**A critical analysis of immunity extended to the spouses of the heads of state**

by

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**Key words**

Immunity; Derivate immunity; *Rationae personae;* Diplomatic and consular immunity; Customary international law; Spouses; First ladies; Heads of state; Human rights; international crimes, universal jurisdiction

**Abbreviations**

| | |
|---|---|
| DRC | Democratic Republic of Congo |
| UK | United Kingdom |
| USA | United States |
| UN | United Nations |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| VCDR | Vienna Convention on Diplomatic Relations, 1961 |

**CHAPTER 1**
**INTRODUCTION**

## 1.1 Introduction

Immunity for the spouses of heads of state is something contested in customary international law as can be illustrated by the Grace Mugabe cases when she committed assault crime in China and was accorded immunity on the basis that she was the first lady of Zimbabwe but she was denied the same immunity in South Africa for similar crime. There are certain categories like Presidents, diplomats and Ministers of Foreign Affairs who have been accorded immunity without much debate while others like first ladies and dependencies of Presidents have raised debate on whether or not they are accorded immunity.

There is some debate as to whether first ladies or spouses of Presidents should also be accorded similar immunity that is accorded to their spouses under customary international law. On the one hand, for example, Foakes argued against immunity for first ladies and has even called for a complete removal of immunity when it comes to serious international crimes.[1] On the other hand, some supported the continuation of the concept of immunity citing challenges that would be faced in implementing a court's verdict in another country.[2] Some like Sebastian[3] took a middle ground by observing that diplomatic immunity is not a permanent condition and should be granted only when a foreign representative is on official duty and their spouses may sometimes be extended the same courtesy. Hence, literature on the subject matter is inconclusive as some practices advance an affirmative position supporting the granting of immunity to spouses of heads of state while others are of opposite view. This is the puzzle, which this research sought to address. In other words, the research mainly focused on whether spouses of heads of state are entitled to immunity if they commit crime in a foreign land.

In an attempt to solve the puzzle, the research looked at whether such immunity should cover all crimes if the spouses are accorded or are to be accorded the same

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1 Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press 2014) 193.

2 Ibid 194.

3 Tania Sebastian, 'Diplomatic Immunity versus Harm to the Individual: An Attempt at Appraisal' [2010] 3(1) The Gujarat National Law University Law Review 11 <https://ssrn.com/abstract=2053426> accessed 27 January 2021.

immunity as accorded to their spouses. This is because, on one hand, some scholars are of the view that immunity cannot 'extend to all acts of the state official for otherwise that individual would in effect be conferred an immunity based upon the status of the office held.'[4] The premise of the above argument is that individuals should not be given open personal immunity for all transgressions for there is no such immunity under the customary international law.

It appears that the 'substantive prohibition of torture does not impact upon the procedural immunity of foreign states from judicial proceedings in the forum state's court. Apparently, these norms do not collide because they address different things and hence the peremptory status of one of the norms has no "trumping" effect upon the other.'[5] Immunity, according to this view, has limitations and does not amount to impunity.

On the other hand, the International Court of Justice (ICJ) has held that immunity should actually extend to all criminal offences including international crimes.[6] For the present purpose it is important to highlight the challenges faced by those who seek to institute legal proceedings against the spouses of heads of state that has not been solved as doing so have been considered to be violating norms of international law. Alternatively, scholars like Sebastian[7] have grappled with the question whether the courts of the foreign states should be able under international law to try anyone irrespective of the immunity accorded to him if he or she is alleged to have committed a crime.

### 1.2 Background to the Problem

According to Wertheimer, the traditional role of the first lady was largely focused on femininity and domestic issues that were meant to constrain women occupying that role.[8] In the case of United States, for example, the role of the first lady was meant

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[4] Douglas Zachary, 'State Immunity for the Acts of State Officials' [2012] 82(1) The British Yearbook of International Law 293 <https://doi.org/10.1093/bybil/brs002> accessed 15 May 2021.

[5] ibid 281-348.

[6] *Democratic Republic of Congo v Belgium* [2002] (Arrest Warrant) ICJ Rep (75) ICGJ 22.

[7] Sebastian 2010 GNLR (n 3) 13.

[8] Molly Meijer Wertheimer, *Inventing A Voice: The Rhetoric of American First Ladies of The Twentieth Century* (Rowman & Littlefield Publishers 2004) 353.

to perform those roles that society assigned to females like counselling families and communities, charitable functions and fundraising.[9]

However, the traditional role of women has evolved into one that is professional, dealing with policy and advises the president.[10] As a result, the modern first ladies are no longer only serving as event organisers at their residents but they are getting involved with politics and addressing social issues. This growing political role played by the spouses has increased their visibility due to political awakening. Such political awakening has also triggered the problem whether the spouses of heads of state should be accorded immunity if they commit crimes in another country.

The spouses of heads of state have not been visible in the past and their immunity did not warrant much of international law attention until in the 1950s, the period that Knight calls *Dramatic Changes for Women* from 1950-1974, when she describes the first ladies of the time.[11] According to Knight, the rise of national feminism during this period was a determinant feature for it came with the demands for equal rights, which led to the first ladies getting more and more widespread attention.[12] Knight further observed that the period from 1975 to 2000, which she called *The Recent Years*, actually marked an increased interest in first ladies mainly because of the 'changes in attitudes toward women's roles'.[13]

Hence, the worldwide political awakening of spouses has seen the institution of the First Lady emerging as an institution of great influence with most spouses serving as the heads of state's most trusted and closest political allies like Hillary Clinton to Bill Clinton. Other examples are Zimbabwe and China during the final years of Presidents Robert Mugabe and Chairman Mao Zedong, whose wives are said to have actually usurped powers from their husbands. A good example is Grace Mugabe who actually

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[9] Yusuf Kalyango and Betty Winfield, 'Rhetorical Media Framing of Two First Lady Candidates Across Cultures' (2009) 1(7) Global Media Journal 15 <http://lass.purduecal.edu/cca/gmj/fa09/gmj-fa09-kalyango-winfield.htm> accessed 30 May 2021.

[10] Gil Troy, 'First Ladies and the Fourth Estate: Press Framing of Presidential Wives' (2009) 114(4) The American Historical Review 1121-1122 <https://doi.org/10.1086/ahr.114.4.1121> accessed 29 May 2021.

[11] Misty Lynn Knight, 'From Private to Public Life: Rhetoric of First Ladies in their First Year' (DPhil thesis, The University of Southern Mississippi 2005) 33.

[12] Ibid 35.

[13] Ibid 37.

held national political rallies, summoning political leadership to accompany her during the rallies and making political decisions on behalf of her husband. In the last days of President Robert Mugabe, she was more visible and played a more influential role than her husband.

Notwithstanding the fact that spouses have not been given official titles or functions in most countries, they usually command authority and exercise executive powers like Mrs Grace Mugabe. In 2014, Mrs Mugabe as the first lady spearheaded the ousting of the then Vice President Joice Mujuru, arguing that she should be sacked from government because she was 'corrupt, an extortionist, incompetent, a gossiper, a liar and ungrateful', and accused her of collaborating with opposition forces and white people to undermine the country's post-independence gains.[14] She carried out public campaigns denouncing Mrs Mujuru who was subsequently expelled from both Government and the ruling party, ZANU PF. History repeated itself in 2017, when Mrs Mugabe was again publicly calling on her husband to remove Mr Emmerson Mnangagwa who had replaced Mrs Mujuru as Vice President. In many countries like Zimbabwe, the spouses are among the prominent figures that have a direct bearing on the image of the President as was shown after Mrs Mugabe led the removal of Vice President Mnangagwa in 2017. The removal of Mr Mnangagwa as the Vice President led to the impeachment of her husband who later resigned as the President of Zimbabwe. The main charge in the impeachment of President Mugabe was that he allowed his wife to usurp constitutional power to run the government. She was further accused of insulting civil servants, the Vice President and of denigrating the army at public rallies.

In many cases as illustrated by Mrs Mugabe's political escapades, the role of the spouses has grown from just being a social role to a more involved one as some spouses are now actively participating in politics. Some are even adopting national causes such as being a Health Ambassador by Auxillia Mnangagwa of Zimbabwe and in the United States of America, Hillary Clinton has led health care reform, Laura Bush championed literacy and Michelle Obama led childhood obesity.

[14] -- 'Grace Mugabe: Who is Zimbabwe's former first lady?' *BBC News* (London, 4 December 2014) <https://www.bbc.com/news/world-africa-30307333> accessed 30 May 2021.

It has been observed that the turning point for the spouses of presidents was provided by Eleanor Roosevelt who increased the role of a first lady in an unprecedented way when she jointly led the USA with her husband.[15] Thereafter, each Presidency has witnessed the spouses playing significant roles in both national and international politics,[16] for example, Nancy Reagan directly requested Pope John Paul II to address the issue of drug abuse and Laura Bush played a significant role when she addressed the rights of Arabic women.

The phenomenon of human rights is another factor that has shown the existence of the problem of this type of immunity for the spouse of the President. This subject of immunity has become increasingly topical in today's world of human rights and there have been calls for urgent reform of the immunity system itself.[17] The emerging importance of human rights has seen extreme positions on immunity as some have even called for its total eradication in light of grave international crimes.[18] Others have opposed the idea of eradicating the whole concept citing some challenges likely to be encountered by allowing local courts to handle and enforce penalties or damages for transgressions committed outside their jurisdiction.[19] This has resulted in calls for reviews and inquiries on immunity including the derivative one by various governments and other organizations such as the United Nations. In other words, the human rights issue has triggered a need to re-appraise the interface between human rights and the concept of immunity.[20]

Another significant point is the fact that heads of state are now frequently travelling outside their states to take active participation in the relations of nations.[21] Unlike in ancient times, heads of state or monarchies only sent envoys to convey messages

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[15] Pierre-Marie Loizeau, 'First Lady But Second Fiddle or the Rise and Rejection of the Political Couple in the White House: 1933-Today' (2015) 10(1) European Journal of American Studies 1 <https://journals.openedition.org/ejas/10525> accessed 06 February 2021.

[16] Ibid 2.

[17] Andrea Bianchi, 'Immunity vs Human Rights: The Pinochet Case' (1999) 10(2) European Journal of International Law 2 <https://watermark.silverchair.com/100237.pdf?token> accessed 01 June 2021.

[18] Foakes Position Heads of State *(n 1) 195*.

[19] Ibid 195.

[20] Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16(1) European Journal of International Law 89-112 <https://doi.org/10.1093/ejil/chi104> accessed 1 June 2021.

[21] Foakes Position Heads of State *(n 1) 193*.

to their counterparts.[22] There was no need for frequent travel and the immunity that was relevant was the one only accorded to the representatives of the sovereign who were the ones who were frequently travelling to foreign countries. Resultantly, this area of customary international law received very little attention until recently when modernity brought increased need for travel for the heads of state and their spouses. The position has changed with the evolving world. Heads of state and their spouses are now travelling frequently to attend summits at both bilateral and international levels. Unlike in the ancient past, their travel was very limited but only increased with time. As a result, their immunity and that of their spouses or family members accompanying them have become a significant factor in international law.

By and large, spouses are no longer peripheral as they were in the past but they are now frequently travelling with the presidents and are now taking active roles in politics as indicated above with regards to Grace Mugabe and Hillary Clinton. However, their immunity is one area in both diplomacy and international law that has been neglected yet it has tremendous influence to determine state relations. Today, some of the spouses like Grace Mugabe commit crimes like assault while travelling outside their country accompanying their spouses on official duties or when they are on private business. This has raised questions whether the immunity extended to the presidents should be extended to their spouses too.[23] This has been complicated by the emergence of human rights debate which demands that when international crimes are committed, respect for human rights should take precedent over the traditional principles of state sovereignty and the shield of 'immunity' of state officials.[24] Hence, one of the objectives of this research is to establish whether the spouses who commit international crimes such as assault should invoke immunity to exclude their criminal liability.

### 1.3 Problem Statement

Broadly speaking, the fundamental goal of international law is to bring order in the world and is designed to ensure that peace, prosperity, human rights and

[22] Foakes Position Heads of State *(n 1) 13*.
[23] Sebastian 2010 GNLR (n 3) 13.
[24] Sena 2005 EJIL (n 20)101.

environmental protection are achieved.[25] Ideally, international law is supposed to standardize divergent views and opposing interests that nations may have by providing guidelines to assist states as they interact in situations such as war, diplomacy, trade and human rights.[26] The idea is to ensure stable, consistent and organised international relations.

However, this goal has been missed in the area of derivative immunity that should be accorded to the spouses of heads of state. In this area of international law, there is inconsistent practice by states on whether immunity accorded to heads of state when they visit other countries should be extended to their spouses.[27]

As a result, derivative immunity has remained one area of the law that has not been settled. In other words, granting *rationae personae* under international law to spouses has largely remained an unresolved legal matter.[28]

This subject has been treated differently as seen in Grace Mugabe cases who was granted immunity in China but denied in South Africa for similar offence. Case law has also given mixed and incoherent answers as different courts have arrived at different outcomes on the subject matter.[29]

Some national laws have assisted in clarifying the matter by stipulating clearly whether or not spouses or dependents are entitled to immunity. A case in point is section 20(1) of the Immunity Act[30] of the United Kingdom (UK). This Act provides that immunity is 'granted to members of the head of State's family forming part of his household and his private servants.'[31] The other case in point is section 36(1) of the Australian Foreign States Immunities Act,[32] which also extends immunity to the spouses.

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25 Malcolm Shaw, *International Law* (6 edn Cambridge University Press 2008) 5.
26 Foakes Position Heads of State (n 1) 197.
27 Sebastian 2010 GNLR (n 3) 15.
28 -- 'Immunity of State Officials from Foreign Criminal Jurisdiction Memorandum by the Secretariat' (United Nations, 2008) 173 <https://www.refworld.org/pdfid/48abd597d.pdf> accessed 28 January 2021.
29 Yena Hong, 'Pedigree Prosecution: Should a Head of State's Family Members be Entitled to Immunity in Foreign Courts?' (2018) 86(6) Fordham Law Review 15 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5531&context=flr> accessed 17 February 2021.
30 State Immunity Act 1978 (UK).
31 ibid.
32 Foreign States Immunities Act 1985 (Australia).

This position is not the same with the South African legal position as this area of the law is left to the discretional whim of the Minister of Foreign Affairs under the Diplomatic Immunities and Privileges Act.[33] According to this Act, the Minister has the power to extend immunity to those who visited South Africa while representing their countries on official business.

Furthermore, national case law has also not provided the answer to the puzzle. There is no clear pattern from case law that can be followed to resolve the matter as best illustrated by the former first lady of Zimbabwe, Mrs Grace Mugabe. She provides very interesting case studies on the subject matter of derivative immunity because she committed similar criminal offences of assault in two jurisdictions, China and South Africa, but received different verdicts.

In 2009, Mrs Grace Mugabe and her bodyguards were accused of assaulting photo-journalists in Hong Kong but she was granted diplomatic immunity and was not prosecuted. The Chinese government concluded that its law generally 'confers diplomatic privileges and immunities to spouses of foreign heads of states during their stay in China, including Hong Kong.'[34] Besides its laws, the Chinese also based its decision on customary international law as it was noted that granting immunity from criminal jurisdiction to spouses has been a long-established practice in many civilized states, including China.[35] They cited Article 37 of the Vienna Convention,[36] which grants immunities to the spouse or family member of diplomatic personnel. The Chinese also based their decision on a French practice, which generally regard it as settled practice to extend diplomatic immunities to the spouses of diplomatic personnel.[37]

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[33] Diplomatic Immunities and Privileges Act 2001 (SA).
[34] ibid.
[35] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (2 edn Clarendon Press 1998) 1287.
[36] Vienna Conventions on Diplomatic Relations 1961.
[37] Yena Hong, 'Pedigree Prosecution: Should a Head of State's Family Members be Entitled to Immunity in Foreign Courts?' (2018) 86(6) Fordham Law Review 15 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5531&context=flr> accessed 17 February 2021.

