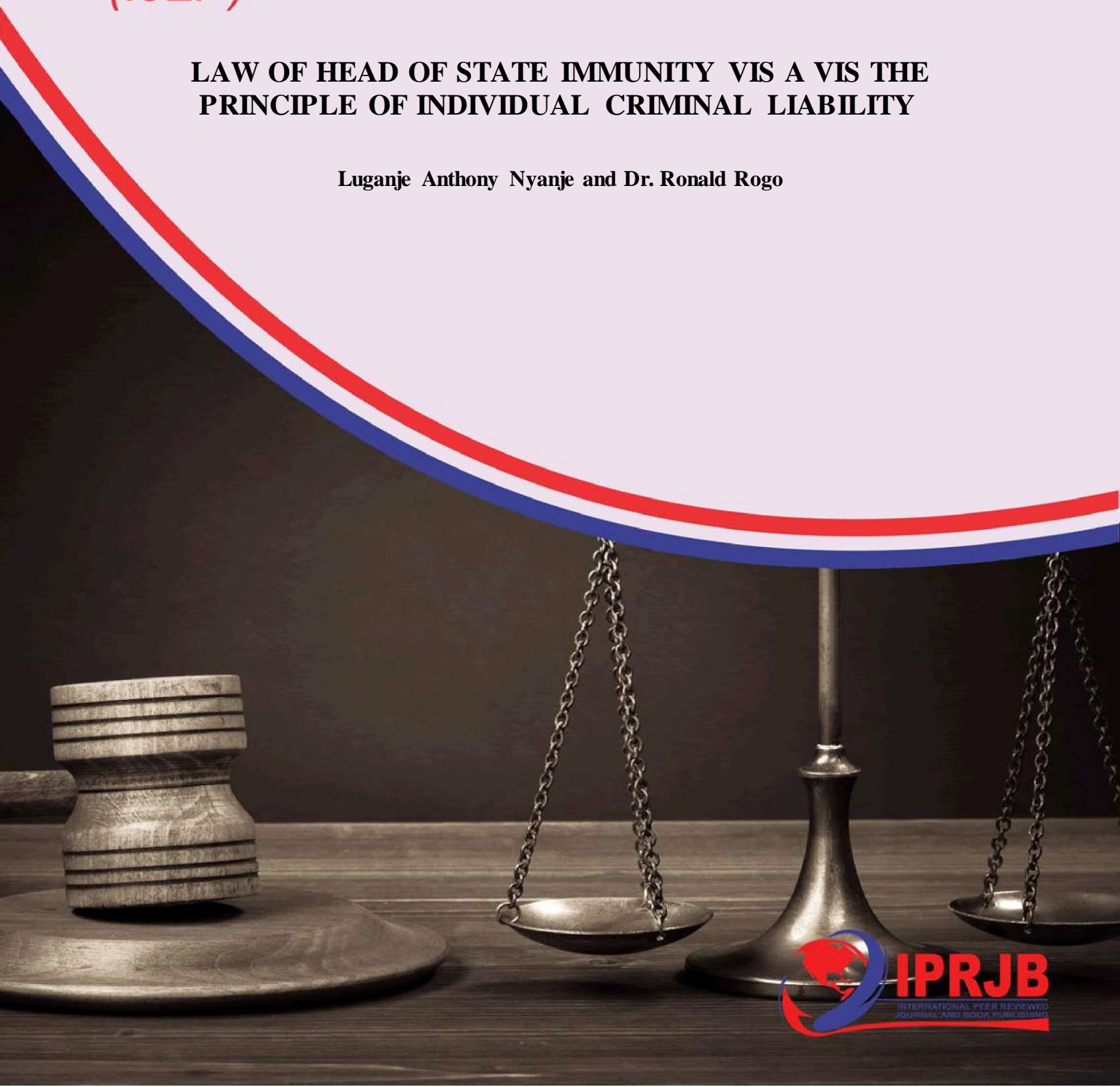


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LAW OF HEAD OF STATE IMMUNITY VIS A VIS THE PRINCIPLE OF INDIVIDUAL CRIMINAL LIABILITY

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Abstract

Purpose: Evaluate the relevance of the Law of Head of State Immunity against the principle of individual criminal responsibility.

Methodology: This descriptive and analytical discourse made constructive usage of both primary and secondary data. Primary data entailed basic documents *viz*; Constitutions, statutes, treaties as well the relevant resolutions by the United Nation. Secondary data comprised majorly of publications by most highly qualified publicists in the nature of Journals and Articles

Results: In the light of the foregoing research, it is true to assert that the in as far as the ICC jurisdiction is concerned; there exists a conflict between the principle of individual immunity and that of executive immunity. This conflict is resolved by the operation of a *jus cogens* principle of ICR with the effect of nullifying a mere international customary rule of jurisdictional immunities. Further, a party to the Rome Statute is bound by its provision among which is article 25 and 27 of the former. Consent to be bound by article 25 and 27 of the Rome Statute is an equivalence of a waiver of such immunities.

Unique contribution to theory, practice and policy: The ultimate object to resolution of the conflict between the two doctrines is this. That the 'most serious crimes of concern to the international community of states must not go unpunished.' Further that the objects and purpose of international criminal justice not to be defeated. The *Judgement of the International Military Tribunals, Trials of the Major War Criminals* case held that sole rationale of international criminal law regime is to attribute criminal liability to individuals without exception to their official capacity and most importantly to defeat the defence of official capacity or act of state. The position is further buttressed by an internal provision of fundamental importance, article 143 (4) of the Constitution of Kenya. This expressly waives the principle of executive immunity attached to the president for crimes committed within the jurisdiction of the ICC. Thus if this object must be met, the principle of executive immunity must not bar the principle of individual criminal responsibility.

Keywords: *State immunity, criminal responsibility, law, tribunal, trials, war criminals.*

1.0 INTRODUCTION

The presented research confined itself to a critical discussion of parallel and non-conflicting doctrines recognized within the realm of International Criminal Law. In separate details, provided in-depth expositions to the principle of Executive Immunity and Individual Criminal liability. The true intention is to evaluate the relevance of the Law of Head of State Immunity against the principle of individual criminal responsibility.

1.1 Statement of the Problem

The research centrally revolved around the legal problem in the application of two doctrines which have ‘hypothetically’ acquired a customary international law status.

It is appreciated that the progressive jurisprudence¹ that has been established clearly indicates an ‘incontestable’ favoritism in the application of one particular doctrine to the detriment of the other. The foregoing position questions the very essence of the Law of Head of State Immunity under International Criminal Law. Is it possible therefore that there exists, under Public International Law of which International Criminal Law is a branch, varying degrees of the binding nature of customary international law principles?

Of course the latter general concern seemingly might be simpler than it reads. However, the problem immediately becomes sophisticated when the doctrine in question is that of Individual Criminal Liability weighed against the principle of Executive Immunity- a non-appreciation of which would threaten the very collapse of the sacrosanct icon of constitutionalism as well as the ultimate symbol of national unity of a given State.

This thesis eventually is to suggest how best to sever the two doctrines. Most importantly, which one of these doctrines pre-empts the other and how far the principle of executive immunity can be of essence to a typical International Criminal Tribunal seized of an appropriate case.

1.2 Research Objective

- i. Evaluate the relevance of the Law of Head of State Immunity against the principle of individual criminal responsibility.
- ii. Asses the essence of State practice on the Law of Head of State Immunity under International Law even in the face of international crimes.
- iii. Evaluate whether articles 25, 27 of the Rome Statute, 143 (1) (e) of the Constitution of Kenya read together with Article 27 of VCLT actually absolute.

2.0 LITERATURE REVIEW 2.1 Theoretical Framework

The present research effectively adopts the natural law school of thought as opposed to the positivist school of thought. The distinction between the two as explained by Professor Malcolm

¹ The Prosecutor v. Duško Tadic, Case No.: IT-94-I-T, Trial Chamber II, 7 May 1997; see also

Article 25 and 27 of the Rome Statute as well Article 27 of VCLT read together with Article 143 (4) of the Constitution of Kenya.

N Shaw,² reflects the variant views of idealism-what the law ought to be and realism- what the law is.

