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RESEARCH TOPIC:

**THE IMPACT OF IMMUNITY ON AFRICAN HEADS OF STATES ON THE
PROTECTION OF HUMAN RIGHTS IN INTERNATIONAL LAW. ANALYSIS BASED
ON AN AFRICAN PERSPRECTIVE.**

SUBMITTED BY

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DECLARATION

I **SERINA-GANDI T MUTUMBWA**, hereby affirm that this presented dissertation is original. A result of my own analysis and research, except to the extent specified in the acknowledgements, references and quotations contained within in the study. It has never been submitted in part or full for some former degree at another University and along these lines it is authentically submitted to the Midlands State University in partial fulfillment of the requirements for my award for the Bachelor of Laws (Honours) Degree.

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APPROVAL FORM

The undersigned certify the contents of the research, they have evaluated and commended a dissertation entitled: **THE IMPACT OF IMMUNITY ON AFRICAN HEADS OF STATES ON THE PROTECTION OF HUMAN RIGHTS IN INTERNATIONAL LAW. ANALYSIS BASED ON AN AFRICAN PERSPECTIVE** to the MIDLANDS STATE UNIVERSITY for acceptance. SERINA-GANDI T MUTUMBWA has submitted the dissertation as a final copy in accordance with the requirements of the University, in partial fulfilment for the award for the Bachelor of Laws (Honours) Degree.

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DEDICATION

This dissertation is dedicated to my parents Mr. I S and Mrs. B G Mutumbwa for believing in me and making this possible through their unwavering support.

My older brothers Nevanji and Takudzwa Mutumbwa for being my relentless supporters. My friends and relatives especially my constant supporter and best friend Tafara Danana for pushing and motivating me.

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LIST OF ABBREVIATIONS

AU - African Union

ACHPR- African Commission on Human and Peoples' Rights

CAT- Convention Against Torture

ICESCR- International Covenant on Economic, Social and Cultural Rights

ICC- International Criminal Court

ICCPR- International Covenant on Civil and Political Rights

ICJ- International Court of Justice

KNDR - Kenya National Dialogue and Reconciliation

ODM - Orange Democratic Party

PCIJ- Permanent Court of International Justice

PNU - Party of National Unity

TJRC - Truth Justice and Reconciliation Commission

UDHR – Universal Declaration of Human Rights

UN - United Nations

UNAMIS- United Nations Advance Mission in the Sudan

UNAMID- African Union-United Nations Hybrid Operation in Darfur

UNSC- United Nations Security Council

VCDR – Vienna Convention on Diplomatic Relations

CHAPTER 1

1.1 INTRODUCTION

The doctrine of immunity can be ascribed as one of the ancient doctrines of customary international law dating as far back as the 15th century. It allows an exception from prosecution on the basis of one's official capacity. Historically, a head of state, usually a monarch, and the state were seen as synonymous; and the immunity of the state was that of the monarch.¹ To regulate the implementation of this doctrine, a number of international conventions have been concluded, principally, the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963. These Conventions have formalised the customary rules on the doctrine and made their application more uniform.

Nevertheless head of states are expected to abide by international rules, situations arise where they commit crimes that attract grievous penalties. African head of states face major criticism, for invoking the plea of immunity to protect themselves from atrocities beyond condonation, which violate the protection of human rights. This study analyses the growing culture of impunity among African States. A culture which has contributed to a society where human rights are continuously violated and not protected.

1.2 BACKGROUND TO THE STUDY

The African human rights and political system continues to worsen in advocating for justice and maintaining fundamental principles of international standards and norms. Accountability for serious crimes and violation of human rights is stifled due to the need to keep peace over justice. Demonstrated by African heads of states' preference to maintain power at the detriment of the masses.

From the calamities of the Sierra Leone 1990-2003 civil war, the 1994 Rwandan genocide, the 2007 Kenya post-election violence, the 2003 rebellion abuses in Uganda and the Darfur Sudan wars to the 2015 Al-Bashir incident. Africa has indeed played a

¹A Watts *'The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers'* Vol. 247 Recueil des Cours de l'Academie de droit international de la Haye, 9 -136.

home for impunity.² These events exposed the illegitimate law institutions of the African system where accountability, transparency and the rule of law have been trampled, all in the guise of immunity.³ It is against this background that this study seeks to assess the conferment of heads of state immunity and its impediment on the protection of human rights.

1.3 PROBLEM STATEMENT

The doctrine of human rights protection and that of immunity are both of great importance in international law and cannot be hierarchically applied. It however builds up contention when the practice of head of state immunity conflicts with the implementation of human rights. Cognizant of the growth of international human rights law and its importance, one wonders if adherence in Africa, specifically by the heads of states, is one that is of less preference when invoking the doctrine of immunity.

1.4 OBJECTIVES

The main objective of this study is:

To analyse the impact of head of state immunity on the protection of human rights in Africa.

Guided by the subsequent sub-objectives

- i.** To interrogate heads of state immunity, its origins, scope and attributes.
- ii.** To analyze the importance of human rights in international law and how the doctrine of immunity affects their enforcement, protection and fulfillment; and reconcile the two.
- iii.** To outline specific African practices that conflict the basic custom and rationale of immunity through violation of human rights.
- iv.** To make conclusions and recommendations.

² BA Chigara & CM Nwankwo 'To be or not to be? The African Union and its member state parties' participation as High Contracting States Parties to the Rome Statute of the International Criminal Court 1998' (2015) Vol 3 Nordic Journal of Human Rights 243-268. <http://www.tandfonline.com/loi/rnhr20> (accessed 6 April 2018)

³P Hartlaub: DUI Case Signals Shift for Diplomatic Immunity Los Angeles Daily News 12 July 1998.

1.5 LITERATURE REVIEW

The doctrine of head of state immunity has attracted so much writing by diverse scholars, from the explanation and justification of the doctrine to critiques of its exploitation and implementation by those privy to the doctrine.

Brownlie⁴ has given quite a critical explanation for the rationale of the doctrine of impunity as he mentions that, “the rationale rest equally on the dignity of a foreign nation its organs and representatives and on the functional need to leave them encumbered in the pursuit of their mission.” Ben-Asher⁵ notes that diplomatic immunity is a well-established exception to the general international law principle of territorial jurisdiction developed from the concepts of sovereign immunity, the concepts of independence and equality of states, and the existence of a specific rule of international law.

On the other hand, due to the growth of international human rights, the justification of immunity has been questioned. Scholars such as Aust⁶ remark that;

“The fact that one state could not be impleaded before the internal courts of another state, and enjoyed absolute immunity from the domestic jurisdiction of another state was customary international law until the mid-twentieth century, when the restrictive doctrine of immunity in civil cases became accepted.”

