SELECT ESSAYS ON GOVERNANCE AND ACCOUNTABILITY ISSUES IN PUBLIC LAW

EDITORS
HENNIE STRYDOM
JOANNA BOTHA

3

HEADS OF STATE IN VIOLATION OF THE LAW

A Typology of the Responsibility Framework and its Effectiveness from a Domestic, Regional and International Perspective

*Roxan Venter**
*Martha M Bradley***

3.1 INTRODUCTION

The head of state in most democratic systems wields considerable power. The abuse of power has dire consequences for the state, its economy, the population at large and for the future of democracy. In most democracies, the domestic law has extensive mechanisms in order to keep the heads of the national executive authority of states responsible and accountable to those who elect them. These mechanisms ought to ensure that abuses do not occur or should provide effective procedures that can be implemented against a head of state who has acted in contravention of his or her duties. The effectiveness of the enforcement of these measures, however, is sometimes questionable, especially in developing countries where political unrest, intimidation and even state capture are influences on the implementation and effectiveness of these measures. In addition, contravention of the law by heads of state could have international repercussions and infringe on international norms and customs and violate human rights. From an international law perspective, it is necessary that heads of state be held accountable by the international community through various state responsibility mechanisms. These measures could be implemented either on a regional or an international basis through various international tribunals and international courts. Implementing and enforcing international mechanisms can be just as problematic as is the case with domestic mechanisms.

* Senior Lecturer in Constitutional law and Human Rights Law, University of Johannesburg.

** LLB, LLM (International Air, Space and Telecommunication Law), LLD (UP); LLM (Shipping Law) (UCT); Research Associate, South African Research Chair in International Law, University of Johannesburg, and Lecturer, Department of Public Law, Faculty of Law, University of Pretoria.

In this chapter, the authors discuss the responsibility framework with regard to heads of state and the various mechanisms on domestic, regional and international levels which can be implemented in order to keep heads of state responsible and accountable. Firstly, from a domestic perspective we consider mainly accountability measures in terms of South African law, but include a number of examples from other African countries, and examine the effectiveness of these measures. In relation to international law, we consider the application and effectiveness of various international criminal law responsibility-mechanisms against heads of state at both international and regional levels. Finally, the chapter expresses some observations about the ineffectiveness of these measures and makes some suggestions as to what could be implemented in order to address these deficiencies and thereby ensure that states and their citizens are protected against heads of state who flout their constitutional and international duties.

3.2 DOMESTIC MECHANISMS***

There are several examples of domestic accountability mechanisms relating to heads of state and members of the national executive authority that may be used in keeping them responsible and accountable. In this section, the authors discuss some of the most prominent South African mechanisms and their effectiveness, as well as examples from other African countries. For the sake of completeness, it should be mentioned that there exist within parliaments various less conspicuous accountability measures which are directed at the head of state and the national executive. However, these mechanisms do not necessarily apply in instances where the president acts unlawfully and therefore these measures will not be discussed in this chapter. Question time in parliament, parliamentary committees, the tabling of subordinate legislation and approval of the national budget are examples of these measures.¹

The structure of this part of the chapter briefly is as follows: first, independent institutions such as ombudspersons are discussed in the context of South Africa, Namibia, Zimbabwe and Zambia. Second, the chapter focuses on motions of no-confidence and impeachment proceedings in South Africa, Nigeria, Cameroon and Gabon. Third, the mechanism of criminal prosecution (and the issue of domestic immunity of heads of state) in South Africa, Lesotho, Namibia, Botswana and Nigeria is given attention. Fourth, the chapter discusses the appointment of commissions of inquiry in South Africa, Zimbabwe and Malawi. Finally, judicial control as an accountability mechanism in South Africa, Botswana and Cameroon is discussed.

1 For a discussion of these measures in the South African context, see Rautenbach *Rautenbach-Malherbe Constitutional Law* (2012) 158-159.

*** Section 3.2 of the chapter is partially based on a paper delivered by Venter at the World Congress for Constitutional Law on "Violent Conflicts, Peace-Building And Constitutional Law" of the International Association for Constitutional Law, held in Seoul, South Korea, 18-22 June 2018, with a paper titled, "The courts as the gate-keepers of struggling democracies: a South African perspective".

3.2.1 Ombudspersons

Ombudspersons act as independent authorities that keep a check on organs of state. In states which employ such a mechanism, the institution of an ombudsperson performs a valuable role in conducting investigations into corruption, misappropriation of funds and malfeasance.

3.2.1.1 South Africa

In South Africa, the Public Protector is an ombudsperson-like institution that (mainly) is responsible for investigating maladministration and corruption in government. The Public Protector can launch an investigation into the activities of the head of state, the executive and other organs of state. The Public Protector is regarded as a completely independent entity in terms of chapter 9 of the South African Constitution and reports directly to parliament.²

Until recently, great confusion surrounded the enforceability of the decisions of the Public Protector. The South African executive and other organs of state ignored the Public Protector's remedial action in various instances, until the binding effect of the Public Protector's decisions and determinations were confirmed in a number of groundbreaking judgments. In *South African Broadcasting Corporation Soc Ltd v Democratic Alliance*;³ *Economic Freedom Fighters v Speaker of the National Assembly*; and *Democratic Alliance v Speaker of the National Assembly*,⁴ the Supreme Court of Appeal and the Constitutional Court respectively confirmed the important status and binding effect of the decisions of the South African Public Protector.⁵ In both instances, the executive and legislative organs involved had not only disregarded their constitutional duties but also the remedial action determined upon by the Public Protector.

In the case of *South African Broadcasting Corporation*, the Public Protector's report on maladministration at the South African Broadcasting Corporation (South Africa's national broadcasting authority) was ignored by the broadcaster as well as by parliament.⁶ In the case of the *Economic Freedom Fighters v Speaker of the National Assembly*, the Public Protector's report on the mismanagement of funds in the upgrading of the private residence of the former South African President, Mr Jacob Zuma, was at issue.⁷ In *President of the Republic of South Africa v Office*

2 See ss 181-183 of the Constitution. Although there are several ch 9 institutions listed in the Constitution, this chapter will only be focusing on the Public Protector.

3 *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 2 SA 522 (SCA).

4 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC) (hereinafter *Economic Freedom Fighters* (I) case).

5 For a discussion of these cases see Venter 2017 "The executive, the public protector and the legislature: 'The lion, the witch and the wardrobe'?" TSAR 176-189.

6 Venter (n 5) 178-181.

7 Venter (n 5) 181-184.

of the Public Protector,⁸ the president challenged the Public Protector's prescribed remedial action following her investigation into the so-called "state capture" of the South African government. In this case the court concluded that the president's objections to the Public Protector's decisions (to have a commission of inquiry appointed to investigate the matter further, to let the Chief Justice appoint the judge that would lead the investigation and to direct the manner in which the investigation should be conducted) should be rejected and the remedial action suggested by the Public Protector should be implemented.⁹ After these cases, it is clear that the Public Protector's decisions can be questioned only by taking them on review, otherwise the decisions and proposed remedial action must be followed.

As a mechanism that keeps the head of state responsible and accountable, the office of the South African Public Protector definitely gained prominence and effectiveness following the aforementioned judgments. Unfortunately, after the appointment of a new Public Protector in 2016, the office lost credibility following certain judgments involving ABSA Bank Ltd and the South African Reserve Bank.¹⁰ In these cases, it was found that the Public Protector acted not only contrary to her mandate and the Constitution but also dishonestly and with bias against the Reserve Bank.¹¹ This is a most unfortunate development and it is hoped that the situation is soon remedied. Therefore, there is uncertainty as to whether investigations by the Public Protector in the future will remain an effective mechanism in keeping the South African president and the executive authority responsible and accountable.

3.2.1.2 Namibia

The Constitution of the Republic of Namibia of 1990 and the Ombudsman Act 7 of 1990 make provision for the office of the Namibian Ombudsman. The Namibian Ombudsman seems to have a much broader mandate than the counterpart in South Africa. In terms of article 91 of the Namibian Constitution and section 3 of the Ombudsman Act, the Ombudsman has the authority to investigate fundamental rights violations, corruption and maladministration and administrative practices as well as offences with regard to the environment.¹² With regard to the enforcement of the decisions and findings of the Namibian Ombudsman there seems to be quite a difference between the positions of the Namibian Ombudsman and the South African Public Protector. According to Ruppel-Schlichting the decisions of the Namibian Ombudsman are enforced chiefly by means of alternative dispute resolution (mediation and arbitration) mechanisms and apparently the Ombudsman does not

8 *President of the Republic of South Africa v Office of the Public Protector* 2018 2 SA 100 (GP).

9 *President of the Republic of South Africa v Office of the Public Protector* case (n 8) par 150 152–154.

10 *South African Reserve Bank v Public Protector* 2017 6 SA 198 (GP); *ABSA Bank Limited and Others v Public Protector* [2018] 2 All SA 1 (GP).

11 *ABSA Bank Limited and Others v Public Protector* [2018] 2 All SA 1 (GP) par 123.

12 See Venter (n 5) 187; see Horn "The process of human rights protection in Namibia" 2009 *Journal of Namibian Studies* 99; see also Mubangizi 2006 "The constitutional protection of socio-economic rights in selected African countries: a comparative evaluation" *African Journal of Legal Studies* 1.

possess “coercive powers”.¹³ Disputes between organs of state and the Ombudsman therefore are resolved by means of “negotiations and compromise” and the decisions are not subject to judicial review, mainly because the decisions are not binding in the first place.¹⁴ Although this approach means that an amicable resolution can be reached and that good relations are maintained between the various organs of state and the Ombudsman, it is uncertain how effective this mechanism truly is when political roleplayers are unwilling or unable to negotiate or reach a compromise. It is wholly different from the South African approach that has now been confirmed by the courts that the decisions of the Public Protector are binding and are subject only to judicial review.

3.2.1.3 *Zimbabwe*

In the Republic of Zimbabwe, the office of the Zimbabwean Public Protector was removed in terms of the 2017 amendment to the Constitution of the Republic of Zimbabwe of 2013. In future, all cases that would have been investigated by the Public Protector now should be investigated by the Zimbabwean Human Rights Commission. This is perhaps not the best approach since the investigation of maladministration and corruption in government does not necessarily fall within the expertise of a Human Rights Commission. Therefore, it is uncertain how effective the investigation of maladministration in government will be in future.

3.2.1.4 *Zambia*

In terms of article 243 of the Constitution of the Republic of Zambia of 1991 (as amended in 2016), an office of the Zambian Public Protector is established, which will be decentralised to the provincial governments and “progressively to the districts” of the country. The Public Protector Act 15 of 2016 gives effect to these constitutional provisions and further provides for the powers and functioning of the office of the Public Protector. In terms of section 19(3) of the Zambian Public Protector Act, the Public Protector may take steps to give effect to its own recommendations if the relevant government organ, after having received a report by the Public Protector following an investigation, has taken no steps within 30 days after receipt of such a report. This provision clearly empowers the Public Protector to make sure that there is enforcement and compliance with its decisions and recommendations and has the added benefit of statutory confirmation of the enforceability of its powers. This new office replaces the previous office of Investigator General and the status of the enforcement of its powers has also been improved considerably.¹⁵ These changes should go a long way towards making effective investigations into maladministration committed by the head of state and the government.

13 Ruppel-Schlichting “The independence of the ombudsman in Namibia” in Horn and Bösl *The Independence of the Judiciary in Namibia* (2008) 284; see Venter (n 5) 188.

14 Venter (n 5) 188.

15 See Mwittah “Up close with Zambia’s Public Protector” *Zambia Daily Mail* 20 Nov 2017 <https://www.daily-mail.co.zm/up-close-with-zambias-public-protector/> (2018-08-11).

3.2.2 Motions of no-confidence and impeachment proceedings

Motions of no-confidence and impeachment proceedings are further examples of accountability measures that the legislative authority can utilise in order to provide a check on the actions of the president and the national executive organs or even to remove those organs if the motions are successful.¹⁶

3.2.2.1 South Africa

In the South African context, these accountability measures have not been successful. In spite of a number of no-confidence motions as well as a motion of impeachment tabled against the former South African President, Mr Jacob Zuma, none of these motions were adopted.¹⁷ In one instance, the entire parliamentary procedure for the adoption of these motions was put into question before the South African Constitutional Court because parliament failed to fulfil its constitutional duty to create parliamentary rules that give effect to motions of no-confidence. In other words, there was no effective procedure to table a motion of no-confidence, even though this accountability measure is prescribed by the Constitution.¹⁸ In effect, this omission left the executive unchecked. However, even after the amendment of the Rules of the National Assembly, there has been no successful motion of no-confidence.

The Constitutional Court was approached to make a similar ruling with regard to motions of impeachment since it was argued parliamentary rules similarly do not give effect to impeachment procedures.¹⁹ In another judgment, the Constitutional Court was approached to decide whether a motion of no-confidence could be conducted via secret ballot – a procedure for which no provision had been made either in the Constitution or in the Rules of the National Assembly.²⁰ The Court argued that because general elections in South Africa were conducted using secret voting (section 19(3)(a) of the Constitution) and the fact that the president is elected by the National Assembly using a secret ballot procedure (Part A, Schedule 3 of the Constitution) this supports the contention that it should also be possible to conduct the removal of the president via secret ballot in the correct circumstances.²¹ Even

16 Ss 102 and 89 of the Constitution give effect to motions of no-confidence and motions of impeachment respectively.

17 For general information on the dates and results of the motions that were adopted in the period of former President, Jacob Zuma, see <https://africacheck.org/factsheets/factsheet-many-motions-no-confidence-sa-president-zuma-faced/> (2018-08-04).