In short, the Chinese laws regard issues involving privileges and immunities as a foreign affairs matter that should be handled by the executive arm of government. Mrs Mugabe's case was therefore handled by the government and not the courts as it falls under that category. The Chinese government felt that in modern times, most of these cases that involve diplomatic immunity are settled at the stage of consular notification rather than in court proceedings.

However, the Chinese position was a complete opposite to what happened to Mrs Grace Mugabe in similar situation in South Africa where she received a completely different verdict when she was accused of assaulting a young lady in the Democratic Alliance case.[38] The Minister of Foreign Affairs' decision to grant her immunity was dismissed by the courts as it was felt that immunity in South Africa does not cover such crimes of assault as stipulated by the Foreign States Immunities Act (FSI).[39] According to this Act, immunity for a foreign state cannot be granted for crimes of death or injury of any person.[40] According to the Judge there was no international norm supporting immunity for spouses of heads of state, though, this section allows South Africa to depart from international customary law even if it allows immunity to heads of state.[41] Unlike in China, the South African scenario strictly follows the provisions of Foreign States Immunities Act and the Constitution, which give limited room for the executive's discretion. In particular, it was made clear in the case[42] that section 232 of the Constitution provides that customary international law can only be law in South Africa if such law does not violate the Constitution or other legislative provisions that also don't violate the supreme law.[43]

It is clear from the above that immunity granted to the spouses of heads of state is still an area that needs finality to ensure stable, consistent and organised international relations.

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[38] *Democratic Alliance v Minister of International Relations and Co-Operation and Others* [2018] 2 SACR 654 (GP).
[39] Foreign States Immunities Act 1981 (SA).
[40] State Immunities SA (n 39) s 6(a).
[41] *DA v Minister of International Relations* (n 38) 40.
[42] *Ibid 40*.
[43] The Constitution of the Republic of South Africa 1996.

### 1.4 Research Question

The main question is as follows:

> What is the position at international law regarding derivate immunity accorded to spouses of heads of state who commit crimes outside their countries on official or on private business?

The subsidiary questions are as follows:

1.4.1 What is the customary international law position on derivative immunity extended to the spouses of heads of state?

1.4.2 What are the legal positions of Australia, Austria, China, UK, US and South Africa on spouses' derivative immunity?

1.4.3 Should the local legislation give courts or the executive power to determine the immunity of the spouses of heads of state?

1.4.4 How should national laws and international customary law be reconciled in the event that they conflict with each other? Should the national laws on immunity of spouses take precedent over customary international law?

1.4.5 How were the Arrest Warrant case[44] and Grace Mugabe's two immunity cases in both Hong Kong and South Africa dealt with?

1.4.6 What can be done to harmonise the position regarding immunity extended to the spouses of heads of state?

### 1.5 Research Objectives

The study mainly seeks to investigate the customary international law position regarding derivative immunity accorded to the spouses of heads of state.

The sub-objectives of this research will be to:

[44] Arrest Warrant case (n 6).

1.5.1 To investigate the customary international law position regarding derivative immunity extended to the spouses of heads of state.

1.5.2 To analyse the legal positions of various jurisdictions regarding derivative immunity for the spouses of heads of state.

1.5.3 Analyse whether the legislator should give the courts or the executive the power to determine the immunity accorded to the spouses of heads of state.

1.5.4 To determine the mechanism of reconciling national laws with customary international law on spousal immunity when they are in conflict.

1.5.5 To critically evaluate the Grace Mugabe's immunity cases in both Hong Kong and South Africa and the Arrest Warrant case.[45]

1.5.6 Suggest possible solutions of harmonising divergent positions regarding the immunity extended to the spouses of heads of state.

### 1.6 Chapter Outline

The data gathered in this research is presented in the following format:

**Chapter 1: Introduction**

This chapter explains the research problem to the reader and explains factors that have contributed to the existence of the problem. In other words, the chapter introduces the whole study by addressing the main research question in a broad way. It also broadly explores different positions advanced by various scholars regarding derivative immunity that should be accorded to the spouses of heads of state. The chapter also touches on the legal provisions on immunity extended to the spouses of heads of state, not only in South Africa but other selected countries like Australia, Austria, China, UK and US.

**Chapter 2: Historical Background, Human Rights and Immunity**

In order to understand the problem of immunity extended to spouses of heads of state, there is need to unravel its foundations especially where the immunity is derived from. Hence, this section addresses the research question 1.4.1 on what customary international law says with regard to the immunity extended to the spouses

[45] Arrest Warrant case (n 6).

of Presidents. This goal can only be achieved if the position on immunity extended to Presidents is understood fully since the immunity for their spouses only emerge from them. Furthermore, the issue of immunity has to be understood in the context of the broad concept of human rights. Hence, this chapter contextualises immunity of spouses within the requirements to honour and protect human rights.

**Chapter 3: Assessment of National Laws on Derivative Immunity**

This chapter addresses research sub-questions number 1.4.2 and 1.4.3. The chapter interrogates the legal positions that prevail in Australia, UK, US, Austria, South Africa and China. It also highlights the roles of the courts *vis-à-vis* that of the executive.

**Chapter 4: Reconciling National Laws and International Customary Law**

The objective in this chapter is to answer research sub-question number 1.4.4 on reconciling national laws and international customary law on immunity extended to the spouses of heads of state. The aim here is to proffer an acceptable position on whether the national laws should take precedent over customary international law, for example, the South African position compels courts to take a reasonable interpretation that is consistent with international law.[46] This will be done by analysing the South African position by juxtaposing it to Australia, Austria, China, UK, US legal positions as discussed in chapter 3.

**Chapter 5: Case law on Immunity**

The research sub-question number 1.4.5 is tackled under this chapter. This chapter reviewed three different cases that include the Grace Mugabe's immunity cases in both Hong Kong and South Africa and the Arrest Warrant Case[47] in order to have a full understanding of case law on immunity of spouses. Customary international law is mainly aimed at standardising international relations of states. Hence, this chapter explores the cases that were dealt at national level and the one decided by the ICJ in order to find the best way of handling similar cases in future.

**Chapter 6: Conclusions and Recommendations**

The question on the way forward regarding immunity for the spouses of heads of state, 1.4.6, is addressed under this chapter. This is done by summing up all the findings in this research and proffer recommendations on the best way of

[46] Constitution SA (n 43) s 233.
[47] Arrest Warrant case (n 6).

harmonising the position regarding immunity extended to the spouses of heads of state.

### 1.7 Methodology

This is a desktop research utilizing both primary and secondary sources of information. Primary sources such as the legal texts and case law were reviewed together with secondary sources such as books and journals sourced from the library and the internet to complement each other.

The processing of gathered data was done by describing the information and through thematic development as well as deducing the meaning or by making inferences from the gathered data to come to logical conclusions.

### 1.8 Literature Review

In an effort to make sure that the reader understands the essence of the subject under discussion, it is imperative that this section starts by providing definitions of key concepts to avoid multiple interpretations. It will then proceed with a comprehensive overview of the knowledge available on the immunity extended to the first ladies or family members of the person accorded the immunity.

#### 1.8.1 Defining key Terms

Stoll explains State immunity as something that shields a State and its possessions from all kinds of litigation in the courts of another State and from being compelled to implement certain decisions.[48]

Immunity is best defined as a principle that takes away the authority of a state from trying a case under its jurisdiction because of the status of the person or organization involved such as the head of state or even the nature of the conduct that happened.[49]

[48] Peter-Tobias Stoll, 'State Immunity' Max Planck Encyclopedia of Public International Law (2011) 13 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106> accessed 28 January 2021.

[49] Hennie Strydom et al (eds), *International Law* (Oxford University Press 2016) 11.

According to Pedretti, immunity means one's freedom is not restricted by another state.[50] For him, this means that one with immunity is not compelled to obey rules and regulations of another state.[51] Pedretti further explains that immunity 'preserves the State and its representatives from being subjected to foreign scrutiny, best expressed by the maxim *par in parem non habet imperium*, one State cannot exercise its authority over another State.'[52] This means States are equal with the same status. As a result, one State cannot therefore compel another State to appear before it or its institutions. As explained by Marshall J in the first judicial assessment of the doctrine of immunity, 'one sovereign being is in no respect amenable to another.'[53]

In other words, immunity is a legal concept which generally means an exemption of a State and its officials from being tried by another State and its institutions.

Dugard categorized immunity into two forms, namely:

- Sovereign immunity; and
- Diplomatic and consular immunity.

Dugard categorizes immunity into sovereign immunity and that accorded to diplomats.[54]

This research is interested in the state or sovereign immunity that is extended to spouses, which is known as derivative immunity. Derivative immunity refers to that immunity extended to third parties like spouses or members of the head of state.[55] The principal person given state immunity is the head of state but that immunity is then extended to members of his family or entourage (third parties).

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[50] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff Leiden 2015) 7.

[51] Ibid 7.

[52] Ibid 8.

[53] *The Schooner Exchange v McFaddon* [1812] 11 US (116) 137.

[54] John Dugard, *International law: A South African Perspective* (4th edn, Juta 2016) 240.

[55] Jason Malone, 'Derivative Immunity: The Impact of Campbell-Ewald Co. v. Gomez' (2016) 50 Creighton Law Review 50 <https://heinonline.org/HOL/LandingPage?handle> accessed 15 June 2021.

The study does not cover the diplomatic immunity category since it has already been codified. However, reference to such rules shall be made where appropriate to address certain issues that may not be clear under this study.

It has to be noted from the beginning that immunity is also a critical concept of diplomacy and should therefore be discussed in that context.

### 1.8.2 Derivative Immunity for the Spouses

This section addresses the research question 1.3.1 on the current legal position and practice on derivative immunity extended to the first ladies or spouses of Presidents.

The research broadly discusses the personal immunity, which provides immunity for persons of a certain office while they represent their countries in another country. Specifically, the puzzle that the researcher explored is whether the spouses enjoy derivative immunity that is generally considered as customary international law.

Though this type of immunity is sometimes contained in some national laws as pointed out above, it does not provide standard practice since it is not a clear cut position that is followed by all countries.[56] A good example is the British law, which stipulates that immunity is granted to 'members of the head of State's family forming part of his household and his private servants.'[57] The other example is provided under the Australian law that also accords such immunity to the 'spouse of the head of a foreign State.'[58]

The problem of ambiguity has not been limited to the legislations alone but extended to case law too. Various verdicts on the same subject have been reached, which have muddied the topic. As a result, there is no clear pattern that can be followed on decided cases.[59] One of the leading decided cases involves the wife of the former President of Philippines. In this case, a Swiss court made some interesting remarks as follows:

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[56] *DA v Minister of International Relations* (n 38) 32.
[57] Immunity UK (n 30) section 20(1).
[58] Immunity Australia (n 32) section 36(1).
[59] UN Memorandum (n 28) 21.

> customary international law has always granted to Heads of State, as well as to the members of their family and their household visiting a foreign State, the privileges of personal inviolability and immunity from criminal jurisdiction … This jurisdictional immunity is also granted to a Head of State who is visiting a foreign State in a private capacity and also extends, in such circumstances, to the closest accompanying family members as well as to the senior members of his household staff.[60]

It is clear from the above discussion that it is generally considered as customary international law to extend immunity to the spouses.

There are certain conditions that should be satisfied before customary international law is regarded as law. These requirements are derived from the Statute of the ICJ that requires the court to apply 'international custom, as evidence of a general practice accepted as law.'[61] It is clear from the above that general practice (*usus*) and acceptance as law (*opinio juris*) are the two requirements, which should be met before it is accepted as law.

Regarding *usus* requirement, the custom develops from a general practice, which is shown by constant and uniform usage.[62] According to Strydom, usage justifies acceptance by states of such a rule.[63] The first requirement, *usus*, has to be complemented with *opinio juris* to be turned into law. According to Strydom, the second requirement is also known as the subjective or psychological element and it is difficult to determine because it is difficult to read the brain of something not concrete like a state.[64] The custom will only be a rule once a State complies with the usage because it feels legally obliged to do so. In other words, the State must feel compelled to obey certain rules at the global arena. Hence, once the two requirements are met, customary international law is established and it becomes binding.

However, there are constitutional and other legal requirements in South Africa that should be satisfied before customary international law becomes binding. According to the Constitution[65] 'customary international law is law in the Republic unless it is

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60 Ibid 21.
61 United Nations Statute of the International Court of Justice 1945 (ICJ) Article 38(1)(b).
62 ibid, article 38(1)(b).
63 Hennie Strydom et al (eds) *International Law* (Oxford University Press 2016) 114.
64 Strydom International Law (n 63) 114.
65 Constitution SA (n 43) s 232.

inconsistent with the Constitution or an Act of Parliament.' This means international law can only be regarded as law in South Africa as long as it does not violate the Constitution and other legislations enacted by the Parliament of South Africa.

In other words, customary international law is only considered as law in South Africa as long as it does not contradict its Constitution and other relevant legislations, though the courts are compelled to take a reasonable interpretation that is consistent with international law.[66] In this case, the law that addresses immunity for the spouses of heads of state is the Foreign States Immunities Act,[67] which is meant to 'determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic; and to provide for matters connected therewith.'[68]

The concept of immunity has become increasingly topical in today's world of human rights and this has seen scholars like Sebastian[69] and Foakes[70] calling for urgent reform. It has been observed that 'though brought about with a noble intention, the demons of diplomatic immunity soon surfaced. It manifested itself in the form of various abuses, the most cogent among them being the violence done to the human body.'[71] As a result, scholars like Sebastian and Foakes have tried to balance the problem of abuse of state immunity with the dangers of reciprocity that inhibit reform of the system. In order to address the problem of abuse, one has to juxtapose the requirements to protect the state officials or diplomats against the requirements of justice that is, holding them accountable for their actions in a court of law. The resultant rights hence affected can be compressed to a hierarchy form, the pinnacle consisting of those human rights cannot be taken away.[72]

The emergence of human rights importance has seen extreme positions on immunity being advanced. On the one hand, scholars such as Sebastian,[73] Sena and Vittor[74] have called for a complete removal of immunity when it comes to serious international crimes. On the other hand, some supported the continuation of the concept of

66 ibid, s 233.
67 State Immunity SA (n 39).
68 ibid.
69 Sebastian 2010 GNLR (n 3) 15.
70 Foakes Position Heads of State (n 1) 192.
71 Sebastian 2010 GNLR (n 3) 15.
72 Ibid 15.
73 Ibid 15.
74 Sena 2005 EJIL (n 20) 91.

immunity citing challenges that would be faced in implementing a court's verdict in another country.[75] This debate has witnessed stakeholders such as the United Nations calling for further studies in search of a lasting solution on the subject matter.[76]

Sebastian elaborated that diplomatic immunity is not a permanent condition and is granted only when a foreign representative is on official duty or business and their spouses may sometimes be extended the same courtesy[77]. He further explains that immunity does not put them above the law or give them a blank permission to flout the laws.[78] Sebastian cites the example of Mrs. Mugabe who was not on official business, but was granted immunity from criminal proceeding after assaulting a photographer in the country where her husband, President Robert Mugabe, and herself were visiting.[79] Therefore, she could not automatically expect immunity; nor should the government assume it would be granted as a matter of course.[80]

In any case, the idea of limiting the existing norm of diplomatic immunity to actions directly related to the diplomat's official functions would run counter to the purpose of diplomatic immunity, that is providing protection for diplomats in their professional and personal capacities so that they may carry out their official functions unhindered by the burdens imposed by foreign laws.

At the same time, a diplomat's 'official function' should not include free license to commit crimes such as the abuse of children, rape, or it should not put him above the law of the receiving state.[81] It is therefore clear that the intention behind the formulation of the rules of The Vienna Convention was to enable the diplomats to function smoothly rather than protecting the diplomat as an individual. Limiting immunity to professional diplomatic functions would allow courts to hold diplomats responsible for criminal and tortuous acts and might deter diplomats from abusing their immunity.[82]

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[75] Foakes Position Heads of State (n1) 197.
[76] UN Memorandum (n 28) 21.
[77] Sebastian 2010 GNLR (n 3) 17.
[78] ibid 17.
[79] ibid 23.
[80] ibid 25.
[81] ibid 27.
[82] ibid 27.

