the Republic or the victim is ordinarily resident in the Republic. Notably, section 4 (3) (c) provides as follows,

In order to secure the jurisdiction of a South African court for purposes of this chapter, any person who commits [an ICC] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if ...that person, after the commission of the crime, is present in the territory of the Republic.⁴⁴⁵

The effect of section 4(3) (c) is therefore to confer upon South African courts universal jurisdiction, to be exercised in cases where no other jurisdictional nexus exists between South Africa and the crime.⁴⁴⁶ According to Gevers, although the Act provides for four jurisdictional bases, only jurisdiction based on the universality principle is significant because the fact that

⁴⁴² See section 4(1) of the ICC Act which provides that 'Despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence....'. For a detailed commentary on the ICC Act see generally Kantz 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into national law in South Africa' and Du Plessis 'South Africa's Implementation of the ICC Statute: An African example'.

⁴⁴³ Woolaver 'Partners in Complementarity' 131.

⁴⁴⁴ See Schedule 1 of the ICC Act; Gevers 'International criminal law in South Africa' 416.

⁴⁴⁵ See section 4 (3) (c) of the Act.

⁴⁴⁶ Gevers 'International Criminal Law in South Africa' 416; Chenwi 'Universal Jurisdiction and South Africa's Perspective on the Investigation of International Crimes' 35.

the Act empowers courts to exercise universal jurisdiction renders the inclusion of the territoriality, nationality and passive personality bases of jurisdiction redundant.⁴⁴⁷

Section 4(3) (c) also provides for the presence of the accused person in South Africa after the commission of a crime. A number of scholars including Woolaver and Chenwi have asserted that this section provides for the exercise of conditional universal jurisdiction by South African Courts.⁴⁴⁸ However as has been discussed in Chapter Three, whether or not a country's legislation requires the presence of the accused for universal jurisdiction to be exercised does not have a bearing on the permissibility of the exercise of universal jurisdiction.⁴⁴⁹ In this vein, Gevers has convincingly argued that section 4(3)(c) ought to be read together with section 4(1) which confers upon South African Courts prescriptive jurisdiction over the crimes provided for in the Act. Gevers notes that the issue which is subject to debate is not whether universal jurisdiction is conditional, but at what stage of the proceedings the presence of the accused in South Africa is required.⁴⁵⁰

4.3.1.2. SOUTH AFRICA'S PERSPECTIVE ON UNIVERSAL JURISDICTION: THE *ZIMBABWE TORTURE DOCKET CASE*

The *Zimbabwe Torture Docket Case*⁴⁵¹ was the first case in which the South African courts had to rule on the interpretation of the provisions of the ICC Act. Prior to this, the decisions in *AZAPO*⁴⁵² and *S v Basson*⁴⁵³ had been the leading authorities on the subject of the application of international criminal law in South Africa.⁴⁵⁴ The case was first decided by the North Gauteng High Court, then on appeal by the Supreme Court of Appeal and finally the

⁴⁴⁷ Gevers *ibid fn* 63.

⁴⁴⁸ See Chenwi 'Universal Jurisdiction and South Africa's Perspective on the Investigation of International Crimes' 35; Woolaver 'Partners in Complementarity' 131.

⁴⁴⁹ See Woolaver *ibid* 131-132 and Chenwi *ibid* 35.

⁴⁵⁰ For a detailed argument on this point see generally C Gevers 'Southern African Litigation Centre and Another v NDPP and Others: Note' (2013) 130 SALJ 293.

⁴⁵¹ *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (77150/09) [2012] ZAGPPHC 61.

⁴⁵² *Azanian Peoples Organisation (AZAPO) and Others v The President of the Republic of South Africa* CCT 17/96.

⁴⁵³ *S v Basson* 2005 (1) SA 171 (CC); *S v Basson* 2007 (3) SA 582 (CC).

⁴⁵⁴ Gevers 'International Criminal Law in South Africa' 427.

Constitutional Court.⁴⁵⁵ The *Zimbabwe Torture Docket Case* is discussed in detail here because the jurisprudence of the three Courts which dealt with the matter is important in the examination of the rise of universal jurisdiction in Africa. It is pertinent to note that the discussion of this case at length, notwithstanding that the focus of the thesis is not limited to the practice of universal jurisdiction in South Africa; is not in any way intended to diminish the importance or relevance of the domestic instruments of the other selected African states.

The brief facts of the matter are that in March 2007, state police in Zimbabwe raided the headquarters of the country's main opposition party, Movement for Democratic Change (MDC). Following this a South African NGO, the Southern African Litigation Centre (SALC) compiled a dossier with the help of the Zimbabwe Exiles Forum, a South African based NGO. This dossier detailed alleged torture perpetrated against MDC activists by high ranking state officials in Zimbabwe. It was submitted in 2008 to the Priority Crimes Litigation Unit (PCLU) of the National Prosecuting Authority (NPA), and the SALC requested the NPA and the South African Police Services (SAPS) to investigate the alleged systemic torture, in terms of the ICC Act. The NPA declined to initiate investigations on the basis that it lacked the jurisdiction to initiate such investigations as the alleged torture had been committed outside the territorial borders of South Africa, against non-South Africans, by non-South Africans.⁴⁵⁶

In response to the refusal by the NPA to initiate investigations, the SALC approached the North Gauteng High Court for an administrative review of this decision. In 2012, the High Court ruled that the refusal by the NPA to investigate the matter had been unreasonable. The first key issue which was considered by the court was whether South Africa was obliged to investigate and prosecute international crimes under (the ICC Act) domestic law and (the Rome Statute) international law. On this point, the court ruled that South Africa was obliged to investigate and prosecute international crimes 'as far as possible'. The second issue that the court pronounced on was the question at what stage the presence of the accused in South

⁴⁵⁵ For a detailed commentary of the case as decided by the High Court, Supreme Court and Constitutional Court see Gevers *ibid* 427-438, and see generally A Mudukuti 'The Zimbabwe Torture Docket Case: Reflections on domestic litigation for international crimes in Africa' (2016) 1 *Acta Juridica* 287.

⁴⁵⁶ Woolaver 'Partners in Complementarity' 139. For a detailed factual background of the case see SALC (CC).

Africa is required. The court held that the presence of the accused was not required at the investigation stage but only at the trial stage.⁴⁵⁷

As noted by Gevers, this pronouncement by the court brought clarity to section 4 (3) of the ICC Act, which does not specify at which stage the accused's presence is required in South Africa⁴⁵⁸ Thirdly, the court considered the issue of the threshold required for an investigation to be initiated, and it held in this regard that the required threshold is that there should be a reasonable basis to initiate an investigation.⁴⁵⁹ Lastly, the court considered whether or not political considerations are relevant in deciding whether to initiate investigations, and it held that political considerations or diplomatic initiatives were irrelevant for purposes of determining whether to investigate. They would however become relevant at the stage of determining whether or not to prosecute.⁴⁶⁰

The North Gauteng High Court ruling was appealed by the South African government, and this appeal was rejected by the Supreme Court of Appeal in its judgment on 27 November 2013.⁴⁶¹ On appeal, the first and third issues were discussed. In particular, the SCA was requested to rule on the proper interpretation of section 4 (3) (c) of the ICC Act. The Court concluded, as the High Court had done, that the South African police are empowered and required to investigate the allegations of torture regardless of whether or not the accused had been present in South Africa.⁴⁶² In this regard, the court held that section 4 (1) of the ICC Act as read with the definitions of crimes against humanity and part 2 of schedule 1 of the Act '...criminalises...conduct at the time of its commission, regardless of where and by whom it was committed'.⁴⁶³

⁴⁵⁷ *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (77150/09) [2012] ZAGPPHC 61 para 32. For a detailed overview of this point see generally C Gevers 'Southern African Litigation Centre and Another v NDPP and Others: Note' 2013 (130) SALJ 293.

⁴⁵⁸ Gevers 'International Criminal Law in South Africa' 429

⁴⁵⁹ Para 31.

⁴⁶⁰ *Ibid.*

⁴⁶¹ *National Commissioner of South African Police Services v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA).

⁴⁶² Para 3.2.2; para 67. For a detailed discussion of the SCA Judgment see Gevers 'International Criminal Law in South Africa' 430-431.

⁴⁶³ Para 51.

The South African Police Services then took the matter on appeal to the Constitutional Court.⁴⁶⁴ The Constitutional Court upheld the decision of the Supreme Court of Appeal and ruled that the SAPS had breached its obligations by declining to initiate an investigation. The Constitutional Court endorsed the finding by the SCA that the SAPS were not only empowered to investigate the crimes in question, but that they had a duty to do so. It further held that this duty stemmed from those situations where the territorial state is unable or unwilling to investigate the alleged crimes.⁴⁶⁵ On the issue of the presence requirement, the Court held that the presence of the suspect in South Africa was not required in order for an investigation to be initiated.⁴⁶⁶

The Constitutional Court judgment is laudable for having clarified a number of issues relating to South Africa's application of international criminal law generally, and more specifically the implementation of the Rome Statute of the International Criminal Court. These issues include that of the presence requirement and the contentious issue of immunities.

4.3.1.3 The *Implementation of the Geneva Conventions Act 8 of 2012*

South Africa enacted the Geneva Conventions Act in 2012, becoming the first country to domesticate the provisions of the Geneva Conventions and their additional protocols, thereby ensuring the prevention and punishment of their breaches.⁴⁶⁷ The Act was adopted sixty years after the country acceded to the Geneva Conventions.⁴⁶⁸ It criminalises offences which fall under two categories. One is the category of grave breaches of the Geneva Conventions and their first Additional Protocol of 1977, and these are breaches which are typically committed

⁴⁶⁴ For a detailed commentary of the Constitutional Court judgment see Gevers 'International Criminal Law in South Africa' 431-438; M Du Plessis and C Gevers 'Civil Society, 'positive complementarity and the 'Torture Docket' case' (2016) 1 *Acta Juridica* 158,162-167.

⁴⁶⁵ Du Plessis and Gevers *ibid* 164; *SALC* (CC) para 55.

⁴⁶⁶ Para 47.

⁴⁶⁷ See the Preamble to the Geneva Conventions Act. See also Chenwi 'Universal Jurisdiction and South Africa's Perspective on the Investigation of International Crimes' 36; Gevers *ibid* 419; and M Du Plessis 'The Geneva Conventions and South African Law' *Institute for Security Studies* Policy Brief 43 June 2013 2.

⁴⁶⁸ For a detailed commentary on the Act, see generally C Gevers, M Du Plessis & A Wallis 'Geneva Conventions Act: Sixty years in the making, better late than never?' (2012) *African YIHL* 185.

during international armed conflicts.⁴⁶⁹ Section 5 (2) of the Act provides that ‘a grave breach means a breach referred to in article 50 of the First Convention; article 51 of the Second Convention; article 130 of the Third Convention; article 147 of the Fourth Convention ,and article 11 or 85 of Protocol I.’⁴⁷⁰

The second category of offences which are criminalised by the Geneva Conventions Act is that of breaches to the Conventions which are not included in section 5 (2).⁴⁷¹ According to Gevers, this category of offences possibly includes war crimes which are committed in non-international armed conflict.⁴⁷² These two categories are subject to different jurisdictional bases. The first category of offences is subject to the exercise of universal jurisdiction by the courts. Section 7 (1) of the Act provides that

Any court in the Republic may try a person for an offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic.⁴⁷³

Contrary to the ICC Act, the Geneva Conventions Act provides for ‘unconditional’ universal jurisdiction in that section 7 (1) does not provide for a requirement of presence of the accused.

With respect to the second category of offences, the Act does not confer universal jurisdiction upon South African courts over these offences. Instead, jurisdiction can be exercised based on the grounds of territoriality and nationality, but not passive nationality.⁴⁷⁴ The Chief Justice and the National Director for Public Prosecutions have to be consulted

⁴⁶⁹ Du Plessis ‘The Geneva Conventions and South African Law’2; Gevers ‘International Criminal Law in South Africa’ 420.

⁴⁷⁰ See section 5 (2) of the Act.

⁴⁷¹ See section 5 (3) of the Act.

⁴⁷² Gevers ‘International Criminal Law in South Africa’ 420.

⁴⁷³ This section should be read with section 5 (1) which provides that ‘Any person who, whether within or outside the Republic, commits a grave breach of the Conventions, is guilty of an offence.’ See also Woolaver ‘Partners in Complementarity’133.

⁴⁷⁴ See section 5 (3) and section 5 (4) of the Act (providing for territorial and nationality jurisdiction respectively). See also Gevers ‘International Criminal Law in South Africa’ 421; Du Plessis ‘The Geneva Convention and South African Law’ 2.

before a determination is made as to which court should try a person accused of offences referred to in the Act.⁴⁷⁵

Another point worth noting with respect to the Act is that it applies to offences which were committed before it was adopted. Section 7 (4) of the Act provides that, ‘Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect.’⁴⁷⁶ As has been noted by Gevers, and Du Plessis, this provision is confusing because it does not specify how such prosecution is to take place.⁴⁷⁷

4.3.2 Kenya

In Kenya, the provisions of the Rome Statute of the ICC were domesticated by the *International Crimes Act 16 of 2008*. This followed the country’s ratification of the Rome Statute of the ICC in 2005. Its purpose is to enable the courts to exercise jurisdiction over the core international crimes of genocide, crimes against humanity and war crimes, and to enable Kenya to cooperate with the ICC.⁴⁷⁸ The Act incorporates the Rome Statute of the ICC in its entirety, appended as a First Schedule. In terms of defining the core crimes, the Act imports the definitions directly from the Rome Statute of the ICC.⁴⁷⁹ This is similar to the definitions in the ICC Act of South Africa which are incorporated directly from the Rome Statute of the ICC. The Act provides for two categories of offences. The first category is the core crimes which are provided for in section 6 (1) which states that, ‘A person who, in Kenya or elsewhere, commits – (a) genocide, (b) a crime against humanity; or (c) a war crime, is guilty of an offence.’⁴⁸⁰

It is specified in the Act that the High Court is the court which will conduct trials in respect of these crimes.⁴⁸¹ The second category consists of crimes which stem from the prosecution of

⁴⁷⁵ See section 7 (2) of the Act; Chenwi ‘Universal Jurisdiction and South Africa’s Perspective on the Investigation of International Crimes’ 36.

⁴⁷⁶ See section 7 (4) of the Act.

⁴⁷⁷ See Gevers ‘International Criminal Law in South Africa’ 421-422; Du Plessis ‘The Geneva Convention and South African Law’ 4.

⁴⁷⁸ See the short title section of the International Crimes Act 16 of 2008. For an overview of this legislation see generally Okuta ‘Legislation for the Prosecution of International Crimes in Kenya’.

⁴⁷⁹ See section 6 (4) of the Act.

⁴⁸⁰ See section 6 (1) of the Act.

⁴⁸¹ See section 8 (2) of the Act.

core crimes under section 6 of the Act. These offences range from bribery of judges and officials, obstructing justice, perjury and fabricating evidence among others, and are provided for in section 9-17 of the Act.

With respect to the first category of offences, the Act empowers the court to exercise jurisdiction on the basis of the territoriality, nationality and passive personality principle. In addition, jurisdiction can be exercised in those instances where the accused at the time of the commission of the offence was a citizen or an employee of a state engaged in an armed conflict against Kenya, or if the victim is a citizen of a state that was allied with Kenya in an armed conflict. Finally, the Act empowers the court to exercise universal jurisdiction over the core crimes. It stipulates in section 8 (c) that, ‘A person who is alleged to have committed an offence under section 6 may be tried and punished in Kenya for that offence if ...the person is, after the commission of the offence, present in Kenya.’⁴⁸²

For the second category of offences, jurisdiction is provided for in section 18 which provides for jurisdiction on the basis of the territoriality, nationality and universality principle.⁴⁸³ In contrast to jurisdiction over the core crimes which is the preserve of the High Court in terms of section 8, section 18 (2) stipulates that a trial in respect of the crimes provided for in section 9-17 may be conducted by any competent court.

With respect to the issue of presence of the accused, the Act is strict on the presence requirement. Both section 8 (c) and section 18 (c) which provide for the exercise of universal jurisdiction require the presence of the accused in Kenya after the commission of the offence. Both provisions stipulate that an accused person ‘...may be tried and punished in Kenya if they are present in Kenya after the commission of the offence.’⁴⁸⁴

It ought to be noted that despite Kenya having domesticated the Rome Statute of the ICC, the relationship between the country and the ICC has been deteriorating in recent years. This followed the confirmation of proceedings against the incumbent President Uhuru Kenyatta and his deputy William Ruto in 2012. Although the cases have now ended, Kenya has been at the forefront of calling for a mass withdrawal of African countries from the ICC. In a public address in December 2016, Kenya’s President said that,

⁴⁸² For the other jurisdictional bases see section 8 (a) - (b) (iv).

⁴⁸³ See section 18 (a) - (c) of the Act.

⁴⁸⁴ See section 8 (c) and section 18 (c) of the Act.

The Kenyan cases at the International Criminal Court have ended, but the experience has given us cause to observe that this institution has become a tool of global power politics and not the justice it was built to dispense.⁴⁸⁵

4.3.3 Uganda

The *International Criminal Court Act 11 of 2010* confers universal jurisdiction upon Ugandan courts in respect of the core crimes of genocide, war crimes and crimes against humanity.⁴⁸⁶ The purposes of the Act include giving domestic effect to the Rome Statute of the ICC, to implement Uganda's obligations under the Rome Statute of the ICC, and to enable Uganda to cooperate with the ICC in matters including the arrest and surrender of suspects.⁴⁸⁷ In terms of definitions of the core crimes, the Act incorporates the definitions as they are given in the Rome statute of the ICC and in the Geneva Conventions. Section 7 (2) provides that genocide is an act referred to in article 6 of the Rome Statute of the ICC, whilst section 8 (2) provides that crimes against humanity are those referred to in article 7 of the Rome Statute of the ICC. In terms of section 9 (2) of the Act, war crimes are those acts referred to in article 8 (2) (a)-(e) of the Rome Statute. Article 2 (a) relates to the breaches of the Geneva Conventions.

In addition to the core crimes, the Act also provides for jurisdiction over offences related to the administration of justice including corruption of a judge, bribery of a judge, corruption and bribery of an official of the ICC, and giving false evidence. These are provided for in section 10-16 of the Act. The difference between the core crimes and the crimes against the administration of justice is that for the core crimes the Act specifies that the penalty to be imposed upon conviction shall be '...imprisonment for life or a lesser term.'⁴⁸⁸ With the offences related to the administration of justice, the penalties vary according to the offence, with a heavier penalty being imposed for offences involving an act of omission compared to those which do not. For instance, section 10 (1) of the Act stipulates that the penalty of a judge convicted of corruption in respect of an act of omission is '...imprisonment for a term not exceeding 14 years.' Section 10 (2) provides that the penalty of a Judge, Registrar or

⁴⁸⁵ See Voice of Africa (13/12/2016) 'Kenya Signals Possible ICC Withdrawal' available at www.voanews.com/a/kenya-signals-possible-icc-withdrawal/3634365.html (accessed 29/6/2018).

⁴⁸⁶ See the purposes section of the International Criminal Court Act 11 of 2010, and section 7-9 of the Act.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ See section 7 (3) (genocide); section 8 (3) (crimes against humanity) and section 9 (3) (war crimes).

Deputy Registrar convicted for corruption which does not involve an act of omission is ‘...imprisonment for a term not exceeding 7 years.’⁴⁸⁹

For both the core crimes and offences relating to the administration of justice, the Act confers the courts with jurisdiction on the basis of the nationality, passive personality and universality principles where the offence has been committed outside Uganda. In terms of section 18, jurisdiction may be exercised if the person,

(a) is a citizen or permanent resident in Uganda;(b) is employed by Uganda in a civilian or military capacity; (c) has committed the offence against a citizen or permanent resident of Uganda; or (d) is after the commission of the offence, present in Uganda.⁴⁹⁰

Although the Act provides that the accused must be present in Uganda after the commission of the Act, it does not specify at which stage this presence is required. It only states that the accused must be present ‘for the purpose of jurisdiction.’⁴⁹¹ It is therefore not clear as to whether the accused must be present at the stage of investigations or at the trial stage. However, as rightly argued by Dube, as there is no customary international law rule prohibiting investigations in absentia, the suspect’s presence in Uganda is only required at the trial stage.⁴⁹² The consent of the Director for Public Prosecutions is required before proceedings can be initiated before a court, although an accused may be arrested and remanded in custody, and an arrest warrant may be issued without such consent.⁴⁹³

4.3.4 Mauritius

Mauritius domesticated the Rome Statute of the ICC by enacting the International Criminal Court Act 27 of 2011. The Act criminalises the three core crimes and incorporates the Rome Statute definitions for these crimes.⁴⁹⁴ The Act confers jurisdiction upon the courts for acts

⁴⁸⁹ See section 10(1) and (2) of the Act.

⁴⁹⁰ Dube ‘The AU Model Law on Universal Jurisdiction’ 474. See also Gevers ‘Back to the Future?’ 113 footnote 103.

⁴⁹¹ Section 18 of the Act.

⁴⁹² Dube (note 490 above) 475.

⁴⁹³ Section 17 of the Act.

⁴⁹⁴ See section 4 (1) of the International Criminal Court Act 27 of 2011 providing that a person who commits crimes against humanity, war crimes and genocide shall have committed an offence. See also section 2 for the definitions of the core crimes.

committed outside the country on the basis of the nationality, passive personality and universality principles. Section 4 (3) provides that,

Where a person commits an international crime outside Mauritius he shall be deemed to have committed the crime in Mauritius if he (a) is a citizen of Mauritius;(b) is not a citizen of Mauritius but is ordinarily resident in Mauritius;(c) is present in Mauritius after the commission of the crime; or (d) has committed the crime against a citizen or resident of Mauritius.⁴⁹⁵

Section (4) (3) (c) does not specify at which stage after the commission of the crime the presence of the accused person is required. However, as thoughtfully argued by Gevers, the presence requirement is provided for under the ‘Offences and Jurisdiction of Courts of Mauritius’ section, therefore by implication the presence of the accused is only required at the trial stage.⁴⁹⁶

4.3.5 Senegal

Senegal was the first country in the world to ratify the Rome statute of the ICC, but it did not take any immediate steps to domesticate its provisions.⁴⁹⁷ However, following Senegal’s refusal to extradite the former Chadian leader Hissene Habre to Belgium in 2005, and the decision by the AU that Habre should be tried in Senegal and that Senegal should put in place a legal framework to enable such a trial to take place, the country took steps to domesticate the provisions of the Rome statute of the ICC.⁴⁹⁸

In a law enacted on 31 January 2007, the country amended its Penal Code to provide a framework for the prosecution of the crimes of genocide, war crimes and crimes against humanity.⁴⁹⁹ In addition, Senegal amended its Criminal Procedure Code to provide for the exercise of universal jurisdiction and to give effect to the complementarity provision in the

⁴⁹⁵See section 3 (a)-(d) of the Act.

⁴⁹⁶ Gevers ‘Back to the Future?’ 113 -114 footnote 103.

⁴⁹⁷ Niang ‘The Senegalese Legal Framework for the Prosecution of International Crimes’ 1047.

⁴⁹⁸ See Decision on the Hissene Habre Case and the African Union Assembly/AU/Dec127 (VII).

⁴⁹⁹ Law no 2007-02-of 12 February 2007 modifying the Penal Code. For a detailed overview of the law see generally Niang ‘The Senegalese Legal Framework for the Prosecution of International Crimes’; and C Murungu ‘Immunity of State Officials and Prosecution of International Crimes in Africa’, unpublished LLD thesis (University of Pretoria 2011) 228-238.

Rome Statute.⁵⁰⁰ Article 2 of the law amending the criminal Procedure Code amended article 669 of the Criminal Procedure Code and provides for the exercise of universal jurisdiction by the Courts of Senegal.⁵⁰¹ The exercise of universal jurisdiction in Senegal is subject to the accused person being present in the territory of Senegal. Article 2 of Law no 2007-05 provides that universal jurisdiction can be exercised ‘...if that person is found in Senegalese territory or if the victim resides in Senegal if the government obtains extradition for that person.’⁵⁰² As was mentioned above, the amendment to the Penal Code and to the Criminal Procedure Code was done in order to put in place a legal framework to try Habre.⁵⁰³ Earlier attempts to try Habre for human rights violations perpetrated whilst he was president of Chad had failed as Senegalese law did not incorporate a framework for the punishment of international crimes, or provide for the exercise of universal jurisdiction.⁵⁰⁴

Article 431-1 of the Amended Penal Code incorporates the crime of genocide and it lists the four protected groups which are the national, ethnic, racial and religious groups, incorporating the groups as they are stated in both the Convention on the Prevention and Punishment of Genocide of 1948 (Genocide Convention) and the Rome Statute of the ICC.⁵⁰⁵ Article 431-2 incorporates crimes against humanity and war crimes are incorporated in article 431-3.⁵⁰⁶ Article 431-6 introduced a departure from the principle of non-retroactive application of the law. This was necessitated by the fact that the crimes which Habre was accused of having committed dated back to between 1982 and 1990, and therefore the enabling legislation would have to be applied retroactively in Habre’s case.⁵⁰⁷ Despite the provision in Article 431-6, the Penal Code could not override the Constitution as it is the

⁵⁰⁰ Law no 2007-05 of 12 February 2007 Modifying the Criminal Procedure Code on the Implementation of the Rome Statute of the International Criminal Court; Niang *ibid* 1048; Murungu *ibid* 235.

⁵⁰¹ Article 2 Law no 2007-05 of 12 February 2007; Murungu *ibid* 235-236.

⁵⁰² Murungu *ibid* 236.

⁵⁰³ Niang ‘The Senegalese Legal Framework for the Prosecution of International Crimes’ 1047.

⁵⁰⁴ See S Williams ‘The Extraordinary African Chambers in the Senegalese Courts: an African Solution to an African Problem?’ (2013) 11:5 *J of Int Criminal Justice* 1139, 1141; Niang *ibid* 1048.

⁵⁰⁵ Niang *ibid* 1049. Niang notes that article 431-1 further provides that ‘...the protected groups can be “...determined by any other criteria...” and it is not clear which other criteria can be used in this determination.

⁵⁰⁶ Niang *ibid* 1051-1052.

⁵⁰⁷ Niang *ibid* 1053-1054.

supreme law. Article 9 (2) of the Senegalese Constitution provides that, ‘No one can be convicted save pursuant to a law entered into force prior to the act committed.’⁵⁰⁸

In order to overcome this legal hurdle, a new paragraph was added to article 9 of the Constitution, providing for an exception to the principle of non-retroactivity with respect to the crimes of genocide, crimes against humanity and war crimes. It provides as follows,

the provisions of the preceding paragraph shall not exclude the prosecution, trial and sentencing of a person for acts which at the time they were committed were deemed to be criminal acts in accordance with the rules of international law on genocide, crimes against humanity and war crimes.⁵⁰⁹

In addition, the amendment to the Criminal Procedure Code provides in article 1 that the crimes incorporated into the Code shall not be subject to the Statute of Limitations.⁵¹⁰ Habre however successfully challenged the amendments to both the Penal Code and the Criminal Procedure Code before the ECOWAS court in 2010. The court ruled that if a domestic court in Senegal were to try Habre based on these amendments the trial would still be in violation of the *nullum crimen sine lege* rule, but this would not be the case if he were to be tried by an international tribunal. Following this ruling, Senegal agreed to set up a tribunal to try Habre, with the support of the AU.⁵¹¹

The EAC was established in December 2012 after Senegal enacted the requisite legislation, leading to the arrest of Habre in June 2013.⁵¹² The trial of Habre began on the 20th of July 2015 and was concluded on the 11th of February 2016. He was convicted of crimes against

⁵⁰⁸ See article 9 (2) of the Constitution of the Republic of Senegal of 21 January 2001.

⁵⁰⁹ See article 9 (3) of the Constitution of Senegal, inserted by Constitutional Act no 2008-33 of 7 August 2008. See also Murungu ‘Immunity of State Officials’ 228.

⁵¹⁰ Niang ‘The Senegalese Legal Framework for the Prosecution of International Crimes’ 1054. This provision was necessary to deal with the provision in article 7 of the criminal procedure which provides that a crime cannot be prosecuted 10 years after its commission.

