AN ANALYSIS OF THE THEORETICAL AND PRACTICAL HURDLES IN PROSECUTING A SITTING HEAD OF STATE

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ABSTRACT

The International Criminal Court was established to assist states in putting an end to the era of impunity. 13 years later and many African countries are falling short of complying with their obligations under the Rome Statute. African states are furthermore blatantly ignoring orders of cooperation with the ICC, keeping the notion of impunity very much alive on the continent. Tensions between the ICC and the African continent reached a breaking point when the court issued an arrest warrant for the Sudanese President, Omar Al Bashir. President Bashir is wanted by the court for crimes against humanity, war crimes and genocide. Despite the arrest warrants, President Bashir has managed to travel comfortably in the African continent without being arrested.

South Africa is one of the few countries which have translated their obligations in terms of the Rome Statute into domestic legislation: Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. In terms of this piece of legislation South Africa had a duty to not only cooperate with the ICC but also to arrest President Bashir if he entered the country. In blatant disregard of these obligations South Africa invited President Bashir to attend the 2015 AU summit held in Johannesburg and additionally assured that his immunity would be respected.

As a head of state, President Bashir, would normally have enjoyed criminal immunity. However as a result of the international crimes he has committed, President Bashir's immunity is invalid before an international court, such as the ICC. Furthermore, all member states of the Rome Statute are obliged to cooperate with the ICC, irrespective of their membership to the African Union. As a result of South Africa's Implementation of the Rome Statute of the International Criminal Court Act, South Africa cannot in any way escape its obligations to arrest and surrender President Bashir and yet it did just that.

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INTRODUCTION

There are 123 states which are parties to the Rome Statute of the International Criminal Court (Rome Statute),[1] of which 34 are African states.[2] These states have all voluntarily accepted the jurisdiction of the International Criminal Court (ICC). The ICC has a limited scope of jurisdiction including crimes against humanity, war crimes, genocide and as of 1 January 2017, the crime of aggression as well. The ICC's aim is to end impunity.[3]

South Africa's commitment towards ending impunity was recently called into question by allowing President Omar Al Bashir to leave the country despite not one, but two arrest warrants issued for him by the ICC. South Africa has been a member state to the Rome Statute since 17 July 1988 and as a result has many obligations towards the court. One such obligation is to arrest and surrender an accused which is wanted by the court if he is within the state's territory.[4]

Omar Al Bashir rose to power when he led a military coup against Prime Minister Sadiq al Mahdi, who was democratically elected.[5] Bashir subsequently became the President of Sudan in 1993.[6] President Bashir is wanted by the International Criminal Court for charges of crimes against humanity, genocide and war crimes. He has been referred to as the African Adolf Hitler.[7] Bashir wanted to establish a pure race in Sudan.[8] In the process 3 million people were displaced and an average of 500 000 people were killed, most of which belonged to black African tribes in Darfur.[9]

As a result of being the Sudanese President, he would have normally enjoyed certain civil and criminal immunities under customary international law. The validity of his criminal immunity has been a topic of much debate. The debate was sparked when the ICC issued two arrest warrants for President Bashir.

This article will examine both the theoretical and practical aspects of prosecuting a head of state. Section A will examine the theoretical hurdles relating to the prosecution of a head of state; namely immunity and admissibility in terms of the complementarity principle. Acknowledging that this topic cannot be explored without addressing immunity, section A will include a brief examination on the validity of head of state immunity before national and international courts with respect to international crimes. Section A will further address the

[1] Rome Statute of the International Criminal Court 1988.
[2] https://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (03-07-2015).
[3] Preamble Rome Statute.
[4] A 89(1) Rome Statute.
[5] http://www.sudantribune.com/spip.php?mot126 (06-08-2015).
[6] http://www.sudantribune.com/spip.php?mot126 (06-08-2015).
[7] Tladi "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic" 2014 *African Journal of Legal Studies* 381.
[8] Tladi (n 7) 381.
[9] https://www.washingtonpost.com/opinions/the-abandonment-of-darfur/2015/05/15/ca744c46-f8f4-11e4-9030-b4732caefe81_story.html (06-08-2015).

principle of complementarity as set out in article 17 of the Rome Statute.[10] Complementarity relates to the admissibility of a case before the international criminal court. This part of the section will conclude that because there are no states investigating or prosecuting President Bashir, the case is indeed admissible before the International Criminal Court.

Section B will in turn examine the practicalities of prosecuting a sitting head of state. It will begin by addressing the obligations to cooperate with the ICC, with reference to member states of the ICC, Sudan and other African Union members. Furthermore section B will also discuss the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act)[11] of South Africa, regarding their obligations towards the ICC.

Finally section C will explain the South African high court's ruling, in which it ordered that President Bashir be arrested,[12] as well as their decision to allow the Respondents to appeal the matter.

BRIEF BACKGROUND

President Bashir was invited to attend the 2015 African Union summit that was held in Johannesburg. Upon extending the invitation to President Bashir, the South African government granted him a guarantee of immunity.[13] President Bashir arrived in South Africa on Saturday, 13 June 2015, and left the country few days later on Monday, 15 June 2015.

On 13 June, the day that President Bashir arrived in South Africa, the ICC Pre Trial Chamber II issued an order that South Africa immediately arrest him.[14] On 14 July 2015 an interim order was issued by the High Court, ordering President Bashir to remain in South Africa until the court has determined whether he should be arrested and surrendered to The Hague.[15]

One day later the South African High Court ruled that President Bashir must be arrested.[16] On that very same day President Bashir left the Waterkloof Air Force base on a private jet.[17] On 14 June, the night before his departure, President Bashir's private jet was flown from OR Tambo International Airport to the Waterkloof Air Force base which is controlled by the South African National Defence Force.[18] South African president, Jacob Zuma, is commander in chief of all armed forces and as a result the commander in chief of the base as well.[19]

[10] Rome Statute.
[11] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
[12] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* case no 27740/2015 (ZAGPPHC) (unreported).
[13] GG 38860 (05-06-2015).
[14] *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir* ICC-02/05-01/09-242 par 1.
[15] *Southern Africa Litigation Centre* case (n 12).
[16] *Southern Africa Litigation Centre* case (n 12).
[17] http://www.theguardian.com/world/2015/jun/16/omar-al-bashir-escape-south-africa-african-union (01-07-2015).
[18] http://mg.co.za/article/2015-06-18-how-zuma-and-ministers-plotted-omar-al-bashirs-escape (01-07-2015).
[19] http://mg.co.za/article/2015-06-18-how-zuma-and-ministers-plotted-omar-al-bashirs-escape (01-07-2015).

The above may indicate that the South African government colluded with President Bashir to ensure his escape from South Africa before he could be arrested and surrendered to The Hague to stand trial.