In order to be able to address the question regarding immunity extended to first ladies or spouses, it is important to review both the legislative provisions and customary international law in detail. From a preliminary scan of literature, the result is mixed with some states supporting and others opposing the practice. There is inconclusive information to support one conclusion against the other. In some cases, the first lady has been accorded immunity but in others, it is clear that the spouse is not entitled.[83] In the following sections, the remaining task is therefore to assess what the legislative provisions provide and what the customary international law stipulates.

### 1.8.3 South Africa Legislative Provisions

This section discusses South Africa's legislative provisions to see if they can be utilized to solve the immunity puzzle regarding spouses of the head of state.

From the above analysis, it can be observed that it has become a common practice to grant immunity for a head of state. The reason being that to permit such prosecution will likely invite reciprocal retaliation that damage relations of those countries involved.[84]

However, the question still remains whether the President's spouse should be given unlimited immunity for those actions that are not officials. As has already been noted above, this area of the law is yet to be determined. This is true with the South African legislation.

In South Africa, the Act grants the responsible Minister the power to extend immunity to those who visited South Africa while representing their countries on official business.[85] The procedure to extend immunity to them is clearly explained in the Act, where the Minister is given limited discretion.[86]

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83 Sebastian 2010 GNLR (n 3) 18.
84 Hong 2018 FLR (n 29) 13.
85 Diplomatic Immunity Act SA (n 33).
86 ibid.

According to section 4 of the Act, a head of state enjoys immunity in terms of international law or any agreement that might have been entered by the two states; or may be conferred on such head of state by virtue of section 7(2).[87]

However, spouses are not explicitly mentioned under the section. They are covered under section 4(2) relating to all representatives of another state visiting South Africa whose immunity is extended under section 7(2). Section 7(2) provides that the Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette.[88]

This study critically assesses some of the laws like the above legislative provisions to find out if South Africa can invoke the customary international law or its own legislative provisions to grant immunity to the spouses.

It appears granting them immunity is possible when they are accompanying their spouses on official visits. However, the puzzle remains on the spouse's fate who is in South Africa on private visit like shopping or studying. Should the host nation accord such spouse immunity for the sake of diplomacy?

As has been discussed above, the Minister can decide to give such a person some immunity if that advances the interests of South Africa.

The legislative provisions of South Africa on immunity extended to spouses are not explicit. The provisions leave such an important area to the discretion of the responsible Minister to decide.

However, what is certain is that customary international law will only become law in South Africa if it is in harmony with its Constitution or if it does not breach other legislations in place. It is therefore necessary for one to then consider state practice regarding the subject matter.

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87 ibid.
88 ibid.

Before a consideration is made on state practice on immunity extended to spouses of heads of state in South Africa, it is important to highlight the provisions of yet another law with a bearing on such immunity, the Foreign States Immunities Act (FSIA).[89]

Section 6(a) of the Act should be considered as one of the legislative provisions that should not be breached for it has a bearing on the immunity for spouses. It provides that Presidents are not immune from South African courts for murder, assault or destruction of property.[90] Hence, it is clear from the section that the Presidents will not enjoy immunity if they perpetrated the above crimes. Consequently, the spouse cannot enjoy such immunity because her immunity would have derived from the head of state's immunity.

What section 6(a) above means is that former President Robert Mugabe was not going to be accorded immunity if he was the one who committed the crime of assault. The reason is that the law does not grant immunity to heads of state for assault.

As a result, the Minister cannot therefore confer such immunity to Presidents or their spouses since the unlawful conduct causing personal injury is excluded from crimes that can be given immunity.

Hence, based on the provisions of section 6(a) of the Act, Mrs Mugabe did not enjoy the diplomatic immunity when she committed the offence.[91] She cannot enjoy "derivative immunity" when her husband was not entitled to such immunity. One cannot derive a certain benefit from someone who does not possess such benefit.

### 1.8.4 Case law on Derivative Immunity for the Spouses

It has been observed that there is no standard practice when it relates to court verdicts regarding immunity extended to spouses.[92] This section therefore explores

[89] State Immunity SA (n 42).
[90] ibid.
[91] ibid.
[92] *DA v Minister of International Relations* (n 38).

different cases in detail in trying to establish the acceptable custom. Granting immunity to spouses under the international customary law should not remain an uncertain matter. This issue needs to be pursued further in order to find finality and the starting point is to draw lessons from the main case under review.[93]

Immunity for the spouses of the heads of state is derived from the immunity accorded to them based on the immunity given to their spouses. Therefore, a number of cases that focus on immunity accorded to heads of state are important for this study.

The Bashir case[94] is another case that provides important insights regarding immunity extended to Heads of state who are still serving. This case is important because it looks at the question whether international crimes committed by heads of state can be prosecuted in South Africa vis-a-visa international customary law. The case looks at the position of international customary law against South African domestic laws, which is important to understand the immunity extended to spouses of heads of state.

A similar case that seeks to address the subject matter is the Arrest Warrant case. This case is important for the present study because it addresses the issue of immunity extended to those representing their countries and was determined at the ICJ. It was one state against another trying to clarify the responsibilities expected of states to each other. This case is a leading case on the subject matter being discussed and is discussed in detail together with the two Grace Mugabe cases in chapter 5.

The present study will not be thorough if the case of *Equatorial Guinea v France*[95] is omitted. The case was brought before the ICJ by the Republic of Equatorial Guinea against France on their dispute regarding immunity from criminal jurisdiction of the former's Vice President. The Court concluded that it did not have jurisdiction to decide the case since there was no case relating to international crimes. It was clear that the

[93] ibid.
[94] *The Prosecutor v Omar Hassan Ahmad Al-Bashir* [2018] ICC-02/05-01/ 09-302.
[95] *Equatorial Guinea v France* [2020] ICJ-06/06-2018 163.

Court entertains all disputes involving international crimes. The other interesting case concerning international crimes such as torture and crimes against humanity is that of Belgium v. Senegal.[96] This case is important because it also addressed questions on prosecution or extradition of heads of state. The main legal question raised by Belgium was whether Senegal has breached international law by its failure to prosecute Hissene Habre, the former President of Chad who was given political asylum to stay in Senegal. Habre was accused of committing of international crimes of torture, war crimes and crimes against humanity. The Court found that Senegal did not abide by its international responsibility because of two reasons. The first reason is that Senegal did not investigate the alleged crimes and the second is its failure to extradite Habre to the competent authorities.

The Germany v. Italy case[97] is another one involving the jurisdictional immunities of the state that was dealt with by the ICJ. The case is of particular interest especially on the arguments advanced by Germany requesting the Court to sanction Italy for failing to respect its jurisdictional immunity under international law by allowing civil claims against Germany in Italian courts. It provides another perspective on civil cases instead of focusing on criminal cases alone. The Court ruled that, indeed, Italy has breached its international responsibility by denying immunity to Germany. It upheld that under customary international law, a state was entitled to immunity even when it is accused of serious violation of international human rights law.

In Kline v. Kaneko[98], a U.S. court extended immunity to a head of state's family member despite acknowledging that the conduct at issue involved a private act. The court reasoned that it was its duty to dismiss the case to avoid interfering with the executive in handling foreign affairs. In other words, the Court implied that the dismissal was a matter of international comity, not a legal obligation.

The discussion will not be sufficient without referring to the Marcos case[99]. The Swiss court agreed and upheld immunity for both Ferdinand and Imelda Marcos despite the Philippine government's efforts to recover its alleged stolen funds.

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[96] *Belgium v Senegal* [2012] ICJ GL No 144, ICGJ 437 (ICJ 2012).
[97] *Germany v Italy* [2012] ICJ-06/07-2010 143.
[98] *Kline v Kaneko* [1988] SDNY 87 Civ 6479, [1988] RJW 685 F. Supp. 386.
[99] *Marcos v Fed. Dep't of Police*, Tribunal fédéral [TF] [1989] FSC 155 ILR 6202.

Another case is that of Kilroy[100], who filed a civil complaint against Prince Charles in a USA court. The Prince was granted immunity based on the reasoning that the alleged acts were committed on official duty.

The Civil Court of Brussels provides an interesting case when it refused to extend immunity to the wife and children of the former President of Zaire, Mobutu Sese Seko.[101] The court made it clear that unlike the former President Mobutu, who would be entitled to head-of-state immunity under customary international law, his wife and children were not entitled.

According to Vally J, it appears there is state practice, on the one hand, 'supporting the existence of derivative immunity for the family of the Head of State. The only question appears to be whether this immunity extends to the whole family or only the spouse. But there seems to be little doubt that the spouse of a Head of State is entitled to this derivative immunity.'[102] The Judge further maintained that Presidents and their family members have always been accorded immunity against criminal liability in most jurisdictions like India and Hong Kong.[103]

It was also pointed out in the case that legislations have been developed in several States to give effect to this type of immunity.[104] Notable examples given were the British and Australian, which have express legal clauses granting immunity to the foreign Presidents and their spouses.[105]

On the other hand, the court also cited other examples where the standard practice of extending immunity to the Presidents and their spouses was not followed. There were cases in Belgium and Austria where the courts refused to grant immunity to the spouses of Presidents.[106]

[100] *Kilroy v Windsor* [1978] Ch 78-291, [1978] U.S. Dist. LEXIS 20419.
[101] *Mobutu v SA Cotoni* [1988] Civil Court of Brussels 169, [1988] 91 ILR 259.
[102] *DA v Minister of International Relations* (n 38) 10.
[103] *ibid 10*.
[104] *ibid 10*.
[105] *ibid 10*.
[106] *ibid* 24.

This mixed approach has not been resolved. In other words, there seems to be no generally agreed standard practice to extend immunity to the spouses of Presidents yet the subject matter is very critical and emotive in foreign relations among states.

This is clearly explained by Ahluwalia when he states that 'every State has the exclusive right to exercise jurisdiction within its own territory.'[107] However, this jurisdiction is limited by international law that should be taken into consideration. Ahluwalia further notes that the 'rule of State immunity from suit in foreign courts is based upon and firmly grounded on the principles of independence, equality, and the dignity of States, which are deemed to be three characteristics of statehood,'[108] where the well-known maxim *par in parem non habet imperium* has been derived from. He further explains that two different points of view exist on the subject of immunity. The first point being that immunity used to be granted absolutely without taking into consideration of the crime committed. According to this view, Presidents and their spouses are just given a blanket immunity.[109] The second view is different. It is restrictive and it separates those actions performed while the President is doing his official duties (*jure imperii)* and private acts (acts *jure gestionis)* with immunity only restricted to acts *jure imperii*.[110]

The separation above of those acts performed on official duty being distinguished from those performed on private duty, have raised another pertinent question. Chapter 5 addresses this issue by reviewing different cases that include the Grace Mugabe's immunity cases, and the Arrest Warrant Case[111] in order to have a full understanding of case law on immunity of spouses. The idea is to establish the position of immunity extended to spouses in different jurisdictions. Yena has also noted the problem by observing that 'despite progress in crystallizing the scope of customary international law of head-of-state immunity, there is scant discussion regarding the international law basis of immunity for members of a head of state's

[107] Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (Springer 1964) 151.
[108] ibid 153.
[109] ibid 153.
[110] ibid 154.
[111] Arrest Warrant case (n 6).

family.'[112] There is no finality on the topic as states have adopted different positions citing only favourable examples that support their point of view.

It is clear from the above that immunity for the Presidents is straight forward international law provision. What is not clear is the derivative immunity for their spouses that have been left for states to make their own discretion.

However, many authors hold a different view and they maintain that giving immunity to the spouses of Presidents has become a customary international law, which should govern State relations.

These conflicting positions in customary international law regarding immunity call for a detailed research to close such a gap.

In the above discussed cases, the country hosting the foreign official alleged to have committed the crime has limited choice. Such government may decide to expel the diplomat involved or cut diplomatic ties completely. These options are the last resort and can only be taken in accordance with the Vienna Convention.[113]

Immunity is now difficult to justify because of the growing calls for human rights, compensation and justice. As aptly pointed out, 'throughout its modern history, international law has been more an instrument of diplomacy than a weapon of formal forensic confrontation.'[114] It is now difficult for international crimes to be swept under the carpet given the awakening of the public which continuously demand justice and would not understand the concept of immunity.

### 1.8.5 Grace Mugabe's Hong Kong Case

This case is discussed extensively in Chapter 5. Suffice to note that the former first lady of Zimbabwe, Mrs Grace Mugabe, provides very interesting case studies on the immunity extended to first ladies. She commits a similar criminal offence in two jurisdictions (South Africa and China) and receives different verdicts.

[112] Hong 2018 FLR (n 29) 11.
[113] Sebastian 2010 GNLR (n 3) 12.
[114] ibid 13.

In 2009, Mrs Grace Mugabe together with her security personnel were accused of assault in Hong Kong but were granted diplomatic immunity and were not prosecuted.

The basis for the decision not to prosecute her was mainly because of the Chinese laws, especially Article 22(1)(3) of the Regulations that classified Mrs Mugabe as 'other visiting foreigners to whom the Chinese Government has granted the privileges and immunities' under that provision.[115]

The immunity was extended to her though she was not a diplomat or a President who are granted immunity without question. Just like in her South African case, the legal question in the Hong Kong case was whether Mrs Mugabe, during her non-official visit, enjoyed diplomatic immunity from prosecution. The Chinese government decided that its law generally recognizes immunity for the first ladies during their visit to China or Hong Kong.[116]

For the Chinese government, Mrs Mugabe enjoyed immunity in the same way as those enjoyed by a typical diplomatic agent under Article 14 of its Regulations.[117] It was further concluded that the question whether the alleged assault was performed during official functions was irrelevant under the Regulations because there is no such requirement therein.[118]

Besides its laws, the Chinese government also supported its decision by citing statutes from the UK and Australia. The laws in the two countries accord immunity for the spouses of President from criminal prosecution. The laws of these two countries were used to confirm that granting immunity to Mrs Mugabe, wife of a President, by the central government of China is in line with international laws and practices. Moreover, such immunities are granted during their stay without the need of an application before entering into China.[119]

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[115] Hong 2018 FLR (n 29) 12.
[116] ibid 12.
[117] ibid 12.
[118] ibid 13.
[119] -- 'Government of China Legislative Council Panel on Administration of Justice and Legal Services: Supplementary Note on Questions' (Legco, 01 January 2020) 5 <https://www.doj.gov.hk/en/legco/pdf/ajls20200622e1.pdf> accessed 23 February 2021.

Similarly, the Chinese also cited customary international law as another reason why they gave immunity to Mrs Mugabe. It was noted that granting immunity from criminal jurisdiction to spouses has been a long-established practice in many civilized states, including China.[120] The starting point supporting this position is Article 37 of the Vienna Convention on Diplomatic Relations which grants immunities to the family of diplomatic personnel and a French case, *Cottenet and Co v Raffalovich* was given as settled practice illustrating the extension of diplomatic immunities to the spouses of diplomatic personnel.[121]

In short, the Chinese laws regard issues involving privileges and immunities as a foreign affair matter that should be handled by the central government. Mrs Mugabe's case was therefore handled by the government and not the courts as it falls under that category. The Chinese government felt that in modern times, most of these cases that involve diplomatic immunity are settled at the stage of consular notification rather than in court proceedings.

In other words, the case of Mrs Mugabe in Hong Kong raised another unsettled area of law. The question is whether the decision to extend immunity to the spouse should be taken based on policy considerations or customary international law. In the United States of America and China, derivative immunity is granted by the executive without or with minimum deference to the courts to decide.

The position is different from the South African scenario where the executive plays a very minimum role as the courts have an upper hand to decide on derivative immunity, referring only to the Constitution and other legislative provisions. In that regard, only the customary international law that is consistent with the South African Constitution and other legislations enacted by Parliament will be considered as law in the country.[122]

Unlike other legal jurisdictions such as China and America, granting immunity to spouses of Presidents that does not comply with South African laws is

[120] Denza Diplomatic Law (n 35) 1290.
[121] Hong 2018 FLR (n 29) 13.
[122] Constitution SA (n 43) s 232.

considered illegal because the executive is not allowed unfettered powers to determine immunity.