18 *Mazibuko v Sisulu* 2013 6 SA 249 (CC). For a discussion of this case see Venter 2014 “Motions of no confidence: parliament’s executive check and checkmate” TSAR 407 and for a discussion of the parliamentary rules that were created following this judgment see Venter 2015 “The new parliamentary rule on motions of no confidence: an exercise in legislative incompetence or judicial mockery?” TSAR 395-404.

19 *Economic Freedom Fighters v Speaker of the National Assembly* 2018 2 SA 571 (CC) (hereinafter *Economic Freedom Fighters* (II) case).

20 *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC).

21 *United Democratic Movement* (n 20) par 51, 56.

after the Speaker decided to have the motion of no-confidence voted on by means of a secret ballot procedure the motion, nevertheless, was unsuccessful.

At the very least, motions of no-confidence or of impeachment should be effective mechanisms indicating to the president and the executive authority that there are perceived deficiencies in their approach to governing the state and that serious consideration should be given to addressing those deficiencies. At best, the motions should serve to remove an incompetent government from office. In the South African experience, however, neither of these outcomes has been gained from these types of motions. A reason for this failure is the strong level of representation that the ANC enjoys in parliament. It is difficult to reach a two-thirds majority or even an absolute majority (the majorities needed to succeed with impeachment or a motion of no-confidence respectively) when the ANC holds more than half the seats in parliament. This fact begs the question as to whether the requirements for these mechanisms need to be revised in order to address the political reality of the composition of the South African Parliament.

3.2.2.2 Nigeria

In the Federal Republic of Nigeria, impeachment procedures are frequently used (or rather abused) for the purposes of political retribution rather than for the real purpose of acting as a measure to keep the head of state responsible and accountable.²² Section 143 of the Constitution of the Federal Republic of Nigeria of 1999 makes provision for the removal of the Nigerian president by means of impeachment. As Nigeria has a presidential system, there is no provision for motions of no-confidence. Unfortunately, the Nigerian Constitution has a specific provision that prohibits judicial interference in impeachment proceedings against the chief executives at national and state level.²³ The Nigerian courts, however, have determined that this so-called “ouster clause” applies only to adjudication by the courts if the legislative bodies seeking the impeachment have followed all the prescribed constitutional procedures.²⁴ Therefore, if any of the procedural guidelines have been breached, this is sufficient grounds for judicial scrutiny.²⁵ Most impeachments in Nigeria, however, are the result of “bitterness, sentiments and political vendetta[s]” and therefore are not used for their intended purpose of removing the heads of the executive authority at national and state levels when those officials contravene the law.²⁶ This misuse seriously affects the effectiveness of impeachment proceedings in Nigeria in keeping the executive accountable and the circumstances are exacerbated by the fact that it is the only method to remove and criminally charge a sitting Nigerian president since

22 Fagbadebo and Francis “Impeachment as an accountability measure in a presidential system? Views from Nigeria’s Fourth Republic” 2014 *African Journal of Governance and Development* 16 26-28.

23 s 188(10) of the Nigerian Constitution.

24 See *Inakoju v Adeleke* [2007] 2 FWLR (pt 366) 2403; *Dapianlong v Dariye* (2007) 27 WRN 1.

25 For a detailed discussion of the issue see Taiwo “Judicial review of the impeachment procedure in Nigeria” 2009 *Malawi Law Journal* 236-272.

26 Taiwo (n 25) 272.

the president enjoys domestic criminal immunity for the period of his or her office according to section 308 of the Nigerian Constitution. The political elite in Nigeria, therefore, is protected from removal from office and prosecution as a result of the protection of their political cronies, corruption and ineffective legal measures.²⁷ Fagbadebo and Francis submit that “with systemic corruption, governing measures to induce good governance would be an exercise in futility [in Nigeria]... [a]nd [that] impeachment will remain an instrument of political harassment and vendetta.”²⁸

3.2.2.3 *Cameroon and Gabon*

In many other African states, especially those influenced by the French legal system, impeachment proceedings can be instituted against a head of state only in cases of high treason, for example in Cameroon and Gabon.²⁹ In Cameroon, article 53 of the Constitution of the Republic of Cameroon of 1972 provides that the president may be impeached only for high treason by a court of impeachment and may be indicted only by both houses of parliament with a four-fifths majority of the members by means of an open ballot. Article 78 of the Constitution of the Republic of Gabon of 1991 provides that the president may be impeached only for a contravention of the oath of office or the offence of high treason and may be indicted by a two-thirds majority of the members of parliament in a public ballot.

Even in African countries with more elaborate impeachment provisions and the inclusion of more impeachable offences, the impeachment mechanism does not seem to be an effective check on most African heads of state.³⁰ Fombad and Nwauche rightly submit that in most struggling African democracies impeachment proceedings have become “dead letters”, on the one hand because their effectiveness depends on parliamentary majorities and the prevalence of entrenched dominant parties makes this almost impossible to achieve, and on the other hand simply because “an old imperial president is replaced by a new one with the help of the powerful and deeply entrenched dominant parties”.³¹ Until African states find ways to make their impeachment proceedings more effective, it seems that these mechanisms will continue to be abused by parliamentary majorities rather than being used for their intended purpose.

3.2.3 Domestic criminal prosecution and immunity

Arguably, criminal prosecution is the most serious domestic accountability mechanism that can be implemented against a sitting president for contravention of the law. Some states provide civil immunity to heads of state, and in some cases both civil and criminal immunity, but civil immunity is not the main focus of this chapter.

27 Fagbadebo and Francis (n 22) 31.

28 Fagbadebo and Francis (n 22) 31.

29 Fombad and Nwauche “Africa’s imperial presidents: immunity, impunity and accountability” 2012 *African Journal of Legal Studies* 91 106.

30 Fombad and Nwauche (n 29) 108.

31 Fombad and Nwauche (n 29) 107-108.

Unfortunately, the constitutions of many African states under the influence of their erstwhile colonial rulers provide criminal (and civil) immunity to heads of state while in office or even after leaving office.³²

3.2.3.1 South Africa

South Africa may be seen as a fortunate exception. The South African Constitution does not afford any criminal or civil immunity to the South African president. In 2016, criminal charges pertaining to the 1990s so-called “Arms Deal” were reinstated against the then sitting South African President, Mr Jacob Zuma.³³ Following the reinstatement of the charges a court battle ensued wherein Mr Zuma attempted to get the charges dropped again. In October 2017, the Supreme Court of Appeal, however, dismissed the application for a review of the High Court ruling which reinstated the criminal charges.³⁴ The matter of the prosecution of Mr Zuma gave rise to yet another dispute regarding the appointment and dismissal of the head of the National Prosecuting Authority.³⁵ In the *Corruption Watch* case, a civil rights organisation took the president to court for the alleged unlawful removal of the previous National Director of Public Prosecutions, Mr Nxasana, and in order to have him vacate his position, providing him with an alleged unlawful settlement to the amount of R17.3 million, and the alleged unlawful appointment of a new Director, Advocate Abrahams.³⁶ The complication was that President Zuma was soon to face criminal charges of corruption and therefore was not competent to make a decision on the appointment or dismissal of the Director of Public Prosecutions. The High Court decided that the president indeed was “unable” to make a decision in this instance because of the conflict of interest. Section 90(1) of the Constitution states that in the event of the president being “unable” to act the deputy president must perform the presidential duties, therefore the Court concluded that the actions of the president were to be set aside and that the deputy president should make the appointment.³⁷ It is trite that the president should not benefit from the appointment of a new, perhaps more sympathetic, Director of Public Prosecutions if the president faces imminent prosecution. The drafters of the National Prosecuting Authority Act 32 of 1998 obviously did not envision the possibility that the president might be the subject of a prosecution when the provisions relating to the appointment of the director were drafted. The criminal prosecution of a sitting president in South Africa therefore is not without its challenges.

32 See Fombad and Nwauche (n 29) 95.

33 In *Democratic Alliance v Acting National Director of Public Prosecutions* [2016] 3 All SA 78 (GP) the court found that the original decision to drop the charges against Mr Zuma was “irrational” (par 94).

34 *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* [2017] 4 All SA 726 (SCA); 2018 1 SA 200 (SCA).

35 *Corruption Watch (RF) NPC v President of the Republic of South Africa; Council for the Advancement of the South African Constitution v President of the Republic of South Africa* [2018] 1 All SA 471 (GP) (hereinafter the *Corruption Watch* case).

36 *Corruption Watch* (n 35) par 1–3.

37 *Corruption Watch* (n 35) par 112–114.

It is interesting to note that even after the criminal charges against the South African president were reinstated the National Assembly failed to remove the president by means either of a motion of no-confidence or impeachment. It is a strange state of affairs when a head of state has been charged criminally but remains in office and cannot be removed *and* is unwilling to step down himself. It also sets a dangerous precedent for the future. Criminal prosecution is a viable option as an accountability mechanism, but it presupposes that other procedures are in place in order to preclude a president from abusing his position in the prosecution process, such as with regard to the appointment of the Director of Public Prosecutions or by unduly frustrating the prosecution process through delay tactics and launching successive reviews and appeals.

Fombad and Nwauche submit that many African states protect their heads of state against both domestic criminal prosecution and civil liability.³⁸ The reason behind these immunities, amongst others, is that heads of state are conferred with extensive powers and authority and should be able to exercise these powers without fear of court proceedings being instituted against them which may “distract his attention or embarrass and hamper him from concentrating on his responsibilities”.³⁹ The same reasoning applies to the exercise of the head of state’s extensive discretionary powers; these need to be exercised fearlessly and vigorously in order to be effective. As well, immunity protects the so-called dignity of the office.⁴⁰ Fombad and Nwauche rightly point out that absolute immunity cannot easily be justified in a modern democracy.⁴¹ Presidents do not need to be protected in order for them to perform their duties effectively; the opposite is probably more accurate. If presidents know they will be held accountable, they will be more meticulous when it comes to the exercise of their powers and functions. In addition, the dignity of the office of the president is an outdated remnant arising out of the dignity accorded the monarch in the various legal systems that have influenced the constitutional systems of many African countries. There is no place for such “dignity” in relation to the office of president in a modern constitutional democracy where the head of state possesses real executive powers and is not merely the holder of a ceremonial office.

3.2.3.2 *Lesotho*

Immunities for heads of state take various forms. Absolute immunity entails that a head of state is shielded from both civil and criminal liability. In terms of section 50 of the Constitution of the Kingdom of Lesotho of 1993, the king (who is a constitutional monarch) enjoys civil and criminal immunity for anything done (or not done) in both his personal and official capacity. Perhaps this is not surprising

38 Fombad and Nwauche (n 29) 101-102.

39 Fombad and Nwauche (n 29) 101.

40 Fombad and Nwauche (n 29) 101.

41 Fombad and Nwauche (n 29) 101.

as the king is a constitutional monarch and is “not likely to engage in any activities that incur liability”.⁴² These types of immunities are common in states headed by a monarch where the monarch occupies a ceremonial office.

3.2.3.3 Botswana

Qualified immunity, for instance, can relate only to criminal (but not civil) liability. In terms of section 41(1) of the Constitution of the Republic of Botswana of 1966, the president may not be held criminally accountable for any act or omission performed in his or her personal or official capacity while in office. Additionally, no civil proceedings may be instituted against the president regarding any act or omission performed during his or her term, but only in his or her private capacity. The Constitution of Botswana therefore provides a qualified civil immunity. These immunities expire when the president vacates the office.

3.2.3.4 Namibia

Some forms of immunity do not fall squarely within the absolute or the qualified categories. The President of the Republic of Namibia is protected from civil and criminal liability while in office in terms of article 31 of the Constitution of the Republic of Namibia of 1990. However, this civil protection extends further than the president's term if the act or omission was done in the president's official capacity according to article 31(3)(a) of the Namibian Constitution. If the president's actions occurred in his or her personal capacity, but during the president's term of office, then a court with civil or criminal jurisdiction may have jurisdiction in proceedings against the president after his or her term has ended if

Parliament by resolution has removed the President on the grounds specified in this Constitution and if a resolution is adopted by Parliament resolving that any such proceedings are justified in the public interest notwithstanding any damage such proceedings might cause to the dignity of the office of President.⁴³

In terms of the Namibian Constitution, therefore, there is a correlation between impeachment proceedings and instituting criminal proceedings.

3.2.3.5 Zambia

In terms of the Constitution of the Republic of Zambia of 1991 (revised in 2016), article 98(4) makes provision for the president's immunity from criminal liability to continue even after the president ceases to hold that office. However, immunity may be waived by the National Assembly.⁴⁴ In July 2002, the immunity of Zambia's former President, Frederick Chiluba, was removed by parliament after allegations of

⁴² Fombad and Nwauche (n 29) 102.

⁴³ a 31(3)(b) of the Namibian Constitution.

⁴⁴ a 98(5) of the Zambian Constitution.

misappropriation of funds were made against the former head of state.⁴⁵ Although Chiluba was later acquitted of any wrong-doing, at least there was a (seemingly) credible investigation, trial and a verdict.⁴⁶ It remains questionable, however, for such an immunity to be afforded to a head of state which can be waived only by parliamentary majority as parliamentary majorities have proven troublesome with regard to effective action in many African countries with dominant majority party governments.