SECTION A: THEORETICAL HURDLES IN PROSECUTING A HEAD OF STATE

1. IMMUNITY

Absolute immunity enjoyed by head of states in a forum other than their own national jurisdiction was once a firmly established customary international law rule.[20] Since the end of World War 2 however, this customary international law rule has been continuously called into question.[21]

Under customary international law heads of states are granted immunity from jurisdiction being exercised over them from a state other than their own.[22] This rule is founded on the basis that one state does not adjudicate on the conduct of another state, which stems from international comity and the equality of sovereign states.[23]

The distinction between functional and personal immunity will now be explained. Functional immunity or immunity *ratione materiae* covers any official act of the official and is a substantive defence.[24] This immunity is not discharged when the official steps down from his position.[25] The widespread opinion is that immunity *ratione materiae* cannot safeguard anyone from prosecution of international crimes such as genocide, war crimes, torture and crimes against humanity. The abolition of functional immunity previously enjoyed by heads of state or government can be attributed to the statutory provisions of the ICTY, ICTR, ICC and hybrid tribunals along with some of their decisions and certain international treaties and resolutions mentioned above.[26] Although divided on the reasoning, legal scholars have argued against recognising immunity with regards to international crimes. Some believe that the nature of these crimes prevent them from being categorized as official acts.[27] Others however believe that it is the prohibition of these crimes as *jus cogens* which is capable of overriding immunity because it lacks the status of *jus cogens*.[28] In Ex Parte Pinochet Ugarte, official acts were defined as "acts through the duty of a Head of State to protect his subjects,

[20] Jovanovic "Immunity of Heads of State for International Crimes: Deflating Dictators' Lifebelt?" 2009 *Belgrade Law Review* 202.
[21] Cassese *International Criminal Law* (2001) 305.
[22] Watts "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" 1994 *Recued des Cours de la Academie de Droit International de la Haye* 35 as cited by Jovanovic (n 20) 202.
[23] Jovanovic (n 20) 203.
[24] Cassese (n 21) 305.
[25] Cassese (n 21) 305.
[26] *Prosecutor v Karadzic* ICTY IT-95-5/18, *Prosecutor v Mi*losevic ICTY IT-02-54, *Prosecutor v Furundzija* ICTY IT-95-17/1, *Prosecutor v Blaskic* ICTY IT-95-14, *Prosecutor v Kambanda* ICTR-97-23, *Prosecutor v Taylor* SCSL-03-01-A-1389, A 7(2) Statute of the International Criminal Tribunal for the former Yugoslavia, A 6(2) Statute of the International Criminal Tribunal for Rwanda and A 27(1) Rome Statute.
[27] Bianchi "State Immunity to Violations of Human Rights" 2015 *Austrian Journal of Public International Law* 229.
[28] Bianchi "Immunity Versus Human Rights: The Pinochet case" 1999 *European Journal of International Law* 237- 265.

not grossly violate their rights."[29] Other authors however, believe that the exclusion of immunity in the statutes of international tribunals and courts is based on the principle of universal jurisdiction which excludes functional immunity.[30]

Functional immunity and international crimes are naturally irreconcilable.[31] If we allow the actions which constitute international crimes to be categorized as official acts, we are defeating the purpose of international treaties like the Genocide Convention, Torture Convention and even the Geneva Conventions which have laid down the unconditional prohibition of these acts as well as international peremptory norms.[32] All these treaties allow states to establish universal jurisdiction if necessary in order to enable them to prosecute those responsible for international crimes with no exceptions.[33]

We can therefore say that the customary international law rule establishing functional immunity can be subjected to the exception of international crimes in international and foreign national courts.[34] However in the latter, there has not been consistent state practice to deny Heads of State functional immunity before a foreign national court.[35] This coupled with the ICJ decision in the Arrest Warrant case leads us to the fact that a customary international law rule has not yet crystallised which would oblige states to deny a Head of States functional immunity.[36] It can also be said that there is no obligation to respect a head of state's functional immunity either.[37] Upholding the distinction between prosecution in national and international courts has been intensely criticized.[38] Judge Van den Wyngaert articulated her disapproval of the distinction in the Arrest Warrant case by stating "immunity should never apply to crimes under international law, neither before international courts nor national courts".[39] Ideally, states should not acknowledge functional immunity when it comes to

[29] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 3) 1999.
[30] Akande "International Law Immunities and the International Criminal Court" 2004 *American Journal of International Law* 407 415.
[31] Jovanovic (n 20) 221.
[32] Jovanovic (n 20) 221.
[33] A 6 Genocide Convention 1948, A 49 Geneva Convention I 1949, A 50 Geneva Convention II, A 129 Geneva Convention III, A 146 Geneva Convention IV, A 5 Torture Convention 1984.
IV, Article 146, A 5 Torture Convention.
[34] Gaeta "Official Capacity and Immunities" in Cassese (ed) *The Rome Statute of the International Criminal Court – A Commentary* (2002) 982.
[35] Jovanovic (n 20) 221.
[36] Jovanovic (n 20) 221.
[37] Jovanovic (n 20) 221.
[38] Van der Vyver "Prosecuting President Omar Al Bashir in the International Criminal Court" available at http://ebookbrowse.com/johan-van-der-vyver-pdf-d142822965 (19-02-215) 7.
[39] Case Concering the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belguim*) 2002 I.C.J. 3 Dissenting Opinion of Judge Van den Wyngaert par 36, Boister "The ICJ in The Belgian Arrest Warrant Case*:* Arresting The Development Of International Criminal Law" 2002 J*ournal of Conflict and Security Law,* Bassiouni "Universal Jurisdiction Un-revisited: The International Court Of Justice Decision In *Case Concerning The Arrest Warrant Of 11 April 2000 (Democratic Republic Of The Congo V Belgium)* 2002 *The Palestine Yearbook of International Law*, 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 *American University International Law Review*.

prosecuting international crimes nor should this denial be considered a violation of international law.[40]

Personal immunity on the other hand is still able to shield a Head of State from prosecution.[41] Personal immunity of an official ceases to exist once the official steps down from his position.[42] Personal immunity covers all private and officials acts of the individual and is applicable to certain officials such as heads of state, heads of government, foreign ministers and diplomatic agents. The exceptions to personal immunity are limited to international courts and tribunals within their mandates and jurisdiction.[43] State practice in this regard has actually led to the preservation of personal immunity in foreign national courts as we saw in the Arrest Warrant case.[44] The sanctity of personal immunity has been acknowledged in the Princeton Principles on Universal Jurisdiction,[45] 2001 Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law[46] and in the International Law Commission 2008 Memorandum.[47] Currently customary international law does not allow for the exception that a head of state be prosecuted for international crimes in a foreign national court.[48] States find personal immunity binding as it is necessary for the conduct of international relations.[49] To completely disregard immunities as a whole and allow national courts to prosecute sitting heads of state would open the door for malicious prosecution of foreign officials.[50] Personal immunity does not deny justice to the victims of international crimes but merely delays it until the head of state steps down.[51]

Therefore the only forum, in which a sitting head of state may be prosecuted, would be either an international court or tribunal.[52] Prosecution before a national court will only be possible if the state which the head of state is representing chooses to waive the immunity.[53] Prosecution of a sitting head of state is possible because it does not interfere with the equality between sovereign states which entail the principle that states do not judge the conduct of each other.[54] Determining whether to acknowledge or deny immunity will almost always be influenced by politics.[55]

[40] Jovanovic (n 20) 221.
[41] Jovanovic (n 20) 221.
[42] Cassese (n 21) 305.
[43] Jovanovic (n 20) 222, A 6 and 7 Charter of International Military Tribunal 1945, German Control Council Law No 10 1945, A 6 International Military Tribunal for the Far East 1948, A 7(2) Statute of the International Criminal Tribunal for the former Yugoslavia1993, A 6(2) Statute of the International Criminal Tribunal for Rwanda 1994 and A 27(1) Rome Statute.
[44] Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) 2002 I.C.J. 3.
[45] Principle 5 of Robinson and Princeton University *The Princeton Principles on Universal Jurisdiction* (2001) 30.
[46] A 13(2).
[47] International Law Commission 148.
[48] Gaeta (n 34) 987.
[49] Jovanovic (n 20) 222.
[50] Jovanovic (n 20) 222.
[51] Jovanovic (n 20) 222.
[52] Jovanovic (n 20) 222.
[53] Jovanovic (n 20) 222.
[54] Jovanovic (n 20) 223.
[55] Jovanovic (n 20) 224.