This shift is well articulated by Cherif⁷ who notes that, the dual movement of international criminal responsibility of individuals and international protection of individual and collective human rights eroded the barriers of state sovereignty, which historically left states with exclusive power over their citizens and over non-citizens on their territory.

⁴ I Brownlie *Principles of public international law 6th Ed* (2003).

⁵ D Ben-Asher *Human rights meet diplomatic immunities: problems and possible solutions* (2000).

⁶ A Aust *Handbook of International Law 2nd Ed* (2000).

⁷ MC Bassiouni *Introduction to International Criminal Law* (2003).

However the official acts that attract such criminal liability are somewhat unclear. Shaw⁸ suggests the exclusion of acts done in clear violation of international law. The Nuremberg trials advanced a better resolve after the war as it buried once and for all, that facile slogan: “My country right or wrong”. Patten⁹ notes that,

“We have higher obligations as human beings... no alleged national traditions or cultural standards can make right in one place what is wrong in every place.”

Thus, in cases of human rights violations the international globe advocates for accountability and responsibility to those who would have committed international crimes regardless of status.

However, Dugard¹⁰ is of the view that although the growth of international human rights law has led some to argue that diplomatic immunity has lost its *raison d’etre* and that it should cease to exist is a misconceived argument. He notes that, it is the development of substantive norms of international human rights and international criminal law that have not been matched by the development of mechanisms and procedures for their enforcement. Fox and Roth¹¹ note the misnomer that those who have committed the cruelties remain in the nation’s midst and worse of, retain some form of formal or informal power. While the history of the doctrine of immunity is not in contention there has not been focus much point on the doctrine of immunity from an African perspective and its reception and development among the African States. The few authors that have written on an African basis focus on the weaknesses of the AU and its relation with the ICC.

Akokpari¹² notes that the diplomatic efforts of the African Union (AU) have seen limited successes on some major regional and international issues due to the dictates of external actors. This being so because the heads of states cannot be expected to be brought before their national courts because of immunity or because they are shielded

⁸M Shaw *International Law 6th Ed* (2008).

⁹C Patten *Sovereignty and National Interest –Old Concepts New Meanings* (2003).

¹⁰J Dugard ‘Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission’ (2005) *Vol 24 Australian Year Book of International Law* 75.

¹¹G Fox & B Roth *Democratic governance and International Law*, (2000).

¹²J Akokpari ‘The Challenges of Diplomatic Practice in Africa’ (2016) *Journal for Contemporary History*.

by the deployment of raw political force.¹³ While these remarks contribute to the current study, they are not exhaustive neither do they give a progressive solution that can be implemented to balance the two conflicting interests without distorting their purpose in International law. Moreover African literature on this notion is limited as most scholars have concentrated on the fall of African Countries with the ICC. This study seeks to address what entails African Diplomacy, from a African perspective bearing in mind that international law applies to all thus the need to develop the best solution for conformity.

1.6 METHODOLOGY

This research is based on the qualitative approach that seeks to make a critical analysis based on primary and secondary sources of law. The main focus of the methodology will be on international instruments, case law, published books, articles and journals used in critiquing and interpreting the conferment of head of state immunity in terms of its privileges and abuses when it comes to the protection of human rights. The study will also make use of any other related sources found on the internet that can be of vital significance to the analysis.

1.7 CHAPTER SYNOPSIS

The present dissertation consists of five chapters and a bibliography.

Chapter 1

This Chapter presents the introduction, background of the study, the problem statement, objectives, literature review and summary of the dissertation organizational structure.

Chapter 2

This chapter will interrogate the history, scope and importance of head of state immunity under international law.

Chapter 3

This Chapter outlines the importance of protecting human rights in international law when applying the doctrine of immunity. It identifies specific problems related to the

¹³A Abass 'Chapter 2 Historical and Political Background to the Malabo Protocol' (2017) *The African Criminal Court*.

clash between the two sets of principles with regards to issues of enforcement and reconciling the two.

Chapter 4

This Chapter interrogates the African practices, with respect to immunity and human rights violations, by focusing on the Al-Bashir Darfur civil war and the Kenyan post-election violence incident.

Chapter 5

Provides conclusions and recommendations.

CHAPTER 2

HISTORICAL ORIGINS AND DEVELOPMENT OF HEAD OF STATES IMMUNITY

2.1 INTRODUCTION

This Chapter outlines the origins of position of the heads of state immunity in international law. The circumstances in which heads of state immunity is applicable or not will be discussed. This followed by a discussion on the development of the doctrine in Africa. This chapter aims to analyse the existing legal regime, its relevance and evaluate its impact when governing head of states, focusing on notions that can negatively affect the implementation of human rights.

2.2 SOVEREIGN IMMUNITY AND HEAD OF STATE IMMUNITY

Sovereign immunity entails that the sovereign is the state and cannot commit any legal wrong whether civil or criminal hence is exempt from the jurisdiction of foreign courts. This concept expressed by the maxim '*I' e'tat, c'est moi*' meaning I am the state by Loius XIV.¹⁴ Sovereign immunity is also referred to as "jurisdictional immunity" or "immunity from jurisdiction."¹⁵ Consequently an action against a head of state was taken to be against the state itself and a violation of its immunity. This was justified on the basis that a state is only able to act under a natural person. Therefore head of state immunity is necessary for ensuring state immunity.

¹⁴ B. Tractatus *Represalium* (a legal medieval times scholar) 1345.

¹⁵ X. Yang 'Sovereign Immunity' Oxford Bibliographies <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0018.xml>, (accessed 17 June 2018).

Accordingly, state sovereign immunity entails immunity from jurisdiction this being the objective behind the defense or plea of immunity. In the case of, *Exchange v MacFaddo*,

*“Subjecting a state to another state’s jurisdiction would be incompatible with its dignity and that of the nation...states are bound by obligations of the highest character not to degrade the dignity.”*¹⁶

This generally expressed *par in parem non habet imperium* or *par in paren non habet jurisdictionem*.

However, the concept of immunity does not entail one’s exclusion from being bound by the laws of the territorial state. Shaw indicates that immunity is not an exemption from a legal system of the territorial state in question but rather creates a formal barrier for the implementation of national law by the national courts of the state in question.¹⁷ Immunity therefore revolves around the concept of jurisdiction and the principles of sovereign equality and non-interference. As noted in *Exparte Pinochet* 1 AC 147 (2000) by Lord Browne Wilkson¹⁸,

“The independence and equality of states made it difficult to permit municipal courts of another country to manifest their power over foreign sovereign states without their consent.”