3.2.3.6 *Nigeria*

Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 has provision for the criminal immunity of the president. The Nigerian Supreme Court, however, held that this provision may be interpreted to mean that criminal investigations concerning the president and other officials may proceed while these officials are still in office although the officials concerned may not be charged or questioned until they have left office.⁴⁷ Fombad and Nwauche rightly remark that the usefulness of this approach at best is questionable even if it means that an investigation can get underway and it is not necessary to wait until the officials have all left office.⁴⁸

3.2.4 Commissions of inquiry

The power to appoint commissions of inquiry usually vests in the head of state. However, if the head of state is the subject of such an investigation, this could complicate matters. The question it raises relates to whether the president is the only official authorised to call for such an investigation or if another organ can perform this function if the president is involved. A further problem refers to the appointment of the person leading the investigation since it is usually the head of state who makes this appointment.

3.2.4.1 *South Africa*

These problems are clearly illustrated in South African examples. In terms of section 84(2)(f) of the South African Constitution, the South African president has the power to appoint a commission of inquiry into any matter that requires investigation. The reports of these commissions, in turn, are considered by parliament. As in the case of the appointment of the Director of Public Prosecutions, the fact that the president alone can appoint the commission of inquiry is a major drawback to the effectiveness of this accountability measure; clearly, the drafters of the Constitution did not foresee that the president could be the subject of such a commission of

45 See News24 Archives "Chiluba loses immunity, his ex-FM kills himself" 16 July 2002 <https://www.news24.com/xArchive/Archive/Chiluba-loses-immunity-his-ex-FM-kills-himself-20020716> (2018-08-12).

46 See Berger "Zambia's ex-president Frederick Chiluba cleared of theft" *The Telegraph* 17 Aug 2009 <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/zambia/6044417/Zambias-ex-president-Frederick-Chiluba-cleared-of-theft.html> (2018-08-12).

47 *Fawehinmi v Inspector General of Police* [2002] FWLR (Pt. 108) 1355.

48 Fombad and Nwauche (n 29) 104.

inquiry. In *President of the Republic of South Africa v Office of the Public Protector*, the Public Protector prescribed that a commission of inquiry be appointed to investigate the issue of “state capture” and the president’s alleged involvement in this matter.⁴⁹ In order to avoid the apprehension of bias and to promote an open and transparent investigation, the Public Protector suggested that the Chief Justice and not the president appoint the judge responsible for heading the commission of inquiry.⁵⁰ The High Court agreed and ordered that the Public Protector’s recommendations be implemented as set out in her report. The Court remarked that the president obviously has an interest in the outcome of the investigation and therefore cannot be involved in the appointment of the commission.⁵¹

3.2.4.2 Zimbabwe

In the Republic of Zimbabwe, the president is not afforded the authority to constitute commissions of inquiry in terms of section 110 of the Constitution of the Republic of Zimbabwe, 2013 (revised in 2017), which makes provision for all the executive functions of the president. The president, however, is afforded this authority in terms of the Commissions of Inquiry Act (Chapter 10:07). The President of the Republic of Malawi has the power to appoint commissions of inquiry in terms of section 89 of the Constitution of the Republic of Malawi, 1994 (revised in 2017) and the Commissions of Inquiry Act (Chapter 18:01). As in the case of South Africa, these Acts do not contain any provisions or guidelines that address the scenario of the president being the one under investigation. This oversight is also a serious defect in the Zimbabwean and Malawian provisions.

A commission of inquiry, at least in theory, can serve as an effective accountability measure only if the president’s involvement in the appointment process is removed when he or she has a vested interest in the outcome of the investigation.

3.2.5 Judicial control

For many new democracies, the inclusion of judicial control in their new constitutional order meant the end of parliamentary sovereignty and the beginning of democracy and constitutionalism. Fombad and Nwauche argue that prior to the 1990s the judicial authorities in many African countries were mere “handmaidens” of the executive authority in those states and were “incapable of operating effectively” or protecting fundamental human rights.⁵² What is true for many African democracies was also the case in South Africa. The independence of the judicial authority is crucial to its control function. The relationship between the judicial, executive and legislative organs in these states determine the extent and effectiveness of the judicial authority’s influence on the laws and actions of the

49 *President of the Republic of South Africa v Office of the Public Protector* 2018 2 SA 100 (GP).

50 *President of the Republic of South Africa v Office of the Public Protector* (n 49) par 58.

51 *President of the Republic of South Africa v Office of the Public Protector* (n 49) par 143.

52 Fombad and Nwauche (n 29) 96.

other organs of state. When national executives (and also legislatures) continue to wield considerable influence over the judicial authority, it seriously undermines the judicial authority's independence and, in turn, its power to keep a check on the other organs of state. Fombad and Nwauche rightly point out that judicial independence is often "overshadowed by the powerful presence of the president" and his or her intervention in the appointment process of judicial officers in many African countries.

3.2.5.1 *South Africa*

In terms of sections 2 and 172 of the South African Constitution, all obligations imposed by the Constitution must be fulfilled and the courts have the authority to scrutinise every government action and set aside any law or action that is inconsistent with the Constitution. The courts therefore play an integral part in keeping a check on the executive. Courts, however, should be mindful of the separation of powers and may not encroach on the terrain of the executive authority. Courts therefore may not make pronouncements on the desirability, for instance, of an executive or administrative action if it falls within the constitutionally permissible range of options available to the executive.⁵³

When a court is called upon to decide a matter regarding an executive action by the president or the executive authority, there are a number of ways to approach the matter. For example, in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), a common-law review (for instances that do not fall within the scope of PAJA), a statutory right to appeal in terms of the empowering legislation or the Constitution itself can serve to review and declare an administrative or executive action unconstitutional.⁵⁴

In a South African context, judicial control over the actions of the president and the executive authority reflects one of the more effective accountability mechanisms. In many of the cases discussed, the courts played a central role not only by keeping the president accountable but also making sure that the *other* accountability mechanisms are effectively implemented and enforced. In the *Mazibuko* case, for example, the court played an important role in ensuring that parliament established new rules giving effect to motions of no-confidence, thereby making this accountability mechanism more effective. The court played a similar role in relation to the parliamentary rules on motions of impeachment in the *Economic Freedom Fighters II* case. In *President of the Republic of South Africa v Office of the Public Protector*, the Court found that the objections of the president to the remedial action ordered by the Public Protector were unfounded and held that the president must adhere to the remedial action as prescribed. The Court upheld the Public Protector's decision and, again, ensured the effectiveness of this accountability measure.

⁵³ Rautenbach (n 1) 159.

⁵⁴ Rautenbach (n 1) 160-161.

With regard to the appointment of judicial officers in the South African system the presidency exercises a degree of power in this regard but less than its African counterparts. Section 174 of the South African Constitution provides that the Chief Justice and Deputy Chief Justice of the Constitutional Court are appointed after consultation with the Judicial Service Commission and the leaders of the parties represented in the National Assembly. The President and Deputy President of the Supreme Court of Appeal are also appointed after consultation with the Judicial Service Commission. Different procedures apply in the case of the appointment of judges to the Constitutional Court and other courts, but the Judicial Service Commission plays a more important role in these procedures than it does in respect of the appointment of the chief justices of the Constitutional Court and Supreme Court of Appeal. In South Africa, there is less interference by the executive authority in terms of the appointment of the judiciary. This factor is a major advantage and strengthens South Africa's judicial control mechanism considerably. In the South African context, judicial control is an essential and sometimes the ultimate mechanism which ensures executive accountability.

3.2.5.2 Botswana

In the Republic of Botswana, section 96 of the Constitution of the Republic of Botswana, 1966 (revised in 2005) provides that the president appoints the Chief Justice of Botswana, and other judges are appointed by the president on the advice of the Judicial Service Commission. Fombad and Nwauche rightly point out that the Commission consists mostly of persons appointed by the president.⁵⁵ The power in the hands of the president in making judicial appointments could have a very negative impact on judicial independence in Botswana.

3.2.5.3 Cameroon

Some states enjoy only symbolic judicial independence. The Constitution of the Republic of Cameroon, 1972 (revised in 2008) is a prime example. Although article 37(2) of the Constitution of Cameroon provides that the judicial authority is independent of the executive and legislative authority, section 37(3) provides that the president ensures the independence of the judicial authority and appoints all "members of the bench and of the legal department". Section 37(3) mentions that the president is assisted by the Higher Judicial Council in the exercise of this authority, but the Council is authorised to give only their opinion on judicial appointments and dismissals. The president is not obliged to follow their advice and has almost absolute influence over the judicial branch. In Cameroon, it is doubtful that the courts will be able to act as an effective control mechanism, keeping a check on the other branches of government.

In the opinion of the authors, these examples demonstrate that judicial control potentially serves as a counterbalance to the power of the other branches of

⁵⁵ Fombad and Nwauche (n 29) 97.

government, and in relation to the head of state and the executive especially, but only if the judicial branch is secure in its independence and insulated from outside interference.

3.3 INTERNATIONAL LAW MECHANISMS

3.3.1 Introduction

In the second substantive part of this chapter, the central question relates to providing an overview of the avenues which exist under international criminal law that hold heads of states individually responsible for the commission of international crimes. As a head of state, the enjoyment of the privilege of immunity is woven into this question. This part of the chapter explores to what extent heads of state enjoy immunity under international law. Specifically, it examines the content of the concept “head of state immunity” under which a head of state cannot incur individual criminal responsibility for the commission of international crimes. It considers if and when the International Criminal Court, a treaty-based body established under the Rome Statute,⁵⁶ might resolve the dilemma in providing a counter to the impunity of a head of state to prosecution and be in a position to exercise jurisdiction over heads of states in its role as a permanent international criminal tribunal. From a regional perspective, however, that function could be the responsibility of the African Court of Justice and Human Rights as created by the Malabo Protocol.⁵⁷

The authors submit that the political dimension makes head of state immunity a sensitive topic. While cognisant of the political debate, the focus of this chapter is on a doctrinal analysis of the applicable legal framework, relying on the accepted sources of international law as listed in article 38(1) of the Statute of the International Criminal Court.⁵⁸ As African regional discussions of the topic under discussion tend to focus on political arguments, there is a dire need for a positivist approach and legal argument based on doctrinal law. In a different context, another methodology might be more appropriate.

The structure is as follows: First, the doctrine of head of state immunity is explored in light of its customary international law status and by affording a historic overview of cases where immunity has been waived and a head of state consequently has been prosecuted for the commission of international crimes. Next, the complex relationship between articles 27 and 98 of the Rome Statute is examined in order to establish when a head of state may be summoned before the International Criminal Court. The possibility of holding a head of state individually criminally responsible

56 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 90 (ICC Statute).

57 Protocol on Amendments to The Protocol on The Statute of The African Court of Justice and Human Rights (Malabo Protocol) of 27 June 2014.

58 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS No 993 (ICJ Statute).

under the African Regional Framework in terms of the Malabo Protocol (which is yet to enter into force) and further the possible bar under article 46ABis of this treaty will be discussed.

3.3.2 Criminal prosecution and head of state immunity

Head of state immunity is a manifestation of sovereign immunity.⁵⁹ Immunity under international law is generally invoked by state officials, for instance heads of state, to bar the jurisdiction of foreign national tribunals.⁶⁰ In this context, the term “foreign tribunals” refers to the courts of states other than the state to which the state official belongs.⁶¹ In brief, the purpose of head of state immunity is to provide the incumbent with immunity from prosecution. Two categories of immunity exist under public international law: *ratione materiae* or functional immunity;⁶² and *ratione personae* or personal immunity.⁶³

Functional immunity shields public officials from incurring responsibility for actions performed in respect of their official function and in their official capacity on behalf of a state or its organs.⁶⁴ This type of immunity is rooted in the idea that the official activities of state organs are performed on behalf of the state and in accordance with

59 See also *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* 2015 5 SA 1 (GP) and *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) at par 66 citing James Crawford as follows to explain this relationship and the purpose of such immunity: Professor Crawford describes the basic principles of the international law of immunity in the following terms: “State immunity is a rule of international law that facilitates the performance of public functions of the state and its representatives by preventing them from being sued or prosecuted in foreign Courts. Essentially, it precludes the Courts of the forum state from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party. It is a procedural bar (not a substantive defence) based on the status and functions of the state or official in question. Previously described as a privilege conferred at the behest of the executive, the grant of immunity is now understood as an obligation under customary international law ... [T]he existence of this obligation is supported by ample authority ... Immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum.”

60 Cassese et al (eds) *International Criminal Law: Cases and Commentary* (2011) 76; For a general discussion on nature Akande “International Law Immunities and the International Criminal Court” 2004 98 *The American Journal of International Law* 409-419; Gaeta “Does President Al-Bashir Enjoy Immunity from Arrest?” 2009 7 *Journal of International Criminal Justice* 320-322; Knuchel “State Immunity and the Promise of *Jus Cogens*” 2011 9 2 *Northwestern Journal of International Human Rights* 149-183; Tladi “Immunity in the Era of ‘Criminalisation’: The African Union, The ICC, and International Law” 2015 58 *Japanese Yearbook of International Law* 25-30; Zappalá “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Gaddafi Case Before the French Cour de Cassation” 2001 12 3 *European Journal of International Law* 595-612; Caplan “State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory” 2003 97 *The American Journal of International Law* 741-781; Mallory “Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings” 1986 86 *Columbia Law Review* 169-197; Kiyani “Al-Bashir & the ICC: The Problem of Head of State Immunity” 2013 *Chinese Journal of International Law* 486-489; Buzzini “Lights and shadows of immunity and inviolability of state officials in international law: some comments on the *Djibouti v France* case” 2009 22 3 *Leiden Journal of International Law* 455-483.