Head of state immunity has remained unchallenged for decades, but the perspectives and rules on this matter have now been altered by several watershed developments.[56] The first breakthrough in this regard came with the establishment of the Nuremberg and Tokyo Military Tribunals. The Charter of International Military Tribunal stated "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[57] This provision was repeated in the German Control Law No 10.[58] Without explicitly mentioning heads of state or government officials, the Tokyo Tribunal adopted the same position on immunity by implying that official capacity would not be acceptable as a valid defence.[59] Not long after these charters, the principles established in them were unanimously endorsed by the General Assembly in 1946[60] and in 1970 the International Law Commission confirmed that Heads of States are not immune from criminal responsibility.[61]

Twenty years later, with the emergence of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[62] and the International Criminal Tribunal for Rwanda (ICTR)[63] the topic of heads of state immunity reappeared.[64] Both the ICTY and ICTR statutes contain the provision "the official position of any accused person, whether as Head of State or Government…shall not relieve such a person from criminal responsibility of mitigate punishment."[65] The ICTY reaffirmed that head of state immunity would not act as a safeguard from prosecution by the tribunal, when they rejected Milosevic's challenge to the tribunal's jurisdiction, relying on his official capacity.[66] Milosevic was the very first Head of State to be not only indicted but also prosecuted by a court other than his one from his own state[67] as no foreign heads of State appeared before the Military Tribunals of Nuremberg and Tokyo.[68] Unfortunately as a result of Milosevic's death, the trial could not be concluded. In 2007 the Special Court for Sierra Leone indicted Charles Taylor and also rejected his immunity based on the ICJ's opinion that an exception to immunity exists before international courts.[69]

The history behind the drafting of both the ICTY and ICTR Statutes indicate that they were meant to echo the principle of criminal responsibility, irrespective of any official position as

[56] Jovanovic (n 20) 203.
[57] A 7.
[58] German Control Council Law No 10 1945.
[59] A 6 International Military Tribunal for the Far East 1948.
[60] United Nations General Assembly Resolution 95 (I) 1946.
[61] UN General Assembly, Report of the International Law Commission 1950 Principle 3.
[62] United Nations Security Council Resolution 827 (1993).
[63] United Nations Security Council Resolution 955 (1994).
[64] Jovanovic (n 20) 205.
[65] A 7(2) Statute of the International Criminal Tribunal for the former Yugoslavia and A 6(2) Statute of the International Criminal Tribunal for Rwanda.
[66] *Prosecutor v Slobodan Milosevic* IT-99-37-PT par 28-34.
[67] *Milosevic case* (n 66) par 4.
[68] Jovanovic (n 20) 204.
[69] *Prosecutor v Taylor* SCSL-2003-01-I par 37-52.

set out after World War 2.[70] The ICTY also stated the inapplicability of head of state immunity in its statute is "indisputably declaratory of customary international law" in *Prosecutor v Furundzija*.[71] Neither of the Military Tribunal Charters nor the ICTY and ICTR Statutes makes a distinction between personal and functional immunity.[72] The failure to make such a distinction could indicate that the Security Council does not support the concept of immunity in the case of international crimes. However the fact that the ICTY opted to issue an indictment against Milosevic while he was in office shows that the ICTY interprets its statute as denying both personal and functional immunity.[73]

Provisions denying immunity to heads of state can also be found in other treaties. The very first treaty mentioning accountability of heads of state is the Treaty of Versailles,[74] which was to enable German Emperor William II to be prosecuted after World War 1. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), [75] states that those who commit genocide "shall be punishable whether they are constitutionally responsible rulers, public officials or private individuals."[76] Both the Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the International Convention on the Suppression and Punishment of the Crime of Apartheid, support the notion that Heads of State may be held criminally responsible. [77]

The Rome Statute was the first multilateral treaty to explicitly state that with respect to genocide, war crimes and crimes against humanity, head of state immunity; be it personal or functional, will not prevent them from being held criminally responsible,[78] nor will it prevent the court from exercising jurisdiction over them.[79] Article 27[80] cannot be read in isolation and must be read in conjunction with article 98 which states:

> 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.[81]

At first glance article 98[82] might seem to be in direct conflict with article 27.[83] However close attention must be paid to the choice of words used in this provision. Firstly the provision does

[70] UN Secretary General 25704 (1993).
[71] *Prosecutor v Furundzija* ICTY-95-17/1 par 140.
[72] Jovanovic (n 20) 206.
[73] Jovanovic (n 20) 206.
[74] A 227 Treaty of the Peace between the Allied and Associated Powers and Germany 1919.
[75] Convention on the Prevention and Punishment of the Crime of Genocide 1948.
[76] A 4.
[77] A 2 Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and A 3 International Convention on the Suppression and Punishment of the Crime of Apartheid.
[78] A 27(1).
[79] A 27(2).
[80] Rome Statute.
[81] A 98(1) Rome Statute.
[82] Rome Statute.

not prevent the court from exercising jurisdiction over persons with immunity, secondly the provision only prohibits the court from requesting assistance and surrender of a head of state or government of a state which is not party to Rome Statute.[84] This means that the court may still have jurisdiction over such a person but will have to refrain from requesting a member state from arresting and surrendering an official of a non-member state who has immunity.[85] A non-member state, head of state or government will fall under the jurisdiction of the ICC if the case is referred to it by a Security Council resolution.[86]

The issuing of the arrest warrants for President Bashir demonstrates the above interpretation of articles 27 and 98[87] as Al Bashir is a head of state that does enjoy immunity and is an official of Sudan which is not a member state to the Rome Statute. The court was able to ignore his immunity because of the Security Council's powers in chapter 7,[88] as the case was referred to the court by a Security Council resolution.[89] This in turn suggests that other state parties to the Rome Statute, such as South Africa, have to disregard Al Bashir's immunity as well and co-operate with the court enabling it to effectively exercise jurisdiction.[90] Non-member states however are still obligated to respect his immunity.[91]

The high number of states which are party to the Rome Statute suggests their willingness to adhere to the limitations imposed on immunity by the statute and furthermore proves the argument that immunity is no longer applicable in cases of international crimes.[92] Acknowledgment of the notion of holding heads of state criminally responsible for any international crimes which they may have committed has been increasing and is being followed slowly but surely with correlating rules.[93] Crimes against humanity, genocide, torture and war crimes have all been undoubtedly recognized as crimes in which immunity is rendered irrelevant.[94] This exception is based on the gravity of these crimes as they are not only international wrongs, but also offends the public order of the international community.[95]

The fact remains however, that Sudan is not a party to the Rome Statute and therefore cannot have consented to the waiver of immunity. When the arrest warrant was issued for President Bashir, the Trial Chamber of ICC stated:

> Without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that position of Omar Al Bashir as Head of State

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[83] Rome Statute.
[84] Akande "International Law Immunities and the International Criminal Court" 2004 *American Journal of International Law* 407 421.
[85] Akande (n 84) 421.
[86] A 13(b).
[87] *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan* ICC-02/05-01/09-1.
[88] Charter of the United Nations 1945.
[89] United Nations Security Council Resolution 1593 (2005).
[90] Akande "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" 2009 *Journal of International Criminal Justice* 333 342.
[91] Jovanovic (n 20) 209.
[92] Jovanovic (n 20) 218.
[93] Jovanovic (n 20) 219.
[94] Cassese (n 21) 305.
[95] Watts (n 22) 84.

which is not party to the Statute has no effect on the Courts jurisdiction over the present case.[96]

In coming to the above conclusion the Trial Chamber relied on article 27[97] and Resolution 1593,[98] which it interpreted to mean that the Security Council has accepted that an investigation and prosecution will take place in terms of the Rome Statute.[99] The effect of the Trial Chamber's decision is that Sudan is treated as a party to the Rome Statute because of the powers of the Security Council in chapter 7 of the UN Charter which are compulsory in nature.[100] As will be discussed in detail further in this dissertation, article 25 of the UN Charter[101] places a duty on African states to comply with the Rome Statute.