The author however suggests that in order precisely to conceptualize the present research within the context of natural school of thought, the case of *The Speluncean Explorers*,³ ought to be centrally put as an important source of inspiration. In this case, the surviving spelunker respondents had killed and literally eaten the flesh of their companion, Roger Whetmore,⁴ on the ground of the necessity of survival. The Court of General Instances of Stowfield consequently convicted them to death by hanging. An application of error by the court was lodged. Foster J averred that; 'If the court declares under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense, no matter what happens to the individuals involved...'⁵ The only alternative, he reasons, to making a finding that the positive or enacted law may not otherwise compel the court to do that which 'we are ashamed of'⁵ is by way of 'appealing to a dispensation resting with the personal whim of the Executive.'⁶ This position is equivalent to an admission that the relevant positive law certainly is devoid of justice.

The fact of 'appealing to a higher dispensation...the Executive', is what creates the link to the present discourse. This is important most of all because it signifies the death of the force of positivism and the birth of a state of nature. For instance, going by the positivist school of thought, symmetrical to the penal law in *The Speluncean Explorers*' case, the *raison de'tre* of the doctrine of executive immunity must not matter anyway. It in fact becomes the province of the dictates of natural law when factors such as international political relations and international peaceful coexistence between nations must be achieved. Thus since the positive law, the 'state of civil society', is largely incapable of holding the jurisprudential gist of the present research, it is the 'state of nature' or rather that which the early jurists in Europe and America tagged as 'natural law' which is.

2.2 Empirical Review

Dapo Akande in his widely read article on *International law Immunities and the International Criminal Court*,⁷ closes the nearest boundary to the present research by seeking elementally to

² Malcom N Shaw, *International Law*, 6th edn, Cambridge University Press 2008 p 49. See also D. Lysons, *Ethics and the Rule of Law*, London, 1984; R. Dworkin, *Taking Rights seriously*, London 1977; H.L.A Hart, *The Concept of Law*, Oxford, 1961; P. Stein and J.Shand, *Legal Values in Wersten Society*, Edin Burgh, 1974, R. Dias, *Jurisprudence*, 5th edn, London, 1985.

³ *The Speluncean Explorers* (1949) in the Supreme Court of Newgarth, 430, per Foster J at Harvard Law Review Vol. 62, No. 4, February 194, a model of which is that of *R v Dudley Stephens* 14 Queens Bench Division 273 (1884). See also A.W.B. Simpson, *Cannibalism and the Common Law* (1984).

⁴ See also M.D.A Freeman, *LLyod's Jurisprudence*, 8th edn, Sweet & Maxwell, 2008 p 59.

⁵ *Supra* note 3.

⁵ The punishment of death by hanging the respondents.

⁶ *Supra* note 5 [Foster J].

⁷ Akande, *international law immunities and the international criminal court*, *The American Journal of International Law*, Vol. 98, No. 3 (Jul., 2004), pp. 407-433

assess the furthest a state official can rely on international immunities to prevent prosecution at the ICC. Among other things, he discusses on whether a state official suspected of committing an international crime in their state is protected from criminal prosecution by other states; essentially because of the significance of states' legal obligation within the precincts of *complementarity* doctrine under the Rome Statue- a legal expectation that domestic courts of state parties ought to make the ICC a court only of last resort.

The critical drift between Akande's discourse and the present research is that, while the former addresses solely the extent to which an international criminal suspect may comfortably rely on international immunities before the ICC, the latter not only broaches the doctrine of individual criminal liability as a new element, it also goes ahead to provide a comparative discussion of both executive immunity and the concept of individual criminal liability.

Dapo Akande and Sangeeta Shah in Immunities of State Officials, International Crimes, and Foreign Domestic Courts,⁸⁹ examine the extent to which state officials may be subject to prosecution in municipal courts. Besides identifying the immunities available under international criminal law, their curiosity only stretches to tear apart the issue of whether those immunities can be employed in cases where the respondent is accused of having committed an international crime. The present research assesses the viability of such immunities before the ICC. As has been fore stated, it also introduces the principle of individual criminal liability in comparison.

Asad G. Kiyani in Al-Bashir & the ICC: The Problem of Head of State Immunity,¹⁰ provides a serious consideration of the Law of Head of State Immunity but with a biased inclination to the Sudanese president. In it, he argues with emphasis that al-Bashir as Head of State, Sudan is still effectively protected under the principle of executive immunity. He however posits that the only way the ICC can impose its jurisdiction on him is firstly; where the customary international rules of treaties and immunities can be lifted by the Security Council or secondly; that the law of immunities already has an exception that nullifies the president protection. Kiyani's is enough of a subjective piece to the particularity of the circumstances and material facts pertaining to the Sudanese president, al Bashir. Further, it is devoid of a comparative analysis of the said immunity against the principle of individual criminal liability.

Christopher Gevers, Immunity and the Implementation Legislation in South Africa, Kenya and Uganda,¹¹ instructively addresses the significance of immunity with regards to the Rome Statute implementation legislation in South Africa, Kenya and Uganda. He further explains immunity within the conflicting correlation exclusively of Article 27 against article 98 of the Rome Statute.

⁸ Akande and Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, EJIL21 (2011),
⁹ –852

¹⁰ Kiyani G, *Al-Bashir & the ICC: The Problem of Head of State Immunity*, Chinese Journal of International Law (2013) 12(3): 467-508.

¹¹ Gevers C, *Immunity and the Implementation Legislation in South Africa, Kenya and Uganda*, Kai Ambos, Ott ilia A. maunganidze, African Expert Study Group on International Criminal Law edns, Vol 24, Gottingen Studies in Criminal Law and Justice, Universitatseverlag Gottingen 2012.

In the light of the AU decision on the arrest warrant of the Sudanese President al-Bashir, he examines whether executive immunity is the rationale for non-cooperation with regards to Article 98 on arrest and surrendering of individuals to the ICC.

In his article on *Immunity for International Crimes: A Reaffirmation of Traditional Doctrine*,¹² Xiaodong Yang comments, in brief details on the case of concerning *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.¹³ Although the latter is a *locus classicus* on the law of immunity for Head of States his commentary does not shadow the exposition of the present research in relation to the two doctrines.

Yoram Dinstein in *Diplomatic Immunity from Jurisdiction Ratione Materiae*,¹⁴ simply goes straight ahead to elucidate the critical distinction as well as the manner and extent of application of the diplomatic immunity *ratione materiae* and immunity *ratione personae*. He contends that whilst immunity *ratione materiae* is moulded to serve the needs of ‘ex-diplomats’ in the strict relation solely to acts of states-diplomatic functions, it co-exists albeit subtly side by side with immunity *ratione personae*, and only becomes active when the individual ceases to be a diplomat. On the other hand, Elies Van Sliedregt in *The Curious Case of International Criminal Liability*,¹⁵ attempts to provide a unique analysis of the concept of individual criminal liability. Professor Elies Van Sliedregt identifies two important features¹⁶ of the doctrine of individual criminal liability and further distinguishes the manner of its application both under domestic and international criminal jurisprudence. By the use of case analyses on the subject she argues that the variations of these very features are significant in bolstering the position of the concept of personal culpability. However, none of these variations has a bearing on matters regarding the law of head of state immunity which would have otherwise been similar to the present research.

3.0 RESEARCH METHODOLOGY

This descriptive and analytical discourse made constructive usage of both primary and secondary data.

Primary data entailed basic documents *viz*; Constitutions, statutes, treaties as well the relevant resolutions by the United Nation.

Secondary data comprised *majorly* of publications by most highly qualified publicists in the nature of Journals and Articles.

¹² Yang X, *Immunity for International Crimes: A Reaffirmation of Traditional Doctrine*, The Cambridge Law Journal, 61 [2002], pp 242-246

¹³ I.C.J. Reports 2002, p. 3

¹⁴ Dinstein Y, *Diplomatic Immunity from Jurisdiction Ratione Materiae*, The International and Comparative Law Quarterly, Vol. 15, No. 1 (Jan., 1966), pp. 76-89

¹⁵ Sliedregt E, *The Curious Case of International Criminal Liability*, J Int Criminal Justice (2012) 10 (5): 1171 ¹⁶ The two characteristics include the intrinsic feature and the extrinsic feature of the doctrine of Individual Criminal Liability.