2.2.1 LEGAL BASIS OF HEAD OF STATE IMMUNITY

The Vienna Convention on Diplomatic Relations¹⁹ (VCDR), the Convention on Jurisdictional Immunities of States and their property²⁰, as well as the Convention on Special Missions and the Optional Protocol concerning the Compulsory Settlements of Disputes²¹ provide legal basis for the doctrine of head of state immunity. These Conventions do not specifically deal with head of state immunity but certain articles have been argued to analogously refer or to impact head of state immunity. Hence none

¹⁶ *The Exchange v. McFaddon* 11 U.S. 116 (1812)

¹⁷ M. Shaw (n8 above)

¹⁸ *Ex Parte Pinochet* 1 AC 147 (2000)

¹⁹ Vienna Convention on Diplomatic Relations 1961 (VCDR) 95.

²⁰ *The Convention on Jurisdictional Immunities of States and their Property with commentaries* 1991.

²¹ *Special Missions and the Optional Protocol concerning the Compulsory Settlements of Disputes* 1969

of them give sufficient basis for head of state immunity but are rather important indicators.

Therefore the basis of heads of state immunity stems from customary international law. The ICJ has defined customary international law as a norm whose acts have become an established practice or accompanied by an *opinio juris sive necessitate* (acts must occur out of a sense of obligation).²² State compliance is the first identification, evidenced by the few trials on heads of state of a foreign state.²³ The second element of *opinio juris*, meaning that States must see the practice as binding.²⁴ This element became obligatory after the *North Sea Continental Shelf*²⁵ cases of the ICJ. It noted that the mere fact that a state had established a certain act does not suffice, rather *opinio juris* must be established as legally binding. However important to note is the view that head of state immunity has been expressed in all jurisdictional immunities and traceable to the basic norm of state sovereignty.

2.3 APPLICABILITY OF HEAD OF STATE IMMUNITY

International law has traditionally made a distinction between the official and private acts of a head of state.²⁶ Private acts conducted for the benefit of the head of state and not the state can be prosecuted under civil proceedings. Under customary international law, two types of immunity apply. First, immunity *ratione materiae*, which applies to acts performed in an official capacity.²⁷ Second, immunity *ratione personae*, or personal immunity, which attaches to a limited category of officials by virtue of their particular role in representing the State abroad.²⁸

²² Nicaragua v USA ICJ (1986).

²³ M Ruffert 'Pinochet Follow Up: The End of Sovereign Immunity?' (2001) Vol 48 *Netherlands International Law Review*.

²⁴ S.C. Neff, opinion-juris-three concepts chasing a label, discussion paper, https://law.duke.edu/.../opiniojuris/panel_1-neff-opinio_juris_three_concepts_chasi. (Accessed 27 June 2018)

²⁵ Germany v Denmark (26 April 1969) (1969) ICJ Rep 3.

²⁶ Draft Articles with Commentary on Jurisdictional Immunities ILC Report (1991).

²⁷ J Dugard (n10 above)

²⁸ REDRESS *Immunity v Accountability: Considering the Relationship between State Immunity and Accountability for Torture and Other Serious International Crimes* (2005) http://www.redress.org/downloads/publications/Immunity_v_Accountability.pdf. (accessed 26 June 2018)

2.3.1 RATIONE PERSONAE (PERSONAL IMMUNITY)

Immunity *ratione personae* or personal immunity is derived from the official's status, the post occupied by him in government service and from the State functions which the official is required to perform in that post.²⁹ This was the source of absolute immunity of the head of state.³⁰ The immunity cannot go beyond that of the state and is intended to protect the state property or government official from being indicted in a foreign country. His/her action is protected regardless of its legal character.³¹ The major criterion is the status of the head of state. The rationale for this immunity is for the state to function effectively in a foreign jurisdiction.

2.3.2 LIMITATIONS TO PERSONAL IMMUNITY

The ICJ has acknowledged four limitations to personal immunity, as its application raises concerns with regards to accountability of government officials.³² Firstly a state may decide to prosecute the official within its own state. Secondly a state may waive the immunity of the state official concerned. The rationale is that immunities are there to benefit the state and not the office holder.³³ Thirdly, if the proceedings are before International Criminal Courts (ICC) or Tribunals. This will require an analysis of the empowering statutes of the court being referred to in the proceedings regarding the official being a citizen of a state party to the Rome Statute.³⁴ Fourthly the individual ceases to hold office. This is the general rule of international law as personal immunity only applies when one still holds office. Exemplified in the Pinochet case where Augusto Pinochet's immunity as a former head of state of Chile was denied while that of Fidel Castro as incumbent of Cuba accepted.³⁵

2.3.3 SERVING HEAD OF STATE

²⁹ A. Kolodkin *International Law Commission Report on Immunity Of State Officials From Foreign Criminal Jurisdiction* (2008)

³⁰ A. Kolodkin (n29 above)

³¹ A. Kolodkin (n29 above)

³² A Chang, S Kashfi & S Kiamanesh *Accountability in Foreign Courts For State Officials' Serious Illegal Acts: When Do Immunities Apply?* (2016)

³³ *Democratic Republic of the Congo v Belgium* (11 April 2000) (2002) ICJ Rep 3.

³⁴ WA Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) 448

³⁵ A Chang, S Kashfi & S Kiamanesh (n32 above)

Generally serving heads of state enjoy absolute immunity from the exercise of jurisdiction by foreign courts. This immunity attaches to his person as the head of state and as the representative of the state, derives from the concept of sovereign immunity. In Pinochet case³⁶ it was held that immunity enjoyed by the serving head of state is complete and attaches to the person of the heads of state, rendering him immune from all actions of prosecutions whether or not they relate to matters done for state benefit. Lord Hope in the Pinochet case explained this as the jus cogens personality of immunity. In other words, it is very difficult to bring a head of State to justice, no matter what crime committed during his tenure, according to customary international law.³⁷

In re Grand Jury Proceeding (1988)121 ILR P567³⁸ rebutting the Republic of the Philippines judgement³⁹ noted that head of state immunity was primarily an attribute of state sovereignty, not an individual right. However to apply this immunity, the state/executive whose head of state has been brought before a domestic court should recognize his status as a serving head of state.⁴⁰

2.3.4 IMMUNITY RATIONE MATERIAE (FUNCTIONAL IMMUNITY)

Functional immunity also known immunity *ratione materiae* relates to the duties carried out on behalf of a State. The immunity is applicable regardless of whether the official is in the home or host state. In other words, it functions as a jurisdictional or procedural defence by preventing proceedings brought against officials acting on behalf of the state.⁴¹ Application of this principle can be found in Article 39(2) of the Vienna Convention of 1961.⁴² The justifiability is that, the functionality of the state depends upon the head of state's efficiency hence if he/she be found to be indicted the sovereignty of the state is jeopardised. It is likewise grounded on the assumption that if a State would arbitrate the conduct of another State by proceeding against the official

³⁶ Ex Parte Pinochet (n18 above).