Furthermore when the ICC's Pre Trial Chamber ruled on Chad's decision not to cooperate with the court it restated its decisions in the Malawi case; that immunity cannot be invoked by sitting heads of states for prosecutions before international courts,[102] secondly that immunity of heads of state before international courts have been repeatedly rejected since the first World War,[103] thirdly that all 120 states which are party to the Rome Statute have waived immunity by ratifying the statute,[104] in particular article 27(2),[105] fourthly there is an international commitment to reject immunity,[106] and finally that customary international law creates an exception to immunity when a head of state is arrested for international crimes.[107]

The ICC Act adopts the strict position on immunity. Section 4(2)(a) states "despite any other law contrary…the fact that a person is/was a head of state/government...is neither a defence to a crime nor a ground for any reduction of sentence once a person has been convicted for a crime."[108] This provision gives South African courts the same power to override immunity as Section 27 of the Rome Statute gives the ICC.[109] Both Dugard and Abraham correctly point out that this provision represents legislature's choice not to follow the decision of the Arrest Warrant case.[110] We can safely argue that immunity is not supported by South Africa not only because of section 4(2)(a) but also because section 232 of the Constitution states "customary international law is law in the Republic, unless it is inconsistent with the Constitution or an

[96] *Prosecutor v Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-3 par 41.
[97] Rome Statute.
[98] Resolution 1593 (n 89).
[99] Cross and Williams "Recent Developments at the ICC" 2009 *Human Rights Law Review* 267 279.
[100] Cross and Williams (n 99) 279.
[101] Charter of the United Nations.
[102] *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-139 par 36.
[103] *Al Bashir case* (n 103 *)* par 38.
[104] *Al Bashir* case (n 103) par 40.
[105] Rome Statute.
[106] *Al Bashir* case (n 103) par 42.
[107] *Al Bashir* case (n 103) par 43.
[108] s 4(2)(a) ICC Act.
[109] Du Plessis "South Africa's International Criminal Court Act" 2008 available at https://www.issafrica.org/uploads/Paper172.pdf (07-07-2015) 12.
[110] Du Plessis (n 109) 12.

act of parliament."[111] South Africa is not the only African country to explicitly deny immunity to heads of state who have committed international crimes. The constitution of Kenya states "immunity of the President under this article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."[112]

Consequently President Bashir cannot claim immunity at the ICC because the ICC has obtained jurisdiction over him through the Security Council referral. The ICC will not be acting in conflict with article 98 by asking South Africa for assistance and surrender of Al Bashir because South African legislation allows for this possibility.[113] Functional immunity in particular will be ineffective, irrespective of the forum. Personal immunity is only an effective defence in an international forum and not in a foreign national court. However Al Bashir was present in South Africa and was therefore bound by all South African legislation while in the country, he would not have been able to invoke personal immunity before a South African national court because of section 4(2) of the ICC Act which does not acknowledge immunity at all. This provision cannot be overridden by the customary international law rule which allows heads of state to invoke immunity before foreign national courts because section 232 of the Constitution outlaws this customary international law rule, as it is in conflict with section 4(2) of the ICC Act.

2. COMPLEMENTARITY

Both the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda had primary jurisdiction with respect to international crimes.[114] In terms of their primary jurisdiction, the tribunals were given the first right to investigate and prosecute war crimes.[115] The ICC however has complementary jurisdiction.[116] Complementary jurisdiction means that when there are conflicting claims for jurisdiction over international crimes, the principle of complementarity, gives the national jurisdiction the primary right to investigate and prosecute the international crimes.[117] This principle is founded on the respect of national jurisdiction and efficiency and effectiveness because states will have the best access to evidence and witnesses.[118] As Frederic Megret writes:

> Although crime is obviously something that societies are keen to eliminate, it is also curiously something about which they feel a strong sense of ownership, especially when competing claims for jurisdiction arise.[119]

[111] Constitution of the Republic of South Africa, 1996.
[112] A 143(4) The Constitution of Kenya.
[113] s 14-32 ICC Act.
[114] A 9(2) Statute of the International Criminal Tribunal for the former Yugoslavia, A 8(2) Statute of the International Criminal Tribunal for Rwanda
[115] Nouwen *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2014) 9.
[116] Preamble Rome Statute.
[117] Nouwen (n 115) 9.
[118] Nouwen (n 115) 16.
[119] Nouwen (n 115) 16.

Given this, "sense of ownership", states needed a convincing reason to ratify the Rome Statute and the principle of complementarity allowed for the preservation of their sovereignty.[120] Complementarity was not included in the statutes of the ad hoc tribunals because States were legally obliged to accept their jurisdiction as a result of the Security Council resolutions which established them.[121]

The prosecutor's objective is not to compete with states and their national jurisdiction, but rather to ensure that international crimes are punished and impunity is ended.[122] States have a responsibility to investigate and prosecute international crimes.[123] The principle of complementarity is an instrument which encourages states to fulfil that responsibility.[124] In *S v Basson*, the Constitutional Court stated that the responsibility to prosecute international crimes by national courts will not be deprived by the establishment of the ICC.[125]

There are two guiding principles which underscore complementarity. The first principle is partnership. In terms of this principle a positive and constructive relationship between and investigating and, or, prosecuting state and the ICC must be maintained.[126] The second principle is vigilance which entails that the ICC must also ensure that it carries out its designated responsibilities.[127] This means that the prosecutor must ensure that national proceedings are genuine by being able to gather information verifying this.[128] The principle of complementarity can increase the effectiveness of the court far beyond what it can achieve on its own.[129] This is because it establishes a network spanning across all 123 countries which can carry out careful and consistent proceedings.[130]

Article 17 of the Rome Statute determines the admissibility of a case before the ICC with reference to complementarity. Admissibility is not a matter that should be litigated, rather it is something that the prosecutor must take into account when deciding to investigate or prosecute.[131] This article provides for three different scenarios. The first is when no state has initiated any investigation into the international crimes and this case become admissible immediately.[132] There is no need to determine unwillingness or inability because none of the

[120] Nouwen (n 115) 16.
[121] Nouwen (n 115) 16.
[122] Office of the Prosecutor Informal Expert Paper: The Principle of Complementarity in Practice available at https://www.icc-cpi.int/iccdocs/doc/doc654724.PDF (12-10-2015) 3.
[123] Dugard *International Law: A South African Perspective* (4th ed) 192, A 5 Genocide Convention, A 49 Geneva Convention I, A 50 Geneva Convention II, A 129 Geneva Convention III, A 146 Geneva Convention IV, A 5 Convention Against Torture and preamble of the Rome Statute.
[124] Dugard (n 123) 192.
[125] *S v Basson* 2005 (12) BCLR 1192 (CC) par 172.
[126] Jurdi "Lessons for Complementarity for the International Criminal Court" 2009 *South African Yearbook of International Law* 28 33.
[127] Jurdi (n 126) 33.
[128] Jurdi (n 126) 33.
[129] Office of the Prosecutor (n 122) 4.
[130] Office of the Prosecutor (n 122) 4.
[131] Office of the Prosecutor (n 122) 9.
[132] Benzing "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity" 2003 *Max Planck Yearbook of United Nations Law* 591 601.

situations listed in article 17(1)(c) are present.[133] The second scenario is when a state has initiated an investigation into the international crimes but chooses not to initiate a prosecution.[134] In this scenario the case will be inadmissible before the ICC, unless an exception can be established.[135] The third scenario is when a state has initiated proceedings but it can be proven that the proceedings are not genuine because the state is unable or unwilling to carry out a genuine proceeding.[136] This is the only scenario in which the issue of unwillingness and genuineness comes into play, when a state is pretending to institute proceedings.[137]