61 Cassese et al (eds) (n 60) 76.

62 Cassese et al (eds) (n 60) 76.

63 Cassese et al (eds) (n 60) 76.

64 Cassese et al (eds) (n 60) 76-77.

the principles of state sovereignty.⁶⁵ A state official with functional immunity enjoys such immunity for the duration of his tenure in office⁶⁶ and cannot be prosecuted for official acts conducted during that period.⁶⁷ This form of immunity is limited to acts committed in a person's official capacity, and acts which fall outside the scope of an official act can therefore be prosecuted either before the official takes office or after the official no longer occupies the office.⁶⁸ An example of such an act falling outside the scope of functional immunity would be if a state official murders a family member.

Personal immunity also derives from customary international law,⁶⁹ but is attached exclusively to individuals holding a particular office, for instance heads of state or diplomats.⁷⁰ Personal immunity has been described as absolute immunity in that it bars every act of the official, private or otherwise, from prosecution in a foreign jurisdiction.⁷¹ Personal immunities include the inviolability of the person, which means such a person cannot be arrested or detained and has complete immunity from criminal jurisdiction.⁷² Personal immunity extends to civil jurisdiction in a foreign court, albeit with some limited exceptions.⁷³ This type of immunity benefits the recipient during the period that the person remains in the office to which the immunity attaches.⁷⁴ Diplomats, for instance, have absolute immunity against prosecution in a foreign court, in a combination of both *ratio personae* and *ratio materiae* while they hold their office, as a means of allowing them to perform their official functions. Heads of state enjoy a similar type of immunity.

The content and the exact nature of the doctrine of head of state immunity are, however, a matter of dispute.⁷⁵ Head of state immunity is not codified in treaty law, thus differing from diplomatic immunity which was codified in the Vienna Convention on Diplomatic Relations,⁷⁶ as well as consular immunity where the rules regulating consular immunity are codified in the Vienna Convention on Consular Relations.⁷⁷ It is generally accepted that heads of state have absolute immunity,

65 Cassese et al (eds) (n 60) 76-77.

66 Cassese et al (eds) (n 60) 76-77.

67 Cassese et al (eds) (n 60) 76-77.

68 Cassese et al (eds) (n 60) 76-77.

69 Cassese et al (eds) (n 60) 88.

70 Cassese et al (eds) (n 60) 88.

71 Cassese et al (eds) (n 60) 88.

72 Cassese et al (eds) (n 60) 88.

73 Cassese et al (eds) (n 60) 88.

74 Cassese et al (eds) (n 60) 88.

75 O'Neill "A New Customary Law of Head of State Immunity?: Hirohito and Pinochet" 2002 38 *Stanford Journal of International Law* 289-317.

76 Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 UNTS 95.

77 Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 UNTS 261.

which bars a head of state from being prosecuted in a foreign court.⁷⁸ However, this position begs the question as to whether “head of state immunity” is absolute where an international crime has been committed, and specifically crimes which are *ius cogens*.⁷⁹ Furthermore, can a head of state be prosecuted once out of office, and, if so, is it only for acts committed in their personal capacity?⁸⁰ Does “head of state immunity” under customary international law bar heads of state from being prosecuted for the alleged commission of international crimes before an international criminal tribunal⁸¹ or is immunity limited to prosecution by a foreign court?⁸²

3.3.3 Prosecution and head of state immunity in foreign courts

It is generally accepted that a sitting head of state enjoys absolute immunity from prosecution in a foreign jurisdiction.⁸³ This means that a head of state cannot be prosecuted in the court of another sovereign state.⁸⁴ Such immunity derives from the concept of sovereign immunity and allows a state official to carry out his office in a manner similar to diplomatic immunity⁸⁵ – which, incidentally, is similar to the domestic immunity that many heads of state enjoy against criminal prosecution as discussed above. Customary international law provides full immunity to a person during their tenure as a head of state. It is uncertain, however, whether at the end of their term of office such a person may then be prosecuted for international crimes committed during that period.⁸⁶ Although full immunity covers both official and personal functions when an official commits an international crime, the question is whether the prosecution of the commission of an international crime by a head of state after his tenure in office is an exception. This situation is problematic, since crimes obviously never form part of the duties of a head of state.⁸⁷ Unfortunately, there are limited examples of former head of state immunity being questioned by foreign

78 Compare Hood and Cormier ‘Prosecuting International Crimes in Australia: The Case of the Sri Lankan President’ 2012 13 *Melbourne Journal of International Law* 236-264 and Fox ‘The Resolution of the Institute of International Law on the immunities of heads of state and government’ 2002 51 1 *International and Comparative Law Quarterly* 119-125; Kiyani (n 60) 486-489.

79 See Akande and Shah ‘Immunities of state officials, international crimes, and foreign domestic courts’ 2010 21 4 *European Journal of International Law* 815-852. For a contrary opinion see Orakshelashvili ‘Immunities of state officials, international crimes, and foreign domestic courts: a reply to Dapo Akande and Sangeeta Shah’ 2011 22 3 *European Journal of International Law* 849-855 and Kiyani (n 60) 486-489.

80 These questions are also considered in Akande and Shah (n 79) 815-852. For a contrary opinion see Orakshelashvili (n 79) 849-855 and Kiyani (n 60) 486-489.

81 Akande and Shah (n 79) 815-852. For a contrary opinion see Orakshelashvili (n 79) 849-855 and Kiyani (n 60) 486-489.

82 Akande and Shah (n 79) 815-852. For a contrary opinion see Orakshelashvili (n 79) 849-855 and Kiyani (n 60) 486-489.

83 See Hood and Cormier (n 78) 236-264; Fox (n 78) 119-125; Kiyani (n 60) 486-489.

84 See Hood and Cormier (n 78) 236-264; Fox (n 78) 119-125; Kiyani (n 60) 486-489.

85 See Hood and Cormier (n 78) 236-264; Fox (n 78) 119-125; Kiyani (n 60) 486-489.

86 See Hood and Cormier (n 78) 236-264; Fox (n 78) 119-125; Kiyani (n 60) 486-489.

87 See Hood and Cormier (n 78) 236-264; Fox (n 78) 119-125; Kiyani (n 60) 486-489.

courts.⁸⁸ The available examples are mostly limited to violations of international criminal law.⁸⁹ One such an example is the case of ex-President Pinochet of Chile.⁹⁰

88 *R v Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte* (No.3), House of Lords, Judgment of 24 March 1999.

89 *R v Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte* (No.3) (n 88).

90 Another exceptional case in which a head of state was tried is the trial of President Saddam Hussain. This case differs from the Pinochet case in that Saddam Hussain was arrested while he was still in office, even though at the time of the case an interim regime was in power. The nature of the tribunal is complex as the trial was held in Iraq under the auspices of the Iraqi transitional government. It is unclear how much control or to what extent the USA intervened in establishing this tribunal. Saddam Hussain, *inter alia*, was accused of committing crimes against humanity for which he was found guilty and received the death penalty. President Hussain's legal team appealed the guilty verdict and death penalty on various grounds, including that owing to the concept of head of state immunity he was immune from prosecution. The appeals decision issued on 12 December 2006 by the Cessation Chamber of the Iraqi High Court, considered the appeal and ruled as follows concerning the status of President Hussain's immunity: "As to the objection based on the immunity of officials we say the immunity is the practical immunity which comes for the purpose of the position; it is not possible for any person to claim that he committed crimes and that his actions are outside the reach of the law; the immunity is limited to the time in the position and does not continue thereafter, and it is tied in its existence and non-existence to the position, and it is not given to the benefit of a person who clings to the position, but it is given for the benefit of society. The immunity does not violate part two of the international criminal law and the constitution; *no state has the right to give its officials immunity from prosecution for crimes against humanity and genocide, and if immunity constitutes a means to avoid prosecution this principle has disappeared after World War II and immunity has no more effect.* The establishment of criminal courts is nothing but a sign of the end of the immunity principle. Since the law of the tribunal permits the trying of any person accused of committing a crime irrespective of his official position because his position does not protect him from punishment or constitute a mitigating circumstance (even if the person were president or member of the government or its council) *and whereas the law of the tribunal contains penalty provisions, therefore the claim of immunity of head of state or that the act was committed by the accused in his official capacity does not constitute an acceptable defense or a reason to reduce the sentence*, and therefore the immunity does not prevent the tribunal from using its jurisdiction to try those persons for the crimes they committed and over which it has jurisdiction. Therefore the immunity must be a cause to increase the sentence and not to reduce it, because whoever enjoys immunity normally has the power to influence a great number of people which increases the seriousness of the losses and damages resulting from the crimes.

The head of state is responsible internationally for the crimes he commits against the international community because it is not logical or just to punish the subordinates who carry out illegal orders issued by the president and his assistants and spare the president who ordered and planned the commission of these crimes. The president is therefore considered a 'gang chief' and not a head of state who respects the law. As such, the supreme president is to be considered responsible for the crimes committed by his subordinates not only on the basis of his knowledge of those crimes but for his negligence in not obtaining such knowledge. The non-action is considered equal to a positive action in light of article (13/1) of the Third Geneva Convention of 1949 which provides that any illegal action or abstention on the part of the authority which causes death or exposes the safety of prisoners of war to danger is prohibited and constitutes a serious violation of this convention." The appeals chamber held that head of state immunity ceased in the event that a head of state committed international crimes such as crimes against humanity. It further argued that the constitutive act of the tribunal itself waived immunity for a head of state and senior officials and thus the tribunal could exercise jurisdiction over the accused. President Hussain lost his appeal and the death penalty was confirmed. He was later executed. However, the value and legacy of the Saddam Hussain prosecution is tainted as the international community did not deem this tribunal to be upholding the values of a fair trial and there are allegations of procedural inconsistencies. The tribunal was accused of displaying victor's justice. Nevertheless, the ruling by the Iraqi Tribunal is in alignment with developments in international criminal law that international criminal tribunals may prosecute heads of states for the commission of international crimes and that in such cases immunity does not apply. However, owing to its composition the Iraqi High Tribunal is neither a foreign court nor a true international criminal tribunal; the court was composed of Iraqi judges and the trial took place in Iraq itself under Iraqi law. For these reasons it represents a problematic example.

Spain issued an arrest warrant against President Pinochet in response to the alleged commission of torture and torture-related crimes committed before and during his tenure in office.⁹¹ President Pinochet was arrested in the United Kingdom in response to an extradition request by Spain to the United Kingdom while he was in England for medical reasons.⁹² President Pinochet was tried in a domestic court of the United Kingdom.⁹³ The decision to try President Pinochet is therefore unique in that it contradicts the customary international law rule that prohibits the exercise of jurisdiction over a foreign head of state.⁹⁴ The question of the nature of President Pinochet's jurisdiction (whether absolute or functional) was indeed raised during the appeal case.⁹⁵ The House of Lords observed that international criminal law is evolving to the extent that certain categories of international crimes cannot be absolved from foreign prosecution.⁹⁶ The House of Lords, by a vote of six to one, concluded that President Pinochet did not enjoy immunity from extradition for some of the crimes in question, specifically torture.⁹⁷ The prohibition of torture is a norm of *ius cogens*.⁹⁸ The House of Lords reasoned that personal immunity did not extend to crimes which are in contravention of *ius cogens* norms and they are an exception to the general rule of customary international law that heads of state enjoy absolute immunity in a foreign jurisdiction.⁹⁹ This case, however, is an exception and evidence of subsequent practice by foreign courts relating to the prosecution of heads of state in foreign jurisdictions after their tenure in office is scarce or non-existent.¹⁰⁰

For a translation of the Appellate Decision affirming the death sentence against Saddam Hussain see Saliba "Appellate Decision" <https://www.loc.gov/law/help/hussein/appellate.php> (2018-08-14); for a discussion of the case as it relates to the concept of sovereign immunity of President Hussain see Lee "Sovereign Immunity for Saddam? Not likely" (18 October 2005) <https://www.jurist.org/commentary/2005/10/sovereign-immunity-for-saddam-not/> (2018-08-14); Semple "Saddam Hussein is Sentenced to Death" (5 November 2006) <https://www.nytimes.com/2006/11/05/world/middleeast/05cnd-saddam.html> (2018-08-16). For a summary of the trial see also "Saddam Hussain" (8 November 2016) <https://trialinternational.org/latest-post/saddam-hussein/> (2018-08-16); and "Iraq, The Trial of Saddam Hussain" adapted from House of Commons Library, Research Paper 03/51 (3 June 2003) <https://casebook.icrc.org/case-study/iraq-trial-saddam-hussein> (2018-08-16).

91 Cassese et al (eds) (n 60) 79-88.

92 Cassese et al (eds) (n 60) 79-88.

93 *R v Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte* (No.3) (n 88). For a summary of this case see Cassese et al (eds) (n 60) 79-88; of the Appellate Decision affirming the death Sentence against Sadam Hussain see Saliba (n 90); For another discussion, see Penrose "The Emperor's Clothes: Evaluating Head of State Immunity Under International Law" 2010 7 *Santa Clara Journal of International Law* 85-143.