³⁷ A Chang, S Kashfi & S Kiamanesh (n32 above).

³⁸ Doe v Roman Catholic Diocese of Galveston-Houston 408 (1988) 121 ILR.

³⁹ EM Callan 'In Re Mr. and Mrs. Doe: Witnesses Before the Grand Jury and the Head of State Immunity Doctrine' Vol 22 (1989) *New York University Journal of International Law and Politics*.

⁴⁰ United States v. Noriega, 746 F. Supp. 1506 (1990).

⁴¹ D Akande & S Shah 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) Vol 21 *The European Journal of International Law*.

⁴² VCDR (n19 above).

who committed the act that would strife with the rule of state correspondence⁴³. Functional immunity is therefore put in place to curb against state disorders.

2.3.5 OFFICIAL ACTS COVERED

To determine what an official act is the courts have questioned whether the conduct was engaged under the mandate of or in ostensible exercise of public authority.⁴⁴ In *France v Djibouti*, official acts were interpreted as those acts within the scope of duties of state officials as state organs.⁴⁵ In cases of serious international crimes the applicability of functional immunity has been questioned. However Customary International law does not treat a state's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.⁴⁶ In the Pinochet case it was held that,

*"It is not enough to say that it cannot be part of the functions of the Head of State to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae."*⁴⁷

Nonetheless in *Jones v The United Kingdom*⁴⁸, the European Court of Human Rights held that torture can be committed as an official act for the purpose of state immunity as the Convention against Torture (CAT) definition seemed to foster such presumption. Thus all states have a legal interest in the protection of jus cogens.⁴⁹ Moreover, for every state act there are two types of possible responsibility: international responsibility for a State and criminal responsibility for an individual.

2.3.6 FORMER HEAD OF STATE

Former heads of state do not enjoy personal immunity (*rationae personae*) but functional immunity (*rationae materia*), whereby only official acts they conducted during

⁴³ S Knushel *State Immunity and the Promise of Jus Cogens* (2011) *Northwestern Journal of International Human Rights* 149.

⁴⁴ Watts (n1 above)

⁴⁵ *Djibouti v France*, 4th June 2008 (2008) ICJ Rep 177

⁴⁶ *Ex Parte Pinochet* (n18 above)

⁴⁷ *Ex Parte Pinochet* (n18 above)

⁴⁸ *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* (2006) UKHL 26.

⁴⁹ T Dire 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) Vol 16 *African Human Rights Law Journal*.

their term of office are protected. What entails official acts is rather vague, yet it appears to exclude acts done in clear violation of international law.⁵⁰ However if a former head of state happens to be sent to a foreign state by the state, personal immunity applies. The restriction of immunity upon former heads of state can be said to be influenced by the fact that heads of state immunity from state equality. Thus when one leaves office these attributes can no longer be attached to his/her persona as they are no longer acting as the state representative.

2.4 APPLICABILITY IN AFRICA

In Africa heads of state are viewed as highly prestigious individuals who resemble royalty. The appointment of one as a head of state is regarded as one chosen by God.⁵¹ This belief can be traced back to the pre-colonial era where most African systems functioned under kingship rule (mambo) or ancestral medium belief (mudzimu) with the examples of, Shaka the Zulu in South Africa and Lobengula and Mbuya Nehanda in Zimbabwe.⁵² Consequently heads of state are highly respected and given much authority.

To date, no African state has ever witnessed the prosecution of an African leader either in his own state or in another African state during their tenure of office. Additionally African Constitutions give Presidents much authority and protects them from civil or criminal prosecution. In Uganda, Article 98(2)⁵³ of the Constitution gives the president precedence over all persons and in descending order the Vice President. In Swaziland, article 35⁵⁴ of the Constitution accords the King and *Ndlovukazi (queen)* immunity 'regrading all things done or omitted to be done by them while executing official tasks.' In Lesotho, the King is a constitutional monarch and head of state, immune from litigation concerning all things done or omitted to be done in private

⁵⁰ Shaw (n8 above)

⁵¹ Head of state https://en.wikipedia.org/wiki/Head_of_state (accessed 9 July 2018)

⁵² King Mzilikazi <https://en.wikipedia.org/wiki/Mzilikazi> (accessed 9 July 2018)

⁵³ Constitution of the Republic of Uganda (1995).

⁵⁴ Swaziland Independence Constitution Order Act No. 50 (1968) as amended 'King's Proclamation to the Nation No. 12' (1973)

capacity, and from criminal proceedings concerning acts performed in official or private capacity⁵⁵.

Decisions of national courts have also portrayed this well accepted doctrine of international customary law. The High Court of Botswana at Lobatse⁵⁶ contended that the president may be prosecuted after the expiry of office. In a civil suit of the former president Seretse Khama Ian Khama, arising from his role as head of state of the Botswana Democratic Party and at the same time being the President and Head of State of Botswana. In construing section 41(1) of the Constitution which grants immunity it was held that the president could not be sued for civil matters arising from his role as president of the ruling party and head of state of Botswana.⁵⁷ Thus it has become accepted law that serving heads of state in Africa are immune from prosecution. Africa appears to operate on the concept of absolute immunity as opposed to restrictive immunity. This influenced by the distinct way of life, values and world views typical to Africans.

2.5 CONCLUSION

The doctrine immunity on heads of states traces back to sovereign immunity. Its development has moved towards a restrictive interpretation and the need to uphold human rights by holding those responsible accountable regardless status. However in Africa, it has taken a different assimilation and its implementation focuses more on the absolute protection of the head of state. This shows Africa operates under a concept of immunity that can be detrimental to the protection of human rights.

⁵⁵ Article 50 Constitution of Lesotho.

⁵⁶ *Gomolemo Motswaledi v BDP, Ian Khama and Chairman of Gaborone central constituency (HC) MAHLB-000486-09*

⁵⁷ *Gomolemo Motswaledi v BDP* (n56 above)

CHAPTER 3

HUMAN RIGHTS VS IMMUNITY

3.1 INTRODUCTION

Chapter introduces the importance of human rights in international law and how the doctrine of immunity affects their enforcement, protection and fulfillment; and if the two can be reconciled. An overview of the current jurisprudential position of human rights and their effect on heads of state immunity. The continuing need for the protection against specific human rights violations will be discussed.