There has been some uncertainty regarding the adverb "genuinely".[138] There has been confusion around whether "genuinely" is meant as a qualifier for "unable", "to carry out" or "to prosecute".[139] The correct approach would be that it is a qualifier for the phrase "to prosecute".[140] Without such a qualifier, any national proceedings would prevent the ICC from obtaining jurisdiction even if these proceedings were sham trials.[141] The term "genuinely" not only acts as a restrictive measure, but also sets an objective standard;[142] as it is very much possible that a conflict torn country may be may be willing to conduct proceedings but unable to do so at the same time.[143] Proceedings are not found to be dubious simply because a state does not have the same resources available to them as the ICC, [144] for example funding and investigative teams. In essence the determination is whether the proceedings are so inadequate that they cannot be found to be "genuine".[145]

Determining whether a state is unwilling to investigate or prosecute is challenging, as it involves drawing inferences and considering circumstantial evidence.[146] Furthermore it is a politically sensitive matter as it is an accusation against the State's prosecution authorities.[147] The Rome Statute provides certain factors that the ICC must consider when trying to determine whether a state is unwilling to investigate or prosecute.[148] There may be varying degrees of willingness within the state itself.[149] It may be possible that the police are willing to investigate but that the military prevents them from doing so or that the judiciary is willing to prosecute but the executive is not.[150] The unwillingness of one branch of government may and in most circumstances will, lead to the inability of the other branches to investigate or

[133] Office of the Prosecutor (n 122) 7.
[134] Benzing (n 132) 618.
[135] Office of the Prosecutor (n 122) 7.
[136] Office of the Prosecutor (n 122) 7.
[137] Office of the Prosecutor (n 122) 7.
[138] Office of the Prosecutor (n 122) 8.
[139] Office of the Prosecutor (n 122) 8.
[140] Office of the Prosecutor (n 122) 8.
[141] Benzing (n 132) 605.
[142] Benzing (n 132) 605.
[143] Office of the Prosecutor (n 122) 8.
[144] Office of the Prosecutor (n 122) 8.
[145] Office of the Prosecutor (n 122) 8.
[146] Office of the Prosecutor (n 122) 14.
[147] Jurdi (n 126) 44.
[148] A 17(2).
[149] Office of the Prosecutor (n 122) 14.
[150] Office of the Prosecutor (n 122) 14.

prosecute.[151] The unwillingness test is based on the procedure and not the substantive outcome.[152] If it was based on the outcome it would be inconsistent with the Rome Statute.[153] Unwillingness may be inferred from political interference, obstructions and delays, institutional deficiencies and procedural irregularities,[154] for example independence and impartiality.[155]

Under the principle of complementarity a third state which is investigating an international crime will prevent the ICC from exercising jurisdiction, provided the investigating state can obtain the accused and with all the necessary evidence.[156] A third State may be investigating the international crimes based on active or passive nationality or even under universal jurisdiction.[157] A good example of a third state exercising jurisdiction would be the investigation by South Africa into crimes against humanity, particularly torture, perpetrated in Zimbabwe.[158] Third states which exercise jurisdiction in this manner strengthen the complementarity regime as they encourage other capable states to do the same.[159] Third states are encouraged to provide the ICC or the state exercising jurisdiction with any assistance required to further the investigation or prosecution, of persons accused of committing international crimes.[160]

In view of the fact that no state has initiated an investigation into the international crimes committed by President Bashir, his case is admissible before the ICC. In terms of the ICC Act South Africa would have been able to exercise universal jurisdiction while President Bashir was still in the country. [161] The ICC Act further provides that no immunity is recognized with respect to international crimes[162] therefore inability in this sense would not have arisen. Had South Africa initiated proceedings it would have precluded the ICC from exercising their jurisdiction. However the varying degree of willingness within the government itself is best illustrated through the South African example. Here it was the judiciary that was willing to prosecute President Bashir but the executive was not, thereby leading to the inability to initiate proceedings. Even if South Africa had initiated proceedings their inability to prosecute the Sudanese president would have reactivated the ICC's ability to exercise jurisdiction as the case is admissible in terms of article 17.

[151] Office of the Prosecutor (n 122) 14.
[152] Office of the Prosecutor (n 122) 14.
[153] Office of the Prosecutor (n 122) 14.
[154] Office of the Prosecutor (n 122) 14.
[155] Office of the Prosecutor (n 122) 30.
[156] Office of the Prosecutor (n 122) 24.
[157] Office of the Prosecutor (n 122) 24.
[158] *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 1 SA 315.
[159] Office of the Prosecutor (n 122) 24.
[160] Office of the Prosecutor (n 122) 24.
[161] s 4(3)(c).
[162] s 4(2)(c).

SECTION B: PRACTICAL HURDLES IN PROSECUTING A HEAD OF STATE

3. COOPERATION WITH THE ICC

"A giant without arms and legs, it needs artificial limbs to walk and work", was how the first ICTY Judge President, Cassese, described the ICTY, in particular the lack of enforcement mechanisms.[163] The tribunal had to rely on the cooperation of states in order to investigate, arrest and prosecute persons accused of committing international crimes.[164] The same is true for the ICC. The ICC requires the cooperation of states to investigate arrest and prosecute the accused. Unless the Security Council issues a resolution in which it binds all members to co-operate, the obligation to cooperate will be a treaty obligation and not an obligation in terms of chapter 7 of the UN Charter.[165] An obligation to cooperate in terms of a Security Council resolution is binding upon all members of the UN, where as a treaty obligation is only binding on member states.[166] Considering the fact that both the ICTY and ICTR were established in terms of a Security Council resolution under their chapter 7 powers, cooperation with these tribunals were mandatory as opposed to cooperation with the ICC, which in essence means that the ICC has even less enforcement mechanisms than the tribunals.[167]

Cooperation with the ICC is dealt with in part 9 of the Rome Statute. Article 86 provides that "states parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[168] This is a general treaty obligation. The statute also requires all member states to ensure that their national laws provide for the necessary procedures of the cooperation that may be required.[169] Furthermore state parties are required to comply with arrest warrants when the accused is in their territory.[170]

As we saw above the establishment of the ad hoc tribunals under chapter 7, gave them stronger powers to order compliance than the ICC has a result of its treaty obligation.[171] Irrespective of the difference in powers in theory, it is impossible to obtain people and evidence without the state being willing to cooperate in the first place.[172] Cooperation is likely to be obtained when the *locus delicti* feels that it is in its best interests to comply and

[163] Goldstone "The Role of the United Nations in the Prosecution of International War Criminals" 2001 *Journal of Law & Policy* 119 124.
[164] Southern Africa Litigation Centre (SALC) "Positive Reinforcement: Advocating for International Criminal Justice in Africa" (2013) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Positive-Reinforcement-Advocating-for-International-Criminal-Justice-in-Africa.pdf (15-09-2015) 54.
[165] Charter of the United Nations.
[166] SALC (n 164) 54.
[167] SALC (n 164) 54.
[168] Rome Statute.
[169] A 88 Rome Statute.
[170] A 89(1) Rome Statute.
[171] Cryer "Prosecuting Leaders: Promises, Politics and Practicalities" 2009 Gottingen Journal of International Law 45 62.
[172] Cryer (n 171) 62.

cooperate.[173] When the accused is a head of state the *locus delicti* is in all probability going to decide that it is not in its best interests to cooperate with the ICC.[174] Once cooperation from the *locus delicti* has been denied the cooperation from third states becomes harder to obtain. Cooperation from third states relies on not only the presence of the accused or evidence in their territory, but also on their willingness to cooperate, which is dependent on the coincidence of who the accused is and what the evidence is.[175] In the Pinochet case cooperation was denied because of this very reason.[176] However this was not the case in the prosecution of Charles Taylor.[177] There is no denying that politics and political will play an important part in the cooperation of States.[178] The ICC must be able to uphold the delicate balance of ensuring that states are friendly towards it and comply with their cooperation obligations as well as ensuring that it is independent and that crimes by all parties are investigated and prosecuted.[179]