⁵¹¹ Williams ‘The Extraordinary African Chambers in the Senegalese Courts: an African Solution to an African Problem?’ 1143; C Tansey *Human Rights Brief* 25/4/2011 ‘Bringing Hissene Habre to Justice: Senegal to Create a Special Tribunal in Compliance with ECOWAS Court Judgment’ available at <http://hrbrief.org/2011/04/bringing-hissene-habre-to-justice-senegal-to-create-a-special-tribunal-in-compliance-with-ecowas-court-judgment-> (accessed 29/6/2018).

⁵¹² Williams *ibid* 1144.

humanity, war crimes and torture and sentenced to life in prison.⁵¹³ This marked an end to a decade-long legal battle between Senegal (backed by the AU) and Belgium concerning the issue of bringing Habre to trial. Habre appealed the judgment in 2017 and the EAC upheld his conviction for war crimes, crimes against humanity and torture and life sentence, but acquitted him of rape.⁵¹⁴ The trial of Hissene Habre is very significant to the rise of universal jurisdiction in Africa as it was the first time that a domestic court in Africa had exercised universal jurisdiction against a former head of state. It is worth noting at this point that the EAC is a hybrid quasi-judicial court as it was established by Senegal with the support of the AU, but it is embedded in the domestic legal system. As explained by Williams, ‘The EAC is ... best characterized as an internationalized criminal tribunal, which are ‘essentially domestic institutions but with significant participation from other states or from international organisations.’⁵¹⁵

This discussion on regional and domestic legislation on universal jurisdiction has highlighted that African states have accepted the legality of the principle of universal jurisdiction. However, African states are disgruntled about the application of this principle by European states, hence the AU Model Law and the domestic legislative instruments can be seen as Africa’s way of trying to avoid ‘European’ universal jurisdiction and come up with their own mechanisms to deal with international crimes on the continent. One of the major concerns raised by African states regarding the exercise of universal jurisdiction by European states against African officials is that it infringes upon their sovereignty. The fact that universal jurisdiction is gaining ground in Africa shows that African states are trying to reclaim their sovereignty by avoiding the exercise of jurisdiction over African state officials by non-African states, and the jurisdiction of the ICC through putting in place effective justice mechanisms.

⁵¹³ See Perez-Leon-Acevedo ‘The Conviction of Hissene Habre by the Extraordinary African Chambers in the Senegalese Courts’. On appeal, the conviction and sentence were upheld. See The Guardian (27/4/2017) ‘Ex-Chad dictator’s conviction for crimes against humanity upheld by Dakar court’ available at <https://www.theguardian.com/world/2017/apr/27/conviction-chad-hissene-habre-crimes-against-humanity-upheld> (accessed 29/6/2018).

⁵¹⁴ See AU Press Release 27/5/2017 ‘AU Welcomes appeal outcome of the Hissene Habre case by the Extraordinary African Chambers’ available at https://au.int/.../pressreleases/32420-pr-pr-068_-_au_welcomes_appeal_outcome_of (accessed 29/6/2018).

⁵¹⁵ Williams ‘The Extraordinary African Chambers in the Senegalese Courts’ 1146.

4.4 CONCLUSION: AFRICA, UNIVERSAL JURISDICTION AND SOVEREIGNTY

This chapter has attempted to address the gap created by the scholarly silence on the rise of universal jurisdiction in Africa since 2002 when South Africa enacted domestic legislation to implement the provisions of the Rome Statute of the ICC. The examination of universal jurisdiction legislative instruments both at the domestic level and at the regional level has shown that contrary to assertions by a number of scholars, the repeal of the universal jurisdiction legislation in Belgium did not result in the total demise of the principle. Instead, universal jurisdiction has gone through a second phase in the form of its rise in Africa, a development which, this thesis argues, is part of efforts by African states to reaffirm their sovereignty.

It is submitted that the reaction by African states to universal jurisdiction as practiced by European states, and to efforts by the ICC to prosecute African leaders for human rights violations, ought to be understood against the background of Anghie's theory on the colonial origins of international law. As was explained in Chapter Two, African states and European states have historically experienced sovereignty differently. As a result, they understand and apply the doctrine differently; leading to tensions between the two sides. Anghie has explained that the exercise of the sovereignty doctrine often mirrors the inequalities which were characteristic of the colonial confrontation.⁵¹⁶ The rise of universal jurisdiction in Africa at a time when African states have criticised the perceived abuse of the principle by European states, and when they have criticised the ICC as selectively targeting African leaders, therefore takes place against the background of Anghie's theory on the historical link between colonialism and sovereignty. African states want to strengthen their justice mechanisms at the regional level in order to avoid the jurisdiction of European states and that of the ICC.

It has been argued, for instance, that the establishment of the EAC was part of efforts by the AU to reinforce the sovereignty of its member states and to avoid the exercise of jurisdiction by non-African states against African leaders, in this case by Belgium.⁵¹⁷ Williams has asserted that the involvement of the AU in setting up institutions such as the EAC solves the

⁵¹⁶ Anghie 2007 114.

⁵¹⁷ Williams 'The Extraordinary African Chambers in the Senegalese Courts' 1148.

problem of African states' concerns regarding the infringement of their sovereignty.⁵¹⁸The colonial confrontation subordinated non-European states and resulted in them being treated as objects rather than subjects of international law. According to Anghie, '...It is simply and massively asserted that only the practice of European states was decisive and could create international law .Only European law counted as law.'⁵¹⁹

It is because of this history of subordination and being denied their sovereignty that African states are constantly placing an emphasis on the issue of their sovereignty. They view any attempts by European states to prosecute African state officials as being neo-colonial, which is why they have claimed that the exercise of universal jurisdiction by European states over African state officials evokes memories of colonialism.⁵²⁰

A discussion of the rise of universal jurisdiction in Africa would therefore not be complete without taking into consideration the historical link between colonialism and the sovereignty doctrine. Anghie has explained that the end of colonialism did not result in the end to colonial relations, and that the decolonisation process did not result in the complete emancipation of the former colonies. African states are still weary of their colonial past; hence they often take steps to reassert their sovereignty. He has asserted that,

The end of formal colonialism, while extremely significant, did not mean the end of colonial relations. Rather, in the view of Third World societies, colonialism was replaced by neo-colonialism; Third World states continued to play a subordinate role in the international system because they were economically dependent on the West, and the rules of international economic law continued to ensure that this would be the case.⁵²¹

In this vein, it is submitted that the rise of universal jurisdiction in Africa is an attempt by African states to re-assert their sovereignty which they were historically denied, in order to avoid interference in their affairs by their former colonisers. Although colonialism is now confined to history and it is now considered that all states are equal, the different conceptions of the sovereignty doctrine by African and European states respectively is evidence that the colonial confrontation is still central to the development of international law. This resonates with Anghie's assertion that,

⁵¹⁸ Williams *ibid* 1154.

⁵¹⁹ Anghie 2007 54.

⁵²⁰ AU-EU Expert Report on Universal Jurisdiction para 37-38.

⁵²¹ Anghie 'Evolution of International Law' 748-749.

the colonial encounter has ineluctably shaped the fundamental doctrines of international law – sources and sovereignty. Further, it has created an international law which, even when it innovates, follows the familiar pattern of the colonial encounter, the division between civilized and uncivilized, the developed and the developing⁵²²

Although the end of colonialism was supposed to result in all states being equally sovereign, the deficiency of African sovereignty continues to manifest in the application of international law. This is why African states are trying to re-assert their sovereignty by coming up with their own universal jurisdiction mechanisms, thereby blocking the exercise of universal jurisdiction by non-African states, against African officials.⁵²³ The recent trial and conviction of Hissene Habre by the EAC with the backing of the AU, highlights the resolve by African states to find African solutions to African problems. Belgium wanted Habre to be extradited from Senegal and tried by its courts. On the other hand, Senegal, backed by the AU, was of the view that the best place for Habre to face trial was in Africa. The former Senegalese President Abdoulaye Wade told reporters at an African Union Summit in Gambia in 2006 that, ‘Africans must be judged in Africa. That is why I refused to extradite Hissene Habre to Belgium.’⁵²⁴

It is submitted that the Hissene Habre debacle was not just about the legal issues surrounding his prosecution. It was about the struggle by African states to resist neo-colonialism. The escalating tensions between African states under the auspices of the AU and Western states with regards to the application of the universality principle, and the perceived unfair targeting of African Heads of State by the ICC, show that African states are weary of international criminal justice as practised by Western states and the ICC, therefore they would want to have their own mechanisms in place.

In this regard, Dube has convincingly argued that the AU Model Law was adopted by the AU as a means to address the concerns raised by African states regarding the application of the principle of universal jurisdiction by non-African states, and the work of the ICC in Africa.⁵²⁵ The model law was therefore adopted to provide an alternative to universal jurisdiction as administered by Western states, and to the jurisdiction of the ICC. It provides a framework

⁵²² Anghie 2007 243-244.

⁵²³ Williams ‘The Extraordinary African Chambers in the Senegalese Courts’ 1148.

⁵²⁴ See New York Times (3/7/2006) ‘African Union tells Senegal to Try Ex-Dictator of Chad’ available at www.nytimes.com/2006/07/03/world/africa/03chad.html (accessed 29/6/2018).

⁵²⁵ Dube ‘The AU Model Law on Universal Jurisdiction’ 457-458.

for the application of universal jurisdiction at a domestic level, thereby ensuring that African states have a mechanism to bring those accused of committing international crimes to trial, without interference from non-African states. In this way, African states can supposedly enjoy the sovereignty that they are entitled to at international law without it being infringed upon by Western states in the name of international criminal justice.

Commenting on the reaction by African states to universal jurisdiction as practised by Western states, and the work of the ICC in Africa, Jalloh has explained that African states are of the view that ‘...the two jurisdictional devices are the new weapons of choice of former colonial powers targeting weaker African nations.’⁵²⁶

The attitude of African states to the application of universal jurisdiction by non-African states, and to the distinct but closely related, role of the ICC in Africa, resonates with Anghie’s theory on the colonial origins of international law.⁵²⁷ According to Anghie at the dawn of decolonisation, former colonies sought to enforce the doctrine of sovereignty in order to guard against post-colonial interferences. Anghie asserted that,

the new states would seek to regain control over their own economic and political affairs, and to change an international legal regime that operated to their disadvantage. The use of the newly acquired weapon of sovereignty was fundamental to these initiatives.⁵²⁸

By adopting the AU Model Law, and by assisting Senegal to try Hissene Habre in the EAC, African states have embarked on a project to reclaim their sovereignty. Past African experiences with interference from European states including the indictment of African officials by European states such as Spain and Belgium, and the insistence by Belgium that Hissene Habre must be extradited to Belgium even as the AU was working out the modalities to try Habre, arguably contributed to this rise in universal jurisdiction in Africa.

Habre’s trial and conviction has demonstrated to the world that Africa is indeed capable of prosecuting those accused of committing international crimes, and that the legitimate fight

⁵²⁶ Jalloh ‘Universal Jurisdiction, Universal Prescription?’ 4.

⁵²⁷ It ought to be noted that the ICC does not practice universal jurisdiction, but that it is a court of last resort which exercises jurisdiction on the basis of the complementarity principle. See article 17 of the Rome Statute.

⁵²⁸ Anghie 2007 198.

against impunity in Africa is possible.⁵²⁹ Commenting on the establishment of the EAC, Williams argued that

‘A ‘successful trial’ of Habre before the Extraordinary African Chambers would demonstrate that an AU-led initiative is a viable alternative to the exercise of universal jurisdiction by other states, and that the region can be trusted to resolve situations of impunity.’⁵³⁰

The successful trial of Habre has therefore strengthened rather than weakened the position of African states on the issue of universal jurisdiction. African states have shown that they are willing to deal with international crimes on the continent. As noted by Williams, when responding to African concerns on the perceived abuse of universal jurisdiction, the EU experts argued that African states need to show that they are really willing to prosecute international crimes in their territories.⁵³¹ The fact that Senegal, with the help of the AU, managed to successfully conduct the trial of Hissene Habre, is evidence that African states are capable of coming up with African solutions to African problems.

The discussion on African states and their application of the principles of universal jurisdiction and sovereignty has highlighted that, as argued by Anghie, the end of the colonial confrontation and the universalisation of international law did not result in the end to colonial relations.⁵³² According to Anghie, ‘...because sovereignty was shaped by the colonial encounter, its exercise often reproduces the inequalities inherent in that encounter.’⁵³³ It is asserted that it is these inequalities that African states seek to address by pushing for the rise of the principle of universal jurisdiction on the continent. In Chapter Five, it shall be asserted that these inequalities are highlighted by the perceived double standard in the application of the principle of immunities by European States in the exercise of universal jurisdiction.

⁵²⁹ See Perez-Leon-Acevedo ‘The conviction of Hissene Habre by the Extraordinary African Chambers in the Senegalese Courts’.

⁵³⁰ Williams ‘The Extraordinary African Chambers in the Senegalese Courts’ 1154.

⁵³¹ Williams *ibid*; AU-EU Expert Report on Universal Jurisdiction para 44.

⁵³² Anghie ‘The Evolution of International Law’ 739.

⁵³³ Anghie 2007 114.

CHAPTER FIVE

THE HISTORICAL EVOLUTION OF THE PRINCIPLE OF IMMUNITIES AND ITS APPLICATION IN EUROPE

5.1 INTRODUCTION

The principle of immunities is considered to be one of the oldest principles in international law, and can be traced back to the Greek and Roman times. Van Alebeek has explained in this regard that,

The inviolability of diplomatic agents is one of the oldest rules of international law. Already thousands of years ago, in the practice of, for example the Greeks and the Romans, a diplomatic agent-then called a messenger or herald-was not to be maltreated or subjected to any form of arrest or detention.⁵³⁴

It was only in the 19th century however that courts began to apply immunities for foreign state officials.⁵³⁵ These immunities did not apply to all states, as only European states were considered to be civilised and therefore sovereign. Non-European communities were considered to be uncivilised and therefore not sovereign and were excluded from the realm of international law. The principle of immunities therefore did not apply to them.⁵³⁶ On the other hand, it was common practice for European states to assert immunity not only for their state officials, but for ordinary citizens as well whenever they travelled outside their countries. This immunity was *de facto* immunity because as Gevers and Vrancken have explained, ‘In most instances, this restriction on jurisdiction did not amount to immunity proper as the ‘territories’ concerned were not recognised as sovereigns.’⁵³⁷ Immunities have therefore always been a part of international law, but due to the ‘dynamic of difference’ and the

⁵³⁴ R Van Alebeek ‘Diplomatic Immunity’ in *Max Planck Encyclopaedia of International Law* 2009 para 1. See also J Craig Barker ‘Shared foundations and conceptual differentiation in immunities from jurisdiction’ in A Orakhelashvili (ed) *Research Handbook on Jurisdiction and Immunities in International Law* (2016) 185,186.

⁵³⁵ Gevers & Vrancken ‘Jurisdiction of States’261.

⁵³⁶ See Anghie 2007 63, Crawford *The Creation of States in International Law*.

⁵³⁷ Gevers & Vrancken ‘Jurisdiction of States’261.

‘standard of civilisation’ as explained by Anghie, not all states have historically been able to claim immunities for their subjects.

In recent years, African states under the auspices of the AU have raised the concern that when European states exercise universal jurisdiction against African state officials, they disregard the immunities which these officials ought to enjoy at international law.⁵³⁸ The African states regard this as an infringement of their sovereignty and a reminder of colonialism.⁵³⁹ With regards to the ICC, the relationship between the AU and the ICC has deteriorated following the indictment of the Sudanese President Al Bashir in 2009, and the confirmation of proceedings against Kenyan President Uhuru Kenyatta and his deputy William Ruto in 2012.⁵⁴⁰ African states are of the view that the ICC should not indict sitting Heads of State, as they consider them to be immune from such indictment.⁵⁴¹ The ICC on the other hand has reiterated that Head of State immunity is irrelevant in proceedings before the Court.⁵⁴² As was stated in Chapter One, there is also uncertainty as to whether or not Al Bashir is immune from the jurisdiction of states and from arrest and surrender by states in cooperation with the Court.

The perceived disregard of the immunities of African Heads of State and state officials by the ICC and European states respectively has had serious legal, policy and political implications for state sovereignty on the African continent. For this reason, the discussion on the development of international law on immunities is of both practical and academic relevance. The rise of universal jurisdiction in Africa; the expansion of the proposed African Court of Justice and Human Rights to include a criminal chamber with jurisdiction to try international crimes; the amendment to the Protocol of the statute of the proposed court giving immunity to Heads of State and senior state officials; and the recent announcements by South Africa, Gambia and Burundi of their intention to withdraw from the Rome Statute, all arguably take

⁵³⁸ See AU-EU Expert Report on Universal Jurisdiction para 38

⁵³⁹ *Ibid* para 37.

⁵⁴⁰ For a detailed discussion on the deterioration of the relationship between the African Union and the International Criminal Court see generally Jalloh ‘Regionalizing International Criminal Law’ 445; and Kepler ‘Challenges for International Criminal Justice: Africa and the Role of Civil Society’ 66.

⁵⁴¹ See Decision on Africa’s Relationship with the International Criminal Court (ICC) Ext/Assembly/ AU/Dec.1 (Oct 2013) para 9.

⁵⁴² See for example the Decision on non-cooperation by Malawi *The Prosecutor v Omar Al Bashir* ICC-02/05-01/09-139 –Corr (15/12/2011) Pre-Trial Chamber 1 para 36.

place against the background of African states' discontent with 'European' universal jurisdiction and the work of the ICC in Africa . In this vein, it is submitted that African misgivings towards the application of universal jurisdiction by European states against African state officials, and the indictment of African Heads of State by the ICC, have motivated the desire by African states to re-assert the immunities of their Heads of State and state officials.

The purpose of this chapter is to critically examine the historical evolution of the principle of immunities and its application by European states. The claim by African states that there is a double standard in the application of international criminal justice shall also be examined in the context of the application of the principle of immunities by European states. The AU has argued that European states seem to be targeting sitting African state officials in their exercise of universal jurisdiction, and that the ICC has been unfairly targeting African leaders and disregarding their immunities.⁵⁴³

The literature available on the decline of the application of the principle of immunities points to immunities having fallen universally.⁵⁴⁴ It is submitted that contrary to the international criminal law narrative that the principle of immunities has fallen universally, the reality is that immunities have fallen only in respect to officials of the politically weaker states, with African state officials being the majority of those whose immunities have been disregarded by both international criminal tribunals and domestic courts.⁵⁴⁵ This is illustrative of the perceived double standard in international law, which as Gevers has rightly argued, continues to exist despite colonialism having come to an end and all states being able to participate equally in international law.⁵⁴⁶

⁵⁴³ See AU –EU Report Para 34, and Jalloh *ibid* 462. See also the AU Decision on Africa's Relationship with the ICC (Ext/Assembly/AU/Dec.1. Oct 2013).

⁵⁴⁴ See for example Chok 'Le the Responsible be Responsible: Judicial Oversight and Over-optimism in the *Arrest Warrant* Case and the fall of the Head of State Immunity Doctrine in International and Domestic Courts' 489; Jalloh 'Universal Jurisdiction, Universal Prescription?' 49.

⁵⁴⁵ See Jalloh *ibid* 55 (conceding that the majority of universal jurisdiction cases have been against African state officials) See also Gevers 'Back to the Future?' 104-105 commenting on the ICC trend that 'In terms of case selection, until recently the Prosecutor had only opened formal investigations into cases emanating out of Africa, and declined the opportunity to open a formal investigation outside of the continent.'

⁵⁴⁶ Gevers *ibid* 122.

An understanding of the perceived double standard in the context of the application of the principle of immunities helps to explain why the application of this principle, which is a well-established principle of international law, has resulted in tensions between African states and European states, and African states and the ICC. It is submitted that the perceived existence of this double standard in international criminal law, and the tension between African states and European states, and African states and the ICC, ought to be understood against the background of Anghie's theory on the colonial origins of the sovereignty doctrine which was discussed in detail in Chapter Two.

The tensions between African states and European states with regards to the application of the principles of universal jurisdiction and personal immunities are centred on the doctrine of state sovereignty. It is submitted in this regard that the principle of immunities is seen as a means by which African states can reaffirm their sovereignty; hence they view it as an absolute principle which ought to apply regardless of the circumstances. On the other hand, European states have never been deprived of their sovereignty; hence they see no need to reaffirm their sovereignty. They therefore view the principle of immunities as one which is no longer absolute and which ought to give way to newer principles of international law such as that of ensuring accountability for atrocities.

In this vein, this chapter shall examine the history of immunities to show that African sovereignty has always been deficient and that as sovereignty is a fundamental principle in international law, this deficiency manifested in a number of aspects of international law, including that of the application of the principle of immunities. The capitulations granted by partially recognised 'states' such as the Ottoman Empire (Turkey), and the then Japan and Siam to European states are an example of how European states subjugated non-European 'states' during the colonial confrontation.

The Turkish capitulations shall be examined in detail as it is considered that the Turkish experience best illuminates how the colonial confrontation was central to the development of international law as explained by Anghie, in the context of the principle of immunities. Capitulations were at first granted voluntarily as incentives for trade by non-European states which were partially recognised such as Turkey, and the then Japan and Siam. However, at the height of the colonial confrontation, these capitulations were used by European countries as a means to subjugate the non-European 'states'. European states demanded the granting of

these capitulations, on their own terms, but it was unimaginable that the same capitulations would be granted to non-European states by European states.⁵⁴⁷

5.2 THE MEANING, SCOPE AND RATIONALE OF THE PRINCIPLE OF IMMUNITIES

In order to examine the perceived double standard in the application of the principle of immunities, it is important to first understand the meaning, scope and rationale of the principle.

Immunity from jurisdiction means that states and their officials are exempt from the jurisdiction of foreign courts, both civil and criminal.⁵⁴⁸ In the criminal law context, immunity from jurisdiction means that an individual cannot be prosecuted, summonsed or required to answer questions.⁵⁴⁹ The principle of immunities is doctrinally linked to the principle of the sovereign equality of states which essentially means that as all sovereigns are equal, no state can sit in judgment over the actions of another without infringing upon the sovereignty of that state whose actions are being judged.⁵⁵⁰ According to Akande, the law on immunities, ‘...proceeds from notions of sovereign equality and is aimed at ensuring that states do not unduly interfere with other states and their agents.’⁵⁵¹

⁵⁴⁷ Anghie 2007 84-86.

⁵⁴⁸ Akande and Shah ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ 817; A Watts ‘The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers’ (1994) 13: III *Recueil Des Cours*. This chapter shall focus on the immunity of state officials, in line with the objectives of the thesis.

⁵⁴⁹ E Franey ‘Immunities from the Criminal Jurisdiction of National Courts’ in A Orakhelashvili (ed) *Research Handbook on Jurisdiction and Immunities in International Law* (2015) 205.

⁵⁵⁰ Dugard *International Law-A South African Perspective* 240. For a detailed overview of this principle see generally H Kelsen ‘The Principle of Sovereign Equality of States as a Basis for International Organisation’ (1944) 53: 2 *Yale LJ* 207; T Lee ‘International Law, International Relations Theory and Pre-emptive War: The Vitality of Sovereign Equality Today’ (2004) *Law & Comparative Process J* 147 and A Ansong ‘The Concept of the Sovereign Equality of States in International Law’ (2016) 11: 1 *Ghana Institute of Management and Public Administration LR* 13.

⁵⁵¹ D Akande ‘International Law Immunities and the International Criminal Court’ (2004) 98 *American J of Int L* 407; Tunks ‘Diplomats or Defendants? Defining the Future of Head of State Immunity’ 677 (explaining that the rule on Head of State immunity is in sync with the doctrine of sovereign equality of states); Foakes ‘Immunity for International Crimes? Developments in the Law on Prosecuting Heads of States in Foreign Courts’ 4

The principle of the sovereign equality of states has been codified in the United Nations Charter which provides that ‘The Organisation is based on the principle of the sovereign equality of all its members.’⁵⁵² The Declaration on the Principles of International Law, Friendly Relations and Cooperation among States in Accordance with the Charter of the UN (1970) provides that, ‘All states enjoy sovereign equality and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.’⁵⁵³

The principle of sovereign equality of states has two components, state sovereignty and equality of states.⁵⁵⁴ According to Kelsen,

[T]o speak of sovereign equality is justified insofar as both qualities are usually considered to be connected with each other. The equality of states is frequently explained as a consequence of or as implied by their sovereignty.⁵⁵⁵

The focus of this thesis is on personal immunities in relation to the doctrine of state sovereignty as it is not in dispute that all states are now regarded as being equal and they are able to participate as equal sovereigns in international law.⁵⁵⁶

The principle of immunities has its basis in both customary international law and treaty. The customary international law position on the subject of immunities was explained by the International Court of Justice in the *Arrest Warrant* Case. In terms of treaty, the 1961 Vienna Convention on Diplomatic Relations provides for the immunities of diplomatic agents.⁵⁵⁷ There are two categories of immunities in international law. These are functional immunity (immunity *ratione materiae*), accorded to state officials for the official functions they perform on behalf of the state, and personal immunity (immunity *ratione personae*) which is

(explaining that both functional and personal immunities are derived from the doctrine of sovereign equality of states).

⁵⁵² See article 2(1) and article 2(7) of the UN Charter (1945).

⁵⁵³ See part 1 of the Declaration.

⁵⁵⁴ Ansong ‘The Concept of Sovereign Equality of States in International Law’ 15.

⁵⁵⁵ H Kelsen *Peace through Law* (2000) 34.

⁵⁵⁶ Gevers ‘Back to the Future?’ 122.

⁵⁵⁷ See article 31 of the Vienna Convention on Diplomatic Relations (1961) which provides that a diplomatic agent shall enjoy immunity from both the civil and criminal jurisdiction of the receiving state. See also the Vienna Convention on Consular Relations (1963).

the immunity enjoyed by high ranking individuals such as Heads of State and Foreign Affairs Ministers, by virtue of their status.⁵⁵⁸

5.2.1 Functional immunity (immunity *ratione materiae*)

Functional immunity is the immunity conferred to state officials because of the official duties which they perform on behalf of the state. Functional immunity is substantive in nature and continues to apply even after the official has left office.⁵⁵⁹ Functional immunity can be applied *erga omnes* i.e. in respect of states other than the receiving state.⁵⁶⁰ It applies only in respect of conduct which is part of the official duties of a state official, and it cannot be waived by the home state of the official.⁵⁶¹ As Gevers has explained functional immunity ‘...cannot be waived by the state concerned because it is the conduct itself and not the office bearer that forms the basis of that immunity.’⁵⁶²

The rationale behind functional immunity is that state officials cannot be held accountable for those acts which are considered to be not their own but those of the state which they represent. The ICJ held in the *Arrest Warrant* case that state officials are considered in customary international law to be acting not on their own behalf but on behalf of their home states.⁵⁶³ For this reason, according to Akande and Shah, state officials cannot be held to account for acts of state.⁵⁶⁴ Similarly in *Prosecutor v Blaskic, the ICTY Appeals Chamber* ruled that, ‘...State officials cannot suffer the consequences of wrongful acts which are not

⁵⁵⁸ Akande & Shah ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’817; Gevers & Vrancken ‘Jurisdiction of States’ 261-262.

⁵⁵⁹ See Akande & Shah *ibid* 826; Kayitana ‘The Universal Jurisdiction of South African Criminal Courts and Immunities of Foreign State Officials’ 2567.

⁵⁶⁰ Cassese ‘When May Senior State Officials Be Tried for International Crimes?’863.

⁵⁶¹ Gevers ‘Immunity and the Implementation legislation in South Africa, Kenya and Uganda’ 89.

⁵⁶² *Ibid*.

⁵⁶³ See *Arrest Warrant Judgment* para 53.