### 1.9 Expected Contribution of the Study

As noted above, the immunity of the spouses of Heads of State or family members remains a grey area that should be finalized to close the legal lacuna existing. This means that the granting of immunity *rationae personae* to spouses under the international law has remained an unresolved legal matter. In some cases it has been granted but denied in other similar cases. Case law has not provided guidance since different courts and forums have taken divergent views regarding the matter.

What is clear is that this immunity has been codified in some countries but not provided in others.

Furthermore, it has been illustrated that national case law has not provided standard practice that can be followed. Derivative immunity has been granted in some jurisdictions but denied in others.

This research is therefore an attempt to close these legal lacunas in order to create a standardized international law regarding *rationae personae.* It makes a contribution to this unresolved and ongoing legal debate regarding immunity extended to family members of Heads of State. The debate is so critical in defining state relations and it needs to be pursued further in order to find finality.

The idea is to solve the puzzle faced by legal jurisdictions on how best to balance the noble intentions of diplomatic immunity and the rampant abuse of such immunity. As Sebastian pointed out, 'diplomacy as a system, and immunity as a core principal, evolved slowly over time.'[123]

The puzzle is complicated by the paradox faced by governments regarding immunity. On the one hand, a government is required to accord state immunity to visiting heads of state and members of their families so that its own sovereign is given the same immunity. This is the principle of reciprocity that is so central to diplomatic relations of states but appears not to be noticed in the legal area. Central to the reciprocity

[123] Sebastian 2010 GNLR (n 3) 13.

principle is the question whether or not the granting of immunity should be left to the executive to decide without referring the issue to the courts.

On the other hand, though immunity was introduced with noble intention, it has been abused as those accorded have used it to escape prosecution after committing criminal offences.[124] As a result, governments are placed in a difficult position to answer the public calls for justice while at the same time complying with the requirements of immunity. The balancing act between immunity and holding diplomats and sovereign responsible for their crimes is becoming complicated because of the reciprocity principle in foreign relations.[125] Hence, the problem of abuse of diplomatic immunity remains hard to solve because the dangers of reciprocity inhibit reform of the system.

It is hoped that this research will be a small step towards reforming the whole immunity system to bring to justice the diplomatic offenders and to provide those affected with measures of redress.

### 1.10 Delineations

The research is about derivative immunity accorded to the spouses of heads of state focusing on South Africa, China, UK, USA, Australia and Austria as case studies. It is neither a study of derivative immunity in general nor is it about the diplomatic and consular immunity.

### 1.11 Limitations

There are challenges in studying immunity outside its general context of diplomatic and consular immunity. Even the derivate immunity is not detached from the general practice of diplomatic and consular immunity. In other words, confinement of the study to immunity *rationae* personae will definitely restrict the scope of the study. Hence, there will be therefore need to allude to these broad concepts during the study.

[124] Sena 2005 EJIL (n 20) 101.
[125] Sebastian 2010 GNLR (n 3) 11.

## CHAPTER 2
## HISTORICAL BACKGROUND OF IMMUNITY AND HUMAN RIGHTS

### 2.1 Introduction

The legal approach to immunity for the spouses of heads of state is raising scholarly attention. Given the significance of the issue, there is need for a thorough research on the subject matter. This present chapter gives the basis upon which such immunity is granted and provide some possible pointers for further work ahead.

It provides a context in which immunity for spouses emanates from. It seeks to answer the research question 1.4.1 on what customary international law says with regards to the immunity extended to the spouses of Presidents. This is going to be done by reviewing immunity extended to the Presidents themselves since immunity for the spouses is derived from them. The chapter will also situate immunity of spouses within the requirements to honour and protect human rights.

### 2.2 Types of Immunity for Heads of State

The history of immunity can be traced back to the idea of sovereignty where the concept of sovereign immunity was coined, which later developed to state immunity. This means that sovereign immunity was accorded kings as leaders of their territories, the highest authority that was second to none. Like present day state immunity for heads of state, kings' immunity emanates from the *maxim par in parem non habet imperium*, which means that those who are equal cannot exercise authority over each other.[126]

The immunity accorded to Heads of state and diplomats comes in two forms. They are either granted immunity *ratione personae* or immunity *ratione materiae*. The former relates to the immunity granted to the head of state in his or her individual capacity by virtue of the person holding a certain office. When such person holds the office, the person enjoys absolute immunity. This means all acts that the person performs in his official or private capacity are covered as long as he still holds the office. The official can neither be sued nor prosecuted for civil or criminal offences as

[126] Hennie Strydom et al (eds) *International Law* (Oxford University Press 2016) 43.

long as the tenure of his office still subsidies. The official can only be sued or prosecuted once he ceases to hold such office.[127]

The latter, immunity *ratione materiae*, is not based on the person but the function of the person. It is qualified in that it is extended to the person in order to perform his or her duties unhindered. It is therefore functional as it is meant to protect state officials when they are discharging government functions. The immunity is basically linked to official functions of the person and that person is stripped of the immunity once he or she is not performing official duties. The person should be fulfilling functions of the state in order to be accorded immunity.[128]

### 2.3 Heads of State Immunity

Generally, the question on immunity extended to heads of state appears to be settled. What is contentious is whether such immunity is absolute to cover all crimes including international ones. This contention has resulted in two schools of thought regarding immunity for heads of state. The first school can best be referred to as the traditional sovereignty-oriented approach while the second can be referred to as the modern human rights approach, whose focus on immunity is in the context of violations of human rights and international humanitarian law. There are two leading cases advancing the two opposing views regarding immunity that should be accorded to heads of state. The Arrest Warrant case reaffirms the traditional approach while the Pinochet case is regarded as a key milestone case in the fight against impunity and holds the view that immunity should not be granted for severe crimes.

#### 2.3.1 The Traditional Sovereignty-oriented Approach

This section discusses the first approach which places the concept of sovereignty at the centre of immunity. The principle of absolute immunity for the heads of state based on the equality of states or sovereignty of states is the position advocated by the International Court of Justice (ICJ). The ICJ is very categorical that heads of state are immune for all acts that they perform while they still hold office. According to the ICJ, they enjoy absolute immunity from all acts that include even torture, genocide, and crimes against humanity. This principle was reaffirmed in the Arrest Warrant case

[127] John Dugard, *International law: A South African Perspective* (4th edn, Juta 2016) 241.
[128] ibid 241.

where the court stated that 'in international law it is firmly established that … certain holders of high-ranking offices, such as the head of state, head of government and minister of foreign affairs, enjoy immunities from jurisdiction in other states, both civil and criminal.'[129]

Before reviewing the Arrest Warrant case in Chapter 5, it is prudent to consider the facts of the Gaddafi case[130], which is the forerunner to the Arrest Warrant case. The Gaddafi case was triggered by a 1989 bomb explosion on a French passenger aircraft in Chad that killed 171 people including 50 French citizens. A French NGO, SOS Attendants, and some relatives of the victims sued Gaddafi for terrorism.[131] The French Court of Appeals ruled that Gaddafi could be prosecuted because terrorism was excluded from head of state immunity. This is so because most international conventions ratified by France rejected jurisdictional immunity for serious crimes such as terrorism, genocide, war crimes and crimes against humanity.[132]

However, the lower Court's decision was reversed by the Supreme Court of France that held that, in the absence of contrary international provision binding Libya and France, customary international law grants absolute immunity for heads of state who are still in office.[133] As a result, the Court held that Gaddafi was entitled to immunity as head of state irrespective of the gravity of the crime.[134] This was the same reasoning that was later used in the Arrest Warrant case by the ICJ to re-affirm the position that heads of state enjoy absolute immunity under customary international law without any form of exception during their term of office.

There are other two interesting cases from the US courts on absolute immunity and inviolability of foreign heads of state. The first is the case against the former President of China, Jiang Zemin, in the U.S District Court for the Northern Illinois where he was being sued for alleged torture, genocide and other human rights abuses.[135] These crimes against humanity were allegedly committed during Zemin's time as president

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[129] *Democratic Republic of Congo v Belgium* [2002] (Arrest Warrant) ICJ Rep (75) ICGJ 22.
[130] General Prosecutor at the Court of Appeal of Paris, Appeal judgment, Appeal No 00-87215, Decision No 64, (2001) 125 ILR 490, (2001).
[131] ibid 491.
[132] ibid 490.
[133] ibid 491.
[134] ibid 491.
[135] *Wei Ye v Jiang Zemin* [2004] 383 F.3d 620, (2004) U.S. App. LEXIS 18944.

by members of the Falun Gong spiritual movement. Though the plaintiffs filed their case immediately before Zemin left office, they later argued that Zemin was no longer entitled to immunity from the US courts since he has left office. However, the US government opposed the application on the basis that Zemin was still the Head of state when the papers were filed and was therefore eligible for absolute immunity from the jurisdiction of US courts. The US government further argued that Zemin also enjoyed inviolability from all court processes.[136]

In its decision, the US District court concurred with the US government's position that Zemin was indeed entitled to immunity. The court also addressed the question regarding immunity extended to former head of state and concluded that Zemin was still entitled to immunity as a former head of state for all acts committed in an official capacity as President.[137]

The second case was against President Robert Mugabe of Zimbabwe that was filed a month after the Zemin case by citizens of Zimbabwe in the U.S. District Court for the Southern District of New York ("the district court").[138] The facts in the case against Mugabe were similar to those of Jiang Zemin of China. Like Zemin, Mugabe was accused of murder, torture, terrorism, rape, beatings and other acts of violence and destruction.[139] Mugabe's Minister of Foreign Affairs, Stan Mudenge, was also named as the defendant in the case. In similar pattern with Zemin case, the US government intervened in the case by filing opposing papers citing immunity for both President Mugabe and Minister Mudenge. The arguments by the US government were that both Mugabe and Mudenge were entitled to absolute immunity from jurisdiction under the customary international law doctrine that accord immunity to head of state as well as to senior government officials.[140] The US government further argued that both Mugabe and Mudenge enjoyed diplomatic immunity as they were representing their government to the United Nations Millennium Summit. The two were therefore covered under the Convention on Privileges and Immunities of the United Nations and the Vienna Convention on Diplomatic Relations. It was further argued that the

[136] Ye v Zemin (n. 135).
[137] ibid.
[138] *Tachiona v United States [2004] 386 F.3d 205, (2004) U.S. App. LEXIS 20879.*
[139] ibid.
[140] ibid.

two enjoyed personal inviolability under both absolute immunity accorded to heads of state and diplomatic immunity doctrines.

The key question that the district court was supposed to answer was to confirm the government's absolute immunity for the head of state. The court agreed that argument by the US government on absolute immunity was "fully dispositive" and ruled that both Mugabe and Mudenge enjoyed immunity from jurisdiction of US courts on the grounds of head of state immunity.[141] Alternatively, the court further accepted the US government's second reasoning that Mugabe and Mudenge were also diplomatically immune based on the U.N. Convention, which stipulates that temporary representatives to the United Nations enjoyed the same privileges and immunities as diplomatic envoys under the Vienna Convention, including comprehensive immunity from civil jurisdiction as set out in article 31(1).[142] Hence, the court dismissed all claims against Mugabe and Mudenge on the grounds that it lacked jurisdiction.

It is worth noting that the Mugabe and Zemin cases reached similar verdicts on the law governing the general rules of immunity and the principle of individual responsibility for international crimes such as the alleged serious human rights abuses. As it was decided by the ICJ in the Arrest Warrant case, the US courts reached similar verdict by dismissing international crimes charges against serving heads of state cases on immunity grounds. Based on the above cases, it appears to be a general acceptance under customary international law that heads of state or Ministers of Foreign Affairs enjoy absolute immunity and inviolability from foreign courts when they are still serving for all acts committed while performing their official functions.

However, Andrews[143] has highlighted some inconsistencies between the treatment of the district court in the Zemin case of former head of state immunity and emerging norms of customary international law. Andrews[144] argued that the landmark decision

[141] Tachiona v US (n. 138).
[142] ibid.
[143] Sarah Andrews, 'U.S. Courts Rule on Absolute Immunity and Inviolability of Foreign Heads of State: The Cases against Robert Mugabe and Jiang Zemin' (2004) 8(27) American Society for International Law 5 <https://www.asil.org/insights/volume/8/issue/27/us-courts-rule-absolute-immunity-and-inviolability-foreign-heads-state> accessed 26 May 2022.
[144] ibid 5.

by the UK House of Lords in the Pinochet case has led to the general acceptance that former heads of state do not enjoy permanent immunity for international crimes even if those crimes were committed when the person was still serving as head of state. Andrews therefore pointed out that the district court has failed to take notice of the emerging principle when it ruled former President Zemin continued to enjoy immunity for all acts committed in his official capacity.[145]

The above position brings us to the opposing view that seeks to discuss immunity under the human rights debate, seeking to protect personal rights and the dignity of an individual person.

### 2.3.2 The Modern Human Rights Approach

This section will begin by discussing the law regarding immunity of heads of state in the growing human rights discourse before discussing the actual practice.

#### *2.3.2.1 The Legal History of the Individual Responsibility*

It is important to first establish the legal position regarding the concept of individual responsibility and then try to show the general practice.

This principle of individual responsibility against international crimes can be traced back to the Treaty of Versailles[146] of 1919 that was signed after the First World War at the Paris Peace Conference. According to Article 227 of the Treaty, Germany was required to extradite its former Emperor, William II of Hohenzollern, who was in exile in the Netherlands to a special international tribunal to face charges of "a supreme offense against international morality and sanctity of treaties".[147] Though he was never tried because the Netherlands refused to surrender him, the case remains one of the first instances where a head of state was being sought to be brought before an international court based on the principle of individual responsibility.

The same principle was adopted in the International Military Tribunal Charter (IMT) of 1945, commonly referred to as the Nuremberg Charter or London Charter. Article 7 of the IMT clearly stipulates that defendants of crimes against peace, war crimes

[145] ibid 5.
[146] The Treaty of Peace between the Allied and Associated Powers and Germany [1919] OBJ-2579181373/165.
[147] ibid.

and crimes against humanity shall not have their official positions considered as freeing them from responsibility or mitigating punishment. This applies to heads of state or responsible officials in government departments. The Charter outlined the rules and guidelines to be followed during the Nuremberg trials against the European Axis. The rules and guidelines were then largely used as baseline for the Tokyo Charter that was issued after the Nuremberg Charter against the Japanese Empire. The general principle was to set an exception on immunity accorded heads of state or certain officials representing the state with regards to three categories of crimes: crimes against peace, war crimes and crimes against humanity. Holding an official position was no defense for the three categories of crimes. This Article was endorsed by the United Nations General Assembly Resolution 95(1) of 11 December 1946, which affirmed the Nuremberg principles.

The other milestone in the development of the principle of individual responsibility is the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention of 1948). Article IV of the Convention makes it compulsory to punish all persons who committed genocide or conspiring to commit genocide or attempting to commit genocide or complicity in genocide or directing and inciting public to commit genocide.[148] The Article makes it clear that the persons, whether they are constitutionally responsible rulers, public officials or private individuals shall be punished.

The International Criminal Tribunal of the former Yugoslavia (ICTY) also included the same individual responsibility principle under its Article 7(1). The Article compels any person who aid or commit international crimes to be individually responsible for such crimes. The same principle is contained in Article 27 of the ICC Statute that allows the Court to exercise jurisdiction by removing immunities granted to a person in his official capacity under national or international law.

The Nuremberg and Tokyo Trials from 1945 to 1948 are major milestones in the exception rule to personal immunity for heads of state or state official. It will be

[148] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide [1948] UN 78/277.

therefore necessary to analyse the fundamental legacy of these trails and their contributions to the recent state of immunity for heads of state.

*2.3.2.2 The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)*

The trials were established after the Second World War by the Allied governments (especially the major four powers: the United Kingdom, France, the United States, and the Soviet Union) who wanted to solidify their victory and punish senior state officials and military figures for international crimes. To achieve that goal, the Allied government established the first international tribunals for the purpose of bringing war criminals to justice.