The issues which stem from state cooperation are in some ways comparable to extradition and mutual legal assistance.[180] The difference however is that extradition is the mere arrest and surrender of the accused to another State.[181] Mutual legal assistance goes beyond arrest and surrender and includes a host of activities that relate to the investigation and prosecution of crimes.[182] Both extradition and mutual legal assistance may be denied when there is a high probability of a human rights violation in the requesting state.[183] These issues are irrelevant when it comes to cooperation with the ICC as it adheres to international human rights standards at the highest possible level.[184]

The record of African states cooperating with the court has varied.[185] In terms of states which have cooperated with the ICC, Germaine Katanga and Mathieu Ngudjolo Chui were arrested and surrendered to the ICC by the Democratic Republic of Congo.[186] The Ivory Coast arrested and surrendered Laurent Gbagbo to the ICC.[187] If state parties do not comply with a request to cooperate by the ICC they matter may be referred to the Assembly of State Parties or to the Security Council when the matter was referred to the ICC by the Security Council.[188] The ICC has referred Chad,[189] Djibouti,[190] DRC[191] and Malawi[192] to the Security

[173] Rastan "Testing Co-Operation: The International Criminal Court and National Authorities" 2008 *Leiden Journal of International Law* 431 454.
[174] Rastan (n 169) 431-456.
[175] Cryer (n 171) 63.
[176] Cryer (n 171) 63.
[177] Cryer (n 171) 63.
[178] Roper & Barria "State Co-operation and the International Criminal Court: Bargaining Influence in the Arrest and Surrender of Suspects" 2008 *Leiden Journal of International Law* 457.
[179] Roper and Barria (n 178) 457.
[180] Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) 976.
[181] Schabas (n 180) 976.
[182] Schabas (n 180) 976.
[183] Schabas (n 180) 976.
[184] Schabas (n 180) 976.
[185] SALC (n 164) 55.
[186] SALC (n 164) 55.
[187] SALC (n 164) 55.
[188] A 86(7) Rome Statute.

Council for non cooperation relating to Al Bashir. Once a referral has been made the Assembly of State Parties or Security Council may take "any measure they deem fit".[193]

If the Security Council was to make a decision that there was a failure on behalf of the states to cooperate they would be able to impose sanctions such as the interruption of economic and diplomatic relations.[194] However from the above referrals the Security Council to date has not imposed any sanctions. The Assembly of State Parties has adopted certain procedures in the case of non cooperation by states that have an obligation to cooperate.[195] The procedure to be followed when there has been as referral of non cooperation is an informal and urgent response prior to a formal response.[196] This informal response can consist of an urgent Bureau meeting or a letter from the Assembly of State Parties president.[197] It is evident that these procedures are neither punitive nor confrontational and in turn are ineffective.

When the Security Council referred the situation in Darfur to the ICC, it stated that "the Government of Sudan and all parties to the conflict in Darfur shall cooperate fully".[198] This imposed a chapter 7 obligation only on Sudan to cooperate with the court. In the very same resolution the Security Council further stated that it acknowledges "states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organizations to cooperate fully."[199] By choosing the word "urges" the Security Council imposed no compliance obligations on non-member states and the only obligation that exists in terms of compliance is the treaty obligation upon member states. The treaty obligation that exists among states is compulsory as the provision states that "state parties shall…fully cooperate" and 'shall' is defined as a mandatory expression.[200] Furthermore state parties such as Chad, Djibouti, DRC Malawi and South Africa all had the mandatory obligation to arrest President Bashir while he was in their territory.

Majority of African countries have opposed the proceedings against President Bashir.[201] South Africa has an obligation to cooperate with the ICC not only because they are a member state to the Rome Statute but also because of its own national legislation. Despite these

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[189] *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-140.
[190] *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti* ICC-02/05-01/09-129.
[191] *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* ICC-02/05-01/09-195.
[192] *Al Bashir* case (n 103).
[193] SALC (n 164) 56.
[194] A 41 Charter of the United Nations.
[195] United Nations, Assembly of State Parties (ASP) Resolution ICC-ASP/10/Res5 (2011).
[196] ASP Resolution (n 195) 39.
[197] ASP Resolution (n 195) 39.
[198] Security Council Resolution (n 89).
[199] Security Council Resolution (n 89).
[200] http://www.merriam-webster.com/dictionary/shall (12-10-2015).
[201] SALC (n 164) 57.

obligations, South Africa voted in favour of the African Union resolution in 2009.[202] This resolution calls on all members of the African Union to disregard the arrest warrant issued by the ICC against Al Bashir. This resolution places states which are members of the African Union and the Rome Statute in a difficult situation.[203] These states have competing obligations; they are obliged to cooperate with the ICC in terms of the Rome Statute but they are also obliged to cooperate with any African Union decisions or policies.[204] The African Union Constitutive Act[205] provides that a member state which does not cooperate with the African Union may be subjected to political and economic sanctions as well as being denied communication and transport to other member states.[206]

The ICC's incapacity to enforce compliance, more particularly compliance with arrest warrants, is its pitfall. This makes ensuring cooperation at a national level vital.[207] Both South Africa and Kenya have enacted national legislation to enforce their compliance obligations with the ICC. Part 2 of the ICC Act is titled 'Judicial Assistance to Court' and contains several sections. Sections 14-32 contain many circumstances in which the "relevant and competent authorities in the Republic" must "cooperate with and render assistance to, the Court in relation to investigations and prosecutions." [208] Section 14[209] in particular contains a list of instances in which the relevant authorities in South Africa must assist the ICC including: questioning of suspects,[210] identification and whereabouts of people and items,[211] taking evidence,[212] performing inspections *in loco*,[213] executing searches and seizures[214] as well as any other assistance which is not prohibited by law.[215] Kenya's International Crime Act provides that immunity will not constitute a ground for refusing to execute a request by the ICC for the surrender of an accused.[216]

As a result of South Africa's enactment of the ICC Act which does make provision for the cooperation with the ICC, South Africa was bound to arrest President Bashir. Similarly Kenya will be bound to surrender Al Bashir if he is in their territory because of the enactment of the International Crimes Act. Cooperation from other African Union members which are not party to the Rome Statute is highly unlikely to be obtained for three reasons. Firstly they have an obligation to comply with the African Unions decision to disregard the arrest warrant. Secondly the *locus delicti* is unwilling to cooperate and the person accused is a sitting head of state making cooperation by third states wishful thinking. Thirdly non-member

[202] Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court Doc. Assembly/AU/13(XIII).
[203] SALC (n 164) 57.
[204] SALC (n 164) 57.
[205] Constitutive Act of the African Union 2000.
[206] A 23(2) Constitutive Act of the African Union.
[207] SALC (n 164) 56.
[208] ICC Act.
[209] ICC Act.
[210] s 14(c).
[211] s 14(a).
[212] s 14(b).
[213] s 14(g).
[214] s 14(h).
[215] s 14(l).
[216] A 27(1)(a) International Crimes Act 2008.

states do not have a chapter 7 obligation to cooperate because the Security Council simply urged them to cooperate. All other member states to the Rome statute are obliged to cooperate by part 9 of the Rome Statute.[217]

Additionally African States which are party to the Rome Statute will have an obligation to cooperate fully. The UN Charter states that, "members of the United Nations agree to accept and carry out the decisions of the Security Council",[218] thereby giving the Security Council the power to make decisions which are binding on all members of the UN and therefore binding on all African Union members. The UN Charter further states:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.[219]

As a result of article 25 of the UN Charter,[220] all African Union members which are party to the Rome Statute, have an obligation under the Charter to fully cooperate with the ICC. This obligation overrides any obligation that they have towards the African Union by virtue of article 103.[221] They will however have to consider their obligations to comply with the African Union resolution and this is where the political considerations will come into play.