94 Cassese et al (eds) (n 60) 79-88.

95 Cassese et al (eds) (n 60) 79-88.

96 Cassese et al (eds) (n 60) 79-88.

97 Cassese et al (eds) (n 60) 79-88.

98 See a 53 Vienna Convention on the Law of Treaties. Ultimately, however, President Pinochet was not extradited owing to medical reasons. See Cassese et al (eds) (n 60) 79-88.

99 Penrose (n 93) 85-143.

100 Compare *R v Bow Street Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte* (No.3) (n 88); for the Appellate Decision affirming the death sentence against Sadam Hussain see Saliba (n 90).

3.3.4 Prosecution and head of state immunity in international criminal tribunals

3.3.4.1 *Head of state immunity and international customary law*

The argument has been made that developments in international customary law are sufficient to establish an exception to the head of state immunity rule, in that a head of state is not protected if they have acted in violation of international criminal law and can thus be tried before an international court or tribunal.¹⁰¹ This argument has been disputed¹⁰² and will be tested in the form of a brief overview of the content of customary international law.¹⁰³ Article 38(1)(b) of the Statute of the International Court of Justice cites customary international law as a primary source of public international law¹⁰⁴ and refers to international custom as being “evidence of a general practice accepted as law”.¹⁰⁵ The wording of this provision is significant as it encompasses the two requirements needed for a rule to attain customary international law status. First, “evidence of general practice” refers to what is termed the *usus* requirement¹⁰⁶ and, second, “accepted as law” refers to what is known as the *opinio juris* requirement.¹⁰⁷

The *usus* requirement refers to the actual practice of states which is consistent with a rule of international law.¹⁰⁸ The *North Sea Continental Shelf* cases considered state practice as it relates to a relevant international law rule, including the practice of especially affected states, to be “extensive” and “virtually uniform”.¹⁰⁹ In the *North Sea Continental Shelf* cases, the International Court of Justice summarised the *usus* requirement as the practice of a rule by a state that “should moreover have occurred in such a way as to show general recognition that a rule of law or obligation is involved”.¹¹⁰ During its sixty-fourth session, the International Law Commission

101 For a discussion of this development see Akande and Shah (n 79) 815-852; Orakshelashvili (n 79) 849-855.

102 Kiyani (n 60) 486-489.

103 For a more in-depth analysis of customary international law, see Cassese *International Law* (2005) 153-69; Goldsmith and Posner *The Limits of International Law* (2005) 21-82; Brownlie *Principles of Public International Law* (2008) 6-12; Shaw *International Law* (2008) 72-93; Damrosch, Henkin, Murphy and Smit *International Law: Cases and Materials* (2009) 59-121.

104 Statute of the International Court of Justice (ICJ Statute) (n 58).

105 Statute of the International Court of Justice (n 58).

106 Statute of the International Court of Justice (n 58), art 38(1)(b); see also Wood *First Report on Formation and Evidence of Customary International Law* International Law Commission, 65th session, Geneva, 6 May–7 June and 8 July–9 August 2013, A/CN.4/663, par 55.

107 Statute of the International Court of Justice (n 58), art 38(1)(b); Wood (n 106) par 55; Wood *Second Report on Identification of Customary International Law* 66th session, Geneva, 5 May–6 June and 7 July–8 August 2014, A/CN.4/672, par 14 fn 61.

108 Statute of the International Court of Justice (n 58), art 38(1)(b); Wood (n 106) par 55; Wood (n 107) par 14 fn 61.

109 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, (Judgment) of 20 February 1969, [1969] ICJ Rep.3, par 74, 77, as cited in Wood (n 106) par 54.

110 *North Sea Continental Shelf Cases* (n 109) as cited in Wood (n 106) par 54.

considered the topic “Formation and evidence of customary international law”.¹¹¹ Subsequently, the International Law Commission released four reports on the “formation and evidence of customary international law” under the guidance of Sir Michael Wood, the Special Rapporteur tasked with this mandate.¹¹² His reports provide insight into the formation of customary international law generally, and discuss the two requirements necessary to establish custom specifically, as well as giving evidence of the existence of these requirements.¹¹³

The Second ILC report on the identification of customary international law comments that *usus* (or a general practice) “[i]s the conduct of states which is of primary importance for the formation and identification of customary international law, and the material element of customary international law thus is commonly referred to as ‘state practice’, that is, conduct which is attributable to states”.¹¹⁴ Draft Conclusion 6 echoes this determination and regards state practice as conduct attributable to the state, irrespective of whether such practice is exercised by its executive, legislative, judicial or other function.¹¹⁵ Draft Conclusion 9 determines that in order to be sufficient to establish a rule of customary international law, state practice must be “general” but need not be “universal”, and it must be “generally consistent”.¹¹⁶ Draft conclusion 9 also determines that if the practice is sufficiently general and consistent, no particular duration is required for such a practice to be considered as *usus*.¹¹⁷

The second requirement, *opinio juris*, provides the psychological element of customary international law.¹¹⁸ This requirement refers to the “subjective attitude” of a state: the fact that a state acts in compliance with a rule on the basis that it is of the opinion that it is legally obliged to do so, means that such a rule is then a rule of customary international law.¹¹⁹ The International Court of Justice distinguishes customary international law from mere ceremonial acts or protocol where the intent is to adhere to a rule, not because of a belief that the state is under any legal obligation to do so but because such an action is motivated by considerations of courtesy or

111 Wood (n 106) par 1.

112 Wood (n 106) par 55. Wood (n 107); Wood *Third Report on Identification of Customary International Law*, International Law Commission, 67th session, Geneva, 4 May–5 June and 6 July–7 August 2015, A/CN.4/882; Wood *Fourth Report on Identification of Customary International Law*, International Law Commission, 68th session, Geneva, 2 May–10 June and 4 July–12 August 2016, A/CN.4/695 21.

113 Wood (n 106) par 55.

114 Wood (n 107) par 33.

115 Wood (n 107) par 37–47.

116 Wood (n 107) par 59.

117 Wood (n 107) par 59.

118 Wood (n 106), Wood (n 107) par 60.

119 Wood (n 106) par 69; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits, (Judgment) of 27 June 1986 [1986] ICJ Rep 14, 103 par 207 as cited in Wood (n 106) par 58.

tradition.¹²⁰ In the *North Sea Continental Shelf* case, the International Court of Justice articulated the relationship between the *usus* and *opinio juris* requirements of international customary law as follows:

Not only must the acts concerned amount to a settled practice ... but they must also be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation.¹²¹

In the *Nicaragua* case, the International Court of Justice articulated the *opinio juris* requirement as evidence of a belief that state practice is binding owing to the existence of an obligatory rule of law.¹²² The International Court of Justice confirmed that it is the very need that requires such a belief which not only serves as evidence of the subjective requirement, but also that such a need is inherent in the very notion of *opinio juris sive necessitatis*.¹²³ In the more recent case of *Germany v Italy*, the Court formulated the test which determines whether the *opinio juris* requirement is satisfied as being the obligation imposed upon states by international law to abide with the rule in question.¹²⁴ The Second Report on the identification of customary international law eloquently phrases the *opinio juris* requirement as feeling “legally compelled to ... [perform the relevant act] by reason of a rule of customary law obliging them to do so”.¹²⁵

The analysis above provides insight into the requirements of *usus* and *opinio juris*, and demonstrates the symbiotic nature of these requirements:¹²⁶ both requirements are necessary to establish a rule of customary international law.¹²⁷ It is not in every case in which a court is faced with asserting the existence of a rule of customary international law that it endeavours to give a comprehensive analysis of both *usus* and *opinio juris*.¹²⁸ The case of *Germany v Italy* serves as an example where the

120 Wood (n 106) par 57, citing *North Sea Continental Shelf Cases* (n 109) par 74 77.

121 Wood (n 106) par 57, citing *North Sea Continental Shelf Cases* (n 109) par 74 77.

122 Wood (n 106) par 58, citing *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (n 119) par 207.

123 Wood (n 106) par 58, citing *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (n 119) par 207.

124 Jurisdictional Immunities of the State (*Germany v Italy*, (Judgment) of 3 February 2012 [2012] ICJ Rep 434, par 55).

125 Wood (n 107) par 60, 69. Draft Conclusion 10 of this report captures the purpose of *opinion juris*: “Role of acceptance as law: 1 The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation. 2 Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.”

126 Wood (n 107) par 3. The report describes these requirements as being “closely entangled”.

127 Wood (n 107) par 31, page 14; Jurisdictional Immunities of the State (*Germany v Italy*) (n 124) par 55.

128 Wood (n 106) par 64 fn 122.

court analysed both *usus* and *opinio juris* in order to establish whether immunity was a rule of customary international law and, if immunity has indeed achieved customary international law status, what the extent of this rule would be.¹²⁹ There are other instances where the international court or tribunal merely acknowledged or announced the status of the rule without an explanation.¹³⁰ Some courts reason that a straightforward approach is used primarily if it is obvious or undisputed that a rule of law can indeed be categorised as a rule of customary international law.¹³¹ This was the approach the International Court of Justice followed in the *Nicaragua* case when the Court proclaimed that Common Article 3 of the Geneva Conventions had attained customary international law status.¹³²

3.3.4.2 The Nuremburg and Tokyo tribunals

There is some evidence in practice that immunity has been waived in regard to sitting heads of state, and former heads of states have been brought before an international tribunal as a result of the commission of the most serious international crimes. The first international criminal tribunal was the Nuremberg Tribunal, which was established to prosecute and punish those persons who acted in the interests of European Axis countries, for example Germany, and committed crimes against peace, war crimes and crimes against humanity during World War II.¹³³ Article 7 of the Nuremberg Charter explicitly waives head of state immunity in its words: “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.”¹³⁴

Arguably, this declaration in the Nuremberg Charter paved the way for future international tribunals to follow suit. In response to the arguments by the defence in the Nuremberg trials that the actions by the defendants were those of a sovereign state and protected by the doctrine of state sovereignty, the Nuremberg court confirmed that immunity was not a defence in the commission of international crimes. The court argued that individuals indeed could be punished for the violation of international law: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes

129 Jurisdictional Immunities of the State (*Germany v Italy*) (n 124) par 55; see also Wood (n 106) par 62.

130 Wood (n 106) par 64.

131 Wood (n 106) par 62, 64.

132 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (n 119) par 207, 218. Common Article 3 to the Geneva Conventions is a provision common to all four of the Geneva Conventions and provides obligations on both parties to a non-international armed conflict.

133 See The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General, Topic: Formulation of the Nürnberg Principles http://www.cininas.lt/wp-content/uploads/2015/06/1949_UN_ILC_N_statuto_koment.pdf (2018-08-14), at 4 and also at 6 of the Nürnberg Charter (UN General Assembly, Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, 21 November 1947, A/RES/177).

134 UN General Assembly, Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (n 133).

can the provisions of international law be enforced.”¹³⁵ The court further asserted: “The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.”¹³⁶ In addition to this argument, the court then referenced article 7 of its constitutive Charter.¹³⁷

Similarly, the International Military Tribunal for the Far East (the Tokyo Tribunal), which was established by special proclamation of the Supreme Commander for the Allied Powers at Tokyo on January 1946, determined in article 6 of the Proclamation (Charter) that state officials could not rely on immunity to exempt them from the jurisdiction of the Tribunal.¹³⁸ Article 6 determined in respect of the responsibility of the accused:

*Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.*¹³⁹

3.3.4.3 The special tribunals and courts

Article 7(2) of The Statute of the International Tribunal for the Former Yugoslavia and article 6(2) of the Statute of the International Tribunal for Rwanda mimic the proclamations which abolish immunity before these tribunals: “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”¹⁴⁰ The Statute of the Special Court for Sierra Leone explicitly states that an accused person cannot rely on immunity that attaches to his or her position or former position.¹⁴¹ Article 6(2) of the Statute of the Special Court for

135 The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum (n 133) at page 42 citing UN General Assembly, Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (n 133) par 53.

136 The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum (n 133) at page 43 citing UN General Assembly, Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (n 133) par 53–54.

137 The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum (n 133) at page 43 citing UN General Assembly, Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (n 133) par 53–54.

138 The Special Proclamation for the Establishment of An International Military Tribunal For the Far East http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (2018-08-14).

139 a 6 of The Special Proclamation for the Establishment of An International Military Tribunal For the Far East (n 138).

140 Statute of the International Criminal Tribunal for the former Yugoslavia (adopted 25 May 1993) UN Doc S/25704; Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) UN Doc SC/5974.

141 Statute of the Special Court for Sierra Leone (16 January 2002) 2178 UNTS 138.

Sierra Leone determines: “The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

These examples of international criminal tribunals are not, *per se*, reflective of state practice. As has been explained, it is only the practice of states that is taken into account in the formation of customary international law. Therefore, if a tribunal is the creation of an international organisation, then the constitutive document does not serve as an example of state practice unless the constitutive document determines that the state itself is fully responsible for the tribunal.

A further question arises with regard to the definition of what constitutes an international criminal tribunal. The Special Court for Sierra Leone, for instance, was established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000, on the basis of which the Security Council mandated the existence of this tribunal. However, the domestic law of Sierra Leone was ultimately applied, and the Sierra Leonean government agreed to establish the court. Consequently, it could be argued that the Agreement of Sierra Leone is a form of state practice, but that does not resolve the problem that this Special Tribunal is the product of a Security Council Resolution. It is difficult to establish which of these statutes, if any, may be considered state practice.