4.0 THE PRINCIPLE OF EXECUTIVE IMMUNITY

Lord Wilkinson in *Pinochet case*¹⁶ opines that ‘immunity enjoyed by a [president] is complete immunity...rendering him immune from all actions and prosecutions.’¹⁷ This is the definition of the doctrine of executive immunity.¹⁸

The notion of executive immunity is ‘remnant of the dignity of the Majesty Kings and princess as well as that of the notion of State’s incarnation in its ruler.’¹⁹ It suffices to state, therefore that the doctrine of executive immunity is as old as it is important especially in the maintenance of international peace and security as well as the promotion of friendly relations within the realm of Public International Law.²¹ A careful analysis of the Fox’s averments identifies the principle of executive immunity as of the nature of a sovereign right. The aspect of this immunity forms one of the important bases of its existence which is to be explained later in this chapter.

Judicial literature on the legal implication of immunity of State Officials in foreign jurisdictions is profuse and firmly established. Marshall CJ in the case of *The Schooner Exchange v Mc Fadden*²⁰ rightly posited that whenever a sovereign, a State representative of a foreign State or a foreign army is present within the territory by consent then ‘it is to be implied that the local sovereign confers immunity from local jurisdiction.’²¹ From the outset, it is to be noted that the principle of executive immunity thrives on the concept of consent between nations.²² The *Gaddafi case*²³ in the French court of cassation adopted the argument that the status of international custom dictated that incumbent Heads of Government could not be prosecuted before criminal courts of foreign States.²⁴ Furthermore, Article 21 of the New York Convention on Special Missions²⁵ also establishes that the Head of State and Government, Ministers for Foreign Affairs and other persons of higher positions must be accorded immunity by the receiving State or any other third party State on top of privileges and immunity recognised under international law.²⁶

¹⁶ *Pinochet No. 3 [2000] 1 A.C. 147.*

¹⁷ See note 1 per Lord Wilkinson.

¹⁸ See also Orakhelashvili, *Pre-emptory Norms in International Law* (2000), at pp. 343.

¹⁹ H. Fox, ‘The Law of State Immunity’ 2nd edn 2008 at pp. 455-464.

²¹ See also the preamble of VCDR.

²⁰ *The Schooner Exchange v Mc Fadden* 11 US 116 (1812) US Sup Ct per Marshall CJ.

²¹ *Supra* Note 2.

²² *Supra* note [Akande & Sangeeta]

²³ *Gaddafi case* French Court of Cassation I.L.R., 490, 497 [2004].

²⁴ *Supra* note 9.

²⁵ New York Convention on Special Missions 1400 UNTS 231/9 ILM 127 (1970).

²⁶ Article 21 (2) provides ‘2.The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a Third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.’

The foregoing shows in brief details the jurisprudence that has been developed regarding the universal application of the principle of executive immunity.

The question under investigation regards the extent to which an incumbent Head of State can rely on this principle in an international criminal tribunal.

This chapter will question the validity and significance of the firmly established state practice on the application of the same and further assess its relevance in international criminal justice system. The chapter will elucidate the true basis of the doctrine of executive immunity, its rationale, the types of immunities recognised under international law, the state practice, its purported customary nature, the principle of executive immunity against crimes under the Rome Statute.

The basis of executive immunity

The doctrine of executive immunity gains key inspiration from the principles of independence of States, non-intervention²⁷ and the basic notion of sovereign equality between member states.²⁸ In fact, it is Fox's exposition that introduces executive immunity as one intrinsic sovereign right.³¹ In *Military and Para-military Activities in and against Nicaragua (Nicaragua v United States of America)*²⁹ in upholding the principle sovereign equality, *par in parem non habet imperium* stipulated that 'non-intervention is corollary to sovereign equality of States...the basis of State immunity over others.'³⁰ For a State to enjoy its sovereign independence, it must, among other things be capable fully to exert its sovereign right State Immunity.³⁴

There exists a crucial association between the law of Head of State Immunity and the doctrine of State immunity which broadly attaches to the immunity of a State including its officials and agents from the jurisdiction of other States.³¹ Immunity of a Head of State is a critical derivative of the principle of State Immunity. This proposition is further bolstered by the ancient notion of the 'incarnation of the State in its own ruler.'³² That the sovereign Head of State is the ultimate symbol of State and represents the latter in any foreign country that they visit.

Thus the act detaining or arresting the Head of State of a given country is tantamount to changing the government of that country in question, a mandate that is only exercised exclusively by the citizens of that State.³³ There cannot be act of an extreme form of interference into the affairs of

²⁷ Charter of the United Nations Article 2(4).

²⁸ Charter of the United Nations Article 2(1). ³¹

Supra note 1 [Fox].

²⁹ *Military and Para-military Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 at para 202.

³⁰ Supra note 16.

³⁴ Supra note 16.

³¹ Anthony Aust, 'Handbook of International Law' (2nd edn Cambridge 2010) at pp. 127.

³² Supra note 1[Fox] at pp. 445.

³³ For instance, The Constitution of Kenya Article 1 (2) states that 'The people may exercise their sovereign power either directly or through their democratically elected representatives.'

another State as this. Such an act effectively violates the principle of non-interference against another State and by consequence, the principles of sovereign equality and independence.

The preamble of the Vienna Convention on Diplomatic Immunity³⁴ introduces yet another underpinning of the principle of executive immunity. It proposes that the reason for existence of international immunities and privileges is not to the advantage of individuals but majorly to guarantee the efficient performance of diplomatic missions in the host State.

Current Legal Position Regarding The Doctrine Of Executive Immunity

Two types of international immunities may apply to a diplomatic mission under different circumstances.³⁵ They include immunity *ratione materiae* and immunity *ratione personae*.⁴⁰ However, this chapter will focus on the immunity *ratione personae* since it is that which generally applies to a Head of State.⁴¹

Immunity ratione personae

Article 13(2) of the Vancouver Resolution which was adopted by the *Institut de Droit International* states that;

‘In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of foreign State for any crime he or she may have committed, regardless of its gravity.’³⁶

This proposition was bolstered by Lord Hope in the case of *Pinochet*.⁴³ Further, Oppenheim⁴⁴ deduced that in the event a Head of State is sued in a foreign municipal court he indubitably enjoys jurisdictional immunity *ratione personae*.³⁷

Jurisdictional immunity *ratione personae* covers both the private and official acts of the person.³⁸ It is created to serve only specific state officials.³⁹

While immunity *ratione personae* is not a permanent, immunity *ratione materiae* is.⁴⁸ This is because the former involves general acts pertaining to the individual while the latter concerns acts of a State⁴⁹ which must be permanent.⁵⁰

³⁴ VCDR preamble para 4.

³⁵ Supra note 14 pp. 76-89. ⁴⁰ Supra note 23. ⁴¹ Oppenheim, ‘International law, I,’ 1038 (Jennings and A. Watts eds., 9th ed., 1992).

³⁶ *Institut de Droit International*, Resolution, ‘Immunities from Jurisdiction and Execution of Heads of State and Government in International Law,’ 69 AIDI 743, 753 (Vancouver, 2001) (Article 13(2)) ⁴³ *Ex parte Pinochet Ugarte* (No.3)(House of Lords), [1999] 2 ALL ER 97, 152 ⁴⁴ Supra note 25.

³⁷ Jurisdictional immunity *ratione personae* applies to Heads of State though it has similar legal implications to that of diplomatic immunity *ratione personae* for diplomats.

³⁸ Supra note 23 [Y Dinstein].

³⁹ Concepción Escobar Hernández, Second report on the immunity of State officials from foreign criminal jurisdiction, International Law Commission Sixty-fifth session Geneva, 6 May-7 June and 8 July-9 August 2013 at para 50.

The term of a diplomat commences at the time he enters the territory of the receiving state.⁵¹ It ends when they return to the sending state or within the lapse of a reasonable period of time when they remain in the receiving state.⁵²

The Customary Nature of Head of State Immunity

The issue under investigation regards the status of binding nature of that the principle of executive immunity under international law.

Is the principle of executive immunity an international customary rule?

Article 38 (1) of the Statute of the International Court of Justice enlists some of the sources of Public International Law. Among the four enlisted is Article 38 (1) (b) which provides that 'international custom, as evidence of a general practice accepted as law' shall form one of the inherent sources of International Law.