⁵⁶⁴ Akande and Shah (note 558 above) 826-827; See also Kayitana ‘The Universal Jurisdiction of South Africa’s Criminal Courts’ 2567(explaining that as acts committed by state officials in the course of carrying out their duties are attributable not to them but to their home states, ‘...actions against state agents in respect of their official acts are essentially proceedings against the state they represent.’)

attributable to them personally but to the State on whose behalf they act: they enjoy so-called functional immunity...'⁵⁶⁵

It is generally accepted that functional immunity cannot be raised in respect of prosecution for international crimes.⁵⁶⁶ The International Military Tribunal at Nuremberg held in *In re Goering & Others* that,

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 shelter themselves behind their official position in order to be freed from punishment.⁵⁶⁷

A number of scholars have put forward different reasons as to why functional immunity must not apply in respect of international crimes, even before domestic courts. These reasons include that international crimes violate *jus cogens* norms hence they cannot be classified as official acts, and that the traditional view that functional immunity applies even in the case of international crimes has been superseded by recent rules in international criminal law on individual accountability.⁵⁶⁸ Akande and Shah, for instance, have argued that,

the principle is necessarily in conflict with more recent rules of international law and it is the older rule of immunity which must yield. Developments in international law now mean that the reasons for which immunity *ratione materiae* are conferred simply do not apply for international crimes.⁵⁶⁹

⁵⁶⁵ IT-95-14-AR 108 1997,110 ILR (1997) 607 para 38 (Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997). For a similar view see the Judgment of the Supreme Court of Israel in the *Eichmann Case* (29/5/1962) 36 ILR 277-342 at 308-309.

⁵⁶⁶ Gevers & Vrancken 'Jurisdiction of States' 263.

⁵⁶⁷ 1946 (13) *International Law Reports* 203,221.

⁵⁶⁸ See for example Bianchi 'Immunity versus Human Rights: The Pinochet Case' 259-262.

⁵⁶⁹ Akande & Shah 'Immunities of State Officials, International Crimes and Foreign Domestic Courts' 840. For a similar view see Judge Van Den Wyngaert's Dissenting Opinion in *Arrest Warrant* para 36. See also R Van Alebeek *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* 2007 418.

Functional immunity is normally relied upon in civil cases.⁵⁷⁰ For this reason, a detailed discussion on this category of immunities is beyond the scope of this thesis, which is focused on immunities for international crimes.

5.2.2 Personal immunity (immunity *ratione personae*)

Personal immunity is the immunity which is conferred on senior state officials such as Heads of State and Foreign Affairs Ministers by virtue of their status.⁵⁷¹ It has its basis in both customary international law and treaty. The customary international law position pertaining to personal immunity was outlined by the ICJ in the *Arrest Warrant* case.⁵⁷² In terms of treaty, the 1961 Vienna Convention on Diplomatic Relations provides that a diplomatic agent shall enjoy immunity from both the civil and criminal jurisdiction of the receiving state.⁵⁷³

Personal immunity applies in respect of both official and private acts.⁵⁷⁴ It applies only for as long as the individual remains in office.⁵⁷⁵ It cannot be applied *erga omnes* i.e. it can only be applied between the sending state and receiving state with respect to a diplomat, and in a third state that a diplomat may pass through in transit to or from the receiving state.⁵⁷⁶ Personal immunity applies even when an official is alleged to have committed international crimes such as war crimes and crimes against humanity.⁵⁷⁷ In *Arrest Warrant*, the ICJ held that there is no exception in customary international law to the rule that incumbent Foreign Affairs Ministers enjoy full immunity from the jurisdiction of national courts, even when

⁵⁷⁰ Gevers & Vrancken 'Jurisdiction of States' 262.

⁵⁷¹ Akande & Shah 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' 818.

⁵⁷² Para 51.

⁵⁷³ See Article 31 (1) of the Vienna Convention on Diplomatic Relations (1961). See also generally the 1963 Vienna Convention on Consular Relations.

⁵⁷⁴ *Arrest Warrant* para 54; Akande 'International Law Immunities and the International Criminal Court' 410; Kayitana 'The Universal Jurisdiction of South African Criminal Courts' 2573.

⁵⁷⁵ Du Plessis & Bosch 'Immunities and Universal Jurisdiction-The World Court steps in (or on?)' 276; Kayitana *ibid* 2574; O'Keefe *International Criminal Law* 413.

⁵⁷⁶ Cassese "When May Senior State Officials be prosecuted?" 864.

⁵⁷⁷ Kayitana 'The Universal Jurisdiction of South African Criminal Courts' 2575; Gevers & Vrancken 261; O'Keefe 2015 413. It ought to be noted however that some scholars are of the view that personal immunity should not apply where a state official is alleged to have committed international crime (J Dugard & A Abraham 'Public International Law' (2002) *Annual Survey of SAL* 140, 166; Chock 'Let the Responsible be Responsible' 489. It shall be argued below that there is no exception in international law to the rules on personal immunity before domestic courts.

they are alleged to have committed international crimes.⁵⁷⁸ Domestic courts have in the past declined to prosecute Heads of State on this basis.

In *Tachiona v Mugabe* a U.S. District Court upheld the suggestion of immunity by the U.S. State Department on the basis that the then Zimbabwean President Robert Mugabe and his Foreign Affairs Minister Simbarashe Mumbengegwi enjoyed personal immunity from prosecution before the American Courts. This was notwithstanding that the two were being accused of having committed a number of crimes including murder and torture.⁵⁷⁹ In *De Boery v Gaddafi* the French Court of Cassation held that the proceedings in which then Libyan leader Muammar Gaddafi was being accused of complicity to a terrorist act had to be discontinued on the basis of his personal immunity.⁵⁸⁰ The court held that there was no exception to the customary international law rule giving immunity to incumbent Heads of State before foreign domestic courts. Earlier, the House of Lords had adopted this position that incumbent Heads of State enjoy full immunity from the jurisdiction of foreign domestic courts in the *Pinochet* Cases. In *Pinochet* no 1, Lord Nicholls said that, ‘...there can be no doubt that if Senator Pinochet had still been the head of the Chilean state; he would have been entitled to immunity.’⁵⁸¹

Likewise, in *Pinochet* no. 3 Lord Millet said regarding the argument raised by the defence that Pinochet was immune to the proceedings, that, ‘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.’⁵⁸²

⁵⁷⁸ Para 58. This position also applies to incumbent Heads of State. For a critique of the court’s findings in this regard, see generally Du Plessis and Bosch ‘Immunities and Universal Jurisdiction’ and A Orakhelashvili ‘International Decisions-Arrest Warrant of 11 April 2000’ B Oxman (ed) (2002) 96 *American J of Int L* 677.

⁵⁷⁹ 169 F.Supp.2d 259 (S.D.N. Y) 2001 .For a commentary on this case see generally D Mundis ‘*Tachiona v Mugabe*: A U.S Court Bows to Personal Immunities of a Foreign Head of State’ (2003) 1 *J of Int Criminal Justice* 462.

⁵⁸⁰ 125 ILR 490(2001) (Court of Cassation, France).

⁵⁸¹ See *Pinochet* no 1 (R v Bow Street Magistrate, ex parte Pinochet Ugarte 1998 (4) All ER p938.

⁵⁸² See *Pinochet* no 3 (R v Bow Street Magistrate, ex parte Pinochet) 1999 (2) WLR 824,905 H. For a comprehensive list of cases where courts in Europe and in the USA upheld personal immunities where individuals were alleged to have committed international crimes, see Akande & Shah ‘Immunities of State Officials’ 820, footnotes 16 and 17.

5.2.3 The rationale and scope of personal immunity

The rationale behind the principle of personal immunity is that of functional necessity, i.e. to ensure that Heads of State and diplomats can carry out their duties effectively, and travel without the fear of being arrested or harassed in a foreign country, thereby promoting orderly and friendly interstate relations.⁵⁸³ The Vienna Convention on Diplomatic Relations states in its preamble that the parties agreed to the Convention, ‘Believing that an international Convention on diplomatic intercourse would contribute to the development of friendly relations among nations.’⁵⁸⁴

According to Akande, personal immunities,

stem from the recognition that the smooth conduct of international relations and international cooperation requires an effective process of communication. The effectiveness of this process of communication and cooperation in turn requires that the state agents charged with the conduct of international relations be able to travel freely in order to perform their functions without the fear or possibility of harassment by other states.⁵⁸⁵

In a similar vein, Kayitana has asserted that personal immunity is essential in order to guard against the abuse of criminal jurisdiction by states, particularly universal jurisdiction.⁵⁸⁶

There has been considerable debate amongst scholars as to whether or not personal immunity ought to apply before domestic courts, in those cases where an individual is alleged to have committed international crimes. One group of scholars argues that it is inconsistent with the emerging principle of accountability for atrocities for personal immunity to apply before domestic courts regardless of the nature of the crime in question. Dugard and Abraham for instance, have argued that,

⁵⁸³ Foakes 4; L Mukombwe ‘The relationship between the exercise of universal jurisdiction and diplomatic and sovereign immunities with respect to heads of states’ (unpublished LLM Dissertation, University of South Africa 2013) 17; O’Keefe *International Criminal Law* 413.

⁵⁸⁴ See the Preamble to the Vienna Convention on Diplomatic Relations. See also *Arrest Warrant* para 53-54 and *Case Concerning United States Diplomatic and Consular Staff in Tehran* (USA V Iran) 1980 ICJ Rep 3 para 91 (emphasising the importance of the inviolability of diplomatic envoys and embassies).

⁵⁸⁵ Akande ‘International Law Immunities and the International Criminal Court’ 410. See also C Wickmerasinghe ‘Immunities Enjoyed by Officials of States and International Organisations’ in M Evans (ed) *International Law* 2003 389.

⁵⁸⁶ Kayitana ‘The Universal Jurisdiction of South African Criminal Courts’ 2577.

It would be ridiculous to allow a foreign Head of State or government responsible for committing genocide in his own country to successfully plead immunity before a South African court, when he could not do so before the ICC.⁵⁸⁷

In a similar vein, Bianchi has asserted that,

The alleged commission of international law crimes should also dispose of a claim of immunity *ratione personae*. Were it not so, one would be left with the impression that it is power more than law which protects office holders⁵⁸⁸

On the other hand, another group of scholars has argued that it is justifiable that personal immunity should apply even when a state official is alleged to have committed international crimes. Tunks, for instance, has argued that removing personal immunity in cases of allegations of human rights violations would not increase accountability for such violations but only serve to hinder officials from travelling abroad.⁵⁸⁹ Similarly, Kayitana has asserted that, ‘Without the guarantee that States’ officials 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 diplomacy.’⁵⁹⁰

It is submitted that although there has been a decline in the application of personal immunity as an absolute principle, the argument that personal immunity should not apply before domestic courts is inconsistent with the rationale behind the principle of personal immunity, and with state practice in this regard. As noted by Akande, no case can be found where a domestic court did not uphold the immunity of an incumbent Head of State.⁵⁹¹ Although ensuring accountability for atrocities is important to avoid impunity, the principle of personal immunities is equally important for the maintenance of orderly interstate relations.

As Kayitana has convincingly argued, personal immunities are also necessary in order to ensure that states do not abuse their criminal jurisdiction, particularly jurisdiction based on the universality principle. In this regard, a number of scholars have expressed concern that if the universality principle is not applied with caution, this could pose a threat to friendly

⁵⁸⁷Dugard & Abraham ‘Public International Law’ 165.

⁵⁸⁸ Bianchi ‘Immunity versus Human Rights’ 261.

⁵⁸⁹ See Tunks ‘Diplomats or Defendants?’ 678-679. See also Akande ‘International Law Immunities’ 411.

⁵⁹⁰ Kayitana ‘The Universal Jurisdiction of South African Criminal Courts’ 2576.

⁵⁹¹ See Akande ‘International Law Immunities and the International Criminal Court’ 411; Tunks ‘Diplomats or Defendants?’ 663.

interstate relations and lead to abuse of legal processes.⁵⁹² According to M-Cherif Bassiouni, ‘Unbridled universal jurisdiction can cause disruptions in the world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes.’⁵⁹³ Kissinger expressed a similar view, arguing that universal jurisdiction has the potential to be used as a weapon to settle political scores.⁵⁹⁴

The principle of personal immunities is one of the checks and balances which ensure that the universality principle is not abused by states. It is therefore submitted that as there is no case where a domestic court has disregarded the personal immunity of a Head of State and as enunciated by the ICJ in *Arrest Warrant*, personal immunity applies before domestic courts regardless of the nature of the crime in question. As O’Keefe has asserted,

The conclusion to be drawn from state practice and international jurisprudence is that the various immunities *ratione personae* undoubtedly pose a bar as a matter of international law to prosecution in a foreign court for an international crime...both treaty-based and customary immunity *ratione personae* remain absolute, no customary exception being made for allegations of international crimes.⁵⁹⁵

5.3 THE HISTORY OF THE PRINCIPLE OF IMMUNITIES

An examination of the history of the application of immunities during colonial times highlights that non-European sovereignty, when it has been granted, has always been deficient. As non-European communities were regarded to be uncivilised and therefore not sovereign, the principles of international law did not apply to them. They were objects rather than subjects of international law.⁵⁹⁶ The granting of capitulations by partially recognised ‘states’ including Turkey (formerly Ottoman Empire), and the then Japan and Siam to European states provides an insight into the subjugation of non-European ‘states’ by European states.

⁵⁹² M.Cherif Bassiouni ‘Universal Jurisdiction for International Crimes’ 81; Coombes ‘Universal Jurisdiction: A Means to end Impunity or a threat to friendly Interstate Relations?’ 421.

⁵⁹³ M.Cherif Bassiouni *ibid*.

⁵⁹⁴ H Kissinger ‘The Pitfalls of Universal Jurisdiction’ (2001) 80 *Foreign Affairs* 86, 88. Kissinger argued that ‘It would be ironic that a doctrine designed to transcend the political process turns into a means to pursue political enemies rather than universal justice’ (p92q). See also G. Fletcher ‘Against Universal Jurisdiction’ (2003) 1:3 *J of Int Criminal Justice* 2003 (1) 3 580-584.

⁵⁹⁵ O’Keefe *International Criminal Law* 422.

⁵⁹⁶ Anghie 2007 54.

The capitulations granted to European states by the Ottoman Empire are arguably the most significant in the history of immunities in that they bring into focus the subjugation of non-European states by European states during the colonial confrontation. Özsu has explained that,

The individual beneficiary of a capitulatory grant...was typically extended privileges of residence on or safe passage through Ottoman territory, made immune from the jurisdiction of Islamic courts, and provided with the benefit of tax exemptions and low custom duties.⁵⁹⁷

It ought to be noted that other partially recognised ‘states’ also granted capitulations to non-European states. These states included the then Japan and Siam, and China. At first the capitulations were granted voluntarily, and it was only at the height of the colonial confrontation in the 19th century that European states started to rely on them to subjugate the partially recognised non-European states.⁵⁹⁸

Commenting on the partial recognition of the Ottoman Empire, Özsu explained that, ‘...while the Ottoman Empire was seldom recognized as a full member of the ‘family of civilised nations’, European jurists of the period often postulated an intermediate class for States of the kind it was deemed to exemplify...’⁵⁹⁹

James Lorimer broke humanity down into ‘three concentric zones or spheres’, with Turkey as an archetype of the kind of ‘barbarous state’ that found itself lodged between ‘civilized’ states and ‘savage’ peoples.⁶⁰⁰ As was discussed in Chapter Two, within the positivist jurisprudence, whether a non-European community was regarded to be partially civilised or totally backward, as long as it had not been accepted into the ‘family of nations’ it did not meet the criteria for statehood. Consequently, communities which received partial recognition such as the Ottoman Empire were excluded from the proper application of the principles of international law.⁶⁰¹ With this in mind, it is important to examine the scope of

⁵⁹⁷ Özsu ‘Ottoman Empire’ 431.

⁵⁹⁸ Anghie 2007 85. For a detailed account of the capitulatory regime of Asian states, see generally C Alexandrowicz *An Introduction to the History of the Law of Nations in the East Indies* 1967.

⁵⁹⁹ Özsu ‘Ottoman Empire’ 433.

⁶⁰⁰ Özsu *ibid.* See also Lorimer *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities* 101.

⁶⁰¹ Anghie 2007 75.

Ottoman capitulations, and how they eventually came to be used as a tool to subjugate the non-European states, particularly in the 19th century.

The history of the Ottoman capitulations can be traced back to the 14th and 15th centuries, when the Ottomans would grant capitulations to traders including Genoese and Venetian traders.⁶⁰² It is however argued that a 1740 capitulation granted to France is the most significant in the history of the Ottoman capitulations. This capitulation reinforced the immunities conferred upon French traders in earlier capitulations, in addition to the Ottoman Empire agreeing to a set of concessions, the binding nature of which were not subject to a renewal of the capitulation.⁶⁰³ By the middle of the 19th century, European states had come to rely on capitulations to reassert their dominance over the Empire. Contrary to the capitulations being mere privileges granted to non-Muslim foreign traders, they were now regarded as treaties with a binding effect.⁶⁰⁴ The capitulations therefore evolved from being privileges, including immunities, granted at the discretion of the Ottoman Empire, to being unequal treaties which had the effect of subjugating the Empire.

The 1838 Balta Liman Convention between the Ottoman Empire and Great Britain, for instance, had the effect of abolishing Ottoman monopolies and fixing import and export duties and reaffirming immunities of British subjects from the jurisdiction of Ottoman courts. It provided that,

[a]ll rights, privileges ,and immunities which have been conferred on the subjects or ships of great Britain by the existing Capitulations and Treaties, are confirmed now and for ever, except in as far as they may be specifically altered by the present Convention.⁶⁰⁵

The Ottoman Empire experience is significant to this study as it highlights that non-European sovereignty has always been deficient. Even though the Ottoman Empire received partial recognition from European states, the capitulations it had granted were later used to subjugate the Empire in that they evolved from being privileges granted voluntarily by the

⁶⁰² Özsu 'Ottoman Empire'433.

⁶⁰³ Özsu *ibid* 435. For a detailed commentary on this capitulation, see T Twiss *The Law of Nations Considered as Independent Political Communities: On the Rights and Duties of Nations in Time of Peace* 1884 389 ff.

⁶⁰⁴ Özsu *ibid* 437.

⁶⁰⁵ *Ibid.* See also the *Convention on Commerce and Navigation between Great Britain and Turkey* (signed 16/08/1838) 88 CTS 77.

Empire to one-sided treaties which were only concerned with the rights of the European states.

In the context of immunities, European states sought to strengthen the immunities enjoyed by their citizens in non-European 'states' such as the Ottoman Empire because although the Empire was partially recognised, it was considered that its standards of civilization did not measure up to that of European states. As such, the European states did not want their citizens to be subjected to a justice system which they considered to be 'backward' hence they sought to rely on the capitulations to exercise extraterritorial jurisdiction over their own citizens' actions in non-European 'states'.⁶⁰⁶ The non-European 'states' on their part considered these capitulations to have developed into instruments of domination and inequality hence they sought to have them abolished.⁶⁰⁷

The European states were however not keen to abolish the capitulations and imposed some conditions on the non-European 'states' in order for the abolition to take place. Non-European 'states' were required to put in place some reform in their justice systems. This would result in the abolition of the capitulatory regime, in addition to the non-European state in question being admitted into the family of nations, on the basis of having complied with the European standard of civilisation.⁶⁰⁸ As explained by Özsü in the context of the Ottoman capitulations,

So long as comprehensive reforms were not undertaken for the purpose of introducing new codes and overhauling the administration of justice, the capitulations would remain indispensable for ensuring that nationals of non-Muslim States operating in the empire...were subject only to 'civilized' European law.⁶⁰⁹

In a similar vein, a 19th century British official, commenting on the possible abolition of consular jurisdiction in Tunis following the occupation of Tunis territory by France and the subsequent introduction of the French justice system said,

The institutions which have grown up under the Capitulations with Turkey have been found essential for the protection of foreigners under the peculiar circumstances of the Ottoman

⁶⁰⁶ Anghie 2007 85.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid* 86; Özsü 'Ottoman Empire'440.

⁶⁰⁹ Özsü *ibid* 440.

Empire...the necessity for them disappears when Tribunals organised and controlled by an European Government take the place of the Mussulman Courts.⁶¹⁰

The requirements for the abolition of the capitulatory regime validate Anghie's theory on the colonial origins of the doctrine of sovereignty. Anghie asserted that the distinction between civilised and uncivilised states as postulated by the positivist jurists is the one which determined whether or not a community belonged to the family of nations and therefore could be regarded as a sovereign state.⁶¹¹ This helped the positivists to address the issue of 'states' such as the Ottoman Empire, and the then Japan and Siam which had never been colonised and thus had nominally retained their independence. Despite being independent and meeting other criteria for statehood which was essential to be considered part of the family of nations and therefore sovereign, these 'states' which received partial recognition were still considered to be lacking in civilisation hence they were excluded from the proper application of the principles of international law, especially the sovereignty doctrine.⁶¹² In order for them to be fully admitted into the family of nations, they had to agree to some reforms and concessions which essentially furthered the colonial interests of the European states. The result of this was to deprive non-European communities of their internal sovereignty. As noted by Anghie,

a different set of principles applied in the case of non-European states, which significantly compromised their internal sovereignty and their cultural distinctiveness in order to be accepted as legal subjects of the system...the actions non-European states had to take to enter into the system negated the rights which they were supposed formally to enjoy upon admittance.⁶¹³

In the case of Turkey, the abolition of the Ottoman capitulatory regime was only successfully negotiated at the Conference of Lausanne after the country agreed to carry out a number of legal reforms and numerous other concessions.⁶¹⁴ The Ottoman Empire capitulations have been examined in detail as it is considered that their history, evolution and abolition best

⁶¹⁰ See Correspondence *respecting the Establishment of French Tribunals and the Abrogation of Foreign Consular Jurisdiction in Tunis* 1882-83 2 (remarks by Mr Plunkett to Earl Granville 19/10/1982) cited by Özsu *ibid* endnote 56.

⁶¹¹ Anghie 2007 75.

⁶¹² *Ibid*.

⁶¹³ *Ibid* 86-87.

⁶¹⁴ Özsu 'Ottoman Empire' 445. See also 'Treaty with Turkey and other Instruments, signed at Lausanne, July 24, 1923' (1924) 18 *American J of Int L* Supplement 1-116.

mirrors the way non-European sovereignty has always been deprived in the context of immunities, and how the end of the distinction between ‘civilised’ and ‘uncivilised’ as authored by the positivists did not mean an end to the ‘standard of civilisation.’ As the Turkish experience shows, although all states are now equal sovereigns, the non-European states acquired this equality through negating their own internal sovereignty and cultural peculiarity.⁶¹⁵

The Turkish experience resonates with Anghie’s argument that the colonial confrontation was central to the development of important doctrines of international law, including most importantly the sovereignty doctrine. As explained by Anghie, the end of colonialism did not mean an end to colonial relations. In order for the system of capitulations to be abolished, and for the non-European ‘states’ to be accepted into the family of nations, the non-European ‘states’ had to agree to conditions set by European states. In so doing, they gained political sovereignty but lost their cultural uniqueness.⁶¹⁶ As a result, it can be argued that although colonialism is now a thing of the past, the ‘double standard’ which was characteristic of this period continues to apply in a number of aspects of international law.

It is submitted that the Turkish example makes for a strong argument that non-European states did not emerge from the colonial confrontation as fully sovereign states. The sovereignty gained was political and not economic sovereignty.⁶¹⁷ Even so, the political sovereignty was not full sovereignty as the non-European states still feel the need to reassert their sovereignty in order to avoid postcolonial interferences, as shown by the rise of universal jurisdiction in Africa discussed in Chapter Four.

5.4 IMMUNITY AND ICC IMPLEMENTATION LEGISLATION IN EUROPE

Unlike universal jurisdiction which has undergone different phases in its application, the principle of immunities has always been a part of international law, but immunities were not available to non-European states during the colonial encounter. With the end of colonialism, the principle of immunities now applies in respect of Heads of State and officials from all states. The rise of universal jurisdiction in Europe in the 1990s led to a disregard of the personal immunities of state officials. As was discussed in Chapter Three, the 1993 universal

⁶¹⁵Anghie 2007 86.

⁶¹⁶ Anghie *ibid* 86.

⁶¹⁷ Anghie ‘The Evolution of International Law’ 748-749.

jurisdiction legislation of Belgium considered the issue of immunities to be irrelevant for purposes of exercising universal jurisdiction. However, following the decision in the *Arrest Warrant* case, and political pressure from states such as the United States, Belgium amended its universal jurisdiction legislation, and ultimately repealed it, in 2003. The universal jurisdiction legislation from other European states such as Spain did recognise the immunities of state officials and Heads of State. Notwithstanding this, Spain, Germany and France did indict African state officials, disregarding their immunities.⁶¹⁸

A closer analysis of the practice of European states highlights that the immunities that were disregarded were mostly those of officials from the politically weaker states, with prosecutors in European states such as Germany using their prosecutorial discretion to determine that officials from politically powerful states such as the US and China were immune from prosecution. On the other hand, using the same prosecutorial discretion it was determined in some instances that African officials were not immune even though their home states had clearly asserted this immunity on their behalf.⁶¹⁹ A prime example is the refusal by the German Federal prosecutor to exercise universal jurisdiction against former Chinese President Jiang Zemin on the basis that he enjoyed immunity in 2003, but later on refusing to recognise the immunity of the Rwandan chief of protocol attached to the President, Rose Kabuye in 2008.⁶²⁰

5.4.1 Belgium

Belgium's universal jurisdiction legislation of 1993 did not recognise claims of immunity as a defence.⁶²¹ On the basis of this law, in April 2000, a Belgian investigative magistrate issued and circulated a warrant of arrest against the then Foreign Affairs Minister for the Democratic Republic of Congo, based on the Belgian law. This warrant was issued pursuant to an action brought by a group of DRC exiles, accusing Mr. Yerodia Ndombasi of having made public speeches inciting racial hatred prior to his being appointed as minister. The magistrate issued a warrant of arrest against Mr. Ndombasi on the basis that he had allegedly committed crimes against humanity and crimes in breach of the four Geneva Conventions of

⁶¹⁸ Jalloh 'Universal Jurisdiction, Universal Prescription?'29-42.

⁶¹⁹ See generally Bhuta & Schurr 'Universal Jurisdiction: State of the Art'.

⁶²⁰ See Kaleck 'From Pinochet to Rumsfeld'938,951 and Jalloh 'Universal Jurisdiction, Universal Prescription?'29-30.

⁶²¹ Drumbl 'Immunities and Exception'239.

1949.⁶²² The DRC then approached the ICJ to resolve its dispute with Belgium resulting from the issuing of the arrest warrant.

The court ruled that the arrest warrant was illegal and that it should be cancelled because it violated the immunity and inviolability that Mr. Ndombasi was entitled to enjoy as a Foreign Affairs Minister. In making its ruling the court outlined the customary international law position with respect to immunities of state officials. It held that,

The court has carefully examined State practice, including national legislation and those few decisions of national higher courts such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.⁶²³

Following the ICJ's decision in the *Arrest Warrant* case, and political pressure from politically powerful states whose high ranking officials had been the target of investigations in Belgium based on its law, Belgium amended the law in April 2003. The amended law included immunity provisions to bring it in conformity with international law.⁶²⁴ As a result of increased diplomatic pressure, the Act was repealed in August 2003, and a new law on extraterritorial jurisdiction was enacted.⁶²⁵ This law reaffirmed the immunity of state officials, and provided that the federal prosecutor must decline to prosecute in a number of instances, most notably where the alleged perpetrator is entitled to immunity.⁶²⁶ In September 2003, the

⁶²² For a summary and commentary of the case, see generally Du Plessis and Bosch 'Immunities and Universal Jurisdiction-The World Court steps in (or on?)'; Orakhelashvili 'International Decisions-*Arrest Warrant of 11 April 2000*', and Mukombwe 'The relationship between the exercise of universal jurisdiction and diplomatic and sovereign immunities with respect to Heads of State' 18-32.

⁶²³ *Arrest Warrant para 58*.

⁶²⁴ Arajarvi 'Looking Back from Nowhere' 18; Bhuta & Schurr 'Universal Jurisdiction: State of the Art' 37. For the amendments see the unofficial translation available in *International Legal Materials* 2003 (42) 749

⁶²⁵ See the 5 August 2003 Act on Grave Breaches of International Humanitarian Law. See also generally Reydam's 'Belgium Reneges on Universality'.

⁶²⁶ Bhuta & Schurr 'Universal Jurisdiction: State of the Art' 37.