As a result of this political factor and the hostility of African states towards the ICC, it is up to civil society organisations to assist the ICC as much as possible. These organisations have had to come up with creative ways to pressure their governments into complying with their Rome Statute obligations.[222] If States are the limbs of the court as Cassese described, then civil society organisations have become the nervous system prompting them to move.[223]

4. EFFECTS OF THE ICC ACT ON SOUTH AFRICA

It has been 13 years since South Africa enacted the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act), mentioning for the first time in domestic legislation war crimes and crimes against humanity.[224] In spite of Africa's initial support of the ICC, only three African countries have domesticated their obligations towards the court. South Africa was the first to incorporate the Rome Statute and it obligations into its domestic law, with Senegal and Kenya following suite.[225]

The ICC Act makes prosecution of international crimes before South African national courts possible. The preamble of the ICC Act states that South Africa is "committed to bringing persons who commit such atrocities to justice…in a court of law in the Republic in terms of

[217] Rome Statute.
[218] A 25.
[219] A 103.
[220] Charter of the United Nations.
[221] Charter of the United Nations.
[222] SALC (n 164) 55.
[223] SALC (n 164) 55.
[224] Du Plessis (n 109) 1.
[225] Du Plessis (n 109) 1.

its domestic law where possible."[226] Section 3(d) further states one of the objectives of the Act is to enable the national prosecuting authority to prosecute and the higher courts to adjudicate over any cases in which a person is accused of committing a crime outside of the border in certain circumstances.[227] By analysing the South African government's reaction to Al Bashir's visit, one can conclude that South Africa is no longer taking their international obligations seriously.

4.1.JURISDICTION

Section 4 founds jurisdiction for South African courts in respect of crimes.[228] Section 4(3) particularly deals with extra-territorial jurisdiction.[229] In terms of this a South African court will have jurisdiction over any person who commits an international crime outside of South Africa's borders, if the person is a South African citizen,[230] ordinarily resident in South Africa,[231] the crime was committed against a South African citizen or someone who is ordinarily resident in South Africa[232] or if after the commission of the crime the accused is present in the territory of South Africa.[233] If the requirements under section 4(3) are met, a South African higher court will have jurisdiction because the crime is deemed to have been committed in South Africa.[234]

The jurisdictional trigger found in section 4(3)(c) is based on the concept of universal jurisdiction. Universal jurisdiction can be described as jurisdiction which exists for all states for international crimes.[235] This is because the accused is, "an enemy of mankind in whose punishment all states have an equal interest", therefore allowing the national court to act as an agent of the international community.[236] Universal jurisdiction can therefore be seen as the ability to act irrespective of where the crime was actually committed or the accused's nationality.[237] International law merely allows states to exercise universal jurisdiction over international crimes, it does not compel them to do so.[238] Most states will not prosecute an accused for international crimes unless the crime has been criminalised under domestic laws; South Africa is one of them.[239] Cassese is of the opinion that universal jurisdiction is not an absolute right under which all states are permitted to investigate and prosecute an international crime.[240] He believes that states are 'potentially' enabled to act, but that currently under international law; universal jurisdiction may only be established if the

[226] ICC Act.
[227] s 3(d) ICC Act.
[228] s 4 ICC Act.
[229] s 4(3) ICC Act.
[230] s 4(3)(a) ICC Act.
[231] s 4(3)(b) ICC Act.
[232] s 4(3)(d) ICC Act.
[233] s 4(3)(c) ICC Act .
[234] s 4(3) ICC Act.
[235] Du Plessis (n 109) 4.
[236] Dugard (n 123) 154.
[237] Du Plessis (n 109) 4.
[238] Dugard (n 123) 55.
[239] Dugard (n 123) 55.
[240] Cassese "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" 2003 *Journal of International Criminal Justice* 589 592.

accused is in the prosecuting states territory.[241] Section 4(3)(c) therefore limits absolute universal jurisdiction. The act follows Cassese's view and therefore chooses to adopt 'conditional' universal jurisdiction, which is dependent on the accused's presence in South Africa.[242]

In the case of President Al Bashir, jurisdiction was validly founded under section 4(3)(c) because he was physically present in South Africa for the AU summit in Sandton, Johannesburg. The National Prosecuting Authority would therefore have been able to not only investigate, but also to successfully initiate prosecutions in a South African High Court, against Bashir for the genocide, war crimes and crimes against humanity he committed in Darfur.

4.2.INVESTIGATION AND PROSECUTION

Under the current body of international law, states may investigate international crimes without the accused having to be present in their territory when exercising universal jurisdiction.[243] Principle 1(2) of the Princeton Principles of Universal Jurisdiction states that universal jurisdiction may be exercised by a competent judicial authority of any state to try a person accused of international crimes provided the person is present before the judicial body.[244] The wording of the principle does not prevent a state from investigating the commission of international crimes in the absence of the accused.[245]

Adopting, 'anticipated presence', as a precondition for opening an investigation will allow South Africa to comply with their complementarity obligations under the Rome Statute and will ensure the ICC Act is used in the manner that parliament intended.[246] In addition to enacting the ICC Act, South Africa established a Priority Crimes Litigation Unit within the National Prosecuting Authority (NPA) to fulfil their obligations to the Rome Statute in 2003.[247] This unit is tasked with the management and direction of investigations relating to international crimes.[248]

There are three factors which must be taken into account when the Priority Crimes Litigation Unit and the National Director of Public Prosecutions (NDPP) are determining whether an investigation or prosecution, under the ICC Act, should be conducted.[249] Firstly the decision to investigate or prosecute must take the aims of the ICC Act into account.[250] The primary aim of the ICC Act is to ensure the prosecution of individuals who have committed international crimes.[251] Secondly, in the event that the NDPP chooses not prosecute a person accused of international crimes, the NDPP must inform the central authority of his decision

[241] Cassese (n 240) 592.
[242] Du Plessis (n 109) 4.
[243] Du Plessis (n 109) 5.
[244] Robinson and Princeton University (n 45) 28.
[245] Robinson and Princeton University (n 45) 44.
[246] Du Plessis (n 109) 6.
[247] GG 24876 (23-05-2003)
[248] GG (n 247).
[249] Du Plessis (n 109) 7.
[250] Du Plessis (n 109) 7.
[251] Du Plessis (n 109) 7.

and the reasons on which it is based, and the central authority must forward both the decision and reasons to the registrar of the ICC.[252] Thirdly the decision must comply with the policy of the NPA.[253]

In terms of the policy, when deciding whether to prosecute, the prosecutor shall consider all relevant factors including: the seriousness of the crime: the way in which the crime was committed and its effect on the victim, the nature of the crime; its pervasiveness and repetition and finally the economic impact of the crime on the effected community.[254]

International crimes such as genocide, war crimes and crimes against humanity are *jus cogens* crimes.[255] They are by their very nature the most serious crimes and it is logical that an investigation and prosecution of such should be conducted under the ICC Act. In the event that there is no investigation and/or prosecution of these crimes under the ICC Act, sufficient and compelling reasons of public interest must exist.[256] In determining what is in the public interest, cognisance must be taken of the gravity of the crime, international condemnation and the universal commitment to suppress these crimes.[257] The Constitutional Court confirmed these factors in the *S v Basson*.[258] The court held "given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the Supreme Court of Appeal in exercising its discretion to refuse to rule on the charges."[259]

President Bashir was invited to the African Union summit by the South Africa, therefore "anticipated presence" was existent and an investigation should have been opened under the ICC Act. The Priority Crimes and Litigation Unit should have considered that the aim of the ICC Act is to prosecute individuals such as Al Bashir who have committed war crimes and crimes against humanity. There was no decision to investigate, yet alone prosecute and as a result the central authority should have notified the Registrar of the ICC but it did not do so. Furthermore a decision not to prosecute should be based on the NPA's policy which it was not, as the seriousness, nature and economic effects of the crimes were ignored.