A conventional account of claiming that a certain norm such as the Head of State Immunity is actually an international customary one is by way of assessing the behavioural conduct States. It is reasonable to deduce that the formation of an international custom is an on going process⁵³ and does not stop the time a norm is said to have been created. The foregoing proposition is in tandem with the standard theory of a uniform and consistent state practice as a basis for the determination of an international custom.⁵⁴ It thus must be evidenced in the general regularity in application. Dan

⁴⁸Art. 20 of the Havana Convention (155 L.N.T.S. 269) and Art. 39 (2) of the Vienna Convention on Diplomatic Relations (Vienna Records, Vol. 2, p. 86). In the legal literature see American Draft, p. 354 (Art. 29); Hill, 'Sanctions Constraining Diplomatic Representatives to Abide by the Local Law' (1931) 25 A.J.I.L. 252-269 at 258; American Institute of International Law, Diplomatic Agents (1925), (1926) 20 American Journal of International Law, (A.J.I.L.) Supp. 350-355; Jones, "Termination of Diplomatic Immunity" (1948) 25 British Year Book of International Law 262-279 at 262-275.

⁴⁹ The Supreme Court of Israel in *Attorney General of Israel v. Eichmann* 36 ILR 277, 308-09 (Sup. Ct. 1962) asserted that;

'The theory of "Act of State" means that the act performed by a person as an organ of the State-whether he was Head of the State or a responsible official acting on the Government's orders-must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefor, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of States based on their sovereignty.'

⁵⁰ Supra note [Yoram] at pp. 84

⁵¹ Article 39 (1) of the Vienna Conventions on Diplomatic Relations. ⁵²Article 39 (2) of the Vienna Conventions on Diplomatic Relations.

⁵³ M.H. Mendelson, "The Formation of Customary International Law", 272 *Recueil des Cours* (1998), 155, 188; See also K. Wolfke, "Some Persistent Controversies Regarding Customary International Law", *Netherlands Yearbook of International Law*, 24 (1993) 1, 15.

⁵⁴ *Asylum (Columbia. v Peru)* 1950 I.C.J. 266, 277, defined a custom as 'a constant and uniform practice accepted as law.'

Bodansky has correctly enunciated that the generality in practice is not to be inferred from uniformities in the conduct of a number of States but rather, in the regularities of a particular behaviour of States.⁴⁰

Such regularity in behaviour standing alone does not amount to a custom within the ambit of Article 38 (1) (b) of the Statute of the ICJ. The internal element, *opinio juris sive necessitatis* must be extant. This requisite component ensures that there exist a congruence between the custom (the non-binding but observable behavioural character of States) and the existing rules for it to be accepted as a legally binding custom.⁴¹ Further, the ICJ in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*⁴² pronounced that for a principle to be settled as customary in nature the behaviour of States in question must be ‘absolutely in rigorous conformity with the rule.’

Michael Wood,⁴³ a special rapporteur to the International Law Commission rejects the notion of ‘formation’ of an international norm because it presents an impending ‘risk of broadening the whole topic and making it too theoretical. He suggests that ‘identification’ other than ‘formation’ should be the central issue.

In *Prosecutor v Tadic* case, it was averred that;

‘In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.’⁴⁴

The aforementioned judicial decisions in this area notably from the antique case of *The Schooner Exchange v Mc Fadden*,⁶⁰ the *Gaddafi case*⁴⁵ in the French Court of Cassation to landmark case of the *Arrest Warrant case*⁴⁶ have established the complete and inviolability of state officials in foreign jurisdictions as an international customary rule. In paragraph 58 of the judgement of the *Arrest Warrant case*, the court did not find any form of exception under international customary

⁴⁰ Bodansky D, ‘Customary (And Not so Customary) International Environmental Law’ Indiana Journal of Global Legal Studies, Vol. 3, No. 1, Symposium: International Environmental Laws and Agencies: The Next Generation (Fall, 1995), pp. 105-119.

⁴¹ Supra note 62 [Bodansky] at pp. 109.

⁴² *Military and Para-military Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14.

⁴³ Wood M, First report on formation and evidence of customary international law, International Law Commission Sixty-fifth session Geneva, 6 May-7 June and 8 July-9 August 2013.

⁴⁴ Supra note 1. see also *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, para. 73 provides that ‘for the purposes of the present case the most pertinent State practice is to be found in national judicial decisions.’ ⁶⁰Supra note 29.

⁴⁵ Supra note 32.

⁴⁶ Supra note 13.

law of any form of exception to the rule on immunity from criminal jurisdiction and inviolability to an incumbent Minister of Foreign Affairs suspected to having committed war crimes and crimes against humanity within the jurisdiction of national courts.⁴⁷

Concepción Escobar Hernández,⁴⁸ special rapporteur to the International Law Commission also recognizes executive immunity as having acquired international customary law status. Further, Daniel Bodansky has also appreciated accentuated the same position.⁶⁵

It is in order therefore to affirm that indeed the executive immunity is an international customary law.

International customary rules are binding on all states with an exception of States that have dissented from the said custom the time it emerged. This was held by the ICJ in the *North Sea Continental Shelf* cases.⁴⁹

Although article 27 of the Rome Statute seem to annul the principle of executive immunity, chapter four will address the issue of whether there exists ways into which executive immunity can effectively invoked and pleaded by senior officials such as Heads of State in international criminal tribunals.⁵⁰ This argument will crystalize the possible lacunae of the Rome Statute created by the dint of Article 98(1) which restrains a third state from arresting the said official if doing so would be violating. It will contend that article 25 of the Rome Statute on irrelevance of official capacities actually may not be as absolute.

THE PRINCIPLE OF INDIVIDUAL CRIMINAL RESPONSIBILITY

The sole rationale that holds together the existence of international criminal law regime is to attribute criminal liability to individuals without exception to their official capacity and most importantly to defeat the defence of official capacity or act of state.⁵¹ Indeed, the foundation of criminal responsibility is the principle of personal culpability.⁵²

⁴⁷ Supra note 13.

⁴⁸ Hernández C, Second report on the immunity of State officials from foreign criminal jurisdiction, International Law Commission Sixty-fifth session Geneva, 6 May-7 June and 8 July-9 August 2013 at para 31. ⁶⁵ Supra note 62[Bodansky] at pp. 108.

⁴⁹ The *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 38, 130; 41 ILR, pp. 29, 67, 137; T. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard International Law Journal*, 1985, p. 457, and J. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 BYIL, 1985, p. 1. See also Malcom Shaw, 'International Law' 6th edn Cambridge University Press, 2008 at pp. 91.

⁵⁰ *Prosecutor. Blaskic* No. IT-95-14-AR 108 bis (Oct. 29, 1997), 110 ILR6 09,707.

⁵¹ Judgement of the International Military Tribunals, Trials of the Major War Criminals, 1947, Official Documents, Vol 1, p 223.

⁵² *Tadic* at para 186.

International criminal law on anti-war instruments pre-existed prior to the notable Nuremberg and Tokyo Trials. The earliest records thus date back in 1474 to an international criminal tribunal in Germany, the trial of Peter Von Hagenbach which interestingly depicted the notion of individual criminal responsibility. Peter Von Hagenbach was convicted of murder, rape and such other crimes which 'he as a knight was deemed to have a duty to prevent.'⁵³

The Hague Convention (IV) of 1907 Reflecting the Laws and Customs of War on Land⁵⁴ marks the first effort of codification of the principle of Individual Criminal Responsibility albeit it was not comprehensively encapsulated.⁵⁵ The Additional Protocol 1 to the Geneva Conventions of 1949⁵⁶ however provided the most effective codification of what the doctrine of Individual criminal responsibility under article 82.⁵⁷

The Nuremberg Trials

The Nuremberg Trials is a name generally coined for a set of two Nazis Trials who participated both in the Second World War and the Holocaust. It is recorded as one of the efforts in the jurisprudence of the International Criminal Law that had the most far reaching effects.⁵⁸ The charter of Nuremberg at article 7 stated that;

'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.'⁵⁹

This position was further affirmed in the *Farben case*.⁶⁰ Nuremberg Trials are known for the founding of the principle of individual criminal responsibility.

The International Military Tribunal for the Far East (Tokyo Tribunal)

It was the General Douglas MacArthur who established the Tokyo Tribunals.⁶¹ The charter that governed the Tokyo tribunal was similar to that of the Nuremberg Trial.⁶²

⁵³ Parks W, 'Command Responsibility for War Crimes' (1973) 62 Military Law Review at 1-5.