Belgian Supreme Court held that a case against former Israeli Prime Minister Ariel Sharon was inadmissible on the basis of the ICJ decision in *Arrest Warrant*.⁶²⁷

As was noted above, Belgium's universal jurisdiction legislation of 1993 was the only one in Europe which did not recognise the immunities of state officials. In this vein, this thesis argues that the international criminal law narrative of a rise and fall in immunities is not correct. Rather, immunities have always been available and states have always claimed immunities for their officials. However, at the height of the application of the principle of universal jurisdiction in Europe, the immunities of officials from politically weaker states particularly those from African states were disregarded. It is submitted that this is evidence of the double standard that arguably exists in the application of international criminal law.

5.4.2 Spain

The Spanish universal jurisdiction legislation, Organic Law no 6/1985, though expansive, did not provide for absolute universal jurisdiction as it recognised two forms of immunity for state officials.⁶²⁸ These are the immunity of representatives of other states and their official delegations as well as officials of other states present at Germany's invitation; and the general rules of international law on sovereign immunity.⁶²⁹ The Spanish courts declined to exercise jurisdiction on the basis of article 20 of the Organic Law in a number of cases. These include cases filed against the then incumbent Cuban President Fidel Castro, the president of Equatorial Guinea Obiang Nguema and then President of Venezuela Hugo Chavez.⁶³⁰

In 2008, a Spanish investigative judge excluded the Rwandan President Paul Kagame from an indictment of former and current high –ranking Rwandan officials for alleged international crimes including genocide and crimes against humanity, on the basis that he was immune by virtue of his status as President.⁶³¹ The Spanish judge however did not provide reasons why the immunity of the indicted officials had been disregarded. These

⁶²⁷ Bhuta & Schurr *ibid* 39; Drumbl 'International Law and Exceptions' 239. Although the law on universal jurisdiction was repealed in August 2003; provisions of the repealed act dealing with international crimes were incorporated into the criminal code (Bhuta & Schurr 37).

⁶²⁸ Bhuta & Schurr *ibid* 87.

⁶²⁹ Article 20 (1) and 2 of Organic Law no 6/1985.

⁶³⁰ See de la Rasilla del Moral 'The swan song of universal jurisdiction in Spain' 785.

⁶³¹ *Ibid*. See also Jalloh 'Universal Jurisdiction, Universal Prescription?' 30.

included the Rwandan ambassador to India, the Chief of Staff of the Rwandan Defence Forces and the Chief of Protocol attached to the Presidency, all of whom were considered by Rwanda to be immune from such indictment.⁶³²

These indictments, and the earlier indictments in 2006 by a French investigative magistrate of nine Rwandan officials, ignited the tensions between African and European states regarding the application of the principles of universal jurisdiction and immunities. It ought to be noted that the denial of immunity by Spanish courts was only in relation to African officials.⁶³³ All cases against European and American officials, and more recently cases involving Chinese officials, were dismissed on the basis of the ruling in the *Arrest Warrant* case, and the reform of the universal jurisdiction legislation in Spain.

5.4.3 Netherlands

The International Crimes Act (ICA) recognises immunity for Heads of State and ministers of foreign affairs.⁶³⁴ The immunity is restricted to the period during which they occupy office. Apart from Heads of State and ministers of foreign affairs, other officials are entitled to immunity under the Act as provided for by customary international law and any convention that Netherlands may be a party to.⁶³⁵ The exercise of universal jurisdiction by Netherlands has not been controversial in the context of its recognition of the immunities of state officials. This has been attributed to the Belgian experience, which had a significant impact on the development of the universal jurisdiction legislation in Netherlands, which was enacted after the amendment of the universal jurisdiction legislation in Belgium, and the judgment in the *Arrest Warrant* case.

5.4.4 Germany

The German CCAIL does not directly address the issue of immunities.⁶³⁶ However the Judiciary Act upholds the immunities of state officials.⁶³⁷ The federal prosecutor declined to prosecute former Chinese President Jiang Zemin on this basis in 2003, finding that he

⁶³² Jalloh *ibid.*

⁶³³ De la Rasilla del Moral 'The Swan Song of Universal Jurisdiction in Spain' 785.

⁶³⁴ See Bhuta & Schurr 'Universal Jurisdiction: State of the Art' 72; Kaleck 'From Pinochet to Rumsfeld' 943.

⁶³⁵ See International Crimes Act section 16; Bhuta & Schurr *ibid.*; Kaleck *ibid.*

⁶³⁶ Bhuta & Schurr *ibid.* 64.

⁶³⁷ Bhuta & Schurr *ibid.*; article 20 (1) and (2) of the Judiciary Act (1972) as amended by article 1 of the Law of 11 July 2002.

enjoyed immunity from prosecution .It has been argued that in so doing the federal prosecutor adopted a broad interpretation of the ICJ’s judgment in the *Arrest Warrant* case by determining that personal immunity applied to both former and current Heads of State and foreign affairs ministers.⁶³⁸

It is submitted that Germany’s application of prosecutorial discretion in this regard is indicative of the perceived double standard in international criminal law. Whilst the federal prosecutor declined to prosecute the former Chinese minister on the basis that he was immune from prosecution, the Rwandan Chief of protocol in the Presidency Rose Kabuye was arrested in Germany in November 2008.This was pursuant to an arrest warrant issued against her and other officials in 2006 by a French investigative magistrate. Kabuye was later transferred to France to face charges of terrorism.⁶³⁹ The arrest resulted in tensions between the Rwandan and German governments, with Rwanda claiming that it was a violation of Rwanda’s sovereignty as Kabuye was immune to arrest, and the German prosecutors claiming that she did not enjoy diplomatic immunity as she was not part of an official delegation.⁶⁴⁰

The arrest of Kabuye, in contrast to the German federal prosecutor’s decision to decline to prosecute in a number of cases involving high profile officials from politically powerful states, resonates with the argument made in this Chapter that the application of immunities declined only in respect to officials from the politically weaker states, most notably African states.

5.4.5 United Kingdom (England and Wales)

The main legislative instrument authorising the exercise of universal jurisdiction by courts in the United Kingdom, the ICC Act of 2001, is silent on the issue of immunities. However, the State Immunity Act of 1978 provides for the immunity of incumbent Heads of State and ministers of foreign governments. It states that the act confers immunities and privileges to,

⁶³⁸ Bhuta & Schurr *ibid*; Kaleck 951.

⁶³⁹ Jalloh ‘Universal Jurisdiction, Universal Prescription?’ 36; Al Jazeera English 10/11/2008 ‘Rwanda angered by official’s arrest’ available at www.aljazeera.com/news/europe/2008/11/2008111013536532253.html (accessed 30/6/2018).

⁶⁴⁰ Daily Nation 11/11/2008 ‘Kagame says Kabuye arrest violates sovereignty’ available at www.nation.co.ke/News/Africa (accessed 30/6/2018); Jalloh *ibid* 36.

‘(a) the sovereign or other Head of ...State in his public capacity, (b) the government of that State...’⁶⁴¹

There are a number of cases in which the UK courts have upheld the immunity of Heads of State and other senior state officials on the basis of section 14 (1) of the State Immunity Act. Complaints filed against former Zimbabwean President Robert Mugabe and the former U.S President George Bush were dismissed on the grounds that they enjoyed immunity before the domestic courts of the United Kingdom.⁶⁴² Immunity has also been upheld in the applications for arrest warrants against then Israeli Defence Minister Shaul Mofaz in 2004, and the then Chinese Trade Minister Bo Xilai in 2005.⁶⁴³

The United Kingdom has been at the forefront of upholding the immunity of state officials in Europe. Even before the ICJ outlined the customary international law position on the immunities of state officials in the *Arrest Warrant* case, the UK House of Lords had considered the scope of both functional immunity and personal immunity at length. In *Pinochet* no.1 and *Pinochet* no.3, the Lordships held that Pinochet could not claim immunity as a defence, but that if he had still been a Head of State, then he would have been immune from proceedings in the United Kingdom courts.⁶⁴⁴

No case can be found in the United Kingdom where an incumbent Head of State has been indicted. In this regard, it is submitted that the application of personal immunity by the courts of the United Kingdom is evidence that immunities have not fallen but that they have always been available at international law.

5.5 CONCLUSION

This chapter has examined the history of the principle of immunities and its meaning, scope and rationale, and highlighted that African sovereignty, when it has been granted, has always been deficient. Historically this deficiency was manifest through the application of

⁶⁴¹ Section 14 (1) of the State Immunity Act of 1978; Kaleck 942.

⁶⁴² See Bhuta & Schurr ‘Universal Jurisdiction: State of the Art’ 94; *Application for Arrest Warrant against Robert Mugabe* (Bow St. Mag. Ct 14 Jan 2004)

⁶⁴³ See Bhuta & Schurr *ibid*, *Application for Arrest Warrant Against General Shaul Mofaz* (Bow St. Mag. Ct 12 Feb 2004); *Application for Arrest Warrant against Bo Xilai* (Bow St. Mag. Ct 8 Nov 2005)

⁶⁴⁴ In *Pinochet* no .1 Lord Nicholls said ‘...there can be no doubt that if Senator Pinochet had still been the Head of the Chilean State, he would have been entitled to immunity.’ In *Pinochet* no.3 Lord Millet explained that if Pinochet had still been a Head of State he could not be extradited.

international law principles including that of immunities, which were deemed to be inapplicable to non-European communities as they were considered to be uncivilised and therefore non-sovereign. In this regard, it is submitted that Anghie's theory on the colonial origins of the sovereignty doctrine is pivotal to comprehending the misunderstandings between African states and European states, and the ICC regarding the application of the principle of immunities. Anghie's theory resonates with the history of the development of the principle of immunities, particularly the history of capitulations. The evolution of capitulations granted by partially recognised 'states' such as the Ottoman Empire to Europeans, from being privileges granted as trade incentives to one sided treaties which were used to subjugate the non-European states, validates Anghie's argument that non-European states were historically treated as objects and not subjects of international law.

When European states exercise universal jurisdiction against African state officials, and when the ICC indicts African Heads of State, African states view this as an affront to their sovereignty.⁶⁴⁵ The misunderstandings between African states and European states, and African states and the ICC regarding the application of immunities, arguably stem from the different ways in which African states and European states have historically obtained and enjoyed the protection of the principle of sovereignty, leading to differences in the way they understand and invoke the doctrine.⁶⁴⁶ It is asserted that as a result of African states having been historically deprived of their sovereignty, they see the need to re-assert this sovereignty to avoid post-colonial influence from their former colonisers by taking steps which include reclaiming the immunities of their Heads of State and state officials.

Although African states were historically deprived of their sovereignty and ultimately fundamental principles including immunities were deemed to be inapplicable to them, the principle of immunities has always been a part of international law from the ancient Greek times. An examination of the universal jurisdiction legislation in selected European countries above has shown that apart from the repealed Belgian legislation on universal jurisdiction,

⁶⁴⁵ AU-EU Expert Report on Universal Jurisdiction para 37-38; Du Plessis 'Shambolic, Shameful and Symbolic' 10.

⁶⁴⁶ African states have expressed sentiments that the ICC is a neo-colonial tool because of the purported immunity of the UN Security Council members. See M Du Plessis & C Gevers 'South Africa's Foreign Policy and the International Criminal Court: on African Lessons, Security Council Reform and Possibilities for an improved ICC' in T Shaw & J Warner (eds) *African Foreign Policies in International Institutions, Contemporary African Political Economy* (2018) 199,208-209.

the legislation in European states made provision for the immunity of Heads of State and state officials. It is therefore submitted that unlike universal jurisdiction, the principle of immunities has not gone through different phases in its application. Rather, there has arguably been a double standard in the application of the principle, with European state practice showing that immunities have been disregarded in respect of politically weaker states, with African state officials making up the majority. It would therefore be incorrect to argue, as some scholars have done, that there has been a rise and fall in immunities.

In this regard, it shall be argued in Chapter Six that when African states insist that their officials are entitled to immunity, they are not deviating from the norm. Contrary to assertions by some scholars that immunities have fallen, immunities have always been a part of international law and states have always claimed immunities for their officials. Due to the colonial history however, African states were unable to claim immunities for their subjects as they were regarded to be uncivilised and therefore not sovereign as explained by Anghie. African states are therefore not seeking to claim immunities which have fallen; they are simply reclaiming and re-asserting immunities which have always been available at international law, but which they were not able to claim due to the 'standard of civilisation' and 'dynamic of difference' as explained by Anghie.

CHAPTER SIX

IMMUNITY AND THE IMPLEMENTATION LEGISLATION IN AFRICA

6.1 INTRODUCTION

As was explained in Chapter Five, the application of the principle of immunities has in recent years led to tensions between African states and European states, and to a deterioration of the relationship between the AU and the ICC. African states have claimed that when European states exercise universal jurisdiction against African state officials, and when the ICC indicts incumbent African Heads of State, this disregards the immunities which these officials ought to enjoy at international law.⁶⁴⁷ The issuing of nine arrest warrants against certain Rwandan officials by a French investigative magistrate in 2006 and the indictment of forty current and former Rwandan officials by a Spanish investigative magistrate in 2008 led to tensions between African states and European states regarding the application of the principle of universal jurisdiction. In both instances, Rwanda insisted that the indicted officials enjoyed immunity.⁶⁴⁸

The relevance of the immunity question was further heightened by the indictment of Sudanese President Omar Al Bashir in 2009 by the ICC, and the confirmation of proceedings against the Kenyan President Uhuru Kenyatta and his deputy William Ruto in 2012. The AU Assembly noted with respect to the proceedings against the Kenyan President and his deputy before the ICC in its 2013 Decision on Africa's Relationship with the ICC that it,

⁶⁴⁷ AU-EU Expert Report on Universal Jurisdiction para 37-38; AU Assembly Decision on Africa's Relationship with the ICC para 9.

⁶⁴⁸ See Geneuss 'Universal Jurisdiction Reloaded? Fostering a better Understanding of Universal Jurisdiction; A Comment on the AU-EU Expert Report on Universal Jurisdiction' 946; Jalloh 'Universal Jurisdiction, Universal Prescription?' 20-21.

Underscores that this is the first time that a sitting Head of State and his deputy are being tried in an international court and STRESSES the gravity of this situation which could undermine the sovereignty, stability and peace in that country and in other Member States ⁶⁴⁹

According to the AU Assembly, this indictment of sitting Heads of States was contrary to the customary international law position on the immunities of sitting Heads of State and other senior officials. It stated in paragraph 9 of the Decision that it ‘Reaffirms the principles deriving from national laws and customary international law by which sitting Heads of State and other senior state officials are granted immunities during their tenure of office.’⁶⁵⁰

The misunderstanding between African states and European states, and African states and the ICC is likely to continue for a long time to come. This is because of the uncertainties regarding the exact scope of immunities in international law. It is not clear as to what extent the immunities, particularly personal immunity, enjoyed by Heads of State and state officials can be used as a bar to their prosecution for international crimes. In response to the perceived disregard of the immunities of African Heads of State and state officials by Western states and the ICC, the AU has embarked on a project to re-assert the immunities of Heads of State and officials of its member states. It has been argued by a number of scholars that the re-assertion of immunities by African states is a deviation from the norm. This chapter argues that African states are simply re-asserting immunities which have always been available to them at international law but which they were previously unable to claim during the colonial confrontation.

An examination of the history of the principle of immunities in Chapter Five has highlighted that African sovereignty, when it has been granted, has always been deficient, and that during the colonial encounter the doctrines of international law such as that of immunities did not apply to African communities. It shall be argued in this chapter that the concerns expressed by African states with respect to the application of the principle of immunities by European states and by the ICC ought to be understood against the background of the historical development of the principle of immunities, and Anghie’s theory on the colonial origins of

⁶⁴⁹ See para 5 of the 2013 AU Assembly Decision on Africa’s Relationship with the ICC (Ext /Assembly/AU/Dec.1 Oct 2013).

⁶⁵⁰ See para 9 of the Decision.

international law. In recent years African states under the ambit of the AU have reiterated the importance of respecting the immunities of their Heads of State and officials.⁶⁵¹

The question to be asked in this regard is why the AU is pushing to re-assert the immunities of African Heads of State and officials, at a time when there has been a push for universal jurisdiction on the African Continent as discussed in Chapter Four. It shall be submitted in this chapter that the push for immunities by African states is part of efforts to re-assert their sovereignty by ensuring that their Heads of State and state officials are not subjected to the jurisdiction of the ICC and non-African states respectively. The AU has moved to strengthen its regional justice mechanisms in order to avoid the jurisdiction of Western states and the ICC, whilst at the same time reclaiming immunities for the Heads of State and officials of its member states.

As has been noted in Chapter Five, a distinction ought to be drawn between the application of immunities before domestic courts and before international courts and tribunals respectively. However, this thesis also considers the immunity question before the ICC because although the jurisdiction of the ICC is distinct from that of domestic courts, the questions arising from efforts by the ICC to prosecute African Heads of State for alleged human rights violations are closely related to those arising from the application of the principles of universal jurisdiction and immunities by domestic courts of non-African states.

African states have addressed the issue of immunity both at the regional and domestic level. At the regional level, the AU Model Law on Universal Jurisdiction provides for the immunity of Heads of State and state officials in article 16 (1). In addition, article 46A bis of the Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights provides for the immunity of Heads of State and other senior state officials before the proposed court. At the domestic level, a number of African states have included immunity provisions in their universal jurisdiction legislation provisions. These immunity provisions relate to both prosecutions before domestic courts of the respective African states, and to issues of cooperation with the ICC.

This chapter shall examine the immunity provisions in the AU Model Law on Universal Jurisdiction and the Protocol on amendments to the Protocol on the Statute of the African

⁶⁵¹ See the Decision on Africa's Relationship with the ICC, and the Decision on the report of the Commission on the Abuse of the Principle of Universal Jurisdiction (1/7/2008) Assembly/AU/dec.199 (XI).

Court of Justice and Human Rights, followed by the immunity provisions in the ICC implementation legislation in South Africa; Kenya; Uganda; Senegal and Mauritius. When South Africa announced that it intended to withdraw from the Rome Statute in 2016, one of the reasons given by the Minister of Justice for the intended withdrawal was that the immunity provisions of the Rome statute and the country's ICC Act were in conflict with South Africa's customary international law obligations to respect the immunity of sitting Heads of State and other senior state officials.⁶⁵² An examination of the immunity provisions of the regional legislative instruments and the domestic ICC implementation legislation in Africa is therefore of both academic and practical relevance because the issue of immunities, particularly personal immunities, has taken centre stage in international law in recent years. Notably, there has been considerable debate amongst scholars as to whether or not the Sudanese president Omar Al Bashir is immune from arrest and surrender by states in cooperation with the ICC.⁶⁵³

It shall be asserted that the problem with the international criminal law narrative as it stands is that it treats colonialism as being peripheral to the discipline, rather than being central to the development of international law as rightly argued by Anghie. In this regard, the chapter shall attempt to address the scholarly silence on the impact that colonialism has had in the shaping of contemporary international law as seen through the lens of the application of the principle of immunities in Africa. Scholars commenting on the efforts by African states to reclaim immunities for their officials have focused on the assertion that when African states claim immunities for their Heads of State and officials they are deviating from the norm as immunities have fallen.⁶⁵⁴

⁶⁵² See Statement by South Africa's Justice Minister on South Africa's Intention to Withdraw from the Rome Statute (21/10/2016).

⁶⁵³ For a detailed discussion on this issue see P Gaeta 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7:2 *J of Int Criminal Justice* 315. For a contrasting view see D Akande 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7: 2 *J of Int Criminal Justice* 333.

⁶⁵⁴ See for example Chok 'Let the Responsible be Responsible' and Jalloh 'Universal Jurisdiction, Universal Prescription?' 49.

6.2 IMMUNITY AND THE REGIONAL IMPLEMENTATION LEGISLATION IN AFRICA

In recent years, African states have been making efforts to re-assert immunities for their Heads of State and state officials. This has taken place against the background of African states claiming that when European states exercise universal jurisdiction against African state officials, and when the ICC indicts sitting African Heads of State, this is a disregard of the immunities which the state officials and Heads of State in question ought to enjoy at international law. The legislative instruments at both the regional and domestic levels have immunity provisions which address the question of the relevance of immunity before domestic courts. In some instances, the provisions address the question of immunity in relation to arrest and surrender in cooperation with the ICC. States have however not addressed the issue of immunity in a uniform manner. The issue of the scope of immunities is therefore likely to remain subject to debate for a long time to come. This section shall examine the African regional legislative instruments on immunity.

6.2.1 The AU Model Law on Universal Jurisdiction

Article 16 (1) of the AU Model Law on Universal Jurisdiction provides that,

Foreign state officials entitled to jurisdictional immunity under international law shall not be charged or prosecuted under this law ,except in situations where these crimes are covered by a treaty to which the State and the State of nationality of such officials are parties and which prohibits immunity.⁶⁵⁵

Article 16(1) prohibits domestic courts from exercising jurisdiction over officials who enjoy immunity at international law. Although the immunity provision is in conformity with the customary international law position on the immunity of state officials as enunciated in *Arrest Warrant*, it is confusing in that it does not clarify the exact circumstances in respect of which the exception to the immunity provision shall apply.⁶⁵⁶ There is also no consensus between the model law and some sub-regional and domestic instruments on this issue of immunity. The Great Lakes Protocol, for instance, expressly provides for the irrelevance of

⁶⁵⁵ See article 16 (1) AU Model Law on Universal Jurisdiction.

⁶⁵⁶ See section 16 (1) and (2) of the Model Law; Gevers ‘Back to the Future?’ 116. For the customary international law position on immunities, see the judgment in the *Arrest Warrant* case *para* 58.

any immunity which the accused might enjoy at international law.⁶⁵⁷ The domestic instruments for South Africa and Mauritius also contain similar provisions.⁶⁵⁸ This contrast is a manifestation of the uncertain relationship between the two principles of universal jurisdiction and immunities.

It has been argued by Dube that the AU Model Law was a response by the AU to the perceived unfair targeting of African state officials by European states in the exercise of universal jurisdiction. As African states under the auspices of the AU have frequently raised the concern that the exercise of universal jurisdiction against African state officials by European states is an affront to their sovereignty, Dube argues that section 16 was tailored to ensure that the immunity of African Heads of State and other senior state officials would be upheld.⁶⁵⁹ This argument by Dube is convincing when one considers subsequent efforts by the AU to reclaim immunities for Heads of State and officials of its member states, including the 2013 AU Assembly Decision on Africa's Relationship with the ICC and the immunity provision in the 2014 Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

6.2.2 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights was adopted in June 2014. It contains a provision granting immunity to Heads of State and senior state officials from the jurisdiction of the proposed African Court of Justice and Human Rights. Article 46 A bis provides that,

No charges shall be commenced or confirmed before the Court against any serving AU Head of State or Government or anybody acting or entitled to act in that capacity, or other senior officials based on their functions, during their tenure of office.⁶⁶⁰

⁶⁵⁷ See Article 12 Great Lakes Protocol on Genocide, War Crimes and Crimes against Humanity; Gevers *ibid* 117.

⁶⁵⁸ See section 4 (2) (a) of the ICC Act (South Africa); and section 6 (1) ICC Act (Mauritius).

⁶⁵⁹ Dube 'The AU Model Law on Universal Jurisdiction' 462.

⁶⁶⁰ See Article 46A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

This immunity provision has been widely criticised by scholars as well as civil society on the basis that it is likely to promote impunity when the proposed court becomes operational. Amnesty International, for instance, said that,

The decision by the Assembly of the African Union (AU) to grant sitting African leaders immunity from prosecution for genocide, war crimes and crimes against humanity is a backward step in the fight against impunity and a betrayal of victims of serious violations of human rights.⁶⁶¹

Jalloh and Bantekas have argued that,

giving immunity to African leaders undercuts the AU's criticism of the ICC's system of 'selective justice' and suggests that the proposed African Court is little more than a thinly veiled attempt to challenge the ICC's authority over high-ranking African politicians.⁶⁶²

It is submitted that from a human rights perspective, the immunity provision is problematic in that it is at odds with the AU's stated commitment to prevent impunity on the continent. As argued by Du Plessis,

Article 46A bis is transparently at odds with the AU's own Constitutive Act. It also conflicts with previous official AU statements relating to the expansion of the African Court to the effect that impunity for international crimes is intolerable and that the perpetrators of such crimes must be held accountable.⁶⁶³

In addition, given that in terms of customary international law Heads of State and other senior state officials are immune to the jurisdiction of domestic courts even when they are accused of having committed international crimes, this immunity provision might leave victims of human rights violations with nowhere to turn to on the continent for justice.

It is important at this point to examine whether or not from a legal point of view, the immunity provision can be said to be one that promotes impunity. Du Plessis has examined Article 46A bis at length, and he has convincingly argued that the immunity which is referred

⁶⁶¹ See Amnesty International press release 01/07/2014 'AU Summit Decision a Backward Step for International Justice' available at <https://www.amnesty.org/en/press-releases/2014/07/au-summit-decision-backward-step-international-justice/> (accessed 30/6/2018).

⁶⁶² See C Jalloh & I Bantekas (Eds) (Epilogue) *The International Criminal Court and Africa* (2017) 61-62.

⁶⁶³ See Du Plessis 'Shambolic, Shameful and Symbolic' 1.

to in the immunity provision appears to be personal rather than functional immunity.⁶⁶⁴ He concludes from this assertion that in the legal sense, article 46A bis does not promote impunity because personal immunity applies only for as long as an individual continues to occupy office. It is submitted that it would therefore be incorrect, legally, to argue that the immunity provision will have the effect of promoting impunity on the continent.

6.3. ICC implementation legislation in selected African states

The ICC implementation legislation universal jurisdiction of the selected African countries discussed in Chapter Four address the issue of immunity of Heads of State and state officials. Some of them have incorporated provisions on immunity before the domestic courts whilst others provide for immunity with respect to the arrest and surrender of individuals in cooperation with the ICC. These provisions shall be examined in detail below.

6.3.1 South Africa

The ICC Act

The ICC Act is silent on the issue of immunity in relation to cooperation with the ICC. It only provides in section 8 (1) for the procedure to be followed when South Africa receives a request for arrest and surrender from the ICC. The request must be forwarded to the Director-General of the department for Justice and Constitutional Development with the requisite documents.⁶⁶⁵ The Director-General will then forward the request and documents to a local magistrate for endorsement of the warrant.⁶⁶⁶

The ICC Act addresses the question of immunity before South Africa's courts in section 4 (2) (a) which provides that,

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 government or parliament, an elected representative or 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.⁶⁶⁷

⁶⁶⁴ Du Plessis *ibid* 10.

⁶⁶⁵ See section 8 (1) ICC Act.

⁶⁶⁶ See section 8 (2) ICC Act.

⁶⁶⁷ See section 4 (2) ICC Act.

A number of scholars have asserted that this provision effectively removes the personal immunity of Heads of State and other senior government officials, and in this regard it is in conformity with section 27 (2) of the Rome statute of the ICC which provides for the irrelevance of an accused's personal immunities before the court. Dugard and Abraham argued that section 4 (2) (a) is a manifestation of the legislature's intention to divert from what they refer to as the 'unfortunate' *Arrest Warrant* decision.⁶⁶⁸

Du Plessis asserted that,

In terms of the Act, South African courts, acting under the complementarity scheme, are thus 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 Statute⁶⁶⁹

According to Chenwi, section 4 (2) of the ICC Act is in conformity with the Rome statute on the issue of immunities, and it

diverges from customary international law, but rightly so in this context, by excluding immunity for certain government officials or for their status to be used as a basis for the reduction of their sentence following convictions.⁶⁷⁰

Gevers has however convincingly argued that section 4 (2) (a) refers to functional rather than personal immunity. According to him, the immunity provision in the ICC Act is based on article 27 (1) of the Rome statute which refers to functional immunities and not on section 27 (2) which provides for the irrelevance of personal immunities before the courts.⁶⁷¹ It is important to note in this regard that the Constitution of South Africa recognises customary international law as part of South African law, providing that, 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'⁶⁷²

If section 4(2) (a) of the ICC Act is interpreted as meaning that the personal immunities of state officials are removed, this would be inconsistent with the obligation of South Africa to

⁶⁶⁸ Dugard & Abraham 'Public International Law' 166.