The first step by the major four Allied powers was to set up the International Military Tribunal (IMT) in Nuremberg, Germany, to prosecute and punish their opponents' major war criminals especially senior Nazi political and military leaders. The same concept was later extended to Asia when the International Military Tribunal for the Far East (IMTFE) was created in Tokyo, Japan. The Japanese tribunal came after a 1946 proclamation by U.S. Army General Douglas MacArthur who was the Commander of the Allied Powers in occupied Japan. The major goal the IMTFE was established was to try senior Japanese political and military leaders accused of war crimes in the Far East.

Both the Nuremberg and Tokyo Tribunals were established to prosecute leading wartime leaders of Germany and Japan. In other words, by creating the Tribunals, the Allied powers established the concept of individual responsibility for acts of government as individuals were prosecuted and were brought to court for the first time in history to personally answer for the crimes that they were alleged to have committed while acting in their official capacities representing the state. This was a major precedent in the history of international law and the concept of state immunity.

In order to understand the Nuremberg principles, it is important to highlight the crimes that the Tribunal was established to deal with. According to Article 6 of the Nuremberg Charter[149], the IMT was created to address three broad crimes.

[149] 'Charter of the International Military Tribunal' [1945] 31(9) 454 American Bar Association Journal <http://www.jstor.org/stable/25715331> accessed 18 September 2022.

The first were crimes against peace. The IMT was meant to try and punish persons who were involved in the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.

The second were war crimes. The Nuremberg Charter defines war crimes as those violations of the laws or customs of war, which include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.[150]

The third group was crimes against humanity. These include murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where crime was perpetrated.

The IMT Charter made it clear that all leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

The concept of immunity was addressed under Article 7 of the IMT Charter, which clarifies that the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[151] It was resolved that the respondent will not be free from responsibility even if he or she acted under instruction of his or her government or his or her superior. It was only going to be

[150] ibid.
[151] ibid.

considered in the mitigation of punishment when such a person was found to have acted under instruction.

At the end of the Nuremberg Trial, nineteen individual defendants were found guilty, twelve were sentenced to death, three to life in prison and four were given prison sentences that ranged from ten to twenty years.[152] There were only three defendants who were acquitted; one of the three had already committed suicide prior to the trial while one of them did not stand trial because of physical or mental illness. The executions were carried out on 16 October 1946 but the highest ranking Nazi official, Hermann Goering, was able to evade the execution after he committed suicide in prison hours before the execution time.

Like the IMT, the IMTFE prosecuted nine senior Japanese political leaders, eighteen military leaders and a scholar. Out of these 28 Japanese leading officials put on trial, 25 were convicted while two died during trial and one suffered mental problems and was hospitalized.[153] The sentences saw seven being executed by hanging while 18 were sentenced to life in prison. Notable among those who were executed was the General of the Imperial Japanese Army, Hideki Tojo, who was responsible for protecting the Japanese Emperor Hirohito. General Tojo took responsibility of the war during his trial. The Japanese Emperor and other members of the imperial family were spared of indictment as part of the agreement reached with the American President. The Emperor was allowed to retain his position with reduced status. Unlike the Nuremberg trials, the IMTFE ones were not created by an international agreement and were less transparent. Their officials made sure that there were no testimonies that implicated the Emperor. Furthermore, there were limited discussions of details and there were reduced or restricted media coverage of the trials. Such censorship and the exclusion of the Japanese Emperor clouded the trials in Tokyo. These greatly tainted the whole IMTFE justice processes, but nonetheless, they were unprecedented in the prosecution of the Japanese war criminals.

Despite the IMTFE shortcomings, the Nuremberg and Tokyo tribunals are considered as milestones in the concept of individual responsibility for international crimes or the

[152] Mahdizadeh Kasrineh Hossein, 'Immunity of Heads of State and its Effects on the Context of International Criminal Law' (DPhil thesis, Hamburg University 2012) 25.

[153] ibid 25.

debate on immunity extended to senior officials such as heads of state who committed international crimes. They were the first platforms where high ranking military leaders, politicians and other influential civilians were tried.

The contribution of these trials was so significant that the tribunals remained for several decades as the only models of international war crimes tribunals upon which new ones were established after the 1990s. The IMTs were also important in that they were the first to define “crimes against peace,” “war crimes” and “crimes against humanity” as they are general used today.

The principles established by the Nuremberg trials are that individuals are the subjects of international criminal law and that individuals can be held liable for crimes under international law irrespective of their status or positions in government. Some have even concluded that the provisions of the Nuremberg Charter embody norms of customary international law (the Nuremberg principles).[154] The reasoning is that treaties and other instruments establishing international tribunals are considered important sources of international criminal law and custom.

By and large, the IMTs enforced new laws on both military and political leaders that were unparalleled in the standard of justice. These trials actually created new standard of international justice after the end of the Second World War. Heads of state, senior government officials and military leaders can be held accountable for the actions if they commit international crimes. The Nuremberg and Tokyo trials proved that any individual should be held accountable for his or her action irrespective of his or her position or status in society. They established a firm policy on individual criminal liability for international crimes such as war crimes, crimes against peace and crimes against humanity. In other words, the Nuremberg and Tokyo trials left an extraordinary legacy which cannot be forgotten in the history of immunity and human rights. They made huge contributions not only to peace but international law as many strides were made in elevating justice over international crimes.[155] The above stipulations are very clear that under international law, absolute

[154] Hossein 2012 DPhil thesis (n. 137) 55.

[155] Wedyan Al Madani, ‘Fundamental legacy of The Nuremberg and Tokyo Trials 1945-1948’ *Diplomat Magazine* (Ottawa, 20 January 2020) 5 <www.ifimes.org/en/researches/fundamental-legacy-of-the-nuremberg-and-tokyo-trials-1945-1948/4521> accessed 17 June 2022.

immunity for the heads of state or Ministers of Foreign Affairs is limited in certain circumstances such as for crimes against peace, war crimes and crimes against humanity. What is not clear at this stage is whether the legal provisions have become customary international law.

*2.3.2.3 The Legacy of the International Criminal Tribunals for Rwanda and former Yugoslavia*

After the Nuremberg and Tokyo Tribunals, then what? These were not permanent institutions to guide future course of action in case of international crimes. The genocide in Rwanda and the conflict in the former Yugoslavia exposed the concept of individual responsibility in the absence of a permanent international court to try the perpetrators. In order to address the loophole, the United Nations Security Council (UNSC) decided to form two ad hoc international Criminal Tribunals to bring to justice those responsible for war crimes, genocide and crimes against humanity. The two were known as the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). The former was formed by the UNSC Resolutions 808 of 22 February 1993 and 827 of 25 May 1993 and is based in The Hague, Netherlands. The latter was formed by UNSC Resolution 955 of 8 November 1994 and is based in Arusha, Tanzania. The two were meant to try and punish all those responsible for international crimes.

The two tribunals were formed through the UNSC resolutions based on Chapter VII of the UN Charter, which gives the Council powers to maintain peace for it allows the Council to establish any aggression, threat or breach to peace and take military or non-military action that is appropriate to restore international peace and security.[156] The rationale for forming the tribunals through Chapter VII was to make their jurisdictions binding on all states since Council decisions are binding for all UN member states.

The ICTY charged 161 politicians, senior military and police officers for war crimes especially sexual crimes from Croatia, Bosnia and Herzegovina, Serbia, Kosovo and Macedonia. Likewise, the ICTR also prosecuted 93 senior politicians, military personnel and businessmen that include former Prime Minister Jean Kambanda. The two ad hoc Tribunals are very important in defining sexual offenses such as rape and

[156] Charter of the United Nations and Statute of the International Court of Justice 1945.

brought them to the attention of the world so that they are not overlooked. The international law is now recognising international crime of rape through the ad hoc Tribunals and no court can now sweep rape under the carpet whenever there is prosecution of war crimes.

Just like the Nuremberg and Tokyo Tribunals, the major shortcoming of both Tribunals was that their mandates were very narrow as they were both limited in terms of time and crimes that were only committed in former Yugoslavia and Rwanda. Another shortcoming cited was that the two Tribunals have failed to apprehend suspects and, as a result, they have not been deterrent enough to stop future commission of international crimes.[157]

These weaknesses have increased calls for the creation of water tight international criminal court with enough deterrence and capability to prosecute international crimes such as genocide, war crimes and crimes against humanity. This has led states to adopt the Statute of the International Criminal Court (ICC) or the Rome Statute on 17 July 1998 that came into force on 1 July 2002. The court assume jurisdiction when states are unable or are not willing to investigate and prosecute international crimes. Furthermore, jurisdiction of the court can be derived from the UNSC that can impose jurisdiction on certain state through the adoption of a resolution under Chapter VII of the UN Charter as was the case with the two ad hoc Tribunals on former Yugoslavia and Rwanda.

**2.4 The General Practice**

It can be argued that one can only detect ambiguity regarding immunity that is extended to heads of state if one considers the two contrasting cases of the Arrest Warrant and that of Pinochet. As pointed out in the previous section above, the ICJ held the principle of immunity of the heads of state and other high-ranking officials by asserting that, under the international law, it is firmly established that certain holders of high-ranking offices, such as the head of state, head of government and Minister of Foreign Affairs, enjoy absolute immunity from both civil and criminal prosecution

[157] Wedyan Al Madani, 'Fundamental legacy of The Nuremberg and Tokyo Trials 1945-1948' Diplomat Magazine (Ottawa, 20 January 2020) 5 <www.ifimes.org/en/researches/fundamental-legacy-of-the-nuremberg-and-tokyo-trials-1945-1948/4521> accessed 17 June 2022.

in foreign courts. The ICJ made it clear that heads of state or Ministers of Foreign Affairs are immune for all acts they perform while they still hold office, including acts such as torture, genocide, and crimes against humanity.[158]

The decision reached by the ICJ above contradicts the one reached in the Pinochet case where the United Kingdom (UK) House of Lords made a completely different judgement. Former President of Chile General Pinochet was accused of mass murders, torture and disappearances. The House of Lords held that these acts could not be considered as official and the former President of Chile, Pinochet, was not eligible for immunity in the courts of United Kingdom. In reaching the decision, the House of Lords argued that crimes against humanity were acts falling outside the official functions of a Head of State and were therefore not covered for immunity. Another reason advanced was that immunity was not admissible under the Convention against Torture.

Customary international law, like any branch of law, is an evolving discipline. As a result, there have been calls for accountability of state officials based on the realisation that certain acts like international crimes cannot be regarded as legitimate official functions. In such cases, the perpetrator cannot hide behind immunity to avoid responsibility for such heinous international crimes and there have been calls for individual criminal responsibility of the perpetrator.

### 2.4.1 The Actions by Different Jurisdiction on the Individual Responsibility

According Franklin[159] the immunity for heads of state are provided by customary international law and not through treaties or conventions. The only exception for Franklin is the United Nations Convention on Specials Missions of 1969 whose Article 21 provides that heads of state enjoy immunity accorded by international law to heads of state during official visit. There is no elaboration to the Article to give a full picture as to the exact nature and scope of such immunity. This is different to the immunity provided to diplomats and consular officers, which is clearly provided in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular

[158] Arrest Warrant case (n. 129).

[159] Alan Franklin, 'Are international immunities of heads of state and government officials undergoing a major change?' (Diplo, 18 July 2021) 7 <https://www.diplomacy.edu/blog/are-international-immunities-of-heads-of-state-and-government-officials-undergoing-a-major-change/> accessed on 30 May 2021.

Relations. Particularly relevant is its Article 39(2), which stipulates that privileges and immunities shall normally end when the person no longer performs the functions that entitled him to such status or immunity. However, the Article makes it clear that immunity shall continue for the acts performed by such a person when exercising his functions as a diplomat or head of state.[160]

Regarding immunity for heads of state and other state officials, Franklin[161] uses the Arrest Warrant and Pinochet cases to illustrate the controversy around such immunity. Whereas the ICJ stated clearly that heads of state enjoy immunity for all acts performed during their term of office, the British House of Lords arrived at a different conclusion in the Pinochet case. It may be prudent to consider full facts regarding the Pinochet case.

### 2.4.2 The Pinochet Precedent

The facts in the case[162] are that General Augusto Pinochet, former president of Chile was arrested on 16 October 1998 at a private clinic in London where he was receiving medical treatment. The UK authorities arrested him intending to extradite him to Spain.

The background to the case is that it started in the early years of Pinochet's rule from 1973 to 1990 when human rights activists documented all international crimes that were being committed by Pinochet, which include murder, torture and forced disappearance. These cases were brought in Spain in 1996 by lawyers representing victims who were unable to file them in Chile. Though the cases were committed in Chile, Spanish courts allowed the cases to proceed using the principle of 'universal jurisdiction' over human rights crimes that is enshrined in its laws and international law. The rationale for Spanish jurisdiction was on an earlier ruling, which held that Spanish laws gives its courts universal jurisdiction over offences committed by any person outside Spain that can be proven under its laws. These offenses include, inter alia, genocide, terrorism and any other international crime recognised in Spain.[163]

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[160] Vienna Convention on Diplomatic Relations 1961.
[161] Franklin 2021 DIPLO (n 142) 9.
[162] *Regina v Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet* [1998] UKHL 68, [1998] 38 ILM 581.
[163] ibid 581.

The Spanish judge, Baltasar Garzón, who was investigating one of the cases requested the UK authorities to arrest Pinochet after he travelled to that country in 1998. The Spanish judge also requested the extradition of General Pinochet from UK to Spain to face murder charges. Pinochet was being accused of killing Spanish nationals in Chile between 11 September 1973 and 31 December 1983. The Spanish judge also accused Pinochet of torture, taking hostage of political opponents and conspiracy to commit such crimes between January 1976 and December 1992. Pinochet opposed the warrant of arrest arguing that as former head of state, he was entitled to immunity from criminal proceedings. The main legal question that the British courts sought to answer was whether Pinochet was entitled to state immunity as the former Head of State.[164]

At their disposal, the British court relied on the following legal provisions:

- Articles 4 and 6 of the Convention on the Prevention and Punishment of the Crime of Genocide.
- Articles 28, 29 and 31 of the Vienna Convention on Diplomatic Relations.
- International Convention against the Taking of Hostages.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- Section 134(1) of the 1988 UK Criminal Justice Act.
- Sections 2(1)(b) and 8(1)(b) of the 1989 UK Extradition Act.
- Sections 1, 14, 16(4), 20(1) and (5) of the UK State Immunity Act.
- UK Diplomatic Privileges Act.
- UK Taking Hostages Act.[165]

The Court held that both heads of state or former Heads of state are entitled to personal immunity in respect of official acts. The Court went further to quantify the official acts as those recognised by international law, which are functions of a Head of state. It was further held that acts of torture and hostage taking are not functions of a Head of State. In other words, the Lords maintained that although a former head of state was entitled to immunity for acts committed when carrying out official

[164] Pinochet case (n.161).
[165] ibid.

functions such immunity does not cover international crimes such as torture, genocide, and crimes against humanity.[166]

As a result, it was found that no immunity from criminal proceedings can be extended to Pinochet for he was alleged to have committed international crimes. In that regard, the majority of three Lords ruled that Pinochet was not entitled to immunity and was supposed to be extradited to Spain to stand trial for charges of torture and conspiracy to commit torture. However, Pinochet was later released on medical grounds as he was found to have no mental capacity to stand trial.

Nonetheless, the Lords' final landmark ruling was notable for dismissing Pinochet's arguments of immunity and decided that he could be extradited to Spain to answer charges for crimes committed when he was still President of Chile.

It was a remarkable decision with far-reaching implications for the concept of immunity and practice of international law. The judgement further set a precedent of significant importance for the development of international human rights law as the ruling was seen as an affirmation of the principle of universal jurisdiction for crimes against humanity.

### 2.4.3 Other Actions Supporting Individual Responsibility

Franklin further traces recent actions by some western countries that suggest support for individual responsibility for international crimes.[167] In particular, the USA's actions denote opposition to the extension of immunity for heads of state and other government officials who commit certain international crimes. A good example is the 2021 report to Congress on undemocratic actors, which barred 55 government officials from El Salvador, Guatemala and Honduras from entering USA because of alleged corruption. The USA has actually enacted several laws like its Foreign Extortion Prevention Act and Magnitsky Act that are intended to punish other foreign leaders engaged in corruption and other international crimes. Furthermore, President Raisi of Iran and President Nicolas Maduro of Venezuela were placed under sanctions by the USA for alleged human rights abuses.