⁵⁴ Article 1 of the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

⁵⁵ Available at <http://www.icrc.org/ihl/INTRO/195?OpenDocument> < accessed on the 20th May 2014 at 1230hrs>.

⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Also available at <http://www.icrc.org/ihl/INTRO/470> <accessed on the 20th May 2014 at 1239hrs>.

⁵⁷ Supra note 5.

⁵⁸ Lord Justice Lawrence speech at The Trials of The Major Criminals by the IMT on the 14th November 1945. Also recorded in American Journal of International Law, 43 (1949) pp. 223.

⁵⁹ Article 7 of the Nuremberg Treaty.

⁶⁰ *United States v. Carl Krauch et al (The Farben Case), Trials of War Criminals*, Vol. VIII, p. 1179.

⁶¹ Available at http://en.wikipedia.org/wiki/International_Military_Tribunal_for_the_Far_East <accessed on the 18th of May 2014 at 1600hrs>.

⁶² Supra note 9.

The main issue that the court had to determine was inter alia whether individuals comprising the government of the accused aggressor state could be held individually responsible for their respective acts under the international criminal justice system.⁶³

There were numerous counts of violation of rules of custom of war.⁶⁴ More than twenty-eight respondents were convicted.⁶⁵ Out of those, seven were sentenced to death by hanging and the rest earned a lifetime in prison. The judgements were rendered without due regard to the relevance of official capacity.⁶⁶

This chapter is set to address in detail the current legal position of the doctrine by way of examining the nature of its application. It is important to note from the outset that this analysis forms the most important part of this paper. This is because it is from this doctrine of ICR against the principle of executive immunity is to be assessed.

As such, an appreciation of the underpinning of ICR ought to be rendered.

The basis of ICR doctrine

The basis of the ICR doctrine was understood by the Appeal Judges in *Tadic* when they firmly upheld the principle *nulla poena sine culpa*;

'The foundation of criminal responsibility is the principle of personal culpability; that nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated.'⁶⁷ The principle of ICR has a personal element by way of attribution. In no circumstance must one carry the burden of criminality of the other. ICTY President, Antonio Cassese as he then was correctly stipulated;

'Establish that not all Germans were responsible for the Holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats, or Hutus but individual perpetrators -- although, of course, there may be a great number of perpetrators.'⁶⁸

⁶³ *International Military Tribunal for the Far East, judgment* of 12 November 1948, in John Pritchard and Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial*, Vol. 22

⁶⁴ See note 87 above.

⁶⁵ They Include, Agastaraki, Sadao; Dihihara, Kenji; Hashimoto, Kingoro; Hata, Shunroku; Hiranuna, Kiichiro; Hirota, Koki; Hoshino, Naoki; Itagaki, Seishiro; Kaya, Okinori; Kido, Koichi; Kimura, Heitaro; Koiso, Kuniaki; Matsui, Iwane; Matsuoka, Yosuke; Minami, Jiro; Muto, Akira; Nagano, Osami; Oka, Takasumi; Okawa, Shumei; Oshima, Hiroshi; Sato, Kenryo; Shigemitsu, Mamoru; Shimada, Shigetaro; Shiratori, Toshio; Suzuki, Teiichi; Togo, Shigenori; Tojo, Hideki; Umezumi, Yoshijiro.

⁶⁶ Article 7 of the Tokyo Tribunal Charter.

⁶⁷ *Tadic* at para 186 of the judgment of the case. See also national case laws on the subject, viz; *R v Dalloway* (1847) 3 Cox CC.

⁶⁸ Supra note 1.

The statement sturdily holds a candid illustration of the rationale of ICR; which is the preclusion of the notion of collective guilt or guilt by association.⁶⁹

The current position regarding the principle of individual criminal responsibility

Presently, this doctrine has been adopted by the Rome Statute,⁸⁷ the ICTY⁸⁸ and the ICTR⁷⁰ statutes including internal laws of fundamental importance,⁷¹ acts of parliament that impute state obligation by way of domestication of the relevant ratified conventions.⁷² This discussion will examine how this doctrine has been applied with reference to the aforementioned jurisprudences.

The nature of the principle of Individual Criminal Responsibility

The principle of individual criminal responsibility is a transposition of the doctrine of personal culpability at the municipal level. The former however has developed gradually to functionally cater for the practical dynamism of international criminal law. Thus as Prof Elies van Sliedregt observes there exist a substantial difference between the two.⁹²

It has both intrinsic and extrinsic features. Intrinsic in the manner that it goes to root of the nature of international crimes on one hand and extrinsic that it ascribes to the Cassese's notion of 'international' the developing nature the international rules.⁷³ The following analysis that ensues will not pedantically rely on Prof Elies' exposition. It will however attempt to explain in details the most elemental tenets of ICR.

Direct Individual Criminal Liability

The ICC approach on the concept of Direct Individual Criminal Liability albeit the fact that it unique is yet to develop.⁷⁴ However, the inspiration that can be drawn from the practice in the ICTY and ICTR is that a person may be held directly liable if they planned, instigated, ordered, committed or otherwise aided, and abetted in the planning, preparation or execution of a crime.⁹⁵ The critical elements under investigation according to Article 7(1) of the ICTY Statute and 6(1) of the ICTR Statute will include;

Planning,

Instigation,

⁶⁹ Supra note 17[Falco]. ⁸⁷

Rome Statute Article 25(3)

⁸⁸ ICTY Article 7.

⁷⁰ ICTR Article 6.

⁷¹ For instance Article 27 para 1 of the Italian Constitution on *La Responsibilita penale e personale* (that Criminal responsibility is personal.)

⁷² For instance the Article 121-1 of the French Code Penal; International Crimes Act of Kenya section ⁹²

Supra note 15.

⁷³ Supra note 19 [Cassese].

⁷⁴ Part 6 Sections L-N, International criminal law training materials for the Extraordinary Chambers in the Courts of Cambodia International Criminal Law Services and Open Society Justice Initiative February 2009 version, para 9. ⁹⁵ Article 7(1) of the ICTY Statute and 6(1) of the ICTR Statute.

Ordering,

Committed,

Aided and abetted.⁷⁵

Planning

The act of planning was defined in *Prosecutor v. Akayesu*⁷⁶ to mean a contemplation of the plan by either one or more persons at both preparatory stage and the execution phase.⁹⁸ The *actus reus* thus is the actual designing of the sketch in violation of the relevant statutory provisions but upon which the crime is to be executed by the accused. The ruling in *Prosecutor v. Kordic and Cerkez*⁷⁷ has established that it is sufficient for the prosecution to demonstrate it was the planning that essentially contributed to the commission of the crime.

On the other hand, the *mens rea* is effected the moment it is shown that the accused used the planning with the intent to commit the crime. If they laboured under the awareness that the execution of such a design is likely to lead to the commission of those crimes then the court can correctly impute an acceptance of the crime themselves by the accused.⁷⁸

Instigating

When one instigates the commission of a crime, they incite, solicit others, the principal offenders to do the crime in question. Mere facilitation or persuasion does not amount to instigation. Instigation can be understood better if distinguished from both ordering and aiding and abetting a crime. Firstly, it differs substantially from the 'ordering' in that, unlike the latter, it does not require the extant of superior subordinate relationship.

SCSL Trial Chambers in *Prosecutor v. Fofana & Kondewa*⁷⁹ explained that while instigating essentials a causal link, aiding and abetting does not.

Generally, in order that a charge of instigation holds, the actual commission by the prime offender must actually have occurred and successfully proved. The only exception that attaches to this rule concerns the crime of genocide.⁸⁰ Instigating the crime of genocide will always be sufficient, whether or not the commission actually happens is immaterial.⁸¹

⁷⁵ Supra note 1.

⁷⁶ *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, para. 480;

⁹⁸ Supra note 104.

⁷⁷ *Prosecutor v. Kordic and Cerkez*, Judgement, Case No. IT- 95-14/2-A, App. Ch., 17 December 2004, para. 26.

⁷⁸ Supra note 106.

⁷⁹ *Prosecutor v. Fofana & Kondewa*, Judgement, Case No. SCSL-04-14-A, App. Ch., 28 May 2008, para. 54.

⁸⁰ *Prosecutor v. Rutaganda*, Judgement and Sentence, Case No. ICTR-96-3-T, T. Ch. I, 6 December 1999, para. 38.