3.2 INTERNATIONAL HUMAN RIGHTS

Human rights are moral principles and norms that define human behavior and interaction, commonly protected as natural and legal rights in municipal and international law.⁵⁸ International human rights law is designed to uphold and safeguard the recognition of these rights on a social, economic, civil and political level. Human rights are universal and inalienable for all human beings⁵⁹ entrenched in treaties, agreements and customary international law.

3.3 LEGAL FRAMEWORK

⁵⁸ Shaw (n8 above)

⁵⁹ Shaw (n8 above)

Individuals have become the main subjects of international human rights law.⁶⁰ The legal framework is designed to protect the individual legally, politically and morally by establishing binding set of principles for governments.⁶¹ It combines international, regional and national legal frameworks contextualising struggles for the respect of rights.

The United Nations General Assembly buttressed human rights movement on 10 December 1948 by adopting the Universal Declaration of Human Rights (UDHR)⁶². UDHR is the point of reference for subsequent conventions and treaties both internationally and regionally. It has implemented the Covenant on Civil and Political Rights (CCPR)⁶³ and Economic, Social and Cultural Rights (CESCR)⁶⁴ establishing the International Bill of Human Rights a standard for other legal instruments in regional systems.

African States that are party to the African Charter on Human and Peoples' Right pledge to promote international cooperation. The Charter reaffirms adherence to principles of human and people's rights contained in declarations, conventions and other international instruments adopted by the Africa Union. Unlike other regional instruments the Charter remains in force during armed conflicts and does not contain a derogation clause.

3.5 IMPACT OF HUMAN RIGHTS WITHIN THE OVERALL IMPERATIVE OF INTERNATIONAL LAW

In 1993 at the World Conference on Human rights it was noted that there is a crucial connection between international peace and security and rule of law and human rights.⁶⁵ Having human rights norms in place emphasises the requirements on governments for standards of proper conduct and legitimizes the complaints of individuals in those cases where fundamental human rights and freedoms are not

⁶⁰ J Tasioulas 'Human Rights, Legitimacy, and International Law' (2013) Vol 58 *The American Journal of Jurisprudence*.

⁶¹ <http://gsdrc.org/topic-guides/human-rights/human-rights-legal-framework/> (accessed 11 August 2018)

⁶² United Nations General Assembly Resolution 217 10 December 1948

⁶³ International Covenant on Civil and Political Rights (ICCPR).

⁶⁴ The International Covenant on Economic, Social and Cultural Rights (ICESCR)

⁶⁵ <https://www.beyondintractability.org/essay/humanrightsprotect> (accessed 10 October 2018)

respected. As noted by Mutua, “underlying the development of human rights is the belief that the state is a predator that must be contained.”⁶⁶

Thus here are four important effects of international human rights law on human rights beneficiaries.⁶⁷ First as a constraint to state actions. Second they stand as a source of norms that can be incorporated and implemented into domestic legislation and institutions. Third, as a constraint on international governmental and non- governmental organisations conduct. Fourth it empowers the individual’s entitlement as a victim. Predominately international human rights standards have limited the traditional freedom of states and thereby constitute an important limit to national sovereignty. As a result the protection and development of human rights law has advanced the direction of international law through the development of international criminal law and international humanitarian law. These pose a great test to the relations of states and their states and call for accountability by the perpetrators of grave violations.

3.6 OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS

States are to adhere to the aforementioned legal framework and put in place domestic laws that uphold and promote international human rights. National courts are to incorporate international human rights law in their interpretation of the law. This guarantees civilians’ human rights protection and implementation in all circumstances, war and peace time.⁶⁸ States that have ratified international human rights treaties have a legal obligation to respect and protect human rights so as to combat impunity and establish effective institutions for accountability. The ICCPR and other human rights treaties oblige States to investigate “allegations of violations promptly, thoroughly and effectively through independent and impartial bodies” and bring to justice those responsible.⁶⁹ Moreover States should ensure that those whose rights have been violated are duly remedied.

⁶⁶ M Mutua *Human Rights A political and cultural critique* (2002).

⁶⁷ R Slye ‘International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law’ (2001) Vol 2 *Chicago Journal of International Law*

⁶⁸ United Nations High Commissioner for Human Rights Report on Impunity and Accountability in Darfur for 2014 (2015). <https://www.ohchr.org/Documents/Countries/SD/ImpunityAccountabilityInDarfur2014.pdf>. (accessed 30 October 2018)

⁶⁹ United Nations High Commissioner for Human Rights Report (n68 above).

3.7 HUMAN RIGHTS AND STATE SOVEREIGNTY

In conflicts between state sovereignty and the protection of human rights, international criminal law and humanitarian law intervenes on the side of humanity so as to supplement and safeguard other human rights protection. The respect for human rights demands that justice be done whenever human rights have been seriously violated and this overrides the traditional principle of state sovereignty. The question that remains debatable is whether the protection of human rights overrides the doctrine of state sovereignty, particularly in situation where heads of states are found to have committed serious and grievous crimes.

3.7.1 ACCOUNTABILITY AND IMMUNITY

Immunities in international law expose multifaceted tensions between goals of international stability and legal accountability.⁷⁰ Whereby it has been argued that the head of state immunity enables the individual to perform his function while individual responsibility for international crimes is to prevent arbitrary use of power.⁷¹ Immunities are one means by which states can deflect efforts to enforce human right norms.⁷² Yet accountability and responsibility exhort a restrictive conception of sovereignty whereby power should be used as a safeguard to human rights. Sovereignty now has a functional and normative content and requires states to exercise their powers respecting the fundamental rights of human beings.⁷³ Popovski⁷⁴ argues that the discussion surrounding state sovereignty and human rights balance is ever-changing in favor of cross-border action to protect human rights.

In the Pinochet case, the court held Pinochet accountable for crimes committed when he was a sitting president. Lord Nicholls and concurred by Lord Hoffman held that,

⁷⁰ Congo v Belgium (11 April 2000) (2000) ICJ.

⁷¹ AH Robertson Human rights in the World (1972)

⁷² P Webb Regional Challenges to the Law of State Immunity (2012) Paper 6 *European Society of International Law*

⁷³ P Gaeta *Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny* (2013).

⁷⁴ <https://medium.com/@hollybrooke/state-sovereignty-and-human-rights-irreconcilable-tensions-462d356ae063> (accessed 26 August 2018))

“International law has made it plain that certain types of conduct ...are not acceptable on the part of anyone and that contrary conclusion would make a mockery of international law.”⁷⁵

They thus reasoned that the acts committed by Pinochet could not be held as official acts.