[166] Pinochet case (n.161).
[167] Franklin 2021 DIPLO (n 142) 9.

In similar fashion, Canada has also introduced the Justice for Victims of Foreign Corrupt Officials Act. The Act allows Canada to seize property in Canada owned by foreign official alleged to be corrupt. Already, Canada has named President Nicolas Maduro of Venezuela as one such official.

The European Union is no exception as it has also enacted similar laws to punish those who are supposed to be immune after they had committed international crimes such as genocide, crimes against humanity, war crimes, torture, and forced disappearance.

According to Article 7 of the International Law Commission on the immunities of heads of state, immunity is removed for crimes such as genocide, crimes against humanity, war crimes, torture, and forced disappearance. The Article clearly contrasts the position held by the ICJ on the matter as it supports the decision reached by the UK House of Lords on the case of Pinochet.

### 2.5 Conclusion

The fact that the rules governing customary international law are based upon the actions of states, there is growing likelihood that immunities for heads of state or government officials under customary international law are being diminished significantly by the actions of most western countries and institutions such as the European Union (EU), Canada and the USA as discussed above.

It is clear from the above discussion that the legal position regarding Heads of State is that they are accorded immunity *ratione personae* because of the sovereign equality of states and the functions they perform. The central principle governing such immunity is the *par in parem non habet imperiu*, which stipulates that leaders and states are equal in their standing and one cannot be subjected to the jurisdiction of another Head of State. The other concept supporting immunity for Heads of State is non-intervention principle. The concept requires that no leader should interfere with the independence and autonomy of another sovereign state by subjecting that leader to his or her courts.

It appears the position regarding immunity *ratione personae* for Heads of State has a universal application despite several provisions from different Conventions that remove immunity for those Heads of State who commit international crimes. These

provisions include Article 4 of the 1948 Genocide Convention[168] that removes immunity from heads of state or any person who commit genocide; Article 3 of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid[169] that makes it clear that heads of state who commit the crime of apartheid will not enjoy immunity; and Articles 4 and 12 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[170] removes immunity for those Heads of State who commit torture. It has been noted that these provisions do not explicitly indicate that the removal of substantive immunity for the crimes of genocide, torture and apartheid also removes temporary immunity for those Heads of State in office.[171]

Temporary immunity for the heads of state who are still in office was confirmed in the Arrest Warrant case. The ICJ held that certain incumbent state officials like Heads of State and Ministers of Foreign Affairs enjoy broad personal immunity for all their actions irrespective of the gravity of their actions. They cannot be prosecuted for any crime, including international crimes, while they are still holding their offices. This principle has been applied by several national courts such as the USA court verdict on Robert Mugabe and the French courts on the Gaddafi case. Hence, one can conclude that judicial opinion and state practice are unanimous on the recognition of the subsistence of *ratione personae* immunity since there is no case that can be found where it was decided that such immunity can be lifted once the state official has committed international crime.[172] One can therefore deduce that incumbent Heads of State and other state officials generally enjoy absolute personal immunity even for international crimes.

The Heads of State or other state officials also enjoy the second functional immunity, *ratione materiae*. This type of immunity is given to those who have acted on behalf of the state since they are deemed to be discharging official duties. In such cases, only the state should be held responsible for the actions of its representatives. This

[168] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide [1948] UN 78/277.
[169] UN General Assembly, The International Convention on the Suppression and Punishment of the Crime of Apartheid [1973] UN 1015/14861.
[170] UN General Assembly, The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [1984] UN 39/46.
[171] Hossein 2012 DPhil thesis (n. 137) 55.
[172] ibid 57.

prevents jurisdictional authority for national courts over actions of other states. Though the principle has in the past been well-established as a customary international rule, present practice suggest otherwise.

It has been observed that international crimes and extra-territorial jurisdiction cannot co-exist with functional immunity.[173] Granting immunity for heads of state accused of such international crimes as torture, forced disappearance and genocide is considered as incompatible with international law against such practice. For example, it will be against the Convention against torture[174] if functional immunity was to be given to those who commit torture. Many proponents of this view cite the ICJ judgement in the Arrest Warrant case as their basis that immunity does not mean impunity. The ICJ ruling addresses the issue of functional immunity when it made it clear that immunity that Ministers of Foreign Affairs or Heads of State enjoy under international law does not bar criminal prosecution in certain circumstances for they can be tried after they leave office. The former Head of State can be tried for actions he committed before and after he assumed office. He can also be tried for the crimes he committed in his private capacity. The only shortcoming of the judgement is that it does not explicitly exclude international crimes from those crimes covered under immunity.

The view is different to the position taken in the Pinochet case, which gives more credence to the view that there is an exception to the rule of functional immunity when international crimes have been committed. Using the Pinochet case, it has been argued that an exception has been formed and heads of state can be prosecuted for committing international crimes.[175] For many scholars, customary international law has evolved as to lift immunity for Heads of State or other state official accused of international crimes.

In short, based on the sovereign equality of states, it is generally accepted that officials such as the Heads of State who are still serving enjoy both personal and functional immunities. Personal immunity protects them for their official or private acts while functional immunity protects them for those acts they perform on behalf of the

[173] ibid 59.
[174] UN General Assembly, The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [1984] UN 39/46.
[175] Hossein 2012 DPhil thesis (n. 137) 61.

state. The principle of individual criminal responsibility came much later after the Second World War. The major milestone of this principle was the Versailles Treaty of 1919 that was eventually established in the Nuremberg Charter as discussed above. The principle removed functional immunity as a defense against prosecution. Immunity should no longer mean impunity as actions such as torture, genocide and war crimes cannot be defined as official functions even if they were committed on behalf of the state.

Hence, according to customary international law, once they leave office, state officials such as Heads of State and Ministers of Foreign Affairs and diplomats are no longer entitled to substantive immunity for their actions that violate international law. After office, they are liable for prosecution for crimes against international law. It becomes irrelevant that those actions may have been carried out on behalf of the state. As a result, any court shall have jurisdiction to try any former state official accused of committing international crimes.

By and large, one can conclude that only personal immunity gives full immunity to serving heads of state or other state officials charged in foreign courts, even for international crimes. This is only temporary immunity, valid during the term of office. They become punishable for committing such crimes immediately after they leave office. This is irrespective to whether they commit such crimes in their official capacity, acting on behalf of the state. Otherwise, International law should not be used as a bar or should not give a blanket amnesty to remove individual responsibility for international crimes. With regards to those who are still serving, the Arrest Warrant case remains the leading. The ICJ grants absolute immunity to those who are still serving. There is no exception. It is not relevant whether they committed international crimes, they remain inviolable. The incumbent can only be brought before some international criminal courts, which have jurisdiction over them such as the International Criminal Court and the International Criminal Tribunals like those for Rwanda and former Yugoslavia, which were formed by the United Nations Security Council resolutions under Chapter VII of the UN Charter. The rationale for such jurisdiction is that they are above the states and they can therefore exercise jurisdiction over them.

In summary, having a clear picture of the context of immunity extended to spouses of Heads of State should assist in understanding the approach implemented by different jurisdictions. Given the significance of the issue, there is need for a thorough research on the legal positions by different legal jurisdictions. The next chapter is intended to do justice on some selected leading legal jurisdictions.

## CHAPTER 3
## ASSESSMENT OF NATIONAL LAWS ON DERIVATIVE IMMUNITY

### 3.1 Introduction

In this chapter, the research sub-questions number 1.4.2 and 1.4.3 are addressed. The chapter will interrogate the legal positions that prevail in Australia, UK, US, Austria, South Africa and China. The idea is to have a balanced view of different legal jurisdictions in various regions. This chapter will also highlight the roles of the courts *vis-à-vis* the executive role.

### 3.2 The Australian Legal Provisions

As discussed under Chapter 2 above, the international law generally accord immunity from the jurisdiction of other countries' courts to foreign states and their agencies through the principle known as 'foreign state immunity'. In Australia, Heads of State, Ministers of Foreign Affairs and other state representatives are granted immunity from prosecution by Australian courts under the Foreign States Immunities Act.[176] This Act, which is administered by the Attorney General of Australia, provides the general provisions of immunity that should be extended to Heads of State and also stipulates the exceptions where immunity cannot be granted.

According to section 9 of the Act,[177] foreign states are generally immune from the jurisdiction of the courts of Australia. The law further stipulates that any service or process against a foreign state in Australia should be made in accordance with the provisions of this Act.

A foreign state under subsection 3(3)(C) of the Act includes the executive branch of government or part of it or the political part of a foreign state.[178] These include Heads of State and or governments, local diplomatic missions, ministers and foreign government officials.

Immunity granted to foreign states under this legislation is restrictive and it is given provided certain statutory exceptions apply. It is restrictive in the sense that immunity is only granted for those state acts which are public and carried out in pursuit of

[176] Foreign States Immunities Act 1985 (Australia).
[177] ibid.
[178] ibid.

sovereign authority by the state. The restrictive approach to state immunity was developed during the end of the 20th Century following the rise in trade by states. The approach is based on the separation of acts of purely governmental functions and those that are commercial. According to the restrictive approach foreign states are only immune for those acts that are purely governmental in character but they are not immune for those acts that are commercial in nature.

Australia is one of the major common law jurisdictions but it is not governed by crown immunity. Crown immunity is not restrictive in approach but generally provides that Heads of State enjoy absolute immunity from domestic courts. Australia repealed crown immunity with the Judiciary Act 1903 and opted to grant immunity only in specific circumstances. Such circumstances include commissions or omissions by state officials when carrying out their duties.

The Act provides exceptions to immunity for commercial transactions and commercial property. In Australia, foreign states cannot claim immunity for both commercial transactions and commercial property. Though, it is sometimes difficult to distinguish between commercial and non-commercial transactions, this is not part of the present discussion. Suffice to note that sometimes the scope of the commercial transaction exception result in uncertainties and relies on the interpretation of the courts.

Another exception pertains to arbitration proceedings and enforcement of arbitral awards. Once a foreign state has agreed to arbitrate, it will have waived its immunity from a tribunal's jurisdiction. This position is provided under section 17 of the Act that stipulates that the court seizes to be immune in any court proceedings that is related to the arbitration.[179]

The position above was confirmed by the Australian Federal Court in 2019 when both Eiser Infrastructure Ltd and Energia Solar Luxembourg S.A.R.L.; and Infrastructure Services Luxembourg S.A.R.L. and Energia Termosolar B.V., applied separately to the Court to enforce arbitral awards by International Centre for Settlement of Investment Disputes ("ICSID").[180] The ICSID found Spain to have breached its

[179] Foreign States Immunities Act 1985 (Australia).
[180] *Eiser Infrastructure Limited and Energía Solar Luxembourg v Kingdom of Spain* [2013] ICSID 368 *(Case ARB/13/36)*.

obligations under the Energy Charter Treaty but Spain claimed immunity under the Australian Immunities Act.[181] The ICSID Convention provides for the recognition and enforcement of arbitral awards by its members. In its decision, the Federal Court held that by signing the ICSID Convention, it follows that states have submitted to the jurisdiction of competent courts to issue judgments enforcing arbitral awards against them.[182] However, it was decided that the ICSID judgement is governed by domestic law in the event that the award is converted to a domestic court judgment.

Spain appealed the Federal Court's decision to the Full Court of the Federal Court of Australia that was supposed to determine whether the position by the lower court remains the Australian position. In its judgment, the Full Court made it clear that foreign sovereign immunity in Australia does not stop an award from being recognized as a judgment. The Full Court affirmed the earlier decision by the Federal Court that Spain had submitted to the jurisdiction of Australian courts by simply being a signatory to the ICSID Convention of 1966.[183]

The other similar exception is when a foreign state waives its immunity by submitting to the Australian courts' jurisdiction. According to section 10 of the Act, a foreign state will stop to enjoy immunity once it has submitted to the jurisdiction of Australian courts.[184]

A key take away from the Australian legal jurisdiction is that the law on sovereign immunity is not static but evolves. There is therefore need to constantly look for new developments in both international and domestic laws regarding the waiver, commercial transactions, commercial property and other related issues to state immunity.

Another important piece of legislation governing immunity in Australia is the International Criminal Court Act[185] that was passed in 2002 to amend the Criminal Code Act of 1995. The Act was introduced to enable Australia to comply with the Rome Statute of the International Criminal Court obligations and the Act incorporated

[181] Foreign States Immunities *Act 1985 (Australia).*
[182] *Luxembourg v Kingdom of Spain (n. 159).*
[183] ibid.
[184] ibid.
[185] International Criminal Court (Consequential Amendments) Act 2002.

international crimes that are recognised by the ICC into Australian law. The Act actually created offences of genocide, crimes against humanity, war crimes and crimes against the administration of justice of the ICC. It gave Australia the right and power to prosecute any person accused of these international crimes instead of surrendering such persons to the ICC.

**3.3 The UK Law**

The United Kingdom's legal position is similar to that of Australia. Just like the Australian jurisdiction, the British also takes a restrictive approach to state immunity. The British courts have applied the restrictive approach to the effect that it is now clear that a foreign state is only entitled to immunity for its governmental acts and not for its commercial transactions.

State immunity is provided under the UK State Immunity Act 1978, subject to two exceptions. First, there should be a written consent to exclusion. The consent should be explicit since submission to jurisdiction alone will not be enough. Second exception is when the state property is used for commercial purposes. It is important to note that the Act[186] was enacted to partially effect the 1972 European Convention on State Immunity[187] (the European Convention), which included some of the common law developments on the restrictive approach to immunity by giving certain exceptions to immunity. The European Convention stipulates circumstances that are excluded for its signatory members to claim immunity before the courts of another state. In that regard, a state signatory to the Convention is barred from claiming immunity once it has accepted the jurisdiction of a foreign court in the following court proceedings:

- Work contracts;
- Commercial activities;
- Rights over immovable property in the country where the court is situated; and
- Redress for injury to persons or damage to property.

It is worth noting that before the UK State Immunity Act of 1978, absolute immunity was accorded to Heads of State and other senior government officials. Both the law

[186] State Immunity Act 1978 (UK).
[187] European Convention on State Immunity [1972] OJ Spec Ed 74.

and case law attested that the English government observed absolute immunity for foreign states in the jurisdiction of English courts. However, the advent of the UK State Immunity Act 1978 and case laws that followed made a distinction between governmental functions and commercial transactions.

The European Convention and the UK State Immunity Act 1978 provisions capture the drift by the English and European laws from absolute immunity to restrictive state immunity. Specifically, this drift is clearly captured in the Act,[188] which is the principal source of state immunity in the UK that can be extended to Heads of State. Section 20(1) of the Act[189] provides that immunity for heads of state, members of his family forming part of his household and his private servant (as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants) are also covered under Diplomatic Privileges Act 1964. The Diplomatic Privileges Act[190] largely draws from some provisions of the Vienna Convention,[191] especially its Article 39 that stipulates that *rationae personae* for an ambassador and his family lasts when he or she is still in office.

This position was confirmed by the UK's Court of Appeal in the Harb case[192] that Head of State enjoys immunity for official acts only. The facts of the case were that Ms Harb filed a claim for financial support from Prince Abdul Aziz (the Prince) of Saudi Arabia, son of the late King Fahd (the King). In her papers, Ms Harb alleged that she was secretly married to King Fahd in 1968 and the King had promised to support her financially during her entire life. She also claimed that the Prince agreed to honour the promise after the King had passed on.

During the trial, the agreed facts were that the agreement between the Prince and Ms Harb was private and falls outside the King's officials duties. It was also agreed that the Prince was acting on behalf of the King during the alleged agreement and was therefore entitled to the same immunity accorded to his father.

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[188] ibid.
[189] ibid.
[190] Diplomatic Privileges Act 1964 (UK).
[191] Vienna Convention on Diplomatic Relations 1961.
[192] *Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2015] EWCA 508 (Ch), [2014] 1 WLR 4437.