⁸¹ Supra note 109.

The mental element for instigation is affirmed by the intention to incite or exacerbate the criminal conduct or with the reasonable knowledge that a likelihood of the commission of such a crime may in fact occur.⁸²

Ordering Ordering ordinarily means ‘instructing’ a person to behave in a certain fashion. From the outset, it follows that this is only possible where there is a superior subordinate relationship.¹⁰⁵ *Prosecutor v. Blaskic*⁸³ has reasoned that the act of ‘ordering’ needs a positive action from the superior.⁸⁴ An omission cannot amount to an ‘order.’⁸⁵

The foregoing position is not the same to cases whereby the superior to orders omissions of which according they fully are aware that such an omission has the likelihood that can result into the commission of a crime.⁸⁶

Having the authority to order as held in *Prosecutor v. Gacumbitsi*⁸⁷ is a question to be inferred from the facts of the case. Official superior subordinate relationship need to exist.

Committed

This demands that there be either personal or physical presence of the offender. The mental element is a simple intention to accept consequences by inference of the persons conduct.

On commission by omission, ICTR Trial Chambers in *Prosecutor v. Naletilic and Martinovic*⁸⁸ held⁸⁹ that an omission will be effected only the following conditions are met; There has to be a legal duty to act.

It has to be shown that the accused had the capability to perform that duty.

Failure to act by the accused person so as to intend to accept the criminal liability.

That such a failure substantially caused the criminal conduct.⁹⁰

⁸² *Prosecutor v. Brdanin*, Judgement, Case No. IT-99-36-T, T. Ch. II, 1 September 2004, para. 269; ¹⁰⁵Supra note 37.

⁸³ *Prosecutor v. Blaskic*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 660.

⁸⁴ Supra note 23.

⁸⁵ *Prosecutor v. Galic*, Judgement, Case No. IT-98-29-A, App. Ch., 30 November 2006, para.176.

⁸⁶ Supra note 21 at para. 42.

⁸⁷ *Prosecutor v. Gacumbitsi*, Judgement, Case No. ICTR-2001-64-A, App. Ch., 7 July 2006, paras. 181-183.

⁸⁸ *Prosecutor v. Naletilic and Martinovic*, Judgement, Case No. IT-98-34-T, T. Ch. I, 31 March 2003, para.

⁸⁹ ; see also *Prosecutor v. Ntagerura*, Judgement, Case No. ICTR-99-46-T, T. Ch. III, 25 February 2004, para. 659.

⁹⁰ Supra note 118.

Aided and abetted

Aiding and abetting is the minimum form of involvement in a criminal commission. It either involves practical assistance, encouragement or moral support to the principal offender⁹¹ before, during or after the commission of the crime.⁹²

Further, the actual commission of the crime upon which it is claimed to have been aided and abetted must have occurred.¹¹⁵

Nonetheless, it is unnecessary to demonstrate that a direct casual link to the actual commission of the crime. It is sufficient if the effect was significant.⁹³

If a commander allows the machineries under him to be utilised to succour in the commission of a crime, the *actus reus* for aiding and abetting that crime can be inferred.⁹⁴

In *Prosecutor v. Brima, Kamara & Kanu*⁹⁵ it was held that where a commander has always been failing to prevent or punish their inferiors for a considerable period of time, the court may hold them liable for aiding and abetting such crimes.

Joint Criminal⁹⁶ Enterprise

The doctrine of JCE is explained not as a constituent of the principle of individual criminal responsibility but as a medium through which the latter applies. Further that a holistic reading of article 25 of the Rome Statute which specifically governs the law on ICR broaches elements of Joint Criminal Enterprise.⁹⁷

Prof Randle C. De Falco further observes that crimes under article 5 of the Rome Statute do not entirely depend on the proclivity of single individuals but rather, a collective effort of a number of individuals.⁹⁸ As a matter of fact, the paradigm underneath commission of heinous crimes of international concern has it that it is hardly possible for a single individual to commit mass killings without the collective efforts of a few other individuals. Yet it is of essence that whenever such a completion occurs, each and every of these individuals must be held by their own names. The prosecutor's averments that went un-rebutted by the Judge Advocate in *Jepsen and Others* posited a clear illustration of JCE when he stated that;

⁹¹ See *Prosecutor v. Delalic et al. (Celebici case)*, Judgement, Case No. IT-96-21-T, T. Ch. IIqtr, 16 November 1998, para. 327.

⁹² *Prosecutor v. Blagojevic and Jokic*, Judgement, Case No. IT-02-60-A, App. Ch., 9 May 2007, para. 127; ¹¹⁵ Refer to the definition of aiding and abetting at note 121.

⁹³ See *Tadic* judgement at para 199.

⁹⁴ *Prosecutor v. Krstic*, Judgement, Case No. IT-98-33-A, App. Ch., 19 April 2004, paras. 137, 138, 144;

⁹⁵ *Prosecutor v. Brima, Kamara & Kanu*, Judgement, Case No.: SCSL-04-16-T, T. Ch. II, 20 June 2007, para.

⁹⁶ .

⁹⁷ Article 25 (3) of the Rome Statute.

⁹⁸ See also the obiter dicta in *Prosecutor v. Tadic*, Judgement, Case No. IT-94-1-A, App. Ch., 15 July 1999 at para

¹²¹ *Trial of Gustav Alfred Jepsen and Others*, Proceedings of War Crimes Trial held at Luneberg, Germany (13-23 August, 1946), judgement of 24 August 194 at pp. 241.

'If Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act.'¹²¹

Thus it follows therefore that there exists a critical link between the principle of individual criminal responsibility and that of joint common enterprise. The doctrine of ICR is not to be strictly interpreted to the original individual perpetration of an international crime. In fact, the concept of JCE has been settled as a mode of personal culpability⁹⁹ as established in *Tadic* case. It is broad enough to materially apply to modes of involvement in the perpetration of a crime where a number of individuals engage to execute a common criminal intent. It may be committed jointly or by a distinct group of persons all of whom are geared to the common object of making a criminal act. In this particular setting the court is tasked to sever using established standards of threshold of contribution to ascertain each person's individual criminal responsibility. This proposition is purely hinged on established norms under international customary law jurisprudence.¹⁰⁰

It is to be noted that even where a treaty provision on doctrine of ICR does not expressly refer to the concept of JCE, jurisprudence of the ICTY has established that the word 'commission' under article 7 encompasses JCE.¹⁰¹ Ultimately, no one should be burdened with another's criminal liability.

There exist several defences under international criminal law.¹⁰² Of concern to this research is the defence of official capacity. The jurisprudence of the Nuremberg Trials¹⁰³ like that of the current one has had to establish that defence of official capacity especially before the ICC is irrelevant and should not be considered as a mitigating factor.¹⁰⁴ Whether this is absolute law against the law on Head of state immunity is a matter to be interrogated in the next Chapter. As such, a detailed

⁹⁹ C. Barthe, Joint Criminal Enterprise (JCE)—*Ein (originar)volkerstrafrechtliches Haftungsmodell mit Zukunft?*, 2009; A. Cassese, International Criminal Law, 2008, 2nd edn, 187.

¹⁰⁰ The jurisprudence on joint criminal enterprise and its correlation with that of IDR has been established in the following seven major decisions; *Prosecutor v. Tadic*, Judgement, Case No. IT-94-1-A, App. Ch., 15 July 1999; *Prosecutor v. Krnojelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003; *Prosecutor v. Vasiljevic*, Judgement, Case No. IT-98-32-A, App. Ch., 25 February 2004; *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004; *Prosecutor v. Stakic*, Judgement, Case No. IT-97-24-A, App. Ch., 22 March 2006; *Prosecutor v. Brdanin*, Judgement, Case No. IT-99-36-A, App. Ch., 3 April 2007 and *Prosecutor v. Martić*, Judgement, Case No. IT-95-11-A, App. Ch., 8 October 2008.

¹⁰¹ *Prosecutor v. Tadic*, Judgement, Case No. IT-94-1-A, App. Ch., 15 July 1999, para. 190; *Prosecutor v.*

Vasiljevic, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 95; *Prosecutor v. Krnojelac*, Case No.

IT-97-25-A, Judgement, 17 September 2003, paras. 28-32, 73.

¹⁰² These may include official capacity, self defence, superior or government orders, duress, necessity, mental disease or defect, alibi, intoxication, reprisals, *tu quoque* etc.