4.3ARREST AND SURRENDER

The ICC Act is based on the understanding that the ICC will have to rely on national jurisdictions to gain custody of the accused.[260] The ICC Act mentions two types of arrests, the first type is where the ICC issues an arrest warrant for the accused,[261] once the arrest

[252] s 5(5) ICC Act.
[253] Du Plessis (n 109) 7.
[254] National Prosecuting Authority (NPA) Prosecution Policy (2013) 7.
[255] Dugard (n 123) 38.
[256] NPA (n 249) 7.
[257] NPA (n 249) 7.
[258] *Basson* case (n 125).
[259] *Basson* case (n 125) par 184.
[260] Du Plessis (n 109) 9.
[261] s 8.

warrant has been received by South Africa it must be forwarded to the Director General of Justice and Constitutional Development to convince the local courts that there are reasonable and sufficient grounds for the accused's arrest.[262] The Director General must then forward the request to a magistrate to have the warrant endorsed.[263] The second type is when the arrest warrant is not issued by the ICC but by the NDPP.[264] The Director General receives a request by the ICC for the provisional arrest of an accused and forwards this request to the NDPP.[265] The NDPP must then apply for a warrant before a magistrate.[266]

Once the accused has been arrested by South Africa, he must be surrendered to The Hague.[267] Before the accused is surrendered, a magistrate must make a committal order.[268] A committal order will be made if the magistrate is satisfied that the accused is in fact the person named in the arrest warrant,[269] the accused has been arrested in accordance with national procedures[270] and the accused's rights as granted in the Bill of Rights have not been violated.[271]

Surrendering the accused to The Hague is very different from extraditing him to another country. The "double criminality" rule is the backbone of any extradition proceeding, whereas this is not a requirement for surrender.[272] Secondly in the case of an extradition there must be a prima facie case against the accused.[273] Where as in a surrender the magistrate must be satisfied that the requirements in section 10(1) are met to make an order of committal.[274]

Despite the ICC having issued not one but two arrest warrants for President Al Bashir, South Africa welcomed him with open arms. President Al Bashir was not arrested in South Africa and consequently could not have been surrendered to The Hague. Had he been arrested an order of committal would most definitely have been made. South Africa would have played a significant part in ending impunity.

[262] s 8 (1) ICC Act.
[263] s 8 (2) ICC.
[264] s 9 ICC Act.
[265] s 9(1) ICC Act.
[266] s 9(2) ICC Act.
[267] Du Plessis (n 109) 9.
[268] s 10(5) ICC Act.
[269] s 10(1)(a) ICC Act.
[270] s 10(1)(b) ICC Act.
[271] s 10(1)(c) ICC Act.
[272] Dugard (n 123) 219-220.
[273] Du Plessis (n 109) 10.
[274] s 10 (1) ICC Act.

SECTION C: OUTCOME OF LITIGATION IN SOUTH AFRICA

The day that President Bashir arrived in South Africa, the ICC Pre Trial Chamber II issued an order that South Africa immediately arrest him.[275] As a result of the guarantee provided by the South African government not to arrest President Bashir,[276] South African Litigation Centre (SALC), a civil society organisation, instituted proceedings in the High Court of South Africa for an order against the Minister of Justice and Constitutional Development along with several other officials, compelling them to ensure that President Bashir does not leave the country until the High Court makes a ruling determining whether he should be arrested and surrendered to the ICC for trial. On 14 June 2015 an interim order was issued by the High Court, ordering President Bashir to remain in South Africa until the court has determined whether he should be arrested and surrendered.[277]

On 15 July 2015 the High Court of South Africa unanimously ruled:

> That the Respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant…and detain him, pending a formal request for his surrender from the International Criminal Court.[278]

The High Court of South Africa elaborated on their reasons for its judgment. Firstly, South African law must be interpreted in a manner that it complies with international law[279] and that the Rome Statute "expressly provides that heads of state do not enjoy immunity under its terms" and a similar provision is found in the ICC Act, which means that immunity which President Bashir would have normally enjoyed is waived with respect to international crimes.[280] Secondly, South Africa's obligations towards the ICC cannot be overridden by any decisions taken by the AU.[281] Finally, the court stated that "the rule of law must prevail".[282]

Following President Bashir's escape from South Africa, Ian Khama, the President of Botswana, urged all ICC member states to cooperate with the court and stated "we therefore find it disappointing that President Al Bashir avoided his arrest when he cut short his visit and fled, in fear of arrest, to his country".[283]

On 16 June 2015 the respondents applied to the High Court of South Africa for leave to appeal.[284] The High Court denied their application to appeal the matter as it was now

[275] *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir* ICC-02/05-01/09-242 par 1.
[276] GG (n 13).
[277] *Southern Africa Litigation Centre* case (n 12).
[278] *Southern Africa Litigation Centre* case (n 12).
[279] s 233 Constitution of the Republic of South Africa, 1996.
[280] *Southern Africa Litigation Centre* case (n 12) par 28.8.
[281] *Southern Africa Litigation Centre* case (n 12) par 28.13.
[282] *Southern Africa Litigation Centre* case (n 12) par 33.
[283] http://www.iol.co.za/news/africa/botswana-critical-of-sa-over-bashir-1.1872656 (18-07-2015).
[284] http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ (01-10-2015).

"moot".[285] The respondents have now lodged a petition with the Supreme Court of Appeal in order to appeal the High Courts' decision.[286]

CONCLUSION

In conclusion we can state that it is theoretically possible to prosecute President Bashir, who is a sitting head of state. The first theoretical issue which was examined was immunity. President Bashir will not be able claim functional or personal immunity before the ICC, as no immunity exists for international crimes. Furthermore the defence of functional or personal immunity before a foreign national court, such as the High Court of South Africa, will not be available as a result of the section 4(2)(a) of the ICC Act. The second theoretical issue was admissibility before the ICC. The case against President Bashir is admissible before the ICC because there has been no investigation or prosecution by any state, including South Africa.

Furthermore it is also practically possible to prosecute President Bashir. The first practical issue with prosecuting a sitting head of state, such as President Bashir, is obtaining the cooperation of other states. All states which are members to the Rome Statute, including those that are also members to the African Union, have an obligation to cooperate with the court. Sudan which is not a party to the Rome Statute is bound to cooperate because of the Security Council resolution. Obtaining the cooperation of states which are not party to the Rome Statute, but are members of the African Union, is more challenging. This is because they are bound by the African Union resolution calling for the non-cooperation with the ICC in the matter of President Bashir. As a result of the Implementation of the Rome Statute Act,[287] South Africa would have been able to exercise universal jurisdiction and institute proceedings against President Bashir. By electing not to institute proceedings against him South Africa was bound to then have him arrested and surrendered to The Hague to stand trial.

If South Africa does elect to withdraw from the Rome Statute all their obligations will not cease to exist. Firstly as a result of article 127(1) the effect of a withdrawal will only take place after one year. In that year South Africa will still have to respect and adhere to all their obligations they incurred under the Rome Statute. Furthermore unless parliament repeals the ICC Act and chooses to withdraw from all international treaties, the obligations under these will still remain intact.

[285] http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ (01-10-2015).
[286] http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ (01-10-2015).
[287] ICC Act.

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