3.7.2 DUTY TO PROSECUTE HUMAN RIGHTS VIOLATIONS

States are called to prosecute perpetrators of grave human rights violations regardless of status. While it is argued that there seems to be a contradiction between the notion of a ‘duty to prosecute’ as a legal obligation of states and the notion of prosecution as a mechanism of transitional justice for victims.⁷⁶ The duty to prosecute is an ideal vision for the world as grave human rights are crimes that are characterized as being so unacceptable that they should be everyone’s concern. This being both international and national courts.

The failure to prosecute heads of state through national courts or criminal tribunals is called impunity.⁷⁷ To this end, universal jurisdiction has become the preferred technique by those seeking to prevent impunity for grave human right violations. However its applicability in customary international law should adjudicate over violations of *jus cogens*. Therefore, the crime must be serious that it can be justly regarded as an attack on the international legal order.⁷⁸

3.8 STATE SOVEREIGNTY AND HUMAN RIGHTS VIOLATIONS IN AFRICA

African states should ensure that heads of state are held accountable, brought to prosecution and this either before their national regional or international courts. However this has been the major contention in Africa due to the conception of sovereign immunity. Africa has thus witnessed so many human rights violations at the hand of those in power. From the Kenya post-election violence, Zimbabwe post-election violence, South Africa xenophobia, Sudan civil wars, Burundi – Liberia civil wars, the

⁷⁵ Ex Parte Pinochet (n18 above)

⁷⁶ D F Orentlicher ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) Vol 100 *Yale Law Journal*.

⁷⁷ D Akande & S Shah (n41 above).

⁷⁸ Ex Parte Pinochet (n18 above).

multiple violations in the Democratic Republic of Congo, the 2016 Egypt bans and attacks on foreign.

In practice, therefore, the supposed primacy of human rights over state sovereignty is rarely applied—the Security Council rarely can come to agreement that humanitarian intervention is justified or necessary.⁷⁹ Moreover court cases have not revealed a consensus resolve of the conflict especially in Africa. Conversely other scholars seem to be of the view that, even though exercises of sovereignty can be the source of violation of fundamental human rights,⁸⁰ the evoking of such immunity can also be equivalent to expressions of fundamental human rights for the state nationals.⁸¹

3.9 CONCLUSION

It is thus apparent that the development of human rights has materialized a shift in the interpretation of the doctrine of head of state immunity. Yet it still remains difficult to determine whether one should prevail over the other as they are both important fundamentals. Nonetheless, it is of worldwide consensus that some crimes cannot go unpunished and the responsible should be held accountable and answerable. Africa still finds itself wanting and Chapter 4 will explore specific cases in Africa where head of states have been found wanting.

⁷⁹ https://www.ohchr.org/.../UNAMID_OHCHR_situation_Darfur2017.docx (accessed 26 August 2018)

⁸⁰ <http://www.yale.edu/lawweb/avalon/imt/wannsee.htm> (accessed 26 August 2018).

⁸¹ <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1770&context=ilj> (accessed 26 August 2018))

CHAPTER 4

A CASE STUDY OF AFRICAN IMMUNITY AND HUMAN RIGHTS VIOLATIONS.

4.1 INTRODUCTION

The position between head of state immunity and protection of human rights can only be fully distinguished by analyzing state practices. The aim of this Chapter is to explore African state practices in its application of the doctrine of immunity. Detailing whether the practices measure up to internationally recognized standards for the protection of human rights and what is at stake as a result of such conduct. A case study of Darfur and Kenya shall portray the attitude of Africans, the African leaders and the AU with regards to head of state immunity were there a human rights violations.

4.2 DARFUR SUDAN CIVIL WARS

The Darfur Sudan civil wars began in 1983 and lasted for two decades. The war was ignited by religious and ethnic differences as well as the quest for natural resources.⁸² In February 2003 the wars initiated by the Darfur Liberation Front rebel group escalated

⁸² UNMISS Background: UN Mission in Republic of South Sudan (2011)
<http://www.un.org/en/peacemaking/missions/unmiss/background/shmtl>. (accessed 29 October 2018).

and led to attacks by government forces and *Janjawiid* militias.⁸³ 172 people were killed in the Deleig area; some had their throats cut and their bodies thrown in the stagnant pools of a river.⁸⁴ These notorious groups were under the command of Al Bashir who enabled crimes against humanity, war crimes and genocide against the Darfur civilians. Ultimately more than 2 million people died, 4 million displaced and 600 000 took refuge.⁸⁵ Families and social structures were disrupted, entire communities persistently got displaced. Women and girls were subjected to constant and brutal sex and gender based violence. This evidenced gross violations of human rights, from the right to life, freedom of association, liberty, children rights and women's rights.

In response the UN set up a UN Advance Mission in the Sudan (UNAMIS) to facilitate peace negotiations and conduct investigations. The AU played a major role in the Darfur Sudan war by deploying personnel to work together with the UNAMIS in 2004 and supporting peace negotiations of the Darfur Ceasefire Agreement,⁸⁶ which was signed in 2006. This portrays how Africans are more inclined to peace rather than accountability as the agreement had the effect of protecting the perpetrators at the expense of human rights victims.

However in 2004 the UN Security Council (UNSC) also set up an international commission of inquiry to investigate the Darfur Crisis. The commission reported Al Bashir for international crimes and referred the Darfur crisis to the ICC. This referral was supported by three countries in Africa, Tanzania, Benin and Malawi. In March 2009 the Prosecutor of the ICC made an application to the Trial Chamber requesting an arrest warrant for president Al-Bashir providing evidences for the allegation of international crimes⁸⁷. This was the first time a warrant was issued over an incumbent head of state, tension sparked between the AU and the ICC. Moreover the UNSC rejected AU's

⁸³GA Aneme *A study of the African Union's right of intervention against genocide, crimes against humanity and war crimes* (2008).

⁸⁴J Flint & A D Waal *Darfur: A New History of a Long War (African Arguments)* (2008).

⁸⁵ UNMISS Background (n82 above).

⁸⁶ "Darfur Peace Agreement" (DPA), 8 April 2004,

https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_050505_DarfurPeaceAgreement.pdf. (accessed 30 October 2018).