¹⁰³ Article 5 ILC Code; See also *United States v. Carl Krauch et al (The Farben Case)*, Trials of War

Criminals, Vol. VIII, p. 1179.

¹⁰⁴ Article 27 of the ICC Statute.

discussion of the analysis of both the doctrine of executive immunity and ICR will be hosted in the ensuing Chapter.

Executive Immunity Vis A Vis Individual Criminal Responsibility

The two immediately preceding Chapters have elucidated the doctrine of executive immunity and individual criminal responsibility in great but separate breadths. The present Chapter merges the two and takes a much closer examination of both the principle of executive immunity and that of Individual Criminal Responsibility. It will first explain how they correlate. Secondly and most essentially, it will address the issue of whether or not one presides over the other. Thirdly, going by the determination of the foregoing issues, it will provide a finding on whether article 25, 27 of the Rome Statute and article 143 of the Constitution of Kenya are in fact absolute provisions. Eventually, this extract will suggest how best to sever and apply the two doctrines.

At this stage, it is important to appreciate from the outset of things that the exposition of the two principles will fundamentally be made with specific reference to the international jurisdictions.¹⁰⁵ This is to mean that it will not focus on the applicability or non applicability of the principles on domestic foreign jurisdictions.

Whether the principle of Executive Immunity pre-empts that of Individual Criminal Responsibility. The debate on which of these principles pre-empt the other implicitly seeks to examine the absoluteness of articles 25 and 27 of the Rome Statute on Individual Criminal Responsibility and irrelevancy of official capacity respectively.

First of all, the relationship between executive immunity and individual criminal responsibility per the ruling in *Arrest Warrant* case is that of a rule of procedural character and substantive law. As established in that case, while jurisdictional immunity is procedural in character, individual criminal responsibility is a matter of substantive law.¹⁰⁶

Further in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*,¹⁰⁷ the International Court of Justice explained the difference between a substantive rule and one of the procedural in nature. Those, unlike rules of procedural in nature, substantive rules such as those of *jus cogens*, decide the lawfulness or unlawfulness of an action whether directly or indirectly.¹³¹ This substantive-procedural distinction is not only important both in domestic and international law, but also, with regards to this paper it establishes the argument that these two doctrines are

¹⁰⁵ International jurisdiction for purposes of this paper means international criminal tribunals (such as the International Criminal Court) that have relevant mandate to nationals of party states to the Rome Statute.

¹⁰⁶ *Arrest warrant* at para 60.

¹⁰⁷ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012. The judgment and all other materials related to the ICJ are available on the Court's website at www.icj-cij.org.¹³¹ *Supra* note 137 at para 58.

separate concepts and therefore, generally they cannot be in conflict.¹⁰⁸ Notable protagonists of this theory of substantive-procedural distinction argue that since they are entirely separate and non conflicting concepts, the operation of a rule of procedural character does not automatically invalidate a rule of *jus cogens*.¹⁰⁹ For instance, Prof Stefan Talmon draws the illustration of article 26 of the Rome Statute on exclusion of the court's jurisdiction on persons under the age of 18 as a rule of procedural character of personal immunity for under 18 year-olds.¹¹⁰ He argues that the fact that a 17 year old has committed a serious international crime does not mandate the court to automatically violate article 26 of the Rome Statute which is a rule of procedural character however serious the *jus cogens* crime committed. He observes that;

'Probably not even proponents of a strict normative hierarchy with *jus cogens* at its apex would call into question this procedural bar to the ICC's jurisdiction...as a rule of personal immunity of under-18-year-olds [it] demonstrates that rules of *jus cogens* do not automatically displace rules of immunity.'¹¹¹

Irrelevance of official capacity Article 27 of the Rome Statute

There exist more than ten defences under international criminal law.¹¹² Of concern to this research is the defence of official capacity. The jurisprudence of the Nuremberg Trials was that while official capacity could not hold as a defence *per se*, it was to be considered as a mitigating factor.¹¹³ Contrastingly, the defence of official capacity especially before the ICC is deemed irrelevant and should not be considered as a mitigating factor.¹¹⁴

Thus the persuasiveness of this theory suddenly becomes weak especially in the face of article 27 (2) of the Rome Statute which provides as follows;

'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'¹¹⁵

It is clear from article 27(2) that any special procedural rules that may be associated with state officials cannot stand as a bar to eminent arrest and prosecution by the International Criminal Court.

Commentators¹¹⁶ have pointed out article 27(2) of the ICC Statute introduces a completely new legal position that has never before existed in the realm of International Criminal Justice. It has not

¹⁰⁸ See also Stefan Talmon '*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished'; Contra G. Schwarzenberger, *International Law*, Vol. 1 (1957), 584, 611.

¹⁰⁹ Supra note 139 [Talmon].

¹¹⁰ Supra note 139 [Talmon].

¹¹¹ Supra note 139.

¹¹² These may include official capacity, self defence, superior or government orders, duress, necessity, mental disease or defect, alibi, intoxication, reprisals, *tu quoque* etc.

¹¹³ Article 5 ILC Code; See also *United States v. Carl Krauch et al (The Farben Case)*, Trials of War Criminals, Vol. VIII, p. 1179.

¹¹⁴ Article 27 of the ICC Statute.

¹¹⁵ Article 27(2) Rome Statute.

¹¹⁶ Supra note [Akande D] at pp. 420.

pre established in any of the jurisprudence of Nuremberg, Tokyo Tribunals, ICTY and ICTR.¹¹⁷ By the dint of this provision both international and national immunities that would have otherwise been relied on by a Head of State or other state officials become invalidated in *toto* within the jurisdiction of the ICC.

Its preceding article 27(1) provides that;

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

This article applies in three ways. Its first sentence has been interpreted to remove immunities even in the acts that are done in the official capacity of the accused persons.¹¹⁸ Secondly, that it tacitly settles that immunities on the grounds of official capacity can not protect them from the jurisdiction of the ICC. Thirdly, that status does not have the force to mitigate the sentence of the convict.

Thus, it logically follows from the foregoing legal position¹¹⁹ that in fact the two principles under investigation, in so far as the ICC jurisdiction is concerned, are conflicting principles and that they are not entirely separate. This position however applies without prejudice to that of international immunities within the criminal jurisdiction of a foreign domestic court. The latter position was firmly affirmed in the *Arrest Warrant* case.

The decision in *Arrest Warrant* case¹²⁰ identifies *inter alia* a pertinent exception to the customary international rule of international immunities that incumbent state officials can still be tried in international criminal tribunals with requisite jurisdiction their official capacity notwithstanding.¹²¹

The view taken in this paper is this. That the *Arrest Warrant case* in establishing the exception that an incumbent state officials can still be arrested and prosecuted (not in an foreign domestic court but) in an international criminal tribunal with requisite jurisdiction, it did in fact intend to have the doctrine of executive immunity and individual criminal responsibility in conflict. This deduction emanates from the fact of the court’s invalidation of the doctrine of executive immunity for state officials with regard to an international criminal tribunal of requisite jurisdiction. Alternatively, it

¹¹⁷ Supra note 94,95, 96.

¹¹⁸ Supra note 148.

¹¹⁹ Article 27 of the Rome Statute.

¹²⁰ *Arrest Warrant case* para 61. Other exceptions include (a) the state official does not enjoy criminal immunity in their own country and thus is subject to prosecution under relevant domestic laws (b)The state official is devoid of immunity in the event the sending state elects to waive the immunity (c)In cases where the state official ceases to hold the position he can be tried in a foreign state with jurisdiction for acts during the period of their tenure but in private capacity (d)Incumbent state officials can still be tried in international criminal tribunals with requisite jurisdiction their official capacity notwithstanding.

¹²¹ Supra note 151.

is argued that if the two doctrines were really separate and non-conflicting, the court wisdom would have been spared in that there could not be need of invalidating executive immunity principle.

Further, provisions that directly invalidate the essence the law of Head of State Immunity and at the same time uphold in totality the principle of individual criminal responsibility as is the case in article 25 and 27 of the Rome Statute clearly depict this conflict. The basis of the express limiting provisions against international immunities attaching to official status of an accused would largely be informed by the realisation that such international customary immunities would bar the jurisdiction to prosecute state officials for serious international crimes.