The International Tribunal for the Former Yugoslavia arguably is a truly international criminal tribunal and thus article 7(2) cannot be viewed as a manifestation of state practice, as the International Tribunal for the Former Yugoslavia was established by the Security Council acting under its Chapter VII powers afforded to it by the Charter of the United Nations.¹⁴² On the other hand, the International Tribunal for Rwanda was established by the Security Council under Chapter VII of the United Nations, but in response to a request by the government of Rwanda.¹⁴³ The request

142 See preamble to the Statute of the International Tribunal for the Former Yugoslavia adopted 25 May 1993 by Resolution 827. “Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as ‘the International Tribunal’) shall function in accordance with the provisions of the present Statute.”; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) ATS 1 (UN Charter).

143 Statute of the Special Court for Sierra Leone (16 January 2002) 2178 UNTS 138: “*Acting under Chapter VII of the Charter of the United Nations*, 1. Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto.” And preamble to Statute: “Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred

determined that an international tribunal should be established. It is uncertain whether the consent of the state in establishing the tribunal supports the argument that article 6(2) of the Statue of the International Criminal Tribunal for Rwanda is a manifestation of state practice. The Nuremberg and Tokyo Tribunals are international in nature; the Tokyo Tribunal, moreover, was established not by the United Nations Security Council but by General Douglas MacArthur, General of the army of the United States in his capacity as the Supreme Commander for the Allied Powers. He held this authority under the Terms of Surrender agreed upon between Japan and the governments of the United States, Great Britain and Russia.¹⁴⁴

In *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*,¹⁴⁵ also known as the Al-Bashir Appeals Judgment, the Supreme Court of Appeal of South Africa considered whether a customary international law rule existed that determined that state officials do not have immunity before an international criminal tribunal in the commission of international crimes.¹⁴⁶ After a thorough analysis of available jurisprudence, the Supreme Court of Appeal of South Africa came to the conclusion that there is no such rule. The judgment emphasised that state practice should be taken into account and not the practice of international criminal tribunals. This ruling is evidence that in the state practice of the Republic of South Africa there is no rule of customary international law of this nature.¹⁴⁷ The Supreme Court of Appeal held:

But the content of customary international law is not for me to determine and, like Dr Weatherall, I must conclude with regret that it would go too far to say that there is no longer any sovereign immunity for jus cogens (immutable norm) violations. Consideration of the cases and the literature goes no further than showing that Professor Dugard is correct when he says that 'customary international law is in a state of flux in respect of immunity, both criminal and civil, for acts of violation of norms of jus cogens'. In those circumstances I am unable to hold that at this stage of the development of

to as 'The International Tribunal for Rwanda') shall function in accordance with the provisions of the present Statute."

144 Special proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946; charter dated 19 January 1946; amended charter dated 26 April 1946: "Article 1. There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against peace."

145 2016 3 SA 317 (SCA).

146 *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (n 145) at par 68–84. Citing par 68: "Dating back to the instrument that established the Nuremberg Trials, it has been a feature of international instruments dealing with the prosecution of international crimes before specially constituted international tribunals, that those tribunals are constituted on the basis of specific provisions excluding claims of immunity as a defence or mitigating circumstance before those tribunals. The ICJ considered these as well (par 58) and found that they likewise did not enable it to conclude that any such exception existed in customary international law in regard to national Courts. But it was urged upon us that customary international law has moved on and at least when it was concerned with international crimes and international tribunals such as the ICC these principles were subject to an exception."

147 Compare Wood (n 106).

customary international law there is an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts.¹⁴⁸

Contrary to this discussion, and against the ruling in *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*, some authors opine that a rule exists under customary international law that head of state immunity cannot be relied upon as a bar to the jurisdiction of an international criminal tribunal in the event that an official is charged with the commission of international crimes.¹⁴⁹ Other authors agree that there is simply not enough practice which supports the existence of a rule in relation to the immunity of heads of state in front of an international criminal tribunal.¹⁵⁰ The authors of this chapter share the view that, at present, customary international law neither clearly supports the view that immunity precludes the prosecution of heads of state by an international criminal tribunal for the commission of international crimes, nor does it support the prosecution of heads by waiving head of state immunity.¹⁵¹ There is simply not sufficient state practice to support either theory.¹⁵²

In order to establish a way to hold heads of state responsible for the violation of international crimes (especially if the state is not a party to the Rome Statute), it is helpful, for purposes of this chapter, that the United Nations Security Council under Chapter VII can act as it did in the case of the International Criminal Tribunal for the Former Yugoslavia. In that instance, the United Nations established an international criminal tribunal which could prosecute those who are responsible for the commission of crimes within a territory, including high-ranking officials such as a head of state.¹⁵³ Equally, the United Nations Security Council can act at the request of a state under Chapter VII, as occurred following the Rwandan genocide where it established the International Criminal Tribunal for Rwanda.

3.3.5 Prosecution and head of state immunity in the International Criminal Court

The Rome Statute of the International Criminal Court is a treaty which establishes the International Criminal Court,¹⁵⁴ the purpose of which is to exercise jurisdiction

148 *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (n 145) par 84.

149 *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (n 145); Kiyani (n 60) 486-489.

150 Kiyani (n 60) 486-489; Tladi "Separating the (Doctrinal) Wheat from the (Normative) Chaff" 2015 13 *Journal of International Criminal Justice* 3-17.

151 Compare Tladi (n 150) 3-17; *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (n 145).

152 Charter of the United Nations (n 142) at chapter VII and article 103.

153 Charter of the United Nations (n 142) at chapter VII and article 103; De Wet *The Chapter VII Powers of the United Nations Security Council* (2004).

154 Rome Statute of the International Criminal Court (n 56) a 1.

over the most serious international crimes as listed in article 5 of its Statute. The crimes within the jurisdiction of the Court are genocide,¹⁵⁵ crimes against humanity,¹⁵⁶ war crimes¹⁵⁷ and the crime of aggression.¹⁵⁸ The Rome Statute specifically determines that persons cannot rely on any form of immunity conferred upon them either by national or international law if the state of which such a person is a national is a signatory to the Rome Statute.¹⁵⁹ Simply put, article 27 determines that signatories to the Rome Statute consent that head of state immunity, and the immunity of other members of government, are waived in terms of the Rome Statute. The International Criminal Court is thus a forum in which a head of state may be brought to justice for the commission of international crimes if the jurisdictional requirements as set out in the Rome Statute have been satisfied.¹⁶⁰ This section explores article 27 in detail and considers the possibility that heads of non-member states can also be prosecuted by this court.

3.3.5.1 Article 27 of the Rome Statute

To avoid any dispute arising in terms of customary international law, the drafters of the Rome Statute explicitly waived all forms of immunity in declaring all persons equal before the International Criminal Court, so that no one can claim immunity in respect of official capacity in order to escape prosecution if the court has jurisdiction over the accused's case.¹⁶¹ Customary international law may be altered by state parties if they agree to a higher legal standard, in that heads of state do not enjoy immunity before international criminal tribunals for the commission of international crimes, or to incur greater legal obligations owing to acceptance of a stricter rule under treaty law. The nature or content of head of state immunity under customary international law, for purposes of the application of the Rome Statute to member states, is irrelevant as article 27 regulates immunity. Article 27 of the Rome Statute reads as follows:

Irrelevance of Official Capacity

1. This Statute shall apply equally to all persons without any discrimination 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.

155 Rome Statute of the International Criminal Court (n 56) a 6.

156 Rome Statute of the International Criminal Court (n 56) a 7.

157 Rome Statute of the International Criminal Court (n 56) a 8.

158 Rome Statute of the International Criminal Court (n 56) a 8*bis*.

159 Rome Statute of the International Criminal Court (n 56) a 27.

160 Rome Statute of the International Criminal Court (n 56) aa 11, 12, 13, 14.

161 Rome Statute of the International Criminal Court (n 56) a 27.

2. Immunities or special procedural rules which may attach to the official capacity of a person, *whether under national or international law*, shall not bar the Court from exercising its jurisdiction over such a person.¹⁶²

Furthermore, the Rome Statute of the International Criminal Court does not allow for any reservations,¹⁶³ and therefore member states are bound by the entire treaty.¹⁶⁴ All member states, upon signature or ratification of this instrument, depending on whether the state is monist or dualist, waive head of state and other forms of immunity.¹⁶⁵ The meaning and purpose of article 27(1) clearly supports the view that states consenting to the jurisdiction of the Rome Statute cannot raise immunity in order to protect a head of state from the jurisdiction of this court.¹⁶⁶ Article 27(2) of the Rome Statute confirms that any immunities or special procedural rules which attach to a person owing to their official capacity, for instance the capacity of head of state under national or international law, will not apply in this court. Thus, both sitting and former heads of state have absolutely no special privileges or immunities acting as a bar to the jurisdiction of the International Criminal Court. At present, there are 123 member states to the Rome Statute, 33 of which are on the African continent. The heads of these states do not have immunity before the International Criminal Court.¹⁶⁷

Article 27 is crucial to eliminating impunity in the commission of international crimes.¹⁶⁸ The core international crimes included in article 5 of the Rome Statute are of such a nature that governmental authorities often play a role in the commission of these crimes, for instance systematic crimes such as genocide and war crimes. It is the purpose of the International Criminal Court to punish those individuals who should be held most responsible for serious crimes of international concern. It is not the purpose of the International Criminal Court to prosecute low-ranking officials; high-ranking officials such as military leaders, heads of state or the most senior officials of organised armed groups or opposition groups are those that should be prosecuted under the Rome Statute. This objective is achievable only because of article 27.

162 Emphasis added.

163 Rome Statute of the International Criminal Court (n 56) a 120.

164 For the rules pertaining to reservations see Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) a 19.

165 A 27 read together with a 120, Rome Statute of the International Criminal Court, 1998 2187 UNTS 90.

166 Triffterer and Ambos *Rome Statute of the International Criminal Court: A Commentary* (2016) 1037-1055. See a 31 of the United Nations, Vienna Convention on the Law of Treaties (n 164). For a discussion on the general rules of treaty interpretation see Sorel and Bore "Article 21: Convention of 1969" in Corten and Klein *The Vienna Convention on the Law of Treaties: A commentary, Volume I* (2011) 804-837.

167 For an up-to-date list of the ICC member states see https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20to%20the%20rome%20statute.aspx (2018-08-14).

168 Rome Statute of the International Criminal Court (n 56).

3.3.5.2 Article 98 of the Rome Statute

In order for the International Criminal Court to operate effectively, the cooperation of member states, as well as judicial assistance, is required.¹⁶⁹ Member states of the Rome Statute are obliged to cooperate with the International Criminal Court in relation to the investigations conducted by the court as well as in the prosecution of crimes which fall within the jurisdiction of the court.¹⁷⁰ In order to carry out its task, the International Criminal Court may use diplomatic channels to request cooperation from member states. Such cooperation includes a request for the arrest and surrender of a person on the territory of a member state. However, a request for cooperation may not be made if such a request infringes upon the international obligations of the requesting state in relation to the waiver of immunity. Article 98 determines that

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of *a third state*, unless the Court *can first obtain the cooperation of that third State for the waiver of the immunity*.
2. The Court *may not proceed with a request for surrender* which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender...¹⁷¹

Article 98 confirms the applicability of the third-party rule, which is a rule of customary international treaty law codified in article 34 of the Vienna Convention on the Law of Treaties. Article 34 determines that a “treaty does not create either obligations or rights for a third State without its consent”. A unique relationship exists between article 27 and article 98 of the Rome Statute in respect of the waiver of immunity. Only states which consent (for example by becoming member states of the Rome Statute) waive official immunity, including head of state immunity. Non-state parties cannot incur such an obligation as it would automatically be invalid in terms of the third-party rule.

Article 98 reiterates this rule, but determines that a state may exercise jurisdiction over an official, for instance the head of a non-member state, if that third state (the non-member state) consents to waive immunity. Therefore, in this manner such a third state, through agreement, does not incur obligations to which it did not consent.

169 Part 9L International Cooperation and Judicial Assistance articles 86–98 Rome Statute of the International Criminal Court (n 56).

170 See Rome Statute of the International Criminal Court (n 56) a 86.

171 Emphasis added.

The International Criminal Court cannot expect member states to cooperate in the investigation, arrest or prosecution of officials of third states (for instance, the head of state of a non-member (third) state) as to do so would cause the member state to violate its obligations under general international law. Similarly, a member state to the Rome Statute cannot be asked to surrender for instance the head of state of a third state if the International Criminal Court did not first secure the consent of the sending state to the surrender. A non-member state, however, in response to a request from the International Criminal Court can consent to the court's jurisdiction under article 12(3)¹⁷² of the Rome Statute and specifically waive the immunity of the official in question. As a result of the consent theory, such an individual loses his immunity and the court is enabled to investigate the case and arrest and prosecute an accused. This is possible as the third state's consent to waive immunity (including for example head of state immunity) would bar the infraction of the third-party rule and obviate the cooperating member state from violating international law. The referral of the situation in Sudan (a state which is not a party to the Rome Statute), by the Security Council of the United Nations to the International Criminal Court on 31 March 2005 as a consequence of events in Darfur which continued as of 1 July 2002, highlights that the value of article 98 arguably is more contentious than a plain reading of the text.¹⁷³ Alternative interpretations have been offered in response to South Africa's failure to arrest President Al-Bashir when he visited South Africa in June 2015.¹⁷⁴

The non-arrest of Al-Bashir opened what amounts to a 'Pandora's box' in terms of legal arguments in relation to what is often referred to as the strained relationship between articles 27 and 98 of the Rome Statute and to the content and nature of article 98.¹⁷⁵ A central legal issue that was raised in relation to the content of

172 Rome Statute of the International Criminal Court (n 56) a 12(3): "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

173 See Resolution UNSC 1593 (2005) "Acting under Chapter VII of the Charter of the United Nations, 1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court...". For a discussion on the legal nature of Security Council referrals to the ICC see Akande "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities" 2009 7 *Journal of International Criminal Justice* 333-352 and De Wet "Referrals to the International Criminal Court under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials" 2018 112 *AJIL Unbound* 33-37.