⁸⁷Prosecutor v Omar Hassan Ahmad Al Bashir (ICC 2009). (charged with crimes against humanity, war crimes and genocide)

request for the suspension of Al-Bashir's case before the ICC on the basis that the warrant would be prejudicial to the ongoing peace and reconciliation talks.⁸⁸

The UNSC dismissed application and on October 13, 2013 at the AU summit held in Ethiopia the AU issued a resolution requesting heads of states indicted by the ICC to abscond trial.⁸⁹ This also triggered by the refusal of the ICC to withdraw the warrant and postpone the trial. This implicated the African civilian population as it showed the reluctance by the capable institutions to try and bring leaders to accountability. It should be noted ICC is a creation of statute and not a substitute of domestic or regional courts hence can only perform if countries party to the statute are willing to cooperate where there is reluctance to prosecute the perpetrating official by the state. In this case it can be argued that the ICC undermined the negotiations led by African personnel and wanted to take the matters in their own hands. This brought tension between the ICC and the AU.

As a result, in 2015 at the AU summit hosted in South Africa, the South African government guaranteed the AU that Al-Bashir would not be arrested. A South African delegation in the Netherlands alleged an anomaly with article 27(2) of the ICC Statute and argued that Court had to obtain waiver of the immunity from a third state if South Africa was to assist.⁹⁰ Al- Bahir attended the AU summit and upon issuance of a court order compelling the Minister of Justice to prevent his exit from South Africa, the authorities escorted him to the airport and ensured his safe escape. This triggered a conflict between the ICC and the South African government, the latter threatening to withdraw from the Rome Statute. This shows the blatant disregard of the rule of law and retaliation by the African leaders due to the failure to have had their opinions heard by the International Community.

4.3 KENYA

Kenya has experienced a sequence of post-election violence, from 1997 to 2013. Emphasis will be given on the 2007 December and 2013 elections. Elections which

⁸⁸ The Prosecutor v Omar Hassan Al-Bashir (ICC 2009).

⁸⁹ http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf. (accessed 31 October 2018).

⁹⁰ <http://dx.doi.org/10.17159/1996-2096/2015/v15n2a16>. (accessed 6 November 2018).

triggered a severe humanitarian and political pandemonium, perpetrated by the desire to maintain power at the detriment of the masses.

In 2007 it was the unscrupulous announcement of Kibaki's victory and his immediate swearing in for his second term that triggered tribe-based rebellion and violence across the country.⁹¹ Surrounded by assumptions of rigging and election malpractices Kibaki advocated that "verdict of the people" to be respected and for "healing and reconciliation".⁹² This ignited violence and led to ethnic based killings, widespread sexual violence on men and women of all ages and destruction of communities perpetrated by both opposition and ruling parties' gangs. The Human Rights Watch recorded about 1300 deaths and more than 650 000 displaced in between December 2007 to February 2008.⁹³ As a result the international community engaged negotiation efforts by team of African personalities led by Kofi Anan⁹⁴. They initiated the Kenya National Dialogue and Reconciliation (KNDR),⁹⁵ and brought President Kibaki and Mr. Odinga together for formal negotiations. This showed the commitment by the African leaders including the AU to uphold and protect human rights as well as foster political peace. However none was held accountable for the violations instead peace was promoted and only instantaneous issues were dealt with.

Nonetheless this process failed to establish political and controlled measures capable of reserving togetherness and co-operation among the divided people.⁹⁶ Judicial accountability for the human rights violations advocated by the Truth, Justice and Reconciliation Commission (TJRC) was never implemented.⁹⁷ Rather, what persisted were the disrupted political and institutional arrangements that fostered patterns of domination and exclusion.⁹⁸ Aims to create a special domestic tribunal to try the 2007

⁹¹ KM Aman *Mediation: A Viable Solution to Africa's Political Crisis, A Case Study of Kenya's Post-Election Crisis-2008* (2009).

⁹² Aman (n91 above).

⁹³ <https://www.hrw.org/report/2013/02/07/high-stakes/political-violence-and-2013-elections-kenya>. (accessed 8 November 2018).

⁹⁴ Aman (n91 above).

⁹⁵ 'The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project' Draft Review Report (2011).

⁹⁶ SA Dersso 'The 2007 Post-election Crisis in Kenya as a Crisis of State Institutions' (2008) Vol 5 *African Renaissance*.

⁹⁷ Section 5 'Truth, Justice and Reconciliation Act' (2008).

⁹⁸ Dersso (n96 above).

human rights perpetrators were hampered by the Parliament's decision on 12 February 2009 when it voted against the bill seeking creation of the tribunal. Consequently to try and bring better resolutions, the international community intervened and establishment of the Kenyan Commission of Inquiry into the Post-Election Violence (the Waki Commission) in 2008. The Waki Commission singled out Kenyatta, Mohammed Hussein Ali, and Francis Ali,⁹⁹ as instigators of the violence. The ICC intervened and alleged that Muthaura and Kenyatta "committed or contributed to" the killings of supporters of the opposition ODM" while Ruto and Sang were accused of establishing a "network of ODM representatives, members of the media, former Kenyan police and army forces and local leaders" to fund gangs of Kalenjin youth who were attacking civilians believed to be supportive of the PNU.

The political disorder in Kenya continued unresolved to the 2013 elections. Failure to chastise the 2007 perpetrators led not only to an escalation of violence in the 2013 elections, but also culture of impunity which is now seriously beyond control of the State and its security agencies.¹⁰⁰ More so the ICC implications further exposed the disregard of rule of law and human rights protection as Kenyatta was able to manipulate the trial proceedings in his favor. Kenyatta campaigned as a defender of Kenya's Sovereignty against the ICC which he portrayed as a western tool unjustly pursuing Kenyatta, Ruto and ethnic groups around them. He fostered four arguments against ICC's narrative of universal global justice. He argued that ICC attacks and investigations portrayed a risk of foreign interference, ethnic division, and hindrance of national reconciliation. Kenyans viewed Kenyatta as their candidate to deliver security and togetherness among the different ethnicities. Kenyatta used this discourse to cast himself as a hero that embodies the ethos of his late father and show that he has

"Stood firm in defence of Kenyan sovereignty and in defiance of the ICC."¹⁰¹

⁹⁹ <https://ruor.uottawa.ca/bitstream/10393/32829/1/HODGINS%2C%20Stefanie%2020155.pdf>. (accessed 5 November 2018).

¹⁰⁰ Commission of Inquiry on Post-Election Violence 'Report of the Commission of Inquiry into the Post-Election Violence in Kenya' (2008).

¹⁰¹ G Lynch & Zgonec-Rozej M (2013) The ICC intervention in Kenya *Chatham House Programme Paper*.