Reasons why official capacity should be irrelevant; article 27 of the Rome Statute

The rationale for the existence of article 27 of the Rome Statute is manifested in the tussle between the basis for the principle of executive immunity and individual criminal liability.

On the other hand, the essence of individual criminal responsibility by way of attributing guilt to individuals other than by association is that the 'most serious crimes of concern to the international community as a whole must not go unpunished.'¹²² *Judgement of the International Military Tribunals, Trials of the Major War Criminals*,¹²³ held that sole rationale of international criminal law regime is to attribute criminal liability to individuals without exception to their official capacity and most importantly, to defeat the defence of official capacity or act of state.

The essence of sovereign rights ideally is to protect a state's sovereign sanctity from the external interference or exploitation by another sovereign State; since all sovereign states are equal, *par in parem non habet imperium*. The applicability of this rationale becomes fundamentally affected in the event that an international criminal court with which a state is party to expressly provides a waiver of jurisdictional immunity; which is one of the sovereign rights of a state.

The nature of the effect of such a waiver is *sui generis* in this sense. That first, the International Criminal Court is not a State. It is merely a treaty institution.¹²⁴ This aspect is crucial in the determination of an unlawful encroachment of sovereign rights. This is because the ICC as a treaty institution does not fall within the category of objects that can infringe on state's sovereign rights such as independence.¹²⁵ Its mandate is judicial rather than it is political.¹²⁶

Secondly, the state in question has consented to and ratified the treaty of its making and most importantly, it has accepted the competence of the jurisdiction of the court which means that it is bound by the obligations and conferred with the rights thereof.¹²⁷ One of these duties is to see to it

¹²² Preamble of the Rome Statute para.4.

¹²³ *Judgement of the International Military Tribunals, Trials of the Major War Criminals*, 1947, Official Documents, Vol 1, p 223.

¹²⁴ Article 1 of the Rome Statute.

¹²⁵ Supra note 8 [Akande].

¹²⁶ Article 1 of the Rome Statute read together with article 5 of the same.

¹²⁷ Article 26 of the Vienna Conventions on the Law of Treaties providing for the doctrine of *pacta sunt servanda*, that agreements must be respected.

that the objects and purpose of the Rome Statute is not defeated. This purpose is to ensure that perpetrators of most serious crimes go unpunished.¹²⁸ In order to this, official capacity or official acts particularly must not stand to bar prosecution. This provision of article 27 of the Rome Statute contemplates the potential capability considering machineries at their disposal to execute heinous crimes captured within the jurisdiction of the ICC. So that, to allow these state officials comfortably to rely on the defence of official capacity would in fact defeat the objects and purpose of the ICC Statute.

In light of this comparison, it will be correct to assert that the doctrine of individual criminal liability with regards the international criminal jurisdiction pre-empts the concept of jurisdictional immunities that Head of States would ordinarily rely on.

Further considerations on the predominance of the doctrine individual criminal responsibility over executive immunity focuses the relationship between the *jus cogen* principles and those of international customary law.

Article 53 of the Vienna Convention on the Law of Treaties has defined a peremptory norm or *jus cogens* as a 'norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.'¹²⁹ This thesis has argued in Chapter Three that the principle of individual criminal responsible is a principle of *jus cogens*.¹³⁰

On the other hand, Chapter Two has also argued that the principle of executive immunity has acquired the status of international customary law.¹³¹

The question then becomes which of these is to pre empts the other.

Article 40 and 41 of the International Law Commission Draft Articles provides that 'states shall not recognize as lawful a situation created by a serious breach of *jus cogens*.'¹³² This particular article of 'non recognition' is itself a *jus cogens* obligation that applies to the rest of the international community of states.¹³³ Further, in the joint dissenting opinion by the six judges in *Al-Adsani*¹³⁴ case affirmed that;

'...the basic characteristic of a *jus cogens* rule is that ... it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.'

¹²⁸ Supra note 153.

¹²⁹ Article 53 of VCLT.

¹³⁰ *Tadic* per Judge Antonio Cassese.

¹³¹ Supra note [C EHernández].

¹³² ILC, Arts 40– 41 on State Responsibility ,Report of the International Law Commission(2001), Official Records of the General Assembly, Fifty-sixth session, Supp.No. 10 (A/56/10).

¹³³ Orakhelashvili , 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' EJIL (2007), Vol. 18 No. 5, 955–970.

¹³⁴ *A l-Adsani v. UK* (2002) 34 EHRR (2002) 280.

The case of *Siderman de Blake v Republic of Argetina*¹³⁵ establishes that *jus cogens* is the highest status of laws under international law and that it prevails over and invalidates other rules of international law which conflicts them. Most specifically Prof Orakhelashvili posits that ‘peremptory rules...prevail over non-peremptory norms of immunities.’¹³⁶

Conclusively, executive immunity will be void if it does conflict with the rule of ICR at the international criminal tribunal with requisite jurisdiction.

Consequently therefore, in order that the objects and purposes of the ICC statute are not defeated, the article 25 and 27 must be interpreted in strict *senso*.

5.0 CONCLUSION

In the light of the foregoing research, it is true to assert that the in as far as the ICC jurisdiction is concerned; there exists a conflict between the principle of individual immunity and that of executive immunity. This conflict is resolved by the operation of a *jus cogens* principle of ICR with the effect of nullifying a mere international customary rule of jurisdictional immunities. Further, a party to the Rome Statute is bound by its provision among which is article 25 and 27 of the former. Consent to be bound by article 25 and 27 of the Rome Statute is an equivalence of a waiver of such immunities.¹⁶¹

This is without prejudice to the legal position regarding the international law immunities before foreign domestic criminal jurisdiction. The latter position relies on the theory of substantiveprocedural distinction. This means that the doctrine of executive immunity is one of a rule of a procedural character while that of individual criminal liability is a substantive law. The two are separate and non-conflicting. In this, jurisdictional immunities are complete and inviolable. The ultimate object to resolution of the conflict between the two doctrines is this. That the ‘most serious crimes of concern to the international community of states must not go unpunished.’¹³⁷ Further that the objects and purpose of international criminal justice not to be defeated. The *Judgement of the International Military Tribunals, Trials of the Major War Criminals* case¹³⁸ held that sole rationale of international criminal law regime is to attribute criminal liability to individuals without exception to their official capacity and most importantly to defeat the defence of official capacity or act of state.

¹³⁵ *Siderman de Blake v Republic of Argetina* 965 F 2 d 699, at 713 (CA 9th Cir. 1990).

¹³⁶ Orakhelashvili, ‘Peremptory Norms in International Law’ (2000) at 305 & 343.

¹⁶¹ Supra note 8 [Akande D].

¹³⁷ Preamble of the Rome Statute para.4.

¹³⁸ Supra note 10.

The position is further buttressed by an internal provision of fundamental importance, article 143 (4)¹³⁹ of the Constitution of Kenya. This expressly waives the principle of executive immunity attached to the president for crimes committed within the jurisdiction of the ICC.

Thus if this object must be met, the principle of executive immunity must not bar the principle of individual criminal responsibility.

5.1 Further considerations

Further considerations on the predominance of the doctrine individual criminal responsibility over executive immunity focuses the relationship between the *jus cogens* principles and those of international customary law.

Article 53 of the Vienna Convention on the Law of Treaties has defined a peremptory norm or *jus cogens* as a 'norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.'¹⁴⁰ This thesis has argued in Chapter Three that the principle of individual criminal responsible is a principle of *jus cogens*.¹⁴¹

On the other hand, Chapter Two has also argued that the principle of executive immunity has acquired the status of international customary law.¹⁴²

The question then becomes which of these is to pre empts the other.

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¹³⁹ Article 143 (4) of the Constitution of Kenya states that 'The 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.'

¹⁴⁰ Article 53 of VCLT.

¹⁴¹ *Tadic* per Judge Antonio Cassese.

¹⁴² Supra note [C EHernández].

¹⁴³ ILC, Arts 40– 41 on State Responsibility ,Report of the International Law Commission(2001), Official Records of the General Assembly, Fifty-sixth session, Supp.No. 10 (A/56/10).

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¹⁴⁶ *Siderman de Blake v Republic of Argetina* 965 F 2 d 699, at 713 (CA 9th Cir. 1990).

¹⁴⁷ Orakhelashvili, ‘Peremptory Norms in International Law’ (2000) at 305 & 343.