174 See *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* 2015 5 SA 1 (GP) and *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (n 145); see also Tladi "Interpretation and International law in South African courts: The Supreme Court of Appeal and the Al-Bashir saga" 2016 *African Human Rights Law Journal* 310-338; Akande "The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of State?" (29 March 2016) www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/ (2018-07-20).

175 The following scholarly articles offer several arguments concerning the interpretation of article 98 as well as the relationship between article 27 and 98 in context of the Al-Bashir saga: Kiyani (n 60) 467-508; Gaeta (n 60) 315-332; Tladi "Cooperation, Immunities, and Article 98 of the Rome Statute: The ICC, Interpretation, and Conflicting Norms" 2012 106 *Am. Soc'y Int'l L. Proc.* 307-308; Tladi (n 60) 17-44; Triffterer and Ambos (n 166) 2119-2146.

article 98 of the Rome Statute, following the failure of a member state (in this case South Africa, to arrest President Al-Bashir) concerns whether or not article 98 of the Rome Statute can be interpreted as obliging a member state to arrest the head of state of a non-member state which did not consent to the jurisdiction of the International Criminal Court, but in a situation in which there is a Security Council referral and an arrest warrant subsequently issued.¹⁷⁶ As the Al-Bashir case and the interpretation of article 98 have been discussed in great depth, this topic is not given further attention. At this juncture, it should be mentioned that the exact meaning of article 98 is yet to be settled.¹⁷⁷

3.3.6 Prosecution and head of state immunity in the African Court of Justice and Human Rights

The Protocol on Amendments to the Protocol (the Malabo Protocol) was adopted by the African Union (AU) to amend the Protocol on the Statute of the African Court of Justice and Human Rights.¹⁷⁸ In terms of this Protocol, a separate criminal chamber is constituted which extends the jurisdiction of the yet-to-be-established African Court of Justice and Human Rights (ACJHR) to a closed list of international and

176 Compare *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* (n 174) and *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (n 145).

177 See also Akande "An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue" (31 March 2016) www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/ (2018-07-15); De Hoogh and Knottnerus "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong ... Again" (18 April 2014) www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-but-gets-the-law-wrong-again/ (2018-07-15); Akande (n 60) 407-433; see also *In The Case of The Prosecutor v Omar Hassan Ahmad Al-Bashir* "Request by Prof. Flavia Lattanzi for leave to submit observations on the merits of the legal questions presented in The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018 Appeals Chamber, case no ICC-02/05-01/09 OA2 (30 April 2018), Dapo Akande, *The Bashir Appeal at the ICC* (10 September 2018) <https://www.ejiltalk.org/the-bashir-appeal-at-the-icc/#more-16466> (2018-11-19), Talita de Souza Dias *The 'Security Council Route' to the Derogation from Personal Head of State Immunity in the Al-Bashir Case: How Explicit must Security Council Resolutions be?* (19 September 2018) <https://www.ejiltalk.org/the-discussion-of-the-security-council-roots-to-the-derogation-from-personal-immunities-in-the-al-bashir-case-how-explicit-must-security-council-resolutions-be/#more-16485> (2018-11-28), Alexandre Skander Galand *Looking for Middle Ground on the Immunity of Al-Bashir? Take the Third 'Security Council Route'* (23 October 2018) <https://www.ejiltalk.org/looking-for-middle-ground-on-the-immunity-of-al-bashir-take-the-third-security-council-route/#more-16572> (2018-11-19). Dapo Akande and Talita de Souza Dias *Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2) of the Rome Statute* (12 November 2018) <https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/#more-16638> (2018-11-19).

178 Protocol on Amendments to the Protocol on the statute of the African Court of Justice and Human Rights. For a general discussion on the Malabo protocol as well as the immunity provision (art 46ABis) see Tladi "Chapter 12: Immunities (Article 46ABis)" in Werle and Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 203-217; Van Schaack "Immunity Before the African Court of Justice & Human & Peoples rights – The Potential Outlier" (10 July 2010) www.justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/ (2018-07-13); Abebe "The African Court with a criminal jurisdiction and the ICC: a case for overlapping jurisdiction?" 2017 25 3 *African Journal of International and Comparative Law* 418-429.

transnational crimes.¹⁷⁹ The original purpose of the ACJHR was to establish a court with two sections, one for general affairs and one focusing on human rights.¹⁸⁰ The Malabo Protocol introduces a third chamber or section to the existing structure of the Court. The jurisdiction of this third section, the criminal division of the ACJHR, is restricted to the crimes listed in article 28 of the Malabo Protocol,¹⁸¹ as well as being limited to member states of the AU that have signed or ratified the Malabo Protocol.¹⁸² To date, only five states have ratified this treaty and 15 ratifications are needed for the court to be established. Only when the requirement of 15 ratifications has been met will ACJHR serve as an African Regional Criminal Court.

It has been suggested that the strained relationship between the ICC and the AU prompted the adoption of the Malabo Protocol. However, there is evidence that an African criminal court delivering justice in an African manner had been discussed at an earlier stage.¹⁸³ There are core differences in the make-up of the two instruments, including a regional-specific scope for the ACJHR, the extended list of crimes in the Malabo Protocol and, significantly, the restatement of immunity for sitting heads of state under the Malabo Protocol.¹⁸⁴ There may be overlapping jurisdiction with the Rome Statute, but a discussion on that falls outside the scope of the current contribution.¹⁸⁵

3.3.6.1 Article 46Bis

*“No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”*¹⁸⁶ Article 46ABis of the Malabo Protocol, or the so-called immunity clause, is considered the most controversial provision in this treaty¹⁸⁷ as it confers immunity upon sitting heads of state.¹⁸⁸ The ACJHR is unable to prosecute sitting heads of member states to this treaty for the alleged commission of crimes listed under article 28 of the Malabo Protocol. The African Union holds the opinion that

179 For a discussion of the Malabo Protocol see the detailed report by Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* Amnesty International 2016.

180 Protocol on The Statute of the African Court of Justice and Human Rights; *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* Amnesty International 2016 5.

181 See also *Malabo Protocol* (n 180) 5.

182 The *Malabo Protocol* has been signed by 30 states but ratified by only 5 states.

183 *Malabo Protocol* (n 180) 6 22.

184 *Malabo Protocol* (n 180) 5.

185 *Malabo Protocol* (n 180) 22.

186 *Malabo Protocol*, Article 46ABis (emphasis added).

187 *Malabo Protocol* (n 180) 26.

188 *No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.*

this provision is merely a manifestation of existing customary international law.¹⁸⁹ The adoption of this provision however is contrary to contemporary trends in international criminal tribunals, for instance the Special Court of Sierra Leone,¹⁹⁰ the International Criminal Tribunal for the Former Yugoslavia¹⁹¹ and the International Criminal Tribunal for Rwanda,¹⁹² in which immunity for heads of state was not a measure included in these tribunals' constitutive treaties.¹⁹³ It is argued that the provision of this measure would have strengthened the hand of those fighting to eliminate impunity in respect of international crimes on the African Continent.¹⁹⁴

On an initial reading, article 46ABis offers not only functional but absolute immunity to heads of state.¹⁹⁵ The wording "[n]o charges shall be commenced or continued" conforms to the general approach that during their tenure heads of state enjoy absolute immunity.¹⁹⁶ Some authors have suggested that this provision is poorly drafted and that a more restricted form of immunity is envisaged based on the latter part of the provision.¹⁹⁷ The structure of the sentence may be ambiguous. Nevertheless, the wording "*based on their functions, during their tenure of office*" logically refers to the immunity which attaches to "other" state officials, that is, state officials other than heads of state.¹⁹⁸ A textual interpretation of the wording "[n]o charges shall be commenced or continued" in conjunction with article 31(1) of the Vienna Convention on the Law of Treaties is of assistance. The key is the word "no". "No" is negative, the rejection of an idea,¹⁹⁹ and can be replaced by "not any"²⁰⁰ charges shall be commenced or continued before the Court against any serving AU Head of State or Government". As the wording forbids any charges, it can be construed that immunity is not limited to covering the official acts of a head of state but is absolute in its application.²⁰¹

189 Some members of the drafting committee disputed this assertion. See The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, Malabo, Equatorial Guinea, 20-24 June 2014, Ex.Cl/846 (XXV), par 25. See also *Malabo Protocol* (n 180) 26.

190 Statute of the Special Court for Sierra Leone (16 January 2002) 2178 UNTS 138.

191 Statute of the International Criminal Tribunal for the former Yugoslavia (adopted 25 May 1993) UN Doc S/25704.

192 Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) UN Doc SC/5974.

193 For a discussion see *Malabo Protocol* (n 180) 27.

194 *Malabo Protocol* (n 180) 27.

195 *No charges* shall be commenced or continued before the Court *against any serving AU Head of State or Government*, or anybody acting or entitled to act in such capacity, or other senior state officials *based on their functions, during their tenure of office*.

196 Protocol on Amendments to the Protocol on the statute of the African Court of Justice and Human Rights, at a 46ABis.

197 Protocol on Amendments to the Protocol on the statute of the African Court of Justice and Human Rights.

198 Protocol on Amendments to the Protocol on the statute of the African Court of Justice and Human Rights, at a 46ABis.

199 O'Niell and Summers (eds) *Collins English Thesaurus* (2015) 573.

200 O'Niell and Summers (eds) (n 199) 531.

201 Protocol on Amendments to the Protocol on the statute of the African Court of Justice and Human Rights, at a 46ABis.

This interpretation of the text is in alignment with the context of this provision which is directed towards buttressing the immunity of heads of state before the African Court of Justice and Human Rights.²⁰² Furthermore, it is unlikely that the African Union will prosecute a sitting head of state as it supports the principle of sovereignty and has condemned the actions of the International Criminal Court in issuing arrest warrants against sitting heads of states. A reason offered for the general condemnation is that the ICC breached the absolute immunity a head of state enjoys in terms of the African Union's interpretation of immunity.²⁰³ The established interpretation of article 46*ABis* read together with article 28 of the Malabo Protocol is that sitting heads of state enjoy absolute immunity before the ACJHR, irrespective of whether the alleged crime committed is one of the core crimes (aggression, genocide, torture, crimes against humanity and war crimes).

Article 46*ABis* confers immunity upon sitting heads of state and protects them from prosecution by the ACJHR. It is unclear if article 46*ABis* is a regional solution, holding ex-heads of state of states signatory to the Malabo Protocol responsible for the commission of crimes codified in the Malabo Protocol once this instrument has been ratified by a sufficient number of states. An ordinary reading of article 46*Bis* as provided for by article 31(1) of the Vienna Convention on the Law of Treaties suggests that former or retired heads of state may be brought before the African Court of Justice and Human Rights.

In the context of article 46*ABis*, the term “serving” means “to be of service” or to “perform an official duty or duties.”²⁰⁴ Thus, a serving head of state refers to a person (a head of state) who performs the duties of head of state in an official capacity.²⁰⁵ The verb in the provision is in the present tense, therefore, arguably, the immunity offered is restricted to serving heads of states and cannot be used by retired, incapacitated or former heads of state. The favoured reading may be that as the reference is purely to the functional immunity attached to the office, the meaning remains open to interpretation. The interpretation of the wording depends on whether the provision is read as entailing absolute immunity for heads of state while in office, or if heads of states enjoy merely functional immunity. It depends on article 46*Bis* being seen as having either one or two parts. Also, this provision may afford sitting heads of states absolute immunity for any alleged crimes codified in article 28 of the Malabo

202 See Vienna Convention on the Law of Treaties (n 164) at a 31(1) concerning the primary rules of treaty interpretation. For a discussion on treaty interpretation see in general Linderfalk *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention of the Law of Treaties* (2001); Linderfalk *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007); Sorel and Bore “Article 31: Convention of 1969” in Corten and Klein (eds) (n 166).

203 It is so that the disdain between the AU and ICC is far more complex and this is but one of the reasons offered by the AU.

204 O’Niell and Summers (eds) (n 199) 728. Compare article 46*Bis* (emphasis added): *No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.*

205 See also O’Niell and Summers (eds) (n 199) 773.

Protocol, whereas other state officials are limited to having functional immunity. This is a possible reading where the second part of the sentence is viewed as a separate idea split by the comma “or other senior state officials (shall not incur immunity) *based on their functions, during their tenure of office*”.²⁰⁶

It further remains unanswered if the type of crimes listed under article 28 of the Malabo Protocol ever can be reconciled with the exercise of the normal functions of a head of state. Certain crimes simply are not part of the functions of a head of state. For instance, the illicit exploitation of natural resources or money laundering may be covered by functional immunity if these offences are performed during the office of a president, whereas crimes which contravene norms of *ius cogens*, for instance torture or genocide, may not be covered by functional immunity.²⁰⁷ These issues fall beyond the scope of this chapter, but they nevertheless require clarification.