⁶⁶⁹ Du Plessis 'South Africa's Implementation of the ICC Statute: An African Example' 474. For a similar view see Stone 'Implementation of the Rome Statute of the International Criminal Court in South Africa' 312-313.

⁶⁷⁰ Chenwi 'Universal Jurisdiction and South Africa's Perspective on the Investigation of International Crimes' 35.

⁶⁷¹ Gevers 'International Criminal Law in South Africa' 418.

⁶⁷² See section 232, Constitution of the Republic of South Africa Act no 108 of 1996.

give effect to such immunities.⁶⁷³ The interpretation would also be inconsistent with section 233 of the Constitution which provides that,

When 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.⁶⁷⁴

As Akande has observed, state practice and *opinio juris* are unanimous on the issue that personal immunities apply before domestic courts regardless of the nature of the crime in question, and there exists no case in which a domestic court held that the personal immunities of an official are irrelevant due to the nature of the crime.⁶⁷⁵ In this regard, this thesis submits to the argument made by Gevers that the immunities which are referred to in section 4 (2) (a) of the ICC Act are functional immunities and not personal immunities.⁶⁷⁶

6.3.2 Kenya

The IC Act

Kenya's IC Act is silent on whether or not the official position of an accused person is relevant for domestic prosecutions. It however provides extensively for the relevance of immunity with regard to requests for arrest and surrender of an accused person to the ICC. It provides in Section 27 (1) that,

[t]he existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC;(b holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.⁶⁷⁷

It ought to be noted however that the Act distinguishes between requests relating to officials of state parties to the ICC and those relating to non-party states. It provides in section 23 (2)

⁶⁷³ Gevers 'International Criminal Law in South Africa' 418.

⁶⁷⁴ Section 235 of the Constitution; Gevers *ibid*.

⁶⁷⁵ Akande 'International Law Immunities and the International Criminal Court' 411.

⁶⁷⁶ Gevers 'Back to the Future?' 117. For a similar view see Kayitana 'Universal Jurisdiction of South Africa's Criminal Courts' 2574-2577.

⁶⁷⁷ Section 27 (1) ICC Act.

that where a request is in respect of an official of a non-party state or an organisation, a request must be made for the waiver of the immunity of such a person.⁶⁷⁸

The application of this section is however subject to section 115 of the Act, which provides that,

If a request by the ICC for assistance to which this part applies concerns persons who, or information or property that, are subject to the control of another State or an international agreement, the Attorney-General shall inform the ICC to enable it to direct its request to the other State or international organization.⁶⁷⁹

Gevers has argued that the provisions of the Act in this respect are commendable in that they clarify the relevance of personal immunities with regard to requests for cooperation with the ICC. In addition the Act addresses, though not perfectly, the contentious issue of the contradictory provisions in article 27 and 98 of the Rome Statute regarding the immunity issue.⁶⁸⁰

Section 27 of the IC Act provides that the immunity of an individual shall not bar the arrest and surrender of such an individual not only to the ICC but to a third state as well.⁶⁸¹ Gevers has asserted that in view of the customary international law position as enunciated in the *Arrest Warrant* case, Kenya would breach its obligations under customary international law were it to effect such an arrest and surrender to a third state.⁶⁸² It is pertinent to note at this point that despite the commendable provisions in Kenya's IC Act, the country has recently been at the forefront of calling for a mass withdrawal of African states from the Rome Statute of the ICC.

6.3.3 Uganda

The ICC Act

Uganda's ICC Act is silent on the issue of immunity for domestic prosecutions, but like the Kenyan legislation, it does provide for the relevance of immunity in requests for cooperation by the ICC. Section 25(1) provides that,

⁶⁷⁸ See section 23 (2) IC Act.

⁶⁷⁹ See section 115 IC Act.

⁶⁸⁰ See Gevers 'Immunity and the Implementation Legislation in South Africa, Kenya and Uganda' 107.

⁶⁸¹ See section 27 of the Act, Gevers *ibid*.

⁶⁸² Gevers *ibid* 108.

[t]he existence of any immunity or special procedural rule attaching to the official capacity of any person is not a ground for – (a) refusing or postponing the execution of a request for surrender or other assistance made by the ICC; (b) holding that a person is ineligible for arrest or surrender to the ICC under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.⁶⁸³

The Act is similar in wording in this respect to section 27 of Kenya’s International Crimes Act, with the difference being that Uganda’s Act does not make reference to surrender to another state.⁶⁸⁴ Another striking similarity is that the operation of section 25 is subject to article 98 of the Rome Statute, as it is conditional upon section 24 (6).⁶⁸⁵ This section provides that,

If the Minister [of Justice] is of the opinion that the circumstances set out in article 98 of the Statute apply to a request for provisional arrest, arrest and surrender or other assistance, he or she shall consult with the ICC and request a determination as to whether article 98 applies.⁶⁸⁶

As Gevers has observed, it is not clear from the wording of section 24 (6) how the consultative process should take place.⁶⁸⁷ This provision is similar to section 115 of Kenya’s International Crimes Act in that it also addresses the contradictory provisions in section 27 and section 98 of the Rome Statute. However, unlike Kenya’s ICA, Uganda’s ICC Act does not distinguish between requests relating to officials of state parties and those of non-state parties.

6.3.4 Mauritius

The ICC Act

The ICC Act has a similar provision to that found in South Africa’s ICC Act with regards to the relevance of immunities in domestic prosecutions. It provides in section 6 (1) that,

It shall not be a defence to an offence under section 4 nor a ground for a reduction of sentence for a person convicted of an offence under that section to plead that he is or was Head of State, a

⁶⁸³ See section 25 (1) of the Act.

⁶⁸⁴ Section 25 (1) Act; Gevers ‘Immunity and the Implementation Legislation in South Africa, Kenya and Uganda’ 108.

⁶⁸⁵ See section 25 (2) of the Act; Gevers *ibid.*

⁶⁸⁶ Section 24 (6) of the Act.

⁶⁸⁷ Gevers ‘Immunity and the Implementing Legislation in South Africa, Kenya and Uganda’ 109.

member of Government or Parliament, an elected representative or a government official of a foreign state.⁶⁸⁸

It is submitted that like the provision in South Africa's ICC Act, section 6 (1) refers to functional rather than personal immunities. As Kayitana has convincingly argued, if the immunity provision in South Africa's Act were to apply to personal immunities, this would go against the rationale of the principle of personal immunities.⁶⁸⁹ In addition, the interpretation that the immunity provision relates to functional rather than personal immunity is the one which is consistent with the customary international law position on the relevance of immunities before domestic courts.

With regards to the relevance of immunities in cooperation with ICC requests, the Act does not address the issue. It simply outlines the procedure to be followed where the ICC has requested for assistance. Section 11 provides that,

(1) Any request from the International Criminal Court for the arrest or provisional arrest and surrender of a person for whom a warrant of arrest has been issued by the International Criminal Court shall be directed to the Attorney-General... (2)The Attorney-General shall, on receipt of the request, forward it and the accompanying documents to a Judge, who shall endorse the warrant of arrest for execution in Mauritius.⁶⁹⁰

The Act makes reference to Article 98 of the Rome Statute of the ICC, providing in section 14 (1) that,

Where the Attorney-General considers that the execution of a request for the arrest and surrender of any person may be in conflict with the obligations of Mauritius to a foreign country under international law or international agreements referred to in Article 98 of the [Rome] Statute he shall consult with the International Criminal Court.⁶⁹¹

The Act further provides that if the Attorney-General is satisfied that a request by the ICC does not conflict with the obligations of Mauritius; s/he shall sign a certificate to this effect. It is submitted that the fact that the Act does not directly address this issue of the contradictory provisions of section 27 and 98 of the Rome statute but instead provides for

⁶⁸⁸ See section 6 (1) ICC Act.

⁶⁸⁹ Kayitana 'The Universal Jurisdiction of South African Criminal Courts'2583.

⁶⁹⁰ Section 11 ICC Act.

⁶⁹¹ See section 14 (1) of the Act.

consultation with the ICC, is evidence that Mauritius considers itself to be fully bound by the decisions of the ICC in this regard.

6.3.5 Senegal

Law no 2007-02 of 12 February 2007 modifying the Penal Code; and Law no 2007-05 of 12 February 2002 modifying the Criminal Procedure Code

The Senegalese laws which amended the country's Penal Code and Criminal Procedure Code, and enabled the country to give effect to the complementarity provision of the Rome statute do not address the issue of immunity before the courts.⁶⁹² They are also silent on the issue of immunity with respect to cooperation with the ICC.⁶⁹³ Articles 677-1 to articles 677-11 which were incorporated by the 2008 amendment to the constitution provide for issues of cooperation with the ICC, although they are also silent on the issue of immunities.⁶⁹⁴ The Constitution of Senegal however provides for the functional immunity of the President and members of government. It provides in article 101 that the President is immune to all acts linked to his official functions except for the crime of treason, in which case only the High Court of Justice which is made up of mostly members of Parliament will have jurisdiction over the matter.⁶⁹⁵ In 2005, the Appeals Court of Dakar relied on this provision and ruled that Hissene Habre could not be extradited to Belgium because the immunity accorded to the Senegalese President in Article 101 also applied to him even though he was no longer President of Chad.⁶⁹⁶

The Statute of the EAC however provides for the irrelevance of the official position of an accused person. It provides in Article 10 (3) that,

The 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.⁶⁹⁷

⁶⁹² Niang 'The Senegalese Legal Framework for the Prosecution of International Crimes' 1055.

⁶⁹³ Niang *ibid.*

⁶⁹⁴ Niang *ibid.* 1058. For a detailed overview of the provisions on cooperation with the ICC, see 1058-1062.

⁶⁹⁵ Niang *ibid.* See also Constitution of the Republic of Senegal as amended to 2012 (English translation available at <https://www.unwomen.org/en/countries/africa/senegal?provisioncategory> (accessed 30/6/2018)).

⁶⁹⁶ Niang *ibid.* 1056.

⁶⁹⁷ See Article 10 (3) of the 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

As a former Head of State, Hissene Habre could not claim functional immunity as a defence before the EAC. The statute of the EAC does not make any reference to the ICC. This is significant as this court was established as part of efforts by the AU to reassert the sovereignty of its member states by strengthening regional justice mechanisms and avoid the jurisdiction of Western states and that of the ICC.

It can be argued that the trial of Hissene Habre before the EAC is evidence that African states view immunity as one of the central aspects of their sovereignty, hence they want to be in a position to determine when immunities should be applied and when they should be disregarded in respect of their officials and leaders. The trial of Hissene Habre before the EAC was the first instance in which an African court exercised jurisdiction based solely on the universality principle, and the first in which the immunity of a former Head of State was held to be irrelevant. A distinction ought to be drawn between the trial of Hissene Habre and that of Charles Taylor, the former Liberian President, by the Special Court for Sierra Leone (SCSL). As was explained in Chapter Four, the EAC was established by Senegal with the support of the AU, but it is integrated in the Senegalese domestic legal system. The SCSL on the other hand was an international tribunal established by an agreement between the government of Sierra Leone and the United Nations.⁶⁹⁸

6.4 SOVEREIGNTY AND THE APPLICATION OF THE PRINCIPLE OF IMMUNITIES IN AFRICA

As was explained above, there have been tensions between African states and European states, and African states and the ICC, regarding the application of the principle of immunity with respect to African leaders and state officials. It is submitted that the misunderstandings resulting from the application of this principle ought to be understood against the background of the doctrinal link between sovereignty and immunity, and Anghie's theory on the colonial origins of international law. Efforts by African states to re-assert immunities for their Heads of State and officials have been met with criticism, with scholars arguing that this is a deviation from the norm as the principle of immunities is on the decline. In this regard, this thesis argues that African states are merely claiming immunities which have always been a

Human Rights Watch translation available at <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>. (accessed 30/6/2018).

⁶⁹⁸ See C Jalloh 'Special Court for Sierra Leone: Achieving Justice?' (2011) 32:3 *Michigan J of Int L* 395, 404.

part of international law, but which they could not claim due to the ‘standard of civilisation’ and the ‘dynamic of difference’ as explained by Anghie.

The reason why African states are making efforts to re-assert immunities for their Heads of State and officials is because they want to reaffirm their sovereignty which they were previously denied, and avoid the jurisdiction of European states and that of the ICC. African states, weary of their colonial past, want to re-assert their sovereignty to ensure that there is no interference in their affairs from their former colonisers. In so doing they are however perceived as holding on to a principle which is on the decline and it is submitted that this is because scholars treat colonialism as being peripheral, rather than as a central aspect of the discipline of international law. This section shall attempt to address the scholarly silence on the impact that the colonial encounter has had on the development of contemporary international law as seen through the lens of the application of the principle of immunities in Africa.

An examination of the history of the Turkish capitulations in Chapter Five has highlighted that African sovereignty has always been deficient and that during the colonial encounter African states were not able to claim immunity for their subjects as they were excluded from the realm of international law. It is submitted in this regard that Anghie’s theory on the colonial origins of international law enables us to understand why African states are keen to re-assert the immunities of their Heads of State and state officials, despite the repeated statements by the AU that African states are committed to fight impunity on the continent. The AU Model Law on Universal Jurisdiction for instance recognises in its Preamble that, ‘Certain crimes are of most serious concern to the African Union and the international community as a whole and they must not go unpunished.’⁶⁹⁹

Despite this stated commitment to fight impunity, the Model Law itself has an immunity provision which prohibits domestic courts from exercising universal jurisdiction against officials who enjoy immunity at international law.

Anghie has argued that the end of colonialism did not result in the complete emancipation of non-European states. According to Anghie, the continued subjugation of non-European states by their former colonisers is manifest through the structure of international institutions such as the World Bank and International Monetary Fund which highlight that Western powers

⁶⁹⁹ Preamble to the AU Model Law on Universal Jurisdiction.

still exercise dominance over the former colonies.⁷⁰⁰ Anghie explains in great detail how the creation of the Mandate System of the League of Nations and the structure of the World Bank and International Monetary Fund are evidence of the continued domination of former colonies by the politically powerful states, contrary to the narrative that international law is now truly universal as all states are now able to freely participate in international institutions.⁷⁰¹ According to him, the process of decolonisation itself was fraught with the continued subjugation of non-European states, even though this process was meant to emancipate the former colonies.⁷⁰²

A detailed examination of the Mandate system and the economic aspect of international law is beyond the scope of this thesis. However, Anghie's argument in this regard is relevant in that it provides an insight as to where the African states are coming from when they claim that universal jurisdiction as exercised by European states and the work of the ICC in Africa are neo-colonial tools being used by European states to revive the legacy of colonialism on the continent. According to Anghie,

non-European sovereignty is distinctive on account of the mechanisms and processes that brought it into being, despite the appearance of equality between European and non-European sovereignty—an appearance that supports the dominant theoretical paradigm of international law, which examines the question of how order is created among equal and sovereign states, rather than attempting to question the character of this equality.⁷⁰³

It is submitted that due to their colonial history and the distinctive nature of their sovereignty, African states constantly feel the need to re-assert their sovereignty. That is why they are keen to re-assert the immunities of their Heads of State and state officials despite the stated commitment by the AU to combat impunity on the continent, and at a time when there is a rise of universal jurisdiction on the continent. When European states exercise universal jurisdiction against African state officials, and when the ICC makes efforts to prosecute African Heads of State for alleged human rights violations, African states do not view this as efforts to promote accountability. Instead, they view this as a disregard of immunities which the African Heads of State and state officials in question ought to enjoy at international law.

⁷⁰⁰ Anghie 2007 208.

⁷⁰¹ For a detailed overview of Anghie's argument in this respect see Anghie *ibid* 115-244.

⁷⁰² *Ibid* 196-197.

⁷⁰³ Anghie *ibid* 194.

As Du Plessis has rightly argued, this disregard of immunities is perceived by African states as an affront to their sovereignty.⁷⁰⁴

It is significant that the AU Model Law on Universal Jurisdiction makes no reference to the ICC. Although it provides for the immunity of Heads of State and state officials before domestic courts, it is silent on the issue of cooperation with the ICC. This resonates with Anghie's argument that the end of colonialism did not result in an end to colonial relations. The attitude of African states towards the ICC, which they view as a neo-colonial tool being used by Western states to revive the legacy of colonialism in Africa, reflects the growing African misgivings towards the work of the ICC in Africa. The Model Law was adopted in 2012, at a time when relations between African states and the ICC were arguably at an all-time low, in the wake of the ICC confirming proceedings against the Kenyan President Uhuru Kenyatta and his deputy William Ruto.

The AU Assembly asserted in its 2013 decision on Africa's relationship with the ICC that the indictment and trial of sitting Heads of States is an affront to the sovereignty of the African states involved, and decided that sitting Heads of State should not be charged or tried before an international court or tribunal.⁷⁰⁵ It is submitted that Anghie's argument is also relevant to contemporary international institutions such as the ICC. As has been argued in Chapter Two, one of the reasons why there is growing African discontent with the ICC is because the ICC has expanded the application and understanding of the principle of complementarity. It has gone from being a Court of last resort to actively selecting high profile cases for prosecution.⁷⁰⁶

Du Plessis and Gevers have convincingly argued that,

the support for the ICC was not only predicated on a 'complementary' relationship with 'national criminal justice systems', but it was desired so that the 'Court should contribute to furthering the integrity of States generally as well as the equality of States within the general principles of international law.'⁷⁰⁷

They argue further that instead of furthering the equality of states,

⁷⁰⁴ Du Plessis 'Shambolic, Shameful and Symbolic' 10. See also AU-EU Expert Report on Universal Jurisdiction para 37.

⁷⁰⁵ See para 10 (1) of the Decision.

⁷⁰⁶ See McAuliffe 'From Watchdog to Workhose' 259.

⁷⁰⁷ See Du Plessis & Gevers 'South Africa's Foreign Policy and the International Criminal Court' 207-208.

the ICC's work, particularly in the shadow of the Security Council, has been perceived in Africa- and at least portrayed by the African Union as deeply divisive. It has given certain African States, including South Africa, the opportunity to highlight that the international community continues to operate on the basis of an inequality of states.⁷⁰⁸

In this regard, it is submitted that there is a gap in the available literature on the role that colonialism has played in shaping international law, and on the impact that the colonial confrontation continues to have on contemporary international law. It is this gap that the thesis attempts to address in this chapter. The concerns expressed by African states that the disregard of the immunity of their leaders and state officials by European states, and by the ICC, ought to be considered against the background of how colonialism remains central to the development of international law, as seen through the lens of the application of the principle of immunities in Africa, and an examination of the functioning of international institutions such as the ICC. According to Du Plessis and Gevers,

While the ICC has made strides transcending its statist limitations, it has done little to resist the Great Power politics that were incorporated into the Rome Statute in the form of the Security Council's power of referral and deferral of cases to the ICC.⁷⁰⁹

In response to the perceived unfair targeting of African Heads of State and state officials by European states and the ICC, African states have sought to come up with an alternative to avoid universal jurisdiction as exercised by European states, and the jurisdiction of the ICC. The immunity provision in the Protocol on amendments to the Protocol on the Statute of the African court of Justice and Human Rights, though admittedly extreme, is an example of efforts by the AU to re-assert the sovereignty of its member states. The immunity provision is the AU's solution to the perceived disregard of the immunities of the leaders and state officials of African states.

Du Plessis has asserted that the immunity provision was triggered by the confirmation of proceedings against Kenyan President Uhuru Kenyatta and his deputy William Ruto by the ICC in 2012. He notes that prior to this development, the draft Protocols on the proposed court did not include immunity provisions.⁷¹⁰ The inclusion of the immunity provision in the 2014 amendment was a result of the 2013 AU Assembly decision on Africa's Relationship

⁷⁰⁸ *Ibid*

⁷⁰⁹ *Ibid*.

⁷¹⁰ Du Plessis 'Shambolic, Shameful and Symbolic' 9.

with the ICC which resolved that the cases against Kenyatta and Ruto must be stopped.⁷¹¹ The inclusion of Article 46A bis was therefore motivated by the AU's desire to re-assert immunity for Heads of State and officials of its member states in order to counter the perceived disregard of their immunities not only by the ICC, but by European states exercising universal jurisdiction against African state officials and thereby re-assert the sovereignty of member states.⁷¹²

In this regard, it is submitted that when the immunity provision was included in the Malabo Protocol, African states were not deviating from the norm by claiming immunity for their Heads of State and senior state officials. As was noted in Chapter Five, the principle of immunities is a well-established one with a long standing history. It has always been a part of international law but due to the colonial and racial nature of the history of international law, non-European states were unable to apply this principle. Arguments have been made by some scholars that African states should not deviate from the norm by insisting on immunities for their Heads of State and state officials because the principle of immunities has fallen. Notably Jalloh, commenting on concerns expressed by African states that European states were disregarding the immunity of their officials, asserted that, '...Africa should not be allowed to fall back on outmoded notions of immunity to shield its leaders from trials for alleged crimes before national courts.'⁷¹³

It is submitted that contrary to this assertion by Jalloh, the notion of immunity is not at all outmoded. The customary international law position on immunities of state officials as outlined by the ICJ in *Arrest Warrant* still stands. There is therefore no deviation from the norm on the part of African states claiming and re-asserting the immunities of their Heads of State and state officials, as is the case with Article 46 A bis.

The examination of domestic immunity legislation in Europe in Chapter Five has highlighted that European states, with the exception of Belgium whose universal jurisdiction legislation did not recognise immunities, have been consistent in upholding the immunities of Heads of State before their domestic courts. Although in some instances European states such as Germany have disregarded the immunities of African state officials, generally it can be argued that European states have always upheld, and claimed, immunities for their Heads of

⁷¹¹ See para 10 of the 2013 decision.

⁷¹² Du Plessis 'Shambolic, Shameful and Symbolic' 9-10.

⁷¹³ Jalloh 'Universal Jurisdiction, Universal Prescription?' 49.

State and officials.⁷¹⁴ This status quo has not been questioned by scholars of international law. On the contrary, African states have been criticised for asserting the immunities of their officials. This points to the historically Eurocentric focus of international law and the double standard that arguably exists in the application of international criminal law as explained in detail in Chapter Four.

In concluding this section, it is submitted that the re-asserting of immunities of African leaders and state officials takes place against the background of Africa's colonial past which denied African states their sovereignty as explained by Anghie. In some instances, such as Article 46A bis of the amendment to the Protocol on the statute of the proposed court, the steps taken by the AU to re-assert immunities for Heads of State and other senior state officials on behalf of its member states are admittedly extreme. However, these efforts should not just be dismissed as political rhetoric by African states. Rather, they ought to be considered holistically in light of the colonial and racist history of international law which resulted in non-European sovereignty being distinctive. As Anghie has asserted,

The colonial and post-colonial realities of international law have been obscured and misunderstood as a consequence of a persistent and deep seated set of ideas that has structured traditional scholarship on the history and theory of international law.⁷¹⁵

The attitude of African states to universal jurisdiction as exercised by European states, and to the work of the ICC in Africa can thus only be comprehended as part of the broader framework of the history of colonialism and sovereignty and how the colonial confrontation continues to have an impact on contemporary international law.

6.5 CONCLUSION

This chapter has examined the regional and domestic legislative provisions on immunity in Africa. The examination has highlighted that African states are strengthening their resolve to re-assert immunities for their Heads of State and senior state officials. This resolve is in reaction to the perceived unfair targeting of African state officials by European states in their

⁷¹⁴ See generally Bhuta & Schurr 'Universal Jurisdiction: The State of the Art' and Kaleck 'From Pinochet to Rumsfeld'. See also Akande 'International Law Immunities and the International Criminal Court' 411 fn 26 (giving examples of cases where courts in Europe and the United States upheld the immunity of heads of states and senior government officials).

⁷¹⁵ Anghie 'The Evolution of International Law' 739.

exercise of universal jurisdiction, and to the perceived unfair targeting and disregard of the immunities of sitting African Heads of State by the ICC.

The conclusion to be drawn from the immunity provision in the AU Model Law on Universal Jurisdiction and in Article 46A bis of the Protocol on amendments to the Protocol on the statute of the African Court of Justice and Human Rights is that African states are not deviating from the norm by re-asserting immunities for their Heads of State and officials. Instead, they are simply claiming the immunities which have always been a part of international law but which they were unable historically to claim due to the ‘dynamic of difference’ and ‘standard of civilisation’ as explained by Anghie.

Africa’s stance on immunity, particularly at the regional level has been widely criticised on the basis that the immunity provisions in the AU Model Law on Universal Jurisdiction and in the amendment to the Protocol on the statute of the proposed court is a step backwards for the fight against impunity on the continent.⁷¹⁶ This Chapter has argued that although some of the measures that have been taken by the AU to reclaim the immunity of African Heads of State and senior officials are extreme, there is nothing untoward in African states claiming immunity for their Heads of State and senior state officials. Immunities have always been a part of international law but African states were unable to claim them as they were deprived of their sovereignty.

It is asserted that the reason why efforts by African states to re-assert the immunity of their Heads of State and senior officials have been criticised on the basis that African states are holding on to a principle which is on the decline, is because international law treats colonialism as being a peripheral rather than a central feature of the discipline of international law.

As explained by Anghie, sovereignty, which is the fundamental principle of law upon which all the other principles of international law are arguably based, was forged out of the colonial encounter.⁷¹⁷ It is therefore argued in this Chapter that in order to understand the present day nature of international law and international relations, regard ought to be had to the colonial and racial nature of the history of international law. The attitude of African states towards

⁷¹⁶ Du Plessis ‘Shambolic, Shameful and Symbolic’ 10.

⁷¹⁷ Anghie 2007 3; Perrez *Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law* 13.

European states and the ICC regarding the application of international criminal law can best be understood within the context of how the colonial confrontation was instrumental in shaping the development of important doctrines of international law. The impact that colonialism has had on the development of international law is manifest in the application of the sovereignty doctrine in Africa as seen through the lens of the application of the principles of universal jurisdiction and immunity, and Africa's relationship with the ICC.

As has been explained above, there is considerable debate regarding the exact scope of immunity *ratione personae*, despite the ICJ having clarified the customary international law position on the subject of immunities in the *Arrest Warrant* case. The judgment in the *Arrest Warrant* case has been criticised by a number of scholars who argue that it is a step backwards in the fight against impunity.⁷¹⁸ It is submitted that despite its shortcomings, the judgment remains the leading authority on the subject of the scope of personal immunities of heads of state and state officials. The immunity provisions in the AU Model Law on Universal Jurisdiction and in the amendment on the Protocol to the statute of the proposed court are therefore in conformity with international customary law.

It is regrettable that there is lack of clarity on Africa's position on immunity before domestic courts and with respect to the issue of cooperation with the ICC. This is because the immunity provision in the AU Model Law is at odds with those of some sub-regional instruments such as the Great Lakes Protocol, and some domestic instruments such as the ICC Act of South Africa and Mauritius respectively.

In concluding this chapter, it is asserted that the push by the AU to re-assert the immunity of the Heads of State and state officials of its member states takes place against the background of Anghie's theory on the colonial origins of international law. Due to the distinctive character of the sovereignty of African states, they frequently rely on reinforcing their sovereignty in order to address the perceived inequalities between them and their former colonisers.⁷¹⁹ Scholars however treat this push for immunity as a deviation from the norm and

⁷¹⁸ See for example Roht-Ariaza *The Pinochet Effect* 188. See also Du Plessis & Bosch 'Immunities and Universal Jurisdiction' 258 asserting that 'It appears that when presented with a test case, the majority failed to rise to the task of ending impunity by immunity, or at the very least of providing cogent reasons consistent with state practice to explain why the legacy should continue.'

⁷¹⁹ For a detailed discussion on this issue see generally R Anand 'Role of the "New" Asian-African Countries in the Present International Legal Order' (1962)56 *American J of Int L* 383 and Abi-Saab 'The Newly Independent States and the Rules of International Law: An Outline' 95.