The only issue that the Appeal Court sought to determine was whether the immunity from suit that the King enjoyed extended to his private acts. The Prince was appealing an earlier decision by the English High Court that had followed the reasoning by the House of Lords in the Pinochet case.[193] The Pinochet case, as discussed in Chapter 2, is the leading English case on state immunity. Like in the Pinochet case, the English High Court in the Harb case decided that a former Head of State retain immunity for official acts only.

This decision of the High Court was upheld by the Court of Appeal, which dismissed the Prince's appeal against the earlier decision. The decision in the Pinochet case was confirmed as the Court found that the Head of State only enjoys immunity when he or she is still in office. Immunity will only remain for those official acts that were performed when he or she was discharging his duties as Head of State. The Court dismissed the distinction that the Prince sought between a living former Head of State (Pinochet) and the one who died in office (King). The immunity for both was found to be the same. The Court arrived at this decision after considering Article 39(2) of the Vienna Convention and customary international law.

In that regard, the Court concluded that there was no distinction in the diplomat who did not perform his function because his term of office has ended and the one who died in office. As a result, the Court concluded that the former Head of State has no immunity for private acts and this position applies to all former Heads of State who are still living or not. It was therefore found that the estate of the deceased King was no longer state estate; the functional basis of state immunity did not extend to the estate of the deceased Head of State; and that immunity should not apply to the estate of a deceased head of state who is sued in private issues.

It is clear from the British system that it recognizes functional immunity for Heads of State who loses such immunity upon leaving office. Once the Head of State left office, immunity remains for only those acts that were performed when carrying out official functions. The rationale for this position is derived from the underlying reason for diplomatic immunity that was meant to enable diplomatic interactions. There is no justification to retain immunity once a diplomat has seized to occupy the office.

[193] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet [2000]* UKHL 3, [2000] 1 AC 147.

Immunity is only retained to those actions carried out by the Head of State while fulfilling his duties. The main reason for this is to preserve the integrity of state functions.

In short, the British legal jurisdiction has drifted away from absolute state immunity to restrictive state immunity. Immunity is only extended to serving Heads of State to enable them to perform their duties. Once they left office, immunity is retained for official acts only excluding all private acts and commercial transactions. This has been welcomed as a positive development in international law as it promotes transparency and makes sure states are held accountable in case they breached their commercial contractual obligations.

**3.4 The US Law**

Like the English and the Australian laws discussed above, the US law takes a restrictive approach to immunity.

In the US jurisdiction, the state immunity for Heads of State is governed by the Foreign Sovereign Immunities Act 1976 (FSIA). Before the FSIA, Heads of State used to claim immunity from jurisdiction of US courts based on their status as political heads of their governments. As a result, the State Department was responsible for determining the status regarding immunity of Heads of State.

The FSIA is another restrictive legislation that presumes that Heads of State are immune from the jurisdiction of US courts provided that there are no exceptions applying to them. There are a number of exceptions to immunity under the FSIA that include the following:

- An implicit or explicit waiver of its sovereign immunity;
- Commercial transactions; and
- Enforcement and confirmation of arbitration awards in the US.

The distinguishing feature in the US jurisdiction is that the scope of state immunity has gradually been decreasing, while the exceptions like commercial activities have been broadened.

Just recently, the US Congress enacted the Justice against Sponsors of Terrorism Act (JASTA)[194] in 2016. The JASTA seeks to give US civil litigants with broadest possible basis to seek relief against persons, entities, and foreign countries, who have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.[195] In order to achieve the above objective, JASTA has to change some existing US laws, especially the FSIA.

Of particular interest to the present discussion is section 3 of JASTA that narrows foreign state immunity by eliminating "state sponsor of terrorism" requirement from the FSIA.

The position under FSIA before JASTA was that FSIA granted foreign states with immunity from the jurisdiction of US courts provided that any of the specified exceptions did not apply. Furthermore, the FSIA stipulated that no foreign state can be prosecuted in US courts for international terrorism unless that state has been designated by the US government as a "state sponsor of terrorism." This was before JASTA was introduced.

The limitation was removed with the introduction of JASTA whose section 3 makes it possible for all foreign states to be prosecuted in the US courts for acts of international terrorism against the US. This resulted in the narrowed scope of the immunities extended to foreign states under the FSIA.

Furthermore, JASTA limited the foreign sovereign immunity by removing the entire tort requirement. The requirement was an assumption that the FSIA allows claims against foreign states who commit international terrorism only under the legal jurisdiction of the US. This requirement was replaced by a new rule that gives jurisdiction to US courts for all claims against foreign states, for any injuries to persons or property regardless where those acts occurred.

In addition, JASTA's section 5 provides authority to US government over lawsuits. Section 5 provides that the US government has authority to intervene in any lawsuit

[194] Justice Against Sponsors of Terrorism Act 2016 (USA).
[195] ibid.

against foreign states and certifies that it is engaged in good-faith discussions with such foreign state defendant. This provision effectively transferred primary responsibility to decide claims against sovereign states from the courts to the State Department. This was the position under the common law doctrine, which provided that once the State Department granted immunity, the courts should surrender their jurisdiction to allow the principle of separation of powers. However, the courts could decide if the State Department refused to decide the issue on immunity.

It is important to note that Heads of State and other private individuals who qualify under the description of 'politically exposed persons' are also eligible to seek immunity under common law doctrines of sovereign immunity. This position was confirmed in the US Supreme Court.[196] According to the court ruling, JASTA did not change any immunities or protections extended to Heads of State under common law. At this stage, it is prudent to explain the British common law doctrine on immunity before the court case. According to the British common law doctrine, sovereign immunity emanated from the idea that the King cannot do any wrong since his will was the law itself. As a result, once the King has acted, it was lawful and there was no court or authority above the King. This means that, at common law, Heads of State had absolute immunity as it was extended to the King then. The common law doctrine on sovereign immunity was introduced to the American legal system when the states adopted the common law from England.

The Supreme Court decision in the Samantar case[197] in 2010 is a major milestone for Heads of State immunity in the US jurisdiction and for that reason, the case warrants more scrutiny.

The facts of the case are that some natives of Somalia sued Mohamed Ali Samantar for torture and other human rights violations. The case was filed in a Virginia Federal District Court under the Torture Victim Protection Act and the Alien Tort Statute. The defendant was the former Minister of Defence of Somalia and was being sued in his personal capacity for damages for extrajudicial killing he was alleged to have committed. Mr Samantar argued that the allegations should be dismissed on the

[196] *Samantar v Yousuf* 560 US 305 (WDC 2010).
[197] ibid.

grounds that such acts were official acts that are covered under the state immunity by the FSIA. The Supreme Court dismissed his argument on the grounds that the claim was for the individual official and not against state and was therefore excluded under FSIA, which only covers the latter. The Court held that FSIA did not extend immunity to Mr Samantar and does not apply to foreign government officials such as Heads of State. In any case, the Supreme Court further ruled that FSIA does not apply to former foreign government officials in the event that it applies to foreign government officials. It was concluded that “foreign state” under the FSIA does not include state officials acting on its behalf.

Despite the Supreme Court ruling, the Court did not rule out the possibility for the defendant to apply for immunity under common law for the Court state that it does not doubt that foreign state immunity extends to individuals actions carried out in their official capacity.

What is clear in the development of the law on immunity for Heads of State is that the US is taking a restrictive approach, limiting immunity for government officials who violate international law such as torture, human rights abuses and even engaging in corruption.

In short, it can be said that the US Congress has repeatedly amended the FSIA since the 1990s for the sole reason of removing or limiting sovereign immunity against those who commit terrorism. The US Congress has not stopped with amending FSIA legislation on terrorism but has continued to replicate the terrorism model law in other areas to hold foreign states liable to other civil cases before the US courts. The model has been replicated to cover civil cases such as suing China for its response to Coronavirus and for cybercrimes. The US Supreme Court has also clarified that the immunity extended to foreign officials is covered under customary international law and determined on single case basis through the executive guidance. This area remains grey and Congress can clarify how foreign officials’ immunity should be governed.

### 3.5 The Austrian Law

Austria is another important country in the development of the concept of immunity because its capital, Vienna, is a centre of international diplomacy. Vienna is the seat of more than 40 international organisations with about 130 bilateral and multilateral diplomatic representations. Vienna is a hub of international diplomacy with more than 3 800 diplomats and 6 000 international officials. The city is also one of the four headquarters of the United Nations after New York, Geneva and Nairobi.

The above reality makes immunity for state officials, international organisations and their officials a constant issue for the Ministry of Foreign Affairs of Austria and its courts.

In Austria, the position regarding immunity for heads of state and other state officials is provided under the Regulation on Extradition and Mutual Assistance in Criminal Matters (Auslieferungs- und Rechtshilfeverordnung; ARHV). The ARHV set out the process that should be followed when immunity has to be considered. According to section 57 of ARHV, the court is required to seek opinion of the Ministry of Justice whenever there is doubt over immunity. The Ministry of Justice will then have to clarify the status of the person after consulting with the Ministry of Foreign Affairs. Section 56 of ARHV also stipulates that, in the event that the person under investigation and is entitled to immunity has committed a crime, the Public Prosecution Department is supposed to complete the allowed preliminary investigations and report the findings and proposed measures to the Ministry of Justice.

The immunity granted to state officials is based on international law and the preliminary investigations to establish the facts are done before the actual prosecution. Immunity at that stage is not invoked. However, such preliminary investigations are done in compliance with international law on immunity such as Article 22 of the Vienna Convention.[198] This Article provides that the premises of diplomats or state officials must remain inviolable and agents of the host state may not enter the premises without permission by the head of the mission. This also applies to the person entitled to immunity who shall be inviolable too. He shall not be arrested or detained and the host state is responsible for his safety, freedom and

[198] Vienna Convention on Diplomatic Relations 1961.

dignity.[199] This means the preliminary investigations must be carried out without violating these rights accorded to the premises and the person concerned.

The leading case on immunity extended to heads of state in Austria is A.W. (individual) v. J.(H).A. F.v.L. (Head of State).[200] This was an application for declaration of paternity against a serving Head of State. The Head of state sought to absolve himself by claiming absolute immunity and this was granted by the District Court and affirmed by the Regional Court of Appeal. The plaintiff did not relent and she appealed to the Supreme Court arguing that declaration of paternity took precedence over immunity. The Supreme Court held that incumbent Heads of State enjoy absolute immunity during their term of office and the defendant therefore enjoyed immunity from jurisdiction of Austrian courts. The Supreme Court further ruled that paternity declaration under humanitarian law may take precedent over immunity if it was not possible to sue the serving Head of State in his own country.

It is clear from the above ruling that Austria has not been spared of the debate on exceptions to state immunities for international crimes such as serious human rights violations, torture and genocide. Austria is a member of the European Union (EU) since 1995 and is supposed to implement its treaties including those on immunity.

In that regard, Austria as a member of the EU has been welcoming the inclusion of crimes against humanity and other exceptions to immunity. The position to reject claims of state immunity for those accused of committing international crimes are gaining traction in the EU. The EU has already passed the European Magnitsky Act[201] on 7 December 2020 that gives the EU power to freeze assets and impose travel bans on individuals involved in serious human rights abuses. Since then, the EU has continued passing similar laws to the Manitsky Act that are meant to punish foreign government officials involved in international crimes.

The European Magnitsky Act is a significant milestone in its fight against those who breach human rights for the Act provides a global sanctions regime that allows the EU to introduce travel bans, freeze assets and ban any dealings with those accused

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[199] ibid.

[200] *A.W. (individual) v J.(H).A. F.v.L. (Head of state)* No. 70b316/00x <http://www.cahdidatabases.coe.int/Contribution/Details/74> accessed 09 July 2022.

[201] European Magnitsky Act 2020.

of abusing human rights. Through the Act, the EU has joined the US, UK and Canada that have similar Magnitshy laws. Such synergy has already mobilised other countries like Australia to adopt similar laws. These laws allow for the multilateralization of sanctions against a wide range of actors accused of human rights abuse and repression. Furthermore, the adoption of the law in the EU intensifies the impact of sanctions against perpetrators of human rights abuse since most leaders hold assets there.

The Council of Europe has also been seized with the issue and investigations have been carried out on secret detention and transport of detainees who are suspected of terrorism.[202] The investigations have concluded that the international existing rules on state immunity impede effective law enforcement against state officials who are entitled to immunity.[203]

Even the UN International Law Commission has also been leading in coming up with draft articles on the immunity of heads of state that removes immunities for international crimes such as war crimes, crimes against humanity, genocide, torture and forced disappearance. The position by the International Law Commission, a body of experts created to develop and codify international law, contrasts the view of the ICJ and confirms the UK House of Lords' decision on Pinochet.

As a member of the EU, Austria subscribes to the exception principle that diminishes immunities of Heads of State and other government officials who are alleged to have committed international crimes.

### 3.6 The South African Law on Immunity

Like other legal jurisdictions discussed above, South Africa also follows a restrictive approach for immunity extended to incumbent foreign Heads of State. In South Africa, customary international law on immunity for heads of state are dealt with under three

[202] Parliamentary Assembly Council of Europe's Committee on Legal Affairs and Human Rights, 'Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States', (12 June 2006) 43 <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf> accessed 15 July 2022.

[203] ibid 45.

legislations, which are the ICC Act[204], the DIPA[205] and the FSIA[206]. However, all of the three pieces of legislation must comply with the supreme law of South Africa, the Constitution.[207] The Constitutional provisions will be considered first before discussing the provisions of the three laws.

The most important relevant constitutional provisions regarding customary international law are sections 232 and 233 of the Constitution. Section 232 of the Constitution provides that customary international law is regarded as law in South Africa as long as it is consistent with the Constitution or an Act of Parliament. Section 233 guides the application of international law and requires every court to prefer a reasonable interpretation of the legislation that is consistent with international law when interpreting any legislation.[208]

With regard to the ICC Act, this law gives effect to the Rome Statute by domesticating into national laws the international crimes of genocide, war crimes and crimes against humanity. It further criminalizes breaches against the administration of justice by the ICC. As party to the Rome Statute, the ICC Act enables South African courts to exercise jurisdiction over such international crimes. In other words, the ICC Act provides a framework to ensure the effective implementation of the Rome Statute in South Africa. It also provides for the prosecution in South Africa and beyond its borders of persons accused of having committed international crimes and their surrender to the ICC in certain circumstances.[209]

Of particular importance is section 27(1) of the Rome Statute that does not recognise the relevance of official capacity and does not consider the immunities or status of any person brought before the ICC. This provision together with section 4(2) of the ICC Act are the basis of the exception principle in South Africa regarding excluding immunity for Heads of State or anyone alleged to have committed international

[204] The International Criminal Court Act 2010.
[205] Diplomatic Immunities and Privileges Act 2001 (SA).
[206] Foreign States Immunities Act 1981 (SA).
[207] Constitution of the Republic of South Africa 1996.
[208] ibid.
[209] Ntombizozuko Dyani-Mhango, 'Revisiting Personal Immunities for Incumbent Foreign Heads of State in South Africa in Light of the Grace Mugabe Decision' [2021] 21(2) African Human Rights Law Journal 1135 <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962021000200021> accessed 10 July 2022.

crimes. The ICC Act therefore helps South Africa implement the Rome Statute and it enjoys priority when dealing with international crimes.[210]

Another legislation used in South Africa on personal immunity is the FSIA that was enacted to determine the extent of foreign states immunity from South African courts. The Act defines foreign state to include a Head of State and it grants immunity to the Heads of State from the jurisdiction of South African courts except for the death or injury of any person as stipulated under section 6(a) of the Act.[211]

The FSIA clause above illustrates that South Africa has adopted the restrictive approach as opposed to absolute immunity when enacting the FSIA, which is modelled on the UK's States Immunity Act discussed above.