This led to his victory in the 2013 elections and in his acceptance speech, President Kenyatta vowed to work with the International Community but also advised the community to respect the sovereignty and democratic rule of Kenya.¹⁰² This vow was never implemented as the Kenyan government did all it could to obstruct justice and hinder crucial evidence and debar witnesses from testifying against the elected president. More so in September Kenya announced its intention to withdraw from the ICC. This stance was mounted to other African states and established the African theme that, all heads of states current or former should be immune to ICC prosecution. The Kenyatta situation increased African resentment against ICC and the battle became more of a neo-colonialism attack rather than accountability of human violations. The AU called for Kenyatta and Ruso's case to be deferred. When the UNSC refused, AU called for immediate suspension of the case and noted to be representing African's united voice.¹⁰³ They further noted that,

*"no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government."*¹⁰⁴

The Kenyatta case was no longer a single person's battle but rather that of all Africans and the Kenyans believed to unite against the neo-colonist tool being the ICC.

4.4 OVERVIEW OF THE CASES

Acknowledging the above cases, one questions whether the solution rests with the ICC and Western countries politics which functions under the perception of superiority? Africa needs a solution that resonates with the masses. The struggle in Africa is more of a political and power struggle, with a continent that fights for recognition, unity and its own supremacy these which are the repercussions of colonialism. The AU fights to have its own rights and Pan-African ideologies of nationalism accepted. Thereby the mechanisms used by the west tend not to just challenge the impact of heads of state immunity on human rights but the culture and beliefs of the Africans and this sparks neo-colonialism comments.

¹⁰² <https://www.theguardian.com/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections>. (accessed 6 November 2018).

¹⁰³ <http://opil.ouplaw.com/view/10.1093/law-oxio/e98.013.1/law-oxio-e98> (accessed 6 November 2018).

¹⁰⁴ <http://opil.ouplaw.com/view/10.1093/law-oxio/e98.013.1/law-oxio-e98> (n103 above).

However should the people's lives continue in such conditions? As turning a blind-eye to the struggles of Africans with their heads of states on the basis of culture is a blow on rule of law and justice and a disregard of humanity. The AU needs to act as a stronger foothold for international intervention, re-characterisation from sovereignty as control to sovereignty as a responsibility in both internal functions and external duties should be legitimised. The legal framework is available the problem is on implementation, and this has become a necessity, not a legal or academic issue. If the AU is against foreign involvement they need to take a step against authoritarian regimes in Africa, a precedent needs to be set and this time not by the international community but by the African community itself. If the AU does not take the lead and make the decision to set out strategic priorities and impose self-regulating binding responsibilities upon head of states international intervention will continue to be counter-productive and have destabilizing effects on the international globe. Thereby fighting of ICC and the west should be realistic and not at the hand of the same people that resonate their beliefs but to also protect and uphold their freedoms.

4.5 CONCLUSION

The two cases clearly show that the state practice in Africa continues to operate on a sovereign immunity bases with human rights given less attention. The ICC has failed to bring a solution to the African problem as the Africans themselves have failed to cooperate with the Court. The African System has damaged the credibility of the ICC this which has left many victims to suffer at the hands of those in power, dogmatised by notions of culture and neo-colonialism the civilians believe their leaders to be the answers. Thereby the clash between sovereign immunity and the protection of human rights is one that is rampant within Africa and a solution trampled under selfish political interests.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

The question of whether head of state immunity has power over human rights in Africa was what the study sought to answer. The study established that both concepts are of importance and serve a particular purpose within international law that cannot be completely ignored for the supremacy of the other.

It has explained the basis of immunity in terms of its origins under sovereign immunity, and its purpose under state immunity. It is the atrocities of the Second World War that fostered the implementation of the restrictive doctrine. As a consequence of the Nuremberg trials, heads of state entitlement to immunity in criminal cases was questioned as one had to be held responsible for his/her crime. This thereby differentiated the state and the head regardless of status as implemented in the Pinochet case. Of importance to note is the bid by international law to guide against abuse of power and trample justice as some crimes are held to be beyond condonation and cannot forego unpunished. The study nevertheless concludes head of state immunity is still an important doctrine of international law which cannot be disregarded. While international human rights law has come as a challenge to state sovereignty re-evaluating its legitimacy but not eroding the principle.

The development of international human rights law brings a safeguard that is necessary in its interference with the doctrine of immunity. The study shows the international legal frameworks of human rights authored by those in power, showing the acceptance by the states that impunity is an animal that the world has to fight and reprimand. Yet, these safeguards do not strictly mention or incorporate head of state immunity regulation. This has resulted in the inconsistent application of the doctrine in matters of grave human right violations.

The selected cases in Africa of Sudan and Kenya portray conceptions within Africa as a whole. Human rights abuses are not just limited to these two countries but the two cases show the culture of impunity that prevails in Africa and the move by the international community through the ICC to send a message to African leaders. It is the reaction of the African States and the AU that sends the message that sovereign immunity has power over human rights. For many African States, sovereignty is a legal fiction that is not matched by governance and administrative capacity.¹⁰⁵ However to conclude this on a mere basis of reaction would be unreasonable and without a clear appreciation of African ideological and doctrinal conceptions. It is concluded, while the conception of head of state immunity in Africa warrants checks and balance, better mechanism of checks should be put into place, mechanisms that incorporate the Africans frame rather than dictate western foundations and this should be done by the Africans particularly the AU.

5.2 RECCOMENDATIONS

The election of AU Presidents, secretaries and commission chairman should be revised. Electing sitting heads of state can be seen to be the major problem with AU, as these heads end up affiliated to their counterparts so as to protect their position. Election should be based on competency and ability hence should be made open to the African people.

¹⁰⁵http://www.operationspaix.net/DATA/DOCUMENT/5868~v~The_right_of_intervention_under_the_African_Union_8217s_Constitutive_Act_From_non-interference_to_non-intervention.pdf. (accessed 1 December 2018)

Specific treaty law that defines the confines of head of state immunity particularly when it comes to human rights violations should be created so as to create legal binding rules that the courts cannot deviate to when faced with such situations. This will also guide against multifarious interpretation based on state practices.

Regional Intergovernmental Organisations such as SADC, EAC, ECOWAS and IGAD other than the UN and the AU should play an active role to promote human rights, and encourage peace and democracy in their regions. This will help with the creation of strategies that resonate with specific ethnicities and allow for effective resolutions.

The ICC should establish offices in Africa, this will cut on investigation costs usually complained of, it will also enable the ICC to work with African communities so as to get a better understanding of their beliefs and come up with policy suitable for the African people. More so this may change the attitude of African leaders towards the ICC especially if the ICC recruits African Civilians to work in the offices.

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