It is submitted that this is because colonialism is treated as being peripheral rather than being a central to the development of international law. As argued by Anghie,

far from being ancillary to the discipline, colonialism is central to its very constitution. Formal sovereignty is very important, and provides Third World states with a vital means of protecting and furthering their interests. But the enduring vulnerabilities created by the process by which non-European states acquired sovereignty pose an ongoing challenge, not only to the peoples of the Third World, but also to international law itself.⁷²⁰

The push for immunities by African states therefore ought to be understood within the context of the colonial and racial nature of the history of international law. The history of the development of the principle of immunities and the exclusion of non-European communities from the application of this principle provides an insight into why African states want to reaffirm their sovereignty by re-asserting immunity for their Heads of State and officials. Efforts by African states to reclaim the immunities of their Heads of State and officials should therefore not be dismissed as mere political rhetoric, but they should be considered holistically, regard being had to the colonial and racial nature of the history of international law and the impact that the colonial confrontation continues to have on the discipline.

⁷²⁰ Anghie 2007 195.

CHAPTER SEVEN

CONCLUSION

7.1 INTRODUCTION

The thesis has examined the relationship between international criminal law and sovereignty in Africa as seen through the lens of the application of the principles of universal jurisdiction and personal immunities, and the attitude of African states towards the work of the ICC in Africa. The different chapters have drawn different conclusions, and a detailed discussion of the conclusions drawn is not warranted here. This chapter will give a summary of the main research findings, and make proposals for the way forward regarding the application of international criminal law in Africa.

It is proposed that in order to address African states' concerns regarding the application of international criminal law by Western states and the ICC, African states should focus on strengthening their domestic and regional justice mechanisms. As was argued in Chapter Four, this would help to address the concern of double standards raised by African states. The recent successful trial of Hissene Habre by the EAC sitting in Senegal is evidence that African states are capable of addressing impunity on the continent; hence efforts by African states to strengthen their regional justice mechanisms ought to be taken seriously instead of being dismissed as self-serving.

In this regard, it is acknowledged that in order for a purely domestic and regional approach to international criminal law to be a viable alternative to universal jurisdiction as practiced by Western states, and to the jurisdiction of the ICC, African states ought to address the concerns related to the effectiveness of the proposed African Court of Justice and Human Rights. These include lack of resources and lack of clarity regarding the exact scope of jurisdiction for the proposed international criminal chamber.

With regards to the ICC, it is imperative that a solution should be found to the impasse between the AU and the ICC on the immunity issue to avoid the further deterioration of the relationship between the AU and the ICC, and possible withdrawals from the Rome Statute by African states other than Burundi. A number of options have been suggested in this regard, including that there should be a decision from the ICC's Appeals Chamber which

would bring finality to the matter; that the state parties to the ICC should indicate their interpretation of the application of article 27 and 98; and that the ICJ should provide clarity on the issue of Head of State immunity before the ICC.⁷²¹ The possible options available to African states will be analysed in detail below.

7.2 SUMMARY OF THE RESEARCH FINDINGS.

7.2.1 African states and ‘non-Western sovereignty’

An examination of the natural law; positivism and TWAIL theories on the development of the sovereignty doctrine has shown that African sovereignty, when it has been granted, has always been deficient. Flowing from the perception that non-European communities were ‘backward, savages’, non-European communities were treated as objects rather than subjects of international law, and they were excluded from the realm of international law.⁷²²

A critical review of the natural law theory on sovereignty shows that natural law theorists did not consider the doctrine of sovereignty as applicable in relation to non-European communities. To them, it was unimaginable that sovereignty could be discussed with respect to non-Europeans. With the exception of Vitoria, natural law jurists such as Jean Bodin considered sovereignty only in relation to the European world. It is through Vitoria’s *De Indis* that the primitive origins of the role played by colonialism in the development of international law, particularly the sovereignty doctrine, can be traced.⁷²³ Vitoria’s refusal to consider the Indians as being sovereign, notwithstanding that he refused to consider them as ‘animals’ is evidence that the deprivation of non-Europeans of their sovereignty started long before the colonial confrontation of the 19th century.⁷²⁴

The ‘standard of civilisation’ and the ‘dynamic of difference’ as postulated by the positivist jurists is also evidence that African communities were historically denied sovereignty. Non-European communities were not considered to be sovereign by the positivists because they perceived them to be uncivilised, or that their civilisation did not meet the European standard

⁷²¹ See for example Knottnerus ‘The Immunity of Al Bashir: The Latest Turn in the Jurisprudence of the ICC’; D Akande ‘An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue’ *EJIL Talk* 31/3/2016 available at <https://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/> (accessed 30/6/2018).

⁷²² Anghie 2007 54.

⁷²³ *Ibid* 30, explaining that the significance of Vitoria’s *De Indis* extends to our own times.

⁷²⁴ *Ibid* 26.

of civilisation. As a result, they were excluded from the realm of international law. According to Anghie,

Non-European states were excluded from the realm of international law, now identified as being the exclusive preserve of European states, as a result of which the former were deprived of membership and the ability to assert any rights cognizable as legal. In its most extreme form, positivist reasoning suggested that relations and transactions between the European and non-European states occurred entirely outside the realm of international law.⁷²⁵

Positivists referred to non-Europeans using derogatory language such as ‘barbarians’ in order to emphasise their perceived backwardness and thereby justify the colonial confrontation.⁷²⁶

The history of capitulations which were granted to European states by partially recognised ‘states’ such as the Ottoman Empire and China also highlight that African sovereignty (when it has been granted) has always been deficient. The capitulations which were initially voluntarily granted to European ‘states’ were later used as one-sided treaties to subjugate the partially recognised ‘states’. European states insisted on immunities for their citizens from the jurisdiction of the courts in the partially recognised ‘states’ because they considered the legal systems in these ‘states’ to be lacking in civilisation.⁷²⁷ However as was explained in Chapter Five, this immunity was not immunity proper but *de facto* immunity, as international law was not deemed to be applicable to non-European ‘states’.

In order for the capitulatory regime to be abolished and for the partially recognised ‘states’ to be accepted into the ‘family of nations’, they had to agree to concessions as stipulated by the European states.⁷²⁸ As explained by Anghie, the partially recognised ‘states’ gained their sovereignty but in the process gave up their cultural distinctiveness.⁷²⁹ The sovereignty gained was therefore not full sovereignty, and hence despite the ‘standard of civilisation’ and ‘dynamic of difference’ being obsolete as all states are now free to participate in international law as equal subjects, non-European sovereignty retains a distinctive character.⁷³⁰ This is attributable to the colonial and racial history of international law.

⁷²⁵ *Ibid* 54.

⁷²⁶ *Ibid* 40 fn 19; Anghie ‘The Evolution of International Law’ 745.

⁷²⁷ Özsu ‘Ottoman Empire’ 440.

⁷²⁸ *Ibid* 445; Anghie 2007 86.

⁷²⁹ Anghie *ibid*.

⁷³⁰ *Ibid* 194.

Anghie's theory on the colonial origins of international law asserts that the colonial confrontation was central to the development of international law including the fundamental sovereignty doctrine. He asserts that despite colonialism having come to an end, it continues to play a pivotal role in the development of international law and international relations. Through a critical examination of the Mandate system of the League of Nations, Anghie argues that the process of decolonisation itself was characterised by the continued subjugation of non-European 'states', and as a result of this non-European sovereignty remains distinctive.⁷³¹ According to Anghie, the inequalities between the former colonisers and former colonies are inherent in the operation of contemporary institutions such as the World Bank and the International Monetary Fund.⁷³² It is submitted that this argument also applies to the ICC.

Anghie's argument is validated by the concerns raised by African states with respect to the efforts by the ICC to prosecute African Heads of State for alleged human rights violations. African states have claimed that the ICC, and universal jurisdiction as practised by European states, are the two jurisdictional tools by which Western states seek to continue the legacy of colonialism in Africa.⁷³³ African states are still sensitive to their colonial past, hence they see any attempts by European states to exercise universal jurisdiction against their officials, and the work of the ICC in Africa, as a form of neo-colonialism and continued deprivation of their sovereignty. In this regard, African concerns ought to be taken seriously within the context of the colonial and racial history of international law, and not be dismissed as mere political rhetoric by scholars.

It is worth noting that Africa's discontent with the application of international criminal justice did not start with the ICC. African states have in the past expressed dissatisfaction with the ICJ. In 1966 the ICJ ruled in the *South West Africa* Case that African states, which were represented by Ethiopia and Libya, had no legal standing to question the apartheid policy and human rights violations perpetrated by South Africa in the then South West

⁷³¹ *Ibid* 196-197.

⁷³² *Ibid*.

⁷³³ Jalloh 'Universal Jurisdiction, Universal Prescription?' 4.

Africa.⁷³⁴ This drew adverse reactions from African states and Gevers, commenting on the intended withdrawal from the ICC by South Africa said,

The similarities between African states' criticisms of these two quite different courts separated by half a century invite us to consider whether there is anything to be gleaned from African states' sense of the failure of the ICJ in 1966, and their criticism of the ICC today, which lies at the heart of South Africa's decision to withdraw from it.⁷³⁵

It can be argued in this regard that Africa's discontent with the ICC is not novel, but it is characteristic of the attitude of African states towards international institutions, which is caused by the continent's sensitivity to its colonial past. As Gevers has rightly argued '...it is the spectre of history itself that raises the question of the ICC's relationship to colonialism, not simply self-interested African states.'⁷³⁶

It is submitted that this assertion by Gevers also applies to the relationship between African states and European states with regards to the application of the principles of universal jurisdiction and personal immunities.

7.2.2 The continued impact of colonialism on international relations

One of the main arguments that Anghie makes is that although the end of colonialism was a significant development in international law, it did not necessarily mean an end to colonial relations.⁷³⁷ This is true in light of the reaction by African states to the exercise of universal jurisdiction by European states against African states, and to efforts by the ICC to prosecute African leaders. As was explained in Chapter Two, during the colonial encounter African communities did not enjoy sovereignty. At the dawn of decolonisation, the newly independent African states sought to use the doctrine of sovereignty as a means to avoid any form of interference in their internal affairs by their former colonisers. Abi-Saab has asserted

⁷³⁴ *South West Africa, Second Phase* 1966 ICJ Reports 6. See also Dugard *International Law: A South African Perspective* 456; Gevers 'SA & the ICC: Justice or Just Us?' *Con Magazine* (8/11/2016) available at www.theconmagazine.co.za/2016/11/18/sa-the-icc-justice-or-just-us/ (accessed 27/6/2018).

⁷³⁵ Gevers *ibid.*

⁷³⁶ *Ibid.*

⁷³⁷ Anghie 'The Evolution of International Law' 748-749.

that African states sought to strengthen their sovereignty because they were aware that they had for a long time been deprived of it.⁷³⁸

The attitude of African states towards the application of the principles of universal jurisdiction and personal immunities by European states, and to the work of the ICC in Africa, resonates with the argument made by Anghie and other TWAIL scholars such as Gathii that the end of colonialism did not mean the end to colonial relations.⁷³⁹ African states have claimed that the ICC, and universal jurisdiction as practiced by European states, is neo-colonial.⁷⁴⁰

When European states exercise universal jurisdiction against African states officials, and when the UN Security Council refers cases involving African Heads of State to the ICC, they do not purport to tell them that they are less sovereign. However, because African states have historically obtained sovereignty differently, they see this exercise of jurisdiction over African state officials and Heads of State by European states and the ICC respectively as an affront to their sovereignty. It can be argued that African states have to relive the trauma of colonialism, a period during which they were subjugated and regarded to be uncivilised and inferior to their European counterparts.

In this vein, it is asserted that the concerns raised by African states ought to be considered holistically in the context of the colonial history of international law. As argued by Anghie, contrary to the narrative that colonialism is a peripheral aspect of international law, it is central to the development of the discipline.⁷⁴¹ In a similar vein, Megret has rightly argued that colonialism cannot easily be divorced from international law because it helped to shape the very fundamental aspects of the discipline.⁷⁴² Therefore, the claim by African states that the indictment of African Heads of States by the ICC and the exercise of universal jurisdiction against African state officials by European states is neo-colonial, and that it disregards their sovereignty and the immunities of the African Heads of State and state officials in question; ought to be understood against the background of Anghie's theory on the colonial origins of international law.

⁷³⁸ Abi-Saab 'The Newly Independent States and the Rules of International Law: An Outline' 103.

⁷³⁹ Gathii 'Twail: A Brief History of its Origins' 34.

⁷⁴⁰ Jalloh 'Universal Jurisdiction, Universal Prescription?' 4.

⁷⁴¹ Anghie 2007 37-38.

⁷⁴² Megret 'Where does the Critique of International Human Rights Stand?' 9.

7.2.3 ‘African sovereignty’ and the rise of universal jurisdiction in Africa

The thesis asserted in Chapter Four that the rise of universal jurisdiction in Africa since 2002 takes place against the background of Anghie’s theory on the colonial origins of international law. In Chapter Six, it was similarly asserted that the push by African states to re-assert immunities for their Heads of State and state officials ought to be understood against the background of Anghie’s theory on the colonial origins of international law. Both the rise of universal jurisdiction in Africa, and efforts by African states to re-assert the immunities of their state officials and Heads of State, are part of efforts to strengthen their sovereignty and thereby avoid the jurisdiction of non-African states, and that of the ICC. This explains why the principle of universal jurisdiction is on the rise in Africa at a time when the AU has repeatedly expressed concern regarding the application of the principle of universal jurisdiction by European states, and why there is a push to re-assert immunities by African states when the AU has repeatedly stated its commitment to fight impunity on the continent.

The enactment of ICC implementation legislation at the domestic level in Africa beginning with South Africa in 2002 and subsequently by countries including Kenya; Uganda; Mauritius and Senegal; and the adoption of the AU Model Law on Universal Jurisdiction in 2012, is evidence that African states want to re-assert their sovereignty. It can be argued that by strengthening their regional and domestic justice mechanisms, African states seek to correct the injustices of the past where they were treated as objects rather than subjects of international law. The recent trial and conviction of the former Chadian leader Hissene Habre by the EAC sitting in Senegal has demonstrated to the world that Africa is indeed capable of dealing with impunity without external help. The efforts by African states to re-assert their sovereignty should therefore not just be dismissed as self-serving, but they should be considered seriously as it has been demonstrated that Africa is able to deal with human rights violations.

It is pertinent to note that to date, Habre’s case is the only one in which a domestic court in Africa has exercised jurisdiction based solely on the universality principle.⁷⁴³ Notwithstanding this, the enactment of ICC implementation legislation on universal jurisdiction by a number

⁷⁴³ Perez-Leon-Acevedo ‘The conviction of Hissene Habre by the Extraordinary African Chambers’.

of African states is evidence that African states are committed to deal with impunity on the continent. It should also be noted that Habre's case is not the only one in which a former African Head of State was tried and convicted for atrocities committed in Africa. In 1998, the ICTR convicted former Rwandan Prime Minister Jean Kambanda of crimes including genocide and crimes against humanity.⁷⁴⁴ In 2012, the SCSL convicted the former Liberian President Charles Taylor of war crimes.⁷⁴⁵ Habre's case is however an important milestone in Africa as it was the first one in which a domestic court tried and convicted a former Head of State for human rights violations.⁷⁴⁶ The ICTR was established by the UN Security Council, and the SCSL was structured as an autonomous organisation.⁷⁴⁷ In addition, as aptly noted by Hogestol, 'The involvement of the AU in bringing Habre to justice also means that Habre is the first person to be tried under an African international criminal justice mechanism.'⁷⁴⁸

A number of scholars, commenting on the establishment of a criminal chamber with jurisdiction to try international crimes in the proposed African Court of Justice and Human Rights, have asserted that Africa does not have the capacity to try international crimes.⁷⁴⁹ It is submitted that although admittedly there are a number of issues that need to be addressed before the Court comes into operation, the proposed criminal chamber is a positive development. As has been rightly argued by Gevers, the criminal chamber will help in addressing the issue of the double standard that arguably exists in international criminal law along colonial lines.⁷⁵⁰ It is arguably more desirable to have a framework in place to deal with international crimes at the regional level, notwithstanding that there are issues which need to be addressed before the Court comes into operation than to have no framework in place at all.

⁷⁴⁴ See *The Prosecutor v Jean Kambanda* ICTR 97-23-S (Judgment and Sentence).

⁷⁴⁵ See *The Prosecutor v Charles Ghankay Taylor* SCSL-03-01-T; *The Prosecutor v Charles Ghankay Taylor* SCSL-03-01-A.

⁷⁴⁶ Perez-Leon-Acevedo 'The conviction of Hissene Habre by the Extraordinary African Chambers'.

⁷⁴⁷ *Ibid.*

⁷⁴⁸ Hogestol 'The Habre Judgment at the Extraordinary African Chambers' 147.

⁷⁴⁹ See for example Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights'; Du Plessis 'Implications of the AU Decision to give the African Court jurisdiction over international crimes' 1, asserting that '...the process of expanding the African court's jurisdiction is fraught with many legal and practical complexities.' See also Woolaver 'International and Domestic Implications of South Africa's Withdrawal from the ICC'.

⁷⁵⁰ Gevers 'Back to the Future?' 124.

7.2.4 The perceived existence of a double standard in the application of international criminal law

African states have repeatedly claimed that there are double standards in the application of international criminal law along colonial lines. With respect to the exercise of universal jurisdiction by European states, the AU has claimed that the European states were unfairly targeting African state officials.⁷⁵¹ The AU has also claimed that the ICC is unfairly targeting African Heads of state in its operations.⁷⁵²

A number of scholars including Gevers have argued that there is indeed evidence of a double standard in the application of international criminal law. Gevers made this argument in the context of the complementarity provision of the Rome statute, observing that the office of the prosecutor has repeatedly declined to investigate matters from Western countries on the basis that the matters were already being investigated by the home states of the accused.⁷⁵³ This is in contrast to situations arising out of Africa, where challenges have been raised by Libya and Kenya on the basis of the complementarity principle.

In March 2011, Kenya challenged the admissibility of the cases against Uhuru Kenyatta; William Ruto; Joshua Arap Sang and Francis Muthaura. Kenya challenged the admissibility of these cases on the basis that the adoption of a new constitution and other legal reforms following a disputed presidential election held in December 2007 were grounds for the cases to be referred back to the country for trial. The ICC's Pre-Trial Chamber II dismissed Kenya's complementarity challenge on the basis that despite the legal reforms there was

⁷⁵¹ AU-EU Expert Report on Universal Jurisdiction para 34.

⁷⁵² Jalloh 'Regionalizing International Criminal Law?' 462.

⁷⁵³ Gevers 'Back to the Future?' 124.

insufficient evidence to show that investigations had actively begun in Kenya.⁷⁵⁴ The Pre-Trial Chamber's decision was upheld by the Appeals Chamber in August 2011.⁷⁵⁵

In May 2013, Libya challenged the admissibility of the case against Saif Gaddafi on the basis that there was an ongoing domestic investigation on the case. This complementarity challenge was dismissed by the ICC's Pre-Trial Chamber I on the basis that Libya had not provided enough evidence to show that the domestic investigation pertained to the same matter before the ICC.⁷⁵⁶ This decision was upheld by the Appeals Chamber in May 2014.⁷⁵⁷ The Pre-Trial Chamber however ruled that the case against Al-Senussi was inadmissible because there was already an ongoing investigation in Libya pertaining to the same case.⁷⁵⁸

There have been no complementarity challenges from Western states. This has been attributed to the perceived double standard applied by the ICC. As observed by Gevers, the ICC has declined to pursue cases from the politically powerful states on the basis of the complementarity principle.⁷⁵⁹ A prime example is the refusal by the then prosecutor Luis Ocampo in 2006 to investigate British war crimes in Iraq on the basis that a preliminary

⁷⁵⁴ See *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-01/11-96 (Decision on the Application by Kenya on the admissibility of the case pursuant to article 19 (2) (b) of the Statute (31/5/2011). See also S Ng & K Flannery (International Justice Project 28/7/2014) 'Complementarity: A Brewing Battle Between the African Court and ICC?' available at www.internationaljusticeproject.com/complementarity-a-brewing-battle-between-the-african-court-and-icc/ (accessed 01/7/2018).

⁷⁵⁵ See *The Prosecutor v Uhuru Muigai Kenyatta* (Judgment on Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled Decision on the application by the Government of Kenya challenging the admissibility of the Case pursuant to article 19 (2) (b) of the Statute; Ng & Flannery *ibid*.

⁷⁵⁶ C Ferstman, K Heller *et al* (Chatham House International Law Programme Summary 22/09/2014) 'The International Criminal Court and Libya: Complementarity in Conflict' available at https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20140922Libya.pdf (accessed 01/7/2018); *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11 (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) Pre-Trial Chamber I (31/05/2013).

⁷⁵⁷ *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11 (Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif-Al-Islam Gaddafi) Appeals Chamber 21/5/2014; Ferstman, Keller *et al ibid*.

⁷⁵⁸ *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11 (Decision on the admissibility of the case against Abdullah Al-Senussi) Pre-Trial Chamber I 11/10/2013; Ferstman, Keller *et al ibid*. It ought to be noted that the perceived inconsistency between the Gaddafi case and the Al-Senussi case has given rise to debate amongst scholars. This is however not discussed as it is beyond the scope of the thesis.

⁷⁵⁹ Gevers 'Back to the Future' 124.

investigation had shown that national proceedings were already underway with respect to all the alleged crimes.⁷⁶⁰ This is arguably evidence of the existence of a double standard in the application of international criminal law by the ICC.

The thesis has argued that the application of the principle of universal jurisdiction by European states against African states, and the application of the principle of personal immunities by European states point to a double standard in the application of international criminal law. The same applies to efforts by the ICC to prosecute African Heads of State. A critical review of the rise and decline of universal jurisdiction in Europe has highlighted that the majority of state officials against whom universal jurisdiction was exercised by European states are from Africa.⁷⁶¹ With respect to the ICC, it is also true that the majority of the cases investigated so far are from Africa.⁷⁶² The ICC has been accused of overlooking cases from politically powerful states. For instance, it has been argued that although there is evidence of human rights abuses by Western States including America in Iraq and Israel in Gaza, these situations are being overlooked by the ICC due to the perceived double standard in the application of international criminal law.⁷⁶³

A critical review of the implementation legislation on immunities in Europe has also highlighted that there is evidence of a double standard in the application of the principle of immunities. The majority of state officials whose immunities were disregarded in the exercise of universal jurisdiction by European states are from Africa. Prosecutors from European states such as Germany used their prosecutorial discretion to determine that accused persons from European states and other politically powerful states including China and America were immune from investigation. However, using the same prosecutorial discretion it was determined that officials from African states could not claim immunity, as was the case with the then Rwandan Chief of Protocol Rose Kabuye who was arrested in Germany in 2006 pursuant to a warrant of arrest issued against her by a Spanish investigative magistrate.⁷⁶⁴

⁷⁶⁰ *Ibid* footnote 160. Gevers notes that in 2014 the current prosecutor Fatou Bensouda indicated that a new investigation would be opened on the basis of new evidence.

⁷⁶¹ Jalloh 'Universal Jurisdiction, Universal Prescription?' 14.

⁷⁶² Gevers 'Back to the Future?' 104.

⁷⁶³ See Gevers 'Back to the Future?' 229; Megret 'Where Does the Critique of Human Rights Stand?' 24 and Du Plessis 'Shambolic, Shameful and Symbolic' 9.

⁷⁶⁴ Kaleck 'From Pinochet to Rumsfeld' 938, 951; Jalloh 'Universal Jurisdiction, Universal Prescription?' 29-30.

It is submitted that this perceived double standard has contributed significantly to the tensions between African states and European states, and African states and the ICC, regarding the application of international criminal law. As long as this double standard persists, African states will always view the application of international criminal law by Western states as continued subjugation by their former colonisers.

7.3 PROPOSALS

This thesis has made the point that the legislative provisions on universal jurisdiction and immunities in Africa ought to be taken seriously and policy makers in non-African states as well as scholars should start paying more attention to the developments in international criminal law in Africa. African international law should be taken seriously in the context of the colonial and racial history that African states have gone through, and taking into account that colonialism is not just an excuse which is being used by African states to evade accountability. On the contrary, colonialism is part of the present day international law in that it continues to influence the course of international law. It is submitted that the ‘dynamic of difference’ is still evident in contemporary international law as highlighted by the review of the application of the principles of universal jurisdiction and personal immunities in Europe.

The question to be asked in this regard is if the colonial and racial history of international law is to be taken seriously, what does that mean for the future of international criminal law in Africa? Should international law be reformed so that it adjusts to how African states are doing things, or should the pretence of a universal international law be abandoned in favour of a regionalised international criminal law? It is submitted that the solution lies at multiple levels, and the following section shall explore the possible options available to African states. It is pertinent to note at this point that because of the history of international law, it is not possible to have a truly universal international law which is accepted by all states.

7.3.1 Regionalising international criminal law

The regionalisation of international criminal law by African states is part of the solution to the problems arising between African states and Western states regarding the application of international criminal law. There are a number of possible ways to do this, including pulling out of international criminal law, and adopting a Model Law on immunities.

7.3.1.1 Pulling out of international criminal law

One option would be for African states to continue on the current path where they have indicated their intention to withdraw from the ICC and concentrate on strengthening their regional justice mechanisms. This would mean that African states abandon international criminal law in favour of domestic and regional application of international law. Whilst this may be desirable considering the concerns raised by African states in the past regarding the application of the principles of universal jurisdiction and personal immunities by European states, and the work of the ICC in Africa, it is submitted that this would not be the best solution in the interest of justice. The Rome Statute of the ICC is a treaty which has been formally adopted by states and therefore African states need to take their obligations under this treaty seriously.

What is needed is dialogue on how to address the African states' concerns regarding the perceived unfair targeting of African leaders, and to discuss the contentious issue of Head of State immunity before the Court. This issue has ignited considerable debate following the indictment of the incumbent Sudanese President Omar al Bashir in 2009 by the ICC. It shall be discussed below that the best solution to this impasse would be for the ICJ to bring the matter to finality.

The ICC should take the concerns of African states seriously regarding its operations. As rightly pointed out by Judge Eboe-Esuji, it would not only be naïve but possibly illegal for these concerns not to be taken seriously.⁷⁶⁵ If the Court could revert to its original mandate of being a court of last resort, this could address the complementarity challenges raised by African states and thereby avoid the possible mass withdrawal from the Rome statute of the International Criminal Court by African states. As was mentioned above there are a number of issues which need to be addressed before the proposed African Court can be considered to be an effective alternative to the ICC.

In order for a purely domestic and regional approach to international criminal law to be viable, it is suggested that the AU should first address the concerns that have been raised with respect to lack of resources for the proposed court, the lack of clarity as to the scope of jurisdiction for the proposed criminal chamber, and the granting of immunity to Heads of

⁷⁶⁵ ICC-*The Prosecutor v Uhuru Muigai Kenyatta* Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Separate Further Opinion of Judge Eboe-Esuji.

State and other senior state officials before the proposed court.⁷⁶⁶ It has been argued that the proposed Court is desirable in that it will address the allegations of double standards by Western states and the ICC in the application of international criminal law.⁷⁶⁷ It has also been argued that the proposed criminal chamber would improve access to justice on the African continent due to its proximity to victims of human rights violations.⁷⁶⁸ It is therefore recommended that the AU should address the concerns raised in respect to the proposed African Court of Justice and Human Rights so that it can effectively focus on domestic and regional application of international criminal law.

The recent trial and conviction of former Chadian leader Hissene Habre by the EAC sitting in Senegal has demonstrated to the world that Africa is capable of finding African solutions to African problems. A purely domestic and regional approach to international criminal law in Africa is therefore possible if the concerns related to Africa's readiness to implement the proposed African Court of Justice and Human Rights are addressed. In this vein, it is submitted that African international law ought to be taken seriously and that efforts by African states to strengthen their regional justice mechanisms should not be dismissed as attempts at evading accountability. Rather, they should be considered as possible effective solutions to the problem of impunity on the continent.

7.3.1.2 Adoption of a Model Law on immunities by African states

A second option would be for African states to adopt a Model Law on immunities. At present, there is no regional legislative framework on immunities in Africa, although the AU Model Law on Universal Jurisdiction does contain an immunity provision in article 16 (1). The adoption of a Model Law on immunities would be desirable in that it would clearly set out the African position on the subject of immunities. In this regard, it is submitted that it would be more desirable to have a flawed Model Law on immunities than to have none at all. The Model Law would help to address the concerns raised by African states regarding the application of the principle of immunities by Western states and the ICC respectively.

⁷⁶⁶ Du Plessis 'Implications of the AU decision to give the African court jurisdiction over international crimes'; Woolaver 'International and Domestic Implications of South Africa's Withdrawal from the ICC'.