As the ordinary meaning of the terms has not clarified what is meant by the content of this provision, which is still obscure, the drafting history can be consulted as a subsidiary means of interpretation.²⁰⁸ Unfortunately, the drafting history of article 46ABis fails to be of assistance since the drafters have expressed opposing views of the content of the customary rule of head of state immunity before an international criminal tribunal.²⁰⁹ If such a court ever becomes a reality, the task will fall on it to clarify the extent of the immunity offered to former heads of state.²¹⁰ It seems possible under article 46ABis that former heads of state may be prosecuted, at least for the core international crimes. Even this possibility is diminished by the fact that on the African continent some leaders have been in power for so many years that prosecution may not be possible and may not provide victims of international crimes relief in their lifetime knowing that justice has been served.

3.4 CONCLUSION

In the first part of this chapter, the authors explored the domestic accountability mechanisms that states may employ to keep heads of state responsible and accountable in South Africa and other African countries. In the course of this discussion, it became evident that most of these accountability mechanisms in the countries under discussion lack the effectiveness that is necessary to keep a proper check on their heads of state. The measure of having an ombudsperson, for example,

206 *No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.* Wording added to Protocol on Amendments to the Protocol on the statute of the African Court of Justice and Human Rights, at a 46ABis.

207 Compare Knuchel (n 60) 149-183; Caplan (n 60) 741-781.

208 See Vienna Convention on the Law of Treaties (n 164) at art 32. For guidance on the operation of article 32 see Le Bouthillier “Article 32: Convention of 1969” in Corten and Klein (eds) (n 166).

209 See The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, Malabo, Equatorial Guinea, 20-24 June 2014, Ex.Cl/846 (XXV).

210 For a discussion on the relationship between *ius cogens* crimes and the doctrine of head of state immunity see Knuchel (n 60) 149-183; Caplan (n 60) 741-781.

is not effective in many African countries because the decisions of these institutions often are not binding. In the South African context, the courts have resolved the uncertainty with regard to the binding nature of the decisions and remedial action prescribed by the Public Protector. This means, at least in the South African context, a head of state could be held accountable by the Public Protector and is obliged to comply with remedial action recommended by the Public Protector. The Zambian Public Protector is another example of a more effective ombudsperson-like institution, since it also has the authority to enforce its remedial action. In contrast, in the Namibian context the Namibian Ombudsman's decisions are not binding, but an alternative dispute resolution procedure is followed. The effectiveness of this measure is questionable since the executive organs involved might be unwilling to negotiate – leaving the Ombudsman without any recourse. In Zimbabwe, the office of Zimbabwean Public Protector has been replaced by a Human Rights Commission, which also is not necessarily the best route to follow for the investigation of governmental maladministration. It is therefore submitted that heads of state and members of the executive authority that contravene the law will be kept responsible and accountable only by ombudsperson-institutions if their decisions are made binding and enforceable by means of appropriate legislative measures.

With regard to motions of no-confidence and impeachment proceedings against heads of state it is submitted that these important mechanisms often are not effectively implemented in many African countries and therefore cannot be used to counterbalance abuse of executive power. There are various reasons why these mechanisms are not effective which are common to various African countries. In many countries, South Africa and Nigeria being good examples, strong majority party governments make it virtually impossible to get the parliamentary majorities required for the adoption either of a motion of no-confidence or of an impeachment against a head of state. Furthermore, as is the case in Nigeria, these processes can be abused in order to serve the agenda of other political parties or as a measure of retribution against an unpopular president rather than to be used for its intended purpose of keeping a check on executive authority in genuine examples of a loss of confidence in a president or in the commission of unlawful acts. As seen in the case of South Africa, voting on these motions by secret ballot has not necessarily resulted in the resolution of the problems either, because of the level of representation of the majority party in parliament. It is submitted that in order to overcome the problem of parliamentary majorities in African countries the requirement in relation to the majority needed for the adoption of such motions needs to be lowered, or these matter may be referred to a court (perhaps a constitutional court) or to a committee consisting of members of all the represented political parties in order to establish whether there are sufficient grounds for the motion to proceed.

The grounds for impeachment in some countries, for example Gabon and Cameroon, are so restrictive that only the most serious crimes, such as high treason, are punishable and less serious crimes are overlooked. This approach is flawed since “less

serious” crimes, such as corruption, continue over many years and lead to moral and economic ruin. It is submitted that the grounds for impeachment of a head of state should relate to every contravention of the law and of the constitution, especially actions that pertain to maladministration and corruption. It is important that these unlawful actions are properly defined and are included in the constitution or in other legislation so as to eliminate confusion or misinterpretations. As the discussion of the South African situation demonstrates these measures cannot simply be stated in the constitution unless there is parliamentary provision for the corresponding procedural rules in order effectively to move, vote on and adopt these motions. The constitutional authority which has the measure to check the executive is powerless without a corresponding procedure effectively to implement such a check. The legal systems of countries should ensure that the constitutional authority to introduce motions of no- confidence or impeachment proceedings against heads of state are enforceable by means of corresponding procedural rules.

This chapter considered the domestic criminal prosecution of sitting heads of state as well. As in the case of criminal prosecution in international law, the effectiveness of this domestic mechanism is influenced by the issue of immunity. South Africa is an example of a country that is in the fortunate position of not affording criminal (or civil) immunity to the president, but it does not mean that successful criminal prosecution in South Africa is without challenges. As is evident from the discussion above, the South African president has faced criminal charges while in office but, in effect, it has been impossible to remove him. The president’s sole authority to appoint the National Director of Public Prosecutions is an aspect that also proved problematic. It is submitted, even if in terms of the Constitution the South African president does not enjoy criminal immunity, nevertheless the legislature requires a provision that in exceptional circumstances in which a conflict of interests prevents the president from having an unbiased opinion with regard to the appointment of the Director of Public Prosecutions that authority is suspended.

Many African countries protect the head of state by providing them with both civil and criminal immunity and, in some instances, these forms of immunity continue even after the head of state leaves office. This is an untenable situation in which heads of state are never held accountable for crimes committed while in office. Although immunity may be waived by parliament after the president has vacated the office, for instance in Namibia and Zambia, a parliamentary majority party supporting an overwhelming majority government is an unresolved problem. It is recommended in order to hold a head of state accountable, head of state immunity either should be removed completely or at least limited substantially, and not extend after the head of state has left office. Furthermore, it is recommended that there should be other precautionary measures such as an alternative arrangement for the appointment to head the prosecuting authority if there is a conflict of interest on the part of the head of state in the outcome of the appointment. It is to ensure that heads of state do not protect themselves from prosecution by the appointment of a pliant head of the prosecuting authority.

In terms of commissions of inquiry, most African countries that have made provision for such mechanisms nominate the head of state to appoint commissions of inquiry. In the case of the head of state being the subject of such an investigation, either he would not make an appointment at all or would appoint a commission certain to absolve him or her from all wrong-doing. Many African countries, as seen in the examples of South Africa, Zimbabwe and Malawi, have not provided for circumstances in which the head of state is investigated and therefore should not be involved in the appointment of a commission of inquiry. It is recommended that current legislation should be amended in order to cater for the exception in which the head of state is complicit in a pending investigation, if this mechanism is to be used as a viable accountability measure.

Finally, the first part of the chapter considered judicial control as a measure to keep heads of state and members of the executive authority responsible and accountable. Judicial control is a powerful tool that democratic states can utilise to check executive action in terms of supreme constitutions, a measure which is the backbone of constitutionalism. Due to a lack of independence in the judicial branch of government, many African states struggle to use this mechanism effectively. In the cases of Botswana and Cameroon, it was seen that involvement by the head of state in the appointment of judicial officers and the requirement to ensure “the independence of the judiciary” creates a dangerous situation with regard to the separation of powers, and makes the judicial branch vulnerable to interference and manipulation. In the case of South Africa, there is less interference by the executive, yet judgments can be made ineffective through the non-compliance of the executive authority with court orders.

In the South African context, despite the emphasis placed on judicial control, other accountability mechanisms are either underutilised or the courts have to be approached to implement these mechanisms, which are supposed to function effectively on their own, for example, in the case of the enforcement of the decision of the Public Protector and also with regard to the procedural rules regarding motions of no-confidence and impeachment proceedings. This necessarily involves the courts in cases of a political or quasi-political nature and leads to questions in relation to the separation of powers. Political issues should be resolved amongst political roleplayers at a political level and not by recourse to the courts, but sometimes this means that issues will not be resolved unless the courts intervene. Political roleplayers and executive organs do not always show willingness to reach political solutions, which makes the intervention of the courts essential if the democratic nature of the state, its economy and its people are to be protected. It is recommended that there should be measures, which ensure the independence of the judicial branch by removing the power of heads of state to interfere in the appointment of judicial officers and influence the functioning of the courts. Furthermore, there is a need to enforce government compliance with court orders and, at the same time, the courts are to be able to maintain a balance between holding the executive and the head of state accountable and upholding the separation of powers.

The second part of this chapter explored the existing international law avenues in terms of which heads of state can be held accountable and prosecuted for the commission of international crimes. The question of holding heads of state responsible for the commission of international crimes or the violation of international law is complex, as the rules have not been codified and the content of custom either is developing or is disputed. The uncertainty surrounding the content of the doctrine of head of state immunity in respect of the prosecution of international crimes before international criminal tribunals brings the efficiency of the international criminal law provisions to the fore in prosecuting and eliminating the impunity of heads of state of member states who have not ratified the Rome Statute and who commit international crimes. The chapter revealed that head of state immunity shields them from prosecution under customary international law, at least before foreign courts.

What is questioned is whether a similar rule exists under customary international law which prevents international criminal tribunals from prosecuting heads of state for the commission of war crimes as a consequence of the absolute immunity attached to the office. A survey of international law reveals that there is not enough state practice either to suggest that under immunity, jurisdiction is barred, or that immunity is waived in relation to international criminal tribunals. The jurisdiction of the specific international criminal tribunal therefore has to be determined by its constitutive treaty. The doctrine in customary international law, under which heads of state are protected by immunity, applies only to foreign courts and not to international courts.

The current confusion surrounding the relationship between articles 27 and 98 of the Rome Statute, as well as the implicit bar on prosecuting sitting heads of state under article 46*ABis* of the Malabo Protocol, places strain on the existing legal framework and is a burden to those who seek justice for the violation of international law by heads of state. It was found that article 27 of the Rome Statute explicitly determines that a head of state, or those holding a similar position, cannot rely on any form of immunity which might attach to the office they hold. Member states upon signature of the Rome Statute agree that the head of state will not be able to rely on an immunity defence. Legal certainty is the only means to resolve this untenable situation. The international legal framework is ineffective in ensuring heads of state are held responsible, but important questions have been raised as to the nature of head of state immunity, and the debate is evolving in a manner which should receive urgent attention by academics, policy- and law-makers. States should be supported in developing public state practice in respect of policies pertaining to head of state immunity, not only with regard to its provision for foreign immunity, but also in relation to the immunity of the head of state before an international criminal tribunal.

Less clear is the duty of member states to the International Criminal Court if the court requires member states to cooperate in the arrest or investigation of a head

of state of a non-member state party to the International Criminal Court. A first reading of article 98 seems to align it with the third-party rule under the Vienna Convention on the Law of Treaties, but the content of this provision is under scrutiny following the non-arrest of President Al-Bashir by the South African government. Nonetheless, the International Criminal Court can exercise jurisdiction over heads of states which consent by ratifying the Rome Statute or by special consent. Security Council referrals may also trigger the jurisdiction of this Court.

Finally, this chapter explored whether the African Court of Justice and Human Rights has jurisdiction in the prosecution of heads of state for the commission of international crimes. The yet-to-be-established African Court of Justice and Human Rights may exercise jurisdiction over an extensive list of international and transnational crimes. The reach of this Court and its effectiveness in resolving the thorny problem of impunity, which is only too prevalent on the African Continent, however, are limited by article 46*ABis* of the immunity clause introduced in the Malabo Protocol. Under the Malabo Protocol, sitting heads of states enjoy absolute immunity, which from an African perspective is a serious problem, as some heads of states have occupied that position for a long time.

The position in relation to a former head of state is unclear, but at least it seems possible that former heads of state might be prosecuted for personal acts or international crimes which are of such a nature that they cannot be ascribed to the office of a head of state, such as the act of genocide. The chapter demonstrates that the status of head of state immunity under customary international law, as well as the disputed interpretation of article 98 of the Rome Statute, is the chief source of frustration in establishing the effective prosecution of heads of state for international crimes.

In conclusion, the authors submit, although many African countries have accomplished a great deal since attaining independence in establishing new democracies in the last fifty years, much still needs to be done to make these systems of government effective and to keep them responsible and to hold them accountable domestically, regionally and as part of the international community. Too often they have been plagued by ineffective governments, power-hungry heads of state and governmental corruption and maladministration, all of which have serious consequences for the domestic and regional well-being of those states and the continent at large.

At a domestic level, African countries need to undertake a reconsideration of the various accountability measures that act as a check on the head of state and executive authority and take steps to make these measures as effective as possible. At regional and international levels, an organisation such as the African Union and its member states should radically act to eliminate corruption in government through treaties and regional courts or tribunals. At the international level, the issue of head of state immunity should be clarified in order to ensure that heads of state cannot act with impunity in committing crimes against international law and custom or human rights law. Only when these issues are addressed will there be a significant change to the trend amongst African regimes to act in a manner that is harmful to society.

On a continent with great potential, these regimes abuse their position in order to enrich themselves while impoverishing their citizens. If these trends were reversed, a prosperous Africa could take its rightful place in the international arena as a region in which governments and heads of state are held responsible and made accountable.