⁷⁶⁷ Gevers 'Back to the Future?' 124.

⁷⁶⁸ C Mabunda 'The Pros and Cons of the Criminal Jurisdiction of the Proposed African Court of Justice and Human Rights' Africa *Institute of SA* Briefing no 98 Nov 2013.

It is suggested that this Model Law should clearly state which officials apart from Heads of State should benefit from immunity before both domestic courts and the proposed African Court of Justice and Human Rights. The immunity provision in the Protocol on Amendments to the Protocol on the proposed court does not specify which officials are covered by the amendment, leaving room for a broad interpretation of the provision.

If, as is proposed here, the AU adopts a specialised regional framework on immunities, international law should adjust to how African states are doing things. As has already been argued, the history of colonialism cannot be divorced from the problems that face modern day international law. Instead of just dismissing the concerns raised by African states regarding the application of international law, and their efforts to re-assert their sovereignty by strengthening their regional justice mechanisms as mere political rhetoric, African concerns and efforts ought to be taken seriously. It is asserted that taking African states' concerns and efforts seriously should not just amount to acknowledging that their reaction to international criminal law as practised by Western states and the ICC is a result of their colonial history. Rather, international law should adjust and acknowledge that the regionalisation of international criminal law by African states is part of the solution to the problems caused by the differences arising between African states and European states, and African states and the ICC.

Scholars and policy makers from Western countries should start taking the legislative provisions in Africa with regard to universal jurisdiction and immunities seriously. The focus should shift from treating the rise of universal jurisdiction in Africa as being an insignificant development, and regarding efforts by the AU to re-assert immunities for the Heads of State and state officials from member states as being a deviation from the norm. Rather, scholars and policy makers from Western states, and the ICC, ought to consider how to embrace these developments on the African continent in order to enhance the effectiveness of international criminal law in the fight against impunity. This would include accepting that African states should be given the opportunity to resort to their domestic and regional justice mechanisms in the fight against impunity, and that non-African states and the ICC should not interfere unless there is evidence that African states are unable or unwilling to ensure accountability for human rights violations.

7.3.2 The ICC should provide clarity on the issue of Head of State immunity before the Court

As has been explained in Chapter Two, one of the reasons given by South Africa for its intended withdrawal from the Rome Statute of the ICC in 2016 was that the provision of the Rome Statute requiring the country to arrest a sitting Head of State (Al Bashir) is in contrast with the customary international law position on immunities, and with the domestic implementation legislation on immunities. The issue of whether or not President Al Bashir is immune from the jurisdiction of the ICC, and from arrest and surrender by African states in cooperation with the ICC has been at the centre of the deteriorating relationship between the AU and the ICC.

It is regrettable that the ICC has so far not provided clarity regarding the issue of Head of State immunity before the Court. As shall be discussed in detail in the Postscript, the AU continues to insist that Al Bashir enjoys immunity on the basis of article 98 of the Rome Statute, and the ICC has maintained that he is not immune. The AU Assembly in its 2013 Decision on Africa's Relationship with the ICC resolved that no sitting Head of State should be indicted or stand trial before an international tribunal.⁷⁶⁹ It is therefore important for a solution to be found to this impasse between the AU and the ICC regarding the immunity issue to avoid the further deterioration of relations between the two sides.

It has been suggested by a number of scholars that the issue of the relationship between article 27 and 98 of the Rome Statute of the ICC, which has been the main source of tension between the ICC and the AU regarding the Bashir issue, should be clarified by the ICC itself.⁷⁷⁰ Knottnerus, for instance, has suggested that the ICC Appeals Chamber should render a decision which would bring finality to the matter.⁷⁷¹ None of the African states against whom the Court has made a ruling on non-cooperation for their failure to arrest Al Bashir when he visited their territories has taken the decision to appeal.

⁷⁶⁹ See para 9 of the Decision.

⁷⁷⁰ Article 27 (2) provides for the irrelevance of immunities before the Court, whilst article 98 (1) provides that a state must first obtain the cooperation of a non-party state before proceeding with a request for arrest and surrender of a national of that non-party state. The contradictory nature of these provisions shall be discussed in detail in the postscript to highlight the confusion surrounding the issue of immunity before the ICC.

⁷⁷¹ See Knottnerus 'The immunity of Al Bashir: The latest Turn in the ICC Jurisprudence'.

There is however hope that the ICC Appeals Chamber will render a decision on this issue of the relationship between article 27 and 98 of the Rome Statute of the ICC. In 2017, the ICC rendered a decision on non-cooperation against Jordan following its failure to arrest Al Bashir when he visited the country in March.⁷⁷² Jordan is appealing the decision on non-compliance⁷⁷³ and as Mudukuti has asserted,

‘It will be difficult for the Appeals Chamber to avoid addressing the proverbial elephant in the room, which is of course the question of Head of States immunity and arrests by third party states at the ICC’s behest’⁷⁷⁴

7.3.3 State parties to the Rome Statute of the ICC should indicate their interpretation of the application of article 27 and 98

Another suggested solution would be for state parties to the ICC to indicate their interpretation of the application of article 27 and 98 of the Rome Statute.⁷⁷⁵ This would involve dialogue between the state parties and the ICC to find common ground. Woolaver has noted that such dialogue, if successful, could prevent a mass exodus of African states from the ICC.⁷⁷⁶

The recent AU Assembly decision on the ICC resolved to request,

The African State Parties to the Rome Statute to request the ICC Assembly of State Parties to convene a working group of experts from its member states to propose a declaratory/interpretative clarification of the relationship between Article 27 (irrelevance of official capacity) and Article 98 (Cooperation with respect to waiver of immunity and consent to surrender) and other contested issues relating to the conflicting obligations of state parties to cooperate with the ICC.

⁷⁷² See *Prosecutor v Omar Al Bashir* ICC-02/05-01/09 Decision under Article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al Bashir (11/12/2017 Pre-Trial Chamber II)

⁷⁷³ See *Prosecutor v Omar Al Bashir* ICC-02/05-01/09 The Hashemite Kingdom of Jordan’s appeal against the ‘Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar al Bashir (12/3/2018).

⁷⁷⁴ See A Mudukuti ‘Immunity, Accountability and Politics: The AU’s bid for an ICJ Advisory Opinion’ *Groningen J of Int L blog* (25/6/2018) available at <https://grojil.org/2018/06/25/immunity-accountability-and-politics-the-aus-bid-for-an-icj-advisory-opinion/> (accessed 03/7/2018).

⁷⁷⁵ *Ibid.*

⁷⁷⁶ Woolaver ‘International and Domestic Implications of South Africa’s Withdrawal from the ICC’.

One way in which African state parties could seek to clarify the relationship would be by referring to statements made on the subject of immunities before the ICC. These statements would collectively constitute settled practice (*usus*) which is part of custom, one of the sources of international law. Examples would include diplomatic statements such as those made by African states such as Malawi and Chad to the effect that their decision not to arrest President Al Bashir when he visited their territories was based on an interpretation of article 98 of the Rome Statute.⁷⁷⁷ As Dugard has explained, ‘Evidence of state practice is to be found in a variety of materials, including ...diplomatic correspondence, policy statements by government officers, opinions of national law advisers...’⁷⁷⁸

African state parties to the ICC could therefore rely on diplomatic statements and state practice to support the African position that article 98 absolves states from the duty to arrest Bashir in cooperation with the ICC.

This move by the AU to seek an interpretative /declaratory clarification from the Assembly of State parties on the relationship between article 27 and 98 is commendable. The focus seems to have shifted from threats of withdrawal by member states to efforts to engage with the Court to try and solve contentious issues. It is however highly unlikely that such engagement will result in clarification on the relationship between Article 97 and 98. As Woolaver has observed, ‘...given that neither the ICC nor the AU is likely to reverse its position on Bashir’s immunities, it is perhaps unrealistic to hope that any significant benefit could result from such consultations.’⁷⁷⁹

7.3.4 The ICJ should provide clarity on the issue of Head of State immunity before the ICC

A number of scholars including Akande; Knottnerus; and Du Plessis and Gevers have recommended that the impasse between the AU and the ICC should be solved by the ICJ rendering an advisory opinion on the issue of Head of State immunity before the ICC.⁷⁸⁰ It is

⁷⁷⁷ See the Decisions on non-cooperation by Malawi and Chad.

⁷⁷⁸ Dugard *International Law-A South African Perspective* 26.

⁷⁷⁹ Woolaver ‘International and Domestic Implications of South Africa’s Withdrawal from the ICC’.

⁷⁸⁰ D Akande ‘An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue’ *EJIL Talk* (31/3/2016) available at <https://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/> (accessed 01/7/2018); Knottnerus ‘The Immunity of Al Bashir: The Latest Turn in the Jurisprudence of the ICC’; Du Plessis & Gevers ‘South African Foreign Policy and the International Criminal Court’ ; M Du Plessis & D Tladi ‘The ICC’s immunity debate-the need for finality’ *EJIL*

commendable that the AU has taken the initiative in its 2018 decision on the International Criminal Court to request the ICJ for an advisory opinion on this issue.⁷⁸¹

At the recent AU summit in January 2018, the AU Assembly agreed to request the ICJ to render an advisory opinion on the issue of Head of State immunity. The Assembly requested,

The African Group in New York to immediately place on the agenda of the United Nations General Assembly a request to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other Senior officials as it relates to the relationship between Articles 27 and 98 and the obligations of State Parties under International law.⁷⁸²

The decision taken by the AU to seek an advisory opinion from the ICJ on immunities before the ICC is evidence that despite African states' misgivings with the Court; they are still committed to the international criminal justice project. Despite the attempted withdrawal from the Rome statute by South Africa and Gambia from the Rome statute in 2016; and the actual withdrawal by Burundi in 2017, African states are still willing to engage with the Court to find a way forward on the issues where there is no common ground such as the immunity issue. Du Plessis, commenting on the 2012 decision by the AU to request the commission to consider seeking an advisory opinion from the ICJ said,

AU member states should be given credit for their tendency to address concerns about the ICC (and international justice more generally) within an international legal framework...This is testament to both the relevance of international law, and the stock that African states place in its ability to resolve matters of international concern in a fair and predictable manner.⁷⁸³

Some scholars have however expressed the view that the resolution by the AU to seek an advisory opinion from the ICJ is an attempt to circumvent the jurisdiction of the ICC and

Talk (11/8/2017) available at <https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality> (accessed 01/7/2018).

⁷⁸¹ Para 5 (ii) of the Decision.

⁷⁸² Para 5 (i).

⁷⁸³ M Du Plessis 'The AU Seeks Clarity on Immunity of State Officials under International Law' *ISS Today* 14/3/2012 available at <https://www.issafrica.org/iss-today/the-au-seeks-clarity-on-immunity-of-state-officials-under-international-law> (accessed 01/7/2018).

engage in forum shopping.’⁷⁸⁴ The benefits of the ICJ rendering an advisory opinion on this matter would however outweigh the concerns raised. Akande has convincingly argued in support of the 2012 proposal by the AU to seek an advisory opinion and argued that the advisory opinion is important in view of the inconsistency of the ICC jurisprudence on the issue of immunities before the ICC. He has also argued that the advisory opinion would help in addressing the international law arguments made by the AU and not just the issue of immunities in terms of the Rome Statute. Finally, and most significant to this thesis, Akande has asserted that because the relationship between the AU and the ICC is characterised by mistrust, it is highly unlikely that the AU will accept any decision made by the ICC regarding the immunity issue, as the regional body has already rejected all the decisions on non-cooperation by states rendered by the ICC.⁷⁸⁵

Considering the nature of the relationship between the AU and the ICC therefore, perhaps it is time for a third party to address the contentious issue of Head of State immunity before the ICC. As was argued in Chapter One, the confusion surrounding the immunity issue before the ICC has contributed to the turn away from the ICC and the turn to domestic courts and universal jurisdiction by African states. It is therefore important for the issue of Head of State immunity before the ICC to be clarified to avoid African states shunning its jurisdiction. Despite the concerns which have been raised regarding the work of the ICC in Africa, it is important that the Court continues to play its role of combating impunity on the continent as there is not yet a viable alternative for the region.

7.3.4.1 The mechanism for approaching the ICJ

It ought to be noted that the Rome Statute of the ICC does not provide a mechanism by which a request for an advisory opinion from the ICJ can be sought regarding a matter that has been dealt with by the ICC or one which is pending before the Court.⁷⁸⁶ However, both the UN Charter and the Statute of the ICJ provide the mechanism by which an advisory opinion may be sought. Article 96 of the UN Charter provides that,

⁷⁸⁴ N Orina ‘Should the ICJ render an advisory opinion on the immunity question re article 27 & 98 of the Rome Statute?’ (24/3/2018) available at <https://www.icjafrika.com/single/post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-articles-27-98-of-the-> (accessed 01/7/2018).

⁷⁸⁵ Akande ‘An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue’.

⁷⁸⁶ Orina (note⁷⁸⁴ above).

(a) The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question (b) Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly may also request advisory opinions of the Court arising within the scope of their activities.⁷⁸⁷

Article 65 (1) of the Statute of the ICJ provides that, ‘The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.’⁷⁸⁸

The hurdle that the AU still has to overcome in this regard is to secure a majority vote in the UN General Assembly in favour of the request for the advisory opinion,⁷⁸⁹ and the ICJ upon receiving the request for an advisory opinion from the General Assembly will decide whether or not it will render the opinion. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ stated that,

When seized of a request for an advisory opinion, the court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction.⁷⁹⁰

It is hoped that the ICJ will deliver the advisory opinion in the near future. This will not only bring clarity to this matter but it might also help to restore relations between African states and the ICC, thereby enhancing the effectiveness of the Court by ensuring that the ICC remains a court of last resort which can step in where domestic and regional justice mechanisms fail. This would be a more desirable situation compared to one where African states completely abandon a universal international criminal law in favour of a purely localised approach which only resorts to domestic and regional frameworks of international criminal law.

⁷⁸⁷ See article 96 of the UN Charter.

⁷⁸⁸ See article 65(1) of the Statute of the ICJ (1946). For a detailed overview of the jurisdiction of the ICJ and the mechanisms for requesting an advisory opinion see Dugard 456-473; H Thirlway *The International Court of Justice* (2016) 61-70.

⁷⁸⁹ See Mudukuti ‘Immunity, Accountability and Politics’ explaining that there is no guarantee that the AU will secure this majority vote in the UN General Assembly as not all states are of the view that the advisory opinion is necessary.

⁷⁹⁰ ICJ Rep 136,144 para 13.

The AU Assembly decision to request for an advisory opinion from the ICJ is arguably the most significant so far as it offers possible solutions to the problems arising from the Rome Statute. In light of this Decision, there is hope for international criminal law and the ICC in Africa. It is hoped that African states will focus on finding solutions to contentious issues with the ICC and reconsider their stance on withdrawal from the ICC, because as was discussed above, there is not yet a viable alternative to the ICC within the African regional justice mechanisms.

The Assembly also requested the Commission to review its agreements on hosting AU summits in order to avoid any ambiguities relating to immunities of Heads of State and state officials attending such functions, as was the case when Al Bashir attended an AU summit in South Africa in June 2015.⁷⁹¹ This is evidence that African states are committed to resolving the problems arising from the question of Head of State immunity before the ICC.

7.3.4.2 Sudan and South Africa/Kenya should register a dispute to the ICJ by consent

It is suggested that the ICJ could also be approached by either Sudan and South Africa or Sudan and Kenya registering a dispute with the court by consent. This is because South Africa's North Gauteng High Court and the Supreme Court of Appeal ruled that South Africa had a duty to arrest President Al Bashir when he visited the country in 2015. More recently on 16 February 2018 Kenya's Appeal Court held that the failure by the government to arrest President Al Bashir when he visited the country in 2010 was in breach of its obligations under the Rome Statute, its constitution and the domestic legislation, the ICC Act. The Court also ruled that President Al Bashir should be arrested should he visit the country again.⁷⁹² A dispute could be registered with the ICJ by consent on the basis of these court judgments which imposed upon South Africa and Kenya the duty to arrest President Al Bashir in cooperation with the ICC.

Article 35(1) of the ICJ statute provides for the jurisdiction of the Court in respect of state parties to the Court. Although Sudan is not a party to the Rome Statute, it is a party to the Statute to the ICJ hence it has the legal standing to register a dispute with another State to the

⁷⁹¹ Para 5(iii).

⁷⁹² See Global Justice Weekly (21/2/2018) 'Kenya must arrest Bashir say Judges' available at www.coalitionfortheicc.org/news/20180221/global-justice-weekly-Kenya-must-arrest-al-bashir (accessed 01/7/2018).

Court in terms article 36 of the Statute of the ICJ.⁷⁹³ The registering of a dispute by consent between either Sudan and South Africa or Sudan and Kenya is an alternative avenue that could be taken should the request by the AU to seek an advisory opinion from the ICJ not be successful.

The proposals on the clarification of the issue of immunities before the ICC have been dealt with in detail in this section because the clarification of the issue of immunity before the ICC is arguably part of the solution to the uncertainty regarding domestic immunity, and universal jurisdiction. The clarification of this issue could therefore be a starting point to removing the confusion and uncertainty regarding the exact scope of personal immunities before domestic courts.

7.4 CONCLUSION

The issue which this thesis has sought to interrogate is why the application of international criminal law, particularly the principle of universal jurisdiction and personal immunities and the distinct, but closely related, efforts by the ICC to prosecute African Heads of State for alleged human rights violations has led to tensions between African states and European states. It has been asserted that this is because the two sides have historically obtained sovereignty differently therefore they understand and invoke the doctrine differently, leading to misunderstandings. Another reason for the misunderstandings is the impact that colonialism continues to have on the development of present day international law.

It has been argued that any analysis of the reaction by African states to the application of international criminal law by European states, and to the work of the ICC in Africa which does not take into account the colonial and racial history of international law would be inadequate. As was explained in Chapter Two, sovereignty is arguably the most fundamental doctrine of international law as most, if not all, the principles of international law are anchored on the sovereignty doctrine.⁷⁹⁴ In order to fully comprehend the contemporary structure of international law and international relations therefore, it is important to understand the colonial history of international law, particularly the impact that the colonial confrontation had on the development of the sovereignty doctrine as articulated by Anghie.

⁷⁹³See article 36 (2) of the Statute of the ICJ which states that the jurisdiction of the court includes all legal disputes concerning, *inter alia*, the interpretation of a treaty or any question of law.

⁷⁹⁴ Perrez *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Law* 13.

Anghie has rightly argued that the ‘dynamic of difference’ is still evident in the present day structure of international law. He has asserted that,

on many occasions on which international law seeks to institute a new order it reproduces, in effect, the colonial structures of international law. It is for this reason, I have argued, that striking parallels exist between the legal worlds of Vitoria and the present...as it proceeds towards an uncertain future. The colonial origins of the discipline are re-enacted whenever the discipline attempts to renew itself, reform itself.⁷⁹⁵

This assertion has been supported by a number of scholars including Gevers.⁷⁹⁶ It is therefore submitted that the ‘dynamic of difference’ will always be a part of international law, for it is a part of the history of international law which cannot be divorced from the present. This ‘dynamic of difference’ is evident in the application of the principles of universal jurisdiction and personal immunities by European states in respect of officials from African states, and in the purported immunity of the five permanent members of the UN Security Council, which has contributed significantly to the deteriorating relationship between African states and the ICC.

In this regard it is submitted that the thesis has addressed the key research objectives as outlined in Chapter One. Each of the chapters has highlighted how the colonial history of the development of the sovereignty doctrine has had an impact on the present day structure of international law. Chapter Two critically reviewed the main jurisprudential theories on the development of the sovereignty doctrine and concluded that the reason why the application of international criminal law results in tensions between African states and European states, and African states and the ICC is because European states and non-European states historically obtained sovereignty differently. Chapter Three examined the rise and fall of universal jurisdiction and it was concluded that although the legality of the exercise of universal jurisdiction is no longer subject to debate, the misunderstandings between African states and European states regarding the application of the principle are likely to continue. This is because of the enduring effects of the colonial history of international law.

In Chapter Four, the rise of universal jurisdiction in Africa was critically examined with a review of the domestic legislative instruments on universal jurisdiction in Africa and the AU Model Law on Universal Jurisdiction. It was concluded that the rise of universal jurisdiction

⁷⁹⁵ Anghie 2007 313.

⁷⁹⁶ Gevers ‘Back to the Future?’ 121-122.

in Africa is part of efforts by African states to re-assert their sovereignty which they were previously denied. Chapter Five examined the historical evolution of the principle of immunities and its application in Europe. It was concluded that a review of the ICC implementation legislation on immunities in Europe highlights the existence of a double standard in the application of international criminal law. An examination of the history of the Ottoman Empire capitulations highlighted that African sovereignty, when granted, has always been deficient.

In Chapter Six the implementation legislation on immunities in Africa was critically reviewed. It was concluded that the push by the AU to re-assert immunities for the Heads of State and officials for its member states is part of efforts by African states to reaffirm their sovereignty. It was also concluded that the re-assertion of immunities by African states is not a deviation from the norm but that African states are simply reclaiming immunities which have always been available at international law but which they were not able to claim due to the 'dynamic of difference'.

The broad conclusion to be drawn from the arguments made in this thesis is that African states are not totally opposed to international criminal justice as administered by Western states and the ICC, but they want their voices to be heard regarding their misgivings with the manner in which this international criminal justice is applied. That is why they have embarked on a project to strengthen their regional justice mechanisms in order to avoid universal jurisdiction as practised by Western states. That is also the reason why African states have resolved that they will not cooperate with the ICC in the execution of the warrant of arrest against President Al Bashir until their concerns regarding the Court have been addressed. The recent decision by the AU Assembly to request the ICJ for an advisory opinion on the contentious issue of Head of State immunity before the ICC is evidence that Africa is still committed to the international criminal justice project.

It is hoped that the proposals made in this Chapter will in the future be given due consideration by policy makers from both African and non-African states, and by the ICC, as part of efforts to find a lasting solution to the problems related to the application of international criminal law. As Anghie has asserted,

whether the Third World is characterized as different, similar, or a combination of the two, it must contend with the history of international law that is sketched here, a history in which international law continuously disempowers the non-European world, even while sanctioning

intervention within it-as when Vitoria characterizes the Indians as ‘infant’, thereby simultaneously diminishing the Indians and justifying their subjection to Spanish tutelage.⁷⁹⁷

⁷⁹⁷ Anghie 2007 312.

POSTSCRIPT

SOUTH AFRICA'S PERSPECTIVE ON IMMUNITIES BEFORE THE ICC

8.1 INTRODUCTION

The focus of this thesis was on the relationship between international criminal law and sovereignty in Africa as seen through the lens of the application of the principles of universal jurisdiction and personal immunities. The thesis examined the application of universal jurisdiction in selected European countries and in selected African countries in order to interrogate why the application of these principles has often led to misunderstandings between African states and European states. This chapter will examine in detail South Africa's perspective on the question of Al Bashir's immunity before the ICC.

It is considered that this detailed examination of the country's perspective on Al Bashir's immunity before the ICC is worthwhile because as argued in Chapter One, the confusion surrounding the issue of immunity before the ICC has had a significant impact on the turn to domestic courts and universal jurisdiction by African states. The rise of universal jurisdiction in Africa and efforts by the AU to re-assert the sovereignty of its member states by strengthening its regional justice mechanisms; arguably takes place to a larger extent, against the background of African states' misgivings towards the perceived disregards of the immunities of their Heads of State and officials by the ICC.

South Africa arguably plays the role of 'big brother' in African politics. The decisions that the country makes therefore have a significant policy and political impact upon the rest of the African continent. For instance, the attempted withdrawal from the Rome Statute of the ICC by South Africa signalled Africa's growing discontent with the ICC. Although Gambia and Burundi also gave notice of their intention to withdraw, and Burundi actually withdrew from the Rome Statute of the ICC in 2017, it was the intended withdrawal by South Africa which shocked the world.⁷⁹⁸

Before examining the jurisprudence of the South African Courts regarding the question of Al Bashir's immunity before the ICC, this chapter shall first discuss the contradictory provisions in article 27 and article 98 of the Rome Statute of the ICC, which is arguably the main factor

⁷⁹⁸ Du Plessis & Gevers 'South Africa's Foreign Policy and the International Criminal Court' 199.

contributing to the misunderstandings between African states and the ICC regarding the immunity issue.

8.2 IMMUNITY AND THE ICC: THE LEGAL ISSUES

8.2.1 The debate between article 27 and article 98 of the Rome Statute

The contradictory provisions in the Rome statute on the relevance of immunities before the Court have arguably been the main contributory factor in the tension between the AU and the ICC. One explanation which has been given for this contradiction is that article 27 and article 98 were drafted by two different committees during the Rome statute negotiations.⁷⁹⁹ Article 27 (2) of the Rome Statute 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.’⁸⁰⁰ In contrast, article 98 (1) provides that,

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.⁸⁰¹

There is no consensus amongst scholars as to how these contradictory provisions ought to be reconciled. One group of scholars has argued that article 27 must be interpreted as a waiver of immunity by member states of the ICC of the immunity of their officials before the ICC, and that consequently article 98 only applies to non-party states.⁸⁰² Proponents of this approach also argue that the removal of immunity applies not only in respect of immunity of state officials before the ICC, but also in respect of arrest and surrender in cooperation with the ICC. Akande for instance asserts that,

the removal of immunity from the exercise of the Court’s jurisdiction contained in Article 27 would be nullified in practice if Article 98 (1) were to be interpreted as allowing parties to rely

⁷⁹⁹ O Triffterer ‘Article 27’ in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (1999).

⁸⁰⁰ See article 27 (2) Rome Statute.

⁸⁰¹ See article 98 (1) Rome Statute.

⁸⁰² See for example Akande ‘International Law Immunities and the International Criminal Court’ 425; S Wirth ‘Immunities, Related Problems and Article 98 of the Rome Statute’ (2001) 12 *Criminal LF* 429,452-454.

on the same immunities in order to prevent the surrender of their officials to the Court by other states.⁸⁰³

Another approach proposed by Gaeta is that the reference to third party states in article 98 should be interpreted as referring to non-states parties. This would mean that article 98 should be interpreted as referring to the obligation on states parties to grant personal immunity to officials of non-states parties.⁸⁰⁴

A detailed analysis as to which approach is more convincing is beyond the scope of this thesis. It suffices to say that from a legal perspective, the contradiction between article 27 and article 98 has arguably been the main contributing factor to the misunderstanding between African states and the ICC regarding the issue of Head of State immunity before the Court. The merits of both approaches have been considered in detail by Gevers, who has convincingly argued that the article 27 waiver approach is the preferred one, although both approaches are not entirely satisfactory.⁸⁰⁵

The relationship between article 27 and article 98 has been central to the question of the relevance of immunities before the ICC generally, and Al Bashir's immunities particularly as Sudan is not a party to the Rome Statute. The AU has interpreted article 98 to mean that there is no obligation on states to arrest and surrender Al Bashir in cooperation with the ICC, and the ICC insists that article 98 has no effect on the obligation of state parties to the Rome Statute to arrest and surrender Al Bashir. In 2009 the AU Assembly adopted a decision on non-cooperation with the ICC regarding the arrest warrant issued against Al Bashir by the Court. It was 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 Al Bashir of the Sudan.'⁸⁰⁶

In subsequent decisions, the Assembly reiterated the position taken on non-cooperation. In a decision adopted in January 2012, the Assembly stated that it,

⁸⁰³ Akande *ibid* 423.

⁸⁰⁴ P Gaeta 'Official Capacities and Immunities' in A Cassese, P Gaeta & J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 975, 993-994.

⁸⁰⁵ Gevers 'Immunity and the Implementation Legislation in South Africa; Kenya and Uganda' 94-105.

⁸⁰⁶ Assembly/AU/Dec.245 (XIII) Para 10. For a detailed overview of this decision see generally Tladi 'The African Union and the ICC: The Battle for the Soul of International Law'.

Reaffirms its understanding that article 98 (1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and by referring the situation in Darfur to the ICC the UN Security Council intended that the Rome Statute would be applicable, including article 98.⁸⁰⁷

The decision also urged member states of the AU to comply with previous decisions on non-cooperation regarding the arrest warrants against Al Bashir.⁸⁰⁸

The AU has also insisted that incumbent Heads of State are immune from the jurisdiction of the ICC. The AU Assembly noted with respect to the proceedings against the Kenyan President and his deputy before the ICC in its 2013 Decision on Africa's Relationship with the ICC that the indictment of sitting Heads of States was contrary to the customary international law position on the immunities of sitting Heads of State and other senior state officials.⁸⁰⁹ On the other hand, the ICC has issued a number of judgments on non-cooperation following the failure by African states to arrest Al Bashir when he visited them. In these Decisions the ICC reiterated that Head of State immunity is irrelevant in proceedings before the Court. In the Decision on non-cooperation by Malawi, the ICC's Pre-Trial Chamber I held 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 State not Parties to the Statute whenever the Court may exercise jurisdiction.⁸¹⁰

As Woolaver has noted, it is highly unlikely that the AU or the ICC will change their position on Head of State immunity before the ICC anytime soon.⁸¹¹

⁸⁰⁷ See para 6 of the Decision on the Progress of the Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Assembly/AU/Dec.397 (XVIII) (January 2012)

⁸⁰⁸ Para 8. See also para 10 of the Decision on the Progress Report of the Commission on the Implementation of the Previous Decisions on the International Criminal Court (ICC) Assembly/AU/Dec.547 (XXIV) (30-31 January 2015).

⁸⁰⁹ See para 9 of the Decision.

⁸¹⁰ *The Prosecutor v Omar Al Bashir* ICC-02/05-01/09-139-Corr (15/12/2011) Pre-Trial Chamber I para 36.

⁸¹¹ Woolaver 'International and Domestic Implications of South Africa's Withdrawal from the ICC'.

8.2.2 The ICC jurisprudence on Heads of State immunity

It is regrettable that the ICC has so far not provided clarity regarding the issue of Head of State immunity before the Court. Although the Court has delivered a number of judgments on non-cooperation by African states, its jurisprudence has been inconsistent. Since the first arrest warrant against Al Bashir was issued in 2009, he has visited a number of countries including Malawi; Chad; Kenya and South Africa and he has not been arrested. The ICC has held in the decisions on non-cooperation by the African states concerned that article 98 (1) of the Rome Statute does not absolve states from their obligation to arrest and surrender Al Bashir, but gave different reasons for the decisions.

The first was the decision on non-cooperation by Malawi which was delivered in 2011.⁸¹² This was the first instance in which the Court addressed the issue of Al Bashir's immunity in detail. The ICC's Pre Trial Chamber I held that Malawi had failed to cooperate with the ICC by not arresting Al Bashir when he visited the country in October 2011.⁸¹³ The reason given by the Chamber for this decision is that there is an exception under customary international law to Head of State immunity where an international Court requests the arrest of a Head of State for international crimes. The Court also held that article 98 (1) of the Rome statute did not apply because as there was an exception to the customary international law position on Head of State immunity, there was no conflict between the obligation of Malawi to arrest Al Bashir and customary international law.⁸¹⁴ This judgment has been criticised by a number of scholars for the Court's failure to directly address the question of the meaning of article 98 (1).⁸¹⁵

⁸¹² *Prosecutor v Omar Al Bashir* ICC-02/05-01/09-139 CORR 915/12/2011) Decision on non-cooperation by Malawi.

⁸¹³ Para 12.

⁸¹⁴ Para 43.

⁸¹⁵ See for example D Akande 'ICC Issues Detailed Decision on Bashir's Immunity (...At long last...) But Gets the Law Wrong' *EJIL Talk* (15/12/2011) available at <https://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir-s-immunity-at-long-last-but-gets-the-law-wrong/> accessed 30/6/2018 (arguing that the Chamber erred when it held that an exception exists in customary international law to the immunity of heads of state before international courts); D Tladi 'The ICC Decision on Chad and Malawi :On Cooperation, Immunities and Article 98'(2013) *J of Int Criminal Justice* 199 (arguing that the reasoning provided by the Court failed to address article 98 of the Rome Statute) .

The Court's Pre-Trial Chamber I adopted the same reasoning for its decision on non-compliance by Chad in 2011 and held that Chad had failed to comply with its obligations under article 86 of the Rome Statute to cooperate with the Court in the arrest and surrender of Al Bashir.⁸¹⁶

In 2014 the ICC's Pre-Trial Chamber II passed another judgment on non-compliance by the DRC.⁸¹⁷ It held that the DRC had failed to cooperate with the ICC when Al Bashir visited its territory, but based its decision on different reasoning from that of the Malawi and Chad decisions.⁸¹⁸ In the DRC decision the Chamber held that the UN Security Council Resolution 1593 of 2005 which obliged Sudan to fully cooperate with the Court explicitly waived Al Bashir's immunity.⁸¹⁹ This decision was also criticised as being unsatisfactory. De Hoogh and Knottnerus, for instance, argued that it was based on an incorrect interpretation of the text of Resolution 1593; and that it is only Sudan which has the power to waive the immunities of Al Bashir and not the Security Council as argued by the Court.⁸²⁰ This argument is convincing when one considers the wording of article 98 which specifically provides that the Court must obtain cooperation for waiver of immunity from a third party. The fact that the Security Council has directed Sudan to cooperate with the ICC does not have the effect of absolving the court from seeking a waiver of Al Bashir's immunity from Sudan in terms of article 98.

In its latest decision on non-cooperation by South Africa, issued in July 2017, the Court held that South Africa had failed to cooperate with the Court as it did not arrest Bashir when he visited the country to attend an AU summit in June 2015.⁸²¹ The Court once again based its

⁸¹⁶ *The Prosecutor v Omar Al Bashir* ICC 02/05-01/09 Pre-Trial Chamber I (13/12/2011) para 9 and 13.A further decision on non-cooperation by Chad was issued by Pre-Trial Chamber II in March 2013 (*The Prosecutor v Omar Al Bashir* ICC-02/05-01/09-151 (26/3/2013).

⁸¹⁷ *The Prosecutor v Omar Al Bashir* ICC-02/05-01/09-195 (9/4/2014) Pre-Trial Chamber II.

⁸¹⁸ Para 34 (a).

⁸¹⁹ Para 29 and 31. For a detailed commentary on the Chamber's decision see A de Hoogh & A Knottnerus 'ICC Issues New Decision on Al Bashir's Immunities-But Gets the Law Wrong-Again' *EJIL Talk* (18/4/2014) available at <https://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-but-gets-the-law-wrong-again/> (accessed 30/6/2018); P Gaeta 'Guest Post: the ICC Changes its Mind on the Immunity from Arrest of President Al Bashir, but it is Wrong Again' *Opinio Juris* 23/4/2014 available at <https://www.opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/> (accessed 30/6/2018).

⁸²⁰ A de Hoogh & A Knottnerus *ibid.* For a similar view see Gaeta *ibid.*

⁸²¹ *The Prosecutor v Omar Al Bashir* ICC-02/05-01/09-302 (6/7/2017) Pre-Trial Chamber II.

decision on a different line of reasoning from both the Malawi and Chad decisions, and the DRC decision. In the South Africa decision the Court held that Al Bashir does not enjoy immunity because the effect of the Security Council referral of his matter to the ICC was to place Sudan in an analogous position to that of a state party, and that article 27 (2) of the Statute would apply thereby rendering Bashir's immunities before the Court inapplicable.⁸²² As with the Malawi and Chad; and the DRC decisions, the South Africa decision has also been criticised for failing to address the issue of the interpretation of article 98.⁸²³

The ICC has missed an opportunity to clarify the meaning of article 98 in relation to the immunity of Al Bashir before the court, and of nationals of non-state parties in general, choosing instead to rely on reasons which could be interpreted to mean that article 98 is of no relevance to the Rome Statute. The ICC has been criticised for changing its jurisprudence in these decisions without providing clear and concise reasons for doing so, and for failing to give a satisfactory interpretation of article 98 (1).⁸²⁴ Instead of bringing clarity and finality to the matter of Head of State immunity for non-states parties, the court has created further uncertainty and reignited debate on this issue amongst scholars.

As Gaeta has argued, 'The highly political tension between the African Union and the Court on this and other matters is far from being settled and the jurisprudence of the court which is not impeccable certainly won't help to alleviate this.'⁸²⁵ True to Gaeta's words, the jurisprudence of the Court did nothing to solve the impasse between the AU and the ICC regarding Al Bashir's immunities. The AU continues to insist that Al Bashir enjoys immunity on the basis of article 98 of the Rome Statute, and the ICC has maintained that he is not immune. The AU Assembly in its 2013 Decision on Africa's Relationship with the ICC resolved that no sitting Head of State should be indicted or stand trial before an international tribunal.⁸²⁶ It is therefore commendable that the AU Assembly has made a decision to request the ICJ for an advisory opinion on the issue of Head of State immunity before the ICC, as this may bring clarity and finality to this contentious issue. As the relationship between the

⁸²² Para 88, 91-93. For a detailed Commentary on this decision see A Knottnerus 'The Immunity of Al Bashir: The Latest Jurisprudence of the ICC' *EJIL Talk* (15/11/2017) available at <https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence> (accessed 30/6/2018).

⁸²³ See Knottnerus *ibid* (arguing that the reasons given by the Court for the Decision are not legally convincing, and that the court still failed to clarify the meaning of article 98).

⁸²⁴ Gaeta 'The AU Changes its Mind on the Immunity from Arrest of President Al Bashir'; Knottnerus *ibid*.

⁸²⁵ Gaeta *ibid*.

⁸²⁶ See para 9 of the Decision.

AU and the ICC is characterised by distrust and misunderstanding it is highly unlikely that either the AU or the ICC will change its position on immunities before the Court.

8.3 SOUTH AFRICA'S PERSPECTIVE ON THE APPLICATION OF IMMUNITY BEFORE THE ICC: THE AI BASHIR CASE

As explained above, South Africa's ICC Act provides for the irrelevance of official capacity in section 4 (2) (a). In addition, The Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA) provides for the personal immunity of Heads of State, special envoys and other officials. This legislation is seemingly at odds with the ICC Act insofar as the ICC Act provides for the irrelevance of the immunities that an accused person might be entitled to. With respect to Heads of State, the Diplomatic Immunities and Privileges Act provides in section 4 (1) (a) that,

A Head of State is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as (a) Heads of State enjoy in accordance with the rules of customary international law.⁸²⁷

With respect to special envoys and other State representatives, the Act provides that they enjoy personal immunity before the domestic courts of South Africa subject to the Minister of Foreign Affairs gazetting consent to such immunity before their arrival in the country.⁸²⁸

As stated above, when South Africa announced its intention to withdraw from the Rome Statute, one of the reasons given by the Minister of Justice for the intended withdrawal was that the provisions of the Rome statute and that of its implementing legislation, the ICC Act, were inconsistent with the customary international law position on immunity. The Minister also argued that the provisions in the Rome Statute and the ICC Act providing for the irrelevance of immunities were at odds with the provisions of the Diplomatic Immunities and Privileges Act.⁸²⁹ It is submitted that the attempted withdrawal from the Rome statute by South Africa was not the only solution to the contradictory provisions in the Rome Statute and the ICC Act, and the Diplomatic Immunities and Privileges Act. As the Diplomatic Immunities and Privileges Act was enacted in 2001 before the enactment of the ICC Act, this discrepancy could have been dealt with by amending the Diplomatic Immunities and

⁸²⁷ Section 4 (1) (a) Diplomatic Immunities and Privileges Act 37 of 2001.

⁸²⁸ Section 4 (3) of the Act.

⁸²⁹ See the Statement by the Minister of Justice on South Africa's Intention to Withdraw from the Rome Statute.

Privileges Act to bring it in conformity with South Africa's obligations in terms of the Rome statute.

The immunity of the Sudanese President Al Bashir and the obligation of states to arrest and surrender him to the ICC in cooperation with the court pursuant to the warrants of arrest issued against him, has been at the centre of the misunderstandings between African states and the ICC. The South African courts had occasion to deal with the matter of Al Bashir's immunity in *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others*.⁸³⁰ The applicant, the Southern African Litigation Centre, approached the North Gauteng High Court on the 14th of June 2015 seeking an urgent order compelling the South African authorities to arrest and surrender President Al Bashir to the ICC pursuant to a warrant of arrests issued against him by the ICC.⁸³¹ President Al Bashir was in the country to attend an AU Summit.

The Court initially granted an order directing the respondents to prevent President Al Bashir from leaving South Africa until a final order had been granted in the matter.⁸³² On the 15th of June 2015 a final order was granted by the court as follows

'(1) That the conduct of the Respondents to the extent that they have failed to take steps to arrest and /or detain the President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir ('President Bashir') is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;

2) That the Respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40 (1) (k) of the Criminal Procedure Act and detain him, pending a formal request for his surrender from the International Criminal Court.⁸³³

The court made this order following repeated assurances by Counsel for the Respondents that President Al Bashir was still in the country. It was only after Judgment had been handed down that the Court was informed that President Al Bashir had already left South Africa.⁸³⁴

⁸³⁰ (27740/2915) [2015] ZAGPPHC 402.

⁸³¹ See para 4 of the Judgment.

⁸³² Para 5.

⁸³³ Para 2.

⁸³⁴ Para 3.

Notwithstanding this, Judge President Mlambo emphasised the relevance of the order and the judgment made by the Court.⁸³⁵

The case was centred on the question as to whether or not President Bashir was immune from arrest and surrender to the ICC. The applicants' Counsel argued that in terms of articles 86,87 (1) and 89 of the Rome Statute, when the ICC makes a request for the arrest and surrender of an accused person, State parties are obliged to comply with such a request. In addition, Counsel for the applicants argued that South Africa had an obligation to comply with the request for the arrest and surrender of Bashir by virtue of the country having enacted the ICC Act.⁸³⁶ The Respondents on the other hand argued that Bashir was immune from arrest and surrender to the ICC in line with article VIII of the host agreement which South Africa had entered into with the AU Commission to facilitate its hosting of the AU summit.⁸³⁷

The Court examined the application of the principle of immunities and noted that although section 4 of the Diplomatic Immunities and Privileges Act provides for the immunity of Heads of State in terms of customary international law, this Act did not domesticate the OAU Immunities Act which has not been ratified by South Africa.⁸³⁸ Consequently, the only basis upon which President Al Bashir could be said to enjoy immunity from arrest and surrender would be by virtue of his status as Head of State, or in terms of the host agreement concluded between South Africa and the AU Commission. The court then explained in this regard that the host agreement did not have the effect of conferring immunity on President Al Bashir as Article VIII of the agreement makes no reference to Heads of State but to Members of the Commission and other Intergovernmental Organisations.⁸³⁹ The Court also held that President Al Bashir could not claim immunity from arrest on the basis of customary international law as the Rome Statute provides that Heads of State do not enjoy immunity before the

⁸³⁵ *Ibid.*

⁸³⁶ Para 23

⁸³⁷ For Respondents' detailed arguments see para 13-21 of the judgment.

⁸³⁸ Para 28.4

⁸³⁹ Para 28.10 and para 30.

Court.⁸⁴⁰ Following the High Court Judgment the government indicated that it would consider withdrawing from the Rome Statute.⁸⁴¹

In March 2016 the South African government appealed the decision of the North Gauteng High Court.⁸⁴² The argument advanced by the government was that the immunity enjoyed by Heads of State in terms of customary international law, and in terms of section 4 (1) DIPA abated the obligations of South Africa to arrest and surrender a Head of State in cooperation with the ICC.⁸⁴³ The SALC on the other hand argued that section 4 (2) and section 10 (9) of the ICC Act affirmed the obligations of South Africa in terms of the Rome Statute to arrest and surrender an accused person in cooperation with the ICC. The SALC also joined issue with the government on the issue of whether the customary international law rules on immunity could be relied upon in cases where a Head of State is charged with having committed international crimes by the ICC.⁸⁴⁴

There were three main issues which the Supreme Court of Appeal had to determine. The first issue was whether the departure of President Al Bashir from South Africa prior to the High Court making its order had made the issues before the Court moot. The second issue was whether article VIII of the hosting agreement and the ministerial proclamation issued by the Minister of International Relations conferred immunity on President Bashir and if not, whether he could claim immunity in terms of customary international law and section 4(1) DIPA. The third issue was whether if President Al Bashir was entitled to immunity under

⁸⁴⁰ Para 28.7.

⁸⁴¹ See Statement on the Cabinet Meeting of 24 June 2015 in which it was announced that the cabinet had resolved to review South Africa's continued participation at the Rome Statute (available at www.dirco.gov.za/docs/cabinet0624.htm (accessed 01/7/2018)).

⁸⁴² *Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre* 2016 (3) SA 317 (SCA). For a detailed commentary on the case see D Akande 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of State?' *EJIL Talk* 29/3/2016 available at <https://www.ejiltalk.org/-the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-state/> (accessed 01/6/2018). For a contrasting view see D Tladi 'The Duty on South Africa to Arrest and Surrender President Al Bashir under South African and International Law: A Perspective from International Law.' 2015 (13) *J of Int Criminal Justice* 1027.

⁸⁴³ Para 16.

⁸⁴⁴ *Ibid.*

customary international law and section 4 (1) DIPA, this immunity could be removed by the provisions of the ICC Act.⁸⁴⁵

With regards to the question as to whether President Al Bashir's departure from South Africa meant that the issue before the parties had become moot, Judge Wallis ruled that the High Court had erred in refusing to grant the applicants leave to appeal on this basis. This was because although the order granted by the High Court could not be enforced, it remained binding and the SALC had indicated that should President Bashir return to South Africa in future, they would seek to have the order enforced.⁸⁴⁶ On the issue of whether article VIII of the hosting agreement conferred immunity on President Al Bashir, the Court concurred with the reasoning of the High Court that the hosting agreement did not provide for the immunity of Heads of State but for the AU itself and other organisations referred to in article VIII.⁸⁴⁷

Akande has however convincingly argued that the wording of the OAU Immunities Convention provides for the immunities of state representatives to conferences such as the AU summit which President Al Bashir had travelled to attend. According to Akande,

it is conceivable that South Africa did seek to provide for immunity of State representatives when entering into the hosting agreement with the AU but that it was not careful enough in drafting the agreement to use words that would achieve that effect.⁸⁴⁸

This highlights the dilemma that South Africa and other African states who are state parties to the Rome statute are faced with when it comes to balancing their obligations as state parties to the Rome statute on the one hand and their obligations as member states of the AU.

On the issue as to whether President Al Bashir enjoyed immunity from arrest in terms of customary international law and section 4 (1) DIPA, Judge Wallis ruled that there is no customary international law exception to the immunities enjoyed by Heads of State.⁸⁴⁹ He said,

⁸⁴⁵ Para 18.

⁸⁴⁶ Para 19-20.

⁸⁴⁷ Para 47.

⁸⁴⁸ Akande 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of State?'

⁸⁴⁹ Para 67-84.

the content of customary international law is not for me to determine and...I must conclude with regret that it would go too far to say that there is no longer any sovereign immunity for *jus cogens* (immutable norm) violations...I am unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that Heads of State enjoy when visiting foreign countries and before foreign national courts.⁸⁵⁰

Judge Wallis' conclusion on the continued relevance of personal immunities under customary international law resonates with the argument made earlier in this thesis that contrary to assertions by some scholars that immunities have fallen, immunities are still a part of international law. The learned judge, in coming to the conclusion that there is no exception to the immunities accorded to Heads of State under customary international law, considered the ICJ's decision in *Arrest Warrant*, and a number of cases in which national courts affirmed the immunities of Heads of State.⁸⁵¹

The Court ruled that Al Bashir would ordinarily have been entitled to immunity under customary international law and under section 4 (1) DIPA when he travelled to South Africa for the AU summit. However, as the SALC had argued that this immunity did not apply by virtue of South Africa having enacted the ICC Act it was necessary to consider whether the provisions of the ICC Act had the effect of removing the immunity that Bashir was entitled to under customary international law.⁸⁵² The Court then concluded that the ICC Act had the effect of removing Al Bashir's immunities under customary international law. Judge Wallis said in this respect,

I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act, it did so on the basis that all forms of immunity, including Head of State immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.⁸⁵³

⁸⁵⁰ Para 84.

⁸⁵¹ See para 67.

⁸⁵² Para 84-85.

⁸⁵³ Para 103.

This judgment has been lauded for clarifying the issue of personal immunities with respect to arrest and surrender in cooperation with the ICC.⁸⁵⁴ As was explained above, the ICC Act is silent on this matter, providing only for the procedure to be followed when South Africa receives a request for arrest and surrender from the ICC. It is however submitted that as the Court held that there is no exception to a customary international law position on personal immunities before domestic courts, the proper interpretation of the judgment should be that personal immunities become irrelevant only when there has been a request for arrest and surrender by the ICC. As Akande has rightly argued, as the judges concluded that there is no exception in customary international law to personal immunities before domestic courts, it would be a breach of customary international law for South Africa to arrest Heads of State, except in cases where there has been a request for cooperation from the ICC.⁸⁵⁵

It is submitted that this judgment is what strengthened the South African government's resolve to attempt to withdraw from the ICC, as the Justice Minister mentioned that the provisions of the Rome Statute of the ICC and the ICC Act requiring the country to arrest a sitting Head of State are at odds with the customary international law position on Head of State immunity. The next section shall examine South Africa's change of attitude towards the ICC, from being an ardent supporter of the court during its inception to growing discontent with the work of the Court in Africa.

8.4 SOUTH AFRICA AND THE ICC

Since 2002 when South Africa enacted the ICC Act, the country has been taking steps towards incorporating international criminal law into its domestic legislation. This is evidenced by the subsequent enactment of legislation including the Protection of Constitutional Democracy against Terrorist Related Activities Act 33 of 2004. The Implementation of the Geneva Conventions Act of 2012 and the Prevention and Combating of Trafficking in Persons Act 7 of 2013.⁸⁵⁶ All these provide for the exercise of universal jurisdiction by South African courts. As observed by Gevers, the courts have been

⁸⁵⁴ Akande 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States?'

⁸⁵⁵ *Ibid*

⁸⁵⁶ See the Protection of Constitutional Democracy against Terrorist Related Activities Act 33 of 2004; Implementation of the Geneva Conventions Act 8 of 2012; Prevention and Combating of Trafficking in Persons Act 7 of 2013.

instrumental in ensuring that South Africa applies international criminal law in line with its obligations under the Rome Statute.⁸⁵⁷

South Africa therefore seems to be on course in terms of incorporating international criminal law into its legislation in order to meet its obligations under the Rome Statute. However, the attitude of South Africa towards the ICC has not always been consistent. At the inception of the ICC, South Africa was at the forefront of supporting the adoption of the Rome Statute, which it ratified in 2000.⁸⁵⁸ In 2002 the country became the first country on the African continent to adopt legislation to implement the provisions of the Rome Statute of the ICC and in 2012 it became the first African country to adopt legislation to implement the provisions of the Geneva Conventions of 1949 and their Additional Protocols.⁸⁵⁹ On this basis, it has been asserted that South Africa has made significant progress in the domestic prosecution of international crimes. Commenting on the legislation adopted by South Africa to enable the prosecution of international crimes, Gevers observed that, ‘These laws...are far from perfect but they place South Africa at the front of the trend towards domestic prosecutions of international crimes.’⁸⁶⁰

Despite the significant progress made by the country in the domestic prosecution of international crimes and its earlier support for the ICC however, South Africa has in recent years taken a stance that supports the growing misgivings towards the ICC by AU member states. For instance, the country supported the proposed African Court of Justice and Human Rights, which as was explained above, is part of the AU’s efforts to reaffirm the sovereignty of its member states by avoiding universal jurisdiction as practised by Western states, and the jurisdiction of the ICC. In 2014, the then Deputy President Kgalema Motlanthe argued that, ‘Africa needs its own court, vested with universal jurisdiction over the three core international crimes of genocide, crimes against humanity and war crimes.’⁸⁶¹

In October 2016 South Africa announced that it intended to withdraw from the Rome Statute of the ICC. This attempted withdrawal was revoked in 2017 following a court ruling that

⁸⁵⁷ Gevers ‘International Criminal Law in South Africa’ 438.

⁸⁵⁸ *Ibid* 409.

⁸⁵⁹ *Ibid* 414.

⁸⁶⁰ *Ibid*.

⁸⁶¹ Public Lecture by Deputy President Kgalema Motlanthe at the University of Pretoria (31 March 2014) available at <http://www.thepresidency.gov.za/pebble.asp?relid=17119> (accessed 01/7/2018).

declared it unlawful and invalid, but in December 2017 the Justice Minister indicated that the government had not changed its position regarding its intention to withdraw from the Rome Statute. The Justice Minister said,

‘I wish to reaffirm the Statement read out by the Government of South Africa at the Fifteenth Session of the Assembly of State Parties, in which it announced its intention to withdraw from the Rome Statute. The Government’s resolve in this regard remains unchanged...⁸⁶²

Whether or not the Minister will serve government’s notice of intention to withdraw from the Rome Statute on Parliament for approval as indicated is uncertain following a change of leadership in the ruling ANC party and the resignation of former President Jacob Zuma in February 2018.

The fact that South Africa took steps towards implementing this withdrawal and is still determined to do so subject to meeting the constitutional requirements of notifying parliament of its intention to withdraw from the Rome Statute, is indicative of the growing tensions between the ICC and African states. Du Plessis and Gevers have asserted in this regard that,

For Africa, the rejection of the ICC by one of its core members was a clear expression of the continent’s concerns with the Court. It has forced others, not always with innocent motives, to reconsider their own position towards the Court and to evaluate how important their membership was and whether remaining accorded with their own political calculus.⁸⁶³

8.5 CONCLUSION

In concluding this chapter, it is submitted that because of South Africa’s influential position on the continent, its policies and its application of international criminal law have a significant impact on the rest of Africa. As Du Plessis and Gevers observed, the attempted withdrawal from the Rome Statute by South Africa was a reflection of not only South African concerns regarding the operation of the ICC, but the concerns of Africa as a whole. Although Gambia and Burundi also attempted to withdraw from the Rome Statute and Burundi actually withdrew in 2017, it was the attempted withdrawal by South Africa which shocked the world. In this vein, it is hoped that South Africa will adopt a clear policy on

⁸⁶² *Ibid.*

⁸⁶³ Du Plessis & Gevers ‘African Foreign Policy’200.

domestic application of international criminal law and its relationship with the ICC. Gevers has rightly argued that,

While South Africa continues to support the ‘international criminal justice’ project at the international level, it does so in a manner that creates confusion and at times attracts undue criticism. What is needed is a clear, comprehensive statement on South Africa’s position, one that separates the *principled* wheat, from the *political* chaff.⁸⁶⁴

It is therefore important for the policy makers to ensure that they adopt a clear policy in this regard. The domestic application of international criminal law in South Africa has to a large extent been enforced by the courts, with considerable resistance from the government. In the *Zimbabwe Torture Docket Case* discussed in Chapter Four the South African government appealed the decision by the North Gauteng High Court that South Africa had an obligation to investigate human rights violations allegedly committed in Zimbabwe, and in the *Bashir Case* the government argued in its appeal that it was not obliged to arrest Bashir when he travelled to South Africa because he was immune from such arrest. The South African government’s approach towards the domestic application of international criminal law is confusing and inconsistent in that the legislature has adopted laws enabling the domestic prosecution of international crimes, but the government is reluctant to act in compliance with these laws.

As was explained in the concluding chapter to this thesis, the regionalisation of international criminal law in Africa would be ideal in addressing African states’ concerns regarding the exercise of universal jurisdiction by Western states and the work of the ICC in Africa. However, there are a number of issues which need to be addressed before the proposed African Court of Justice and Human Rights can be considered to be a viable alternative to the ICC. Therefore, it is suggested that South Africa should use its position of influence to address African concerns regarding the work of the ICC in Africa. Du Plessis and Gevers have suggested that there are a number of ways to achieve this, including working with other state parties to reform the referral process of the UN Security Council. It is hoped that instead of shunning the ICC, South Africa will take the necessary steps to engage with the Court and other African state parties to the Rome statute in order to address the concerns raised by African states regarding efforts by the ICC to prosecute African leaders for alleged human rights violations.

⁸⁶⁴ Gevers ‘International Criminal Law in South Africa’ 439.

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