Like in the UK, FSIA grants general immunity to Heads of State from the jurisdiction of South African courts. Both jurisdictions make it clear that their courts are barred from instituting criminal proceedings against serving foreign Heads of State.[212] This means that despite the adoption of restrictive approach when it comes to commercial transactions and civil claims, there is absolute immunity for incumbent foreign heads of state when it comes to criminal proceedings.[213] Section 2(3) of the FSIA and section 16(4) of the UK States Immunity Act provide that the provisions of the two Acts must not be taken to mean they are subjecting any serving foreign Head of State to the criminal jurisdiction of the courts.[214]

It appears there is a contradiction between section 6(a) and section 2(3) since the former section removes immunity for Heads of State in criminal proceedings relating to international crimes while the latter section grants absolute immunity for serving Heads of State. In light of such contradiction, Dyani-Mhango concludes that section 6(a), read together with section 2(3) of the FSIA, confirms that the FSIA was enacted in order to deal with commercial activities involving a foreign state before South African courts as opposed to criminal litigation.[215] However, in the Grace Mugabe case, the court took a different position as it only considered section 6(a) alone and

[210] ibid 1135.
[211] Foreign States Immunities Act 1981 (SA).
[212] Dyani-Mhango 2021 AHRLJ (n. 185) 1135.
[213] ibid 1137.
[214] ibid 1138.
[215] ibid 1141.

concluded that former President Mugabe was not entitled to immunity for assault charge.[216]

Suffice to say the Court ruling confirms the restrictive approach to state immunity in South Africa. There are limitations in terms of state immunity as it is excluded in commercial transactions and international crimes. This is the general trend obtaining in most Western jurisdictions that have been discussed above.

In terms of the DIPA, its purpose is to give immunities to Heads of State from both criminal and civil jurisdiction of the South African courts. Contrary to FSIA, DIPA is explicit on the immunity extended to Heads of State. Its section 4(1) clearly stipulates that a 'Head of State is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as (a) Heads of State enjoy in accordance with the rules of customary international law.'[217] The duty to confer this immunity is given to the Minister of International Relations who should do so after considering national interest.

A closer look at the DIPA suggest that the legislation was enacted to specifically address the customary international law of Heads of State immunity while the FSIA was designed to deal with state immunity that pertains to commercial activities.

**3.7 The Chinese Law on Immunity**

The Chinese law is a direct opposite to all the legal jurisdictions reviewed above. It is the only one that follows the principle of absolute immunity as opposed to the restrictive approach.

According to the Chinese regulations, it is clear that China follows the principle of absolute immunity of foreign states and their property, which inhibit Chinese litigants from suing foreign governments in domestic Chinese courts.[218] Article 23 of the regulations extends such absolute immunity to visiting Heads of State or Government, foreign ministers and other officials of comparable status from foreign

[216] *Democratic Alliance v Minister of International Relations And Co-Operation And Others* 2018 (2) SACR 654 (GP).
[217] Diplomatic Immunities and Privileges Act 2001 (SA).
[218] Regulations of the People's Republic of China on Diplomatic Privileges and Immunities 1986, 1.

States so that they also enjoy the privileges and immunities specified in these Regulations.[219]

On one hand, as has been noted in the preceding sections above, restrictive sovereign immunity has been growing among many states with many states following their own statutory laws because of the absence of effective international conventions.

On the contrary, China has pushed for absolute sovereign immunity for a number of reasons. One of the main reasons for such a position has been cited as its Socialist ideology that considers restrictive approach as colonialist approach pushed by its enemies.[220] This has compounded by its Confucius teaching that regards sovereignty as sacrosanct, its embedded fear to accept jurisdiction of other courts emanating from its history of unfavourable treaties with foreign states.[221]

The Chinese system grants absolute immunity to foreign states so that they are immune from being sued in Chinese courts. This also extends immunity to foreign states from being subjected to enforcement action for its assets in the Chinese jurisdiction. The doctrine being followed by Chinese emanates from the concept of equal status and friendly relations among states, which should not subject one another to their jurisdictions without each other's consent.

Such immunity is often referred to as sovereign immunity or crown immunity whereby states enjoy immunity even in their courts. This type of immunity extends not only to the state but to the Head of State in the Chinese jurisdiction. However, the application varies with each jurisdiction as issues relating to state immunity have been decided by domestic laws of each state with international treaties playing insignificant role.[222]

There are encouraging efforts to harmonise the position as evidenced by the draft international treaty on state immunity that is yet to be adopted. The treaty is being spearheaded by the United Nations Convention on Jurisdictional Immunities of States

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[219] ibid 2.

[220] Ferdous Rahman, 'Questioning Chinese government's stand for sovereign immunity' [2017] 9(1) Transnational Corporations Review 41-49 <www.tandfonline.com/action/showCitFormats?doi=10.1080%2F19186444.2017.1290923> accessed 09 July 2022.

[221] ibid 43

[222] Andrew Godwin, 'State immunity' [2018] 2(3) China Business Law Journal 5 <https://law.asia/state-immunity/> accessed 09 July 2022.

and their Property, which provides that it will come into force after 30 states have ratified or acceded to the convention. The convention can come into force any time since 28 states have already signed it, including China, and 21 states had ratified the convention.[223]

The fact that China has signed, but not ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property, has given impetus to the discussions about China changing its position on state immunity. The UN Convention will introduce qualified immunity if it is adopted.

Many scholars have suggested that China adopts a limited immunities principle, which has been adopted by other jurisdictions such as the United States, Canada, the United Kingdom and European Union countries. This position has been seen as the best for China on the grounds that, by adopting restrictive immunities principle, China will portray itself as a responsible government open to foreign investors. Adoption of the limited immunities principle is also seen as a signal to ensure stable expectations that investments will be protected.

By and large, it appears there is a general acceptance among Chinese leadership that it may consider a shift of its position on the principle of State immunity from the absolute doctrine to the restrictive doctrine to accommodate the rapid growth of the private sector in China and significantly enhancing the judicial protection of the interest of Chinese private entities actively involved in international commerce since the 1990s.[224]

Triggered by the lawsuit in the US against China over its COVID-19 response, Chinese lawmakers set in Beijing in May 2020 and proposed formulating a foreign states immunities law. The proposal was seen as a way to protect the legitimate rights and interests of Chinese citizens as well as foreign investors. Already, over 35 lawmakers from the National People's Congress (NPC) Beijing delegation endorsed the proposal, which has been accepted by the session and forwarded to special committees of the national legislature for study.

[223] ibid 6.
[224] Godwin 2018 CBLJ (n.198) 7.

It is not yet certain but there may be a change from absolute state immunity to limited immunities principle in China.

Also notable is the hierarchical nature on how immunity is decided by the Chinese courts. In China, any civil case filed with the People's Court (lower court) involving a person who enjoy immunity has to be submitted to the Higher People's Court with jurisdiction to examine the facts. The Higher People's Court will also submit its examination opinions to the Supreme People's Court (SPC) that has the authority to make a final decision on the immunity of the state, person or international organisation involved. The SPC will decide the case with the concurrence of the Ministry of Foreign Affairs. This approval system requires that lower courts must not accept the case before the reply by the SPC.[225]

**3.8 The Role of the Courts versus the Executive**

This section addresses the research question 1.4.3 on whether the legislation should give courts or executive the power to determine the immunity of the spouses of Heads of State. The question has been highlighted in the sections discussing the United States and China legal jurisdictions.

In the United States, the legal position is that section 5 of JASTA gives precedent to US executive arm of government over the judiciary. Section 5 provides that the US government has authority to intervene in any lawsuit against foreign states and certifies that it is engaged in good-faith discussions with such foreign state. As previously pointed out above, this provision effectively transfers the primary responsibility to decide claims against sovereign states from the courts to the State Department. In other words, the US is just implementing the common law doctrine that provides that once the State Department granted immunity, the courts should surrender their jurisdiction to allow the principle of separation of powers. The final responsibility rests with the executive branch of government as the courts are supposed to decide only when the State Department has refused to decide the issue on immunity.

[225] Susan Finder, 'Lawsuits against foreign countries in the Chinese courts' (Supreme People's Court Monitor, 29 March 2020) 7 <https://supremepeoplescourtmonitor.com/2020/03/29/lawsuits-against-foreign-countries-in-the-chinese-courts/> accessed 09 July 2022.

The position is partially similar to the Chinese model. Though the role of the Ministry of Foreign Affairs is not explicitly stated in the regulations, in practice, the Ministry plays a leading role in the determination of immunity for foreign Heads of State. The Supreme People's Court (SPC) will only decide the case with the concurrence of the Ministry of Foreign Affairs.

In Australia, UK, Austria and South Africa, the courts take a leading role in interpreting the legal provisions on state immunity. In South Africa, the Minister for International Relations is given some powers to determine immunity that can be extended to a Head of State. The Minister of International Relations should do so after considering national interest. However, the courts retain the final say in such determination.

The doctrine of immunity is central to both international law and the relations among states. There is therefore need for a balance between impunity and the need to maintain peace. States largely operate on reciprocity basis and conferment of immunity or its denial should be done considering that it should protect foreign states from a violation of their sovereignty. Further, it should be done in a manner that does not interfere with the official functions of their agents.

There is need for trading carefully in the area of foreign relations for such relations are very complex and sensitive. They are supposed to be dealt with by specialized branches of government. The judiciary should be mindful of those sensitivities when deciding issues to do with immunity for Heads of State. This does not mean the courts must be barred from deciding such issues but they must do so with input from the experts of foreign relations.

**3.9 Conclusion**

There are two distinct approaches to the doctrine of state immunity that are absolute and restrictive. Jurisdictions around the world can be divided between those that adopt an absolute or a restrictive immunity approach.

Those that follow the doctrine of absolute immunity grants unlimited immunity to foreign states from the jurisdiction of its courts for all acts performed by the foreign state, which include international crimes and commercial transactions. Those that follow restrictive immunity approach exclude immunity for foreign states in certain circumstance such as commercial activities and international crimes. They recognise

that foreign states enjoy immunity for those acts performed while doing their state functions.

From the above discussions of different jurisdictions, it is evident that the concept of immunity has undergone a lot of changes to meet modern demands. It appears there is a general prevailing practise that is drifting away from absolute state immunity with many states adopting a restrictive approach to state immunity. Many states are only granting immunity to Heads of State for official functions excluding international crimes, commercial transactions and other private actions.

Even China, which has maintained an absolute immunity approach, is now considering the adoption of a popular restrictive approach. As noted above, there is a general acceptance among Chinese leadership that it may consider a shift of its position on the principle of State immunity from the absolute doctrine to the restrictive doctrine to accommodate the rapid growth of its private sector and to enhance its judicial protection of its private entities actively involved in international commerce since the 1990s.

It is clear the international law is not static; it evolves with time to meet emerging issues. The EU and United Nations are leading in harmonising the practise as the latter has already drafted an international treaty on state immunity that should provide a model law for world jurisdictions.

## CHAPTER 4
## RECONCILING NATIONAL LAWS AND INTERNATIONAL CUSTOMARY LAW

### 4.1 Introduction

This chapter largely reviews the concept of universal jurisdiction and immunity for the Heads of State and their spouses, juxtaposing the South Africa jurisdiction with that of Australia, UK, US, Austria and China as discussed in chapter 3. This is to answer research sub-question number 1.4.4 on reconciling national laws and customary international law on immunity extended to the spouses of heads of state. The first task will discuss the national position versus the international position. This will be done to come up with a standard position on whether the national laws should take precedent over customary international law, for example, the South African position compels courts to take a reasonable interpretation that is consistent with international law.[226]

### 4.2 National Laws and Customary International Law

As previously highlighted in Chapter 1, customary international law has been that part of law traditionally established through international practices that is not codified in formal written law.

However, Chapter 2 has highlighted the modern non-tradition approach that has emerged in international law where legal provisions by the international organisations are being elevated into customary international law. In that regard, Baker[227] has highlighted the contribution by international legal tribunals such as the ICTY, ICTR and the ICC in the transformation of their legal provisions into norms of customary international law. As a result, consistent state practice and *opinio juris* (opinion of law) are no longer the only sources of customary international law as not only the international legal tribunals' jurisprudence has found its way into customary international law but even the domestic laws of individual countries.[228]

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[226] The Constitution of the Republic of South Africa 1996, s 233.

[227] Roozbeh Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' [2010] 21(1) European Journal of International Law 174 <https://academic.oup.com/ejil/article/21/1/173/363352> accessed 03 July 2022.

[228] ibid 175.

In Chapter 2, it has also been illustrated that widely ratified international conventions or treaties against international crimes like genocide, torture and slavery are now considered as binding on all states just like what customary international law entails. Conventions on these international crimes are considered to be confirming customary international law since they are not limited to the signatories of such conventions but have a universal application to all states. As already noted above by Baker, the international tribunals' jurisprudence has not only recognised as customary international law but has found its way into domestic laws of several countries.[229] Cases in point are the legal jurisprudence of Australia, UK, US, Austria, South Africa and China that were discussed in Chapter 3 above, which have seen the domestication of customary international law provisions.

Halliday and Carruthers have come up with a theory to explain how international law finds itself into domestic law.[230] For these two authors, the process is repetitive whereby the actors at international level develop legal norms that are then altered into domestic legal jurisdictions. This conversion into domestic laws is often done through external driven ways such as the development of international norms to act as models constituting acceptable way of behaving at the international level. Sometimes the developed international norms are converted into domestic laws by persuasion using international institutions such as the United Nations, ICC and others. At times the means is arbitrary as the international actors may resort to economic coercion to compel domestic actors to adopt certain international norms as their domestic laws. The process can also start from the domestic level, as the law at that level can change through interpretation and implementation until it is repeated at the international level. It's a dual-level process.

Halliday and Carruthers' theory can be used to explain the ICTY and ICTR international legal jurisprudence that have filtered into the domestic legal jurisdictions of some states such as Belgium. A case in point is the 1993 law on repression of serious violations of the international Conventions of Geneva.[231] The law allowed any

[229] Baker 2010 EJIL (n. 203) 181.

[230] Terence Halliday and Bruce Carruthers, 'The Recursivity of Law: Global Norm Making and National Law Making in the Globalization of Corporate Insolvency Regimes' [2007] 112(4) *American Journal of Sociology* 1137 <https://www.jstor.org/stable/10.1086/507855> accessed 20 July 2022.

[231] Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law (Belgium 1999).

individual, irrespective of his or her nationality, to institute legal proceedings in a Belgian court against any person who committed international crimes in violation of the following four 1949 Geneva Conventions and their additional Protocols:

1) The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces;
2) The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
3) The Geneva Convention Relative to the Treatment of Prisoners of War; and
4) The Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

The four treaties above were specifically meant to protect the victims of war such as the wounded, the sick, the shipwrecked, prisoners of war and civilians caught in war zones. They were also meant to protect the health personnel, their facilities and transport. Their only shortcomings were that they did not cover all the aspects of war, for example, they did not include the conduct of combatants and the protection of civilians from hostilities. These shortcomings were then addressed by adopting the following two protocols in 1977 and the additional one in 2005:

- Protocol I: Protocol additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts of 1977;
- Protocol II: Protocol additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 1977;
- Protocol III: Protocol additional to the Geneva Conventions relating to the Adoption of an Additional Distinctive Emblem of 2005. It establishes a Red Crystal, a red square frame on a white background to enhance universal recognition. Its purpose is to provide an additional universally recognised emblem for medical services to improve protection of health personnel working in armed conflicts.

The above Geneva Conventions and their Additional Protocols are very important because they are central to international humanitarian law. They therefore govern the

conduct of armed conflict and they try to limit the effects of war on people who are not part of the war such as civilians and health personnel.

The Belgian law was therefore meant to domestic the above UN principles. In other words, the law refracted the international criminal norm of universal jurisdiction for international crimes into Belgium domestic legal system. It gave Belgian courts jurisdiction over international crimes such as genocide, war crimes and crimes against humanity. The 1999 law was repealed and replaced in 2003 because of significant international pressure, particularly from the USA, and concerns about abuse of politically motivated claims. This arises after high-profile cases were filed in Belgium against foreign officials like Ariel Sharon (former Prime Minister of Israel) drew strong diplomatic complaints that the law was used for political reasons than genuine justice. As a result, the law was revised and repealed in August 2003 to restrict universal jurisdiction so that Belgian courts can only prosecute serious crimes linked to it.

### 4.3 The South Africa Position

The interface between national laws and customary international law on immunity extended to the Heads of State or their spouses has been the subject matter that has seized many legal jurisdictions, including South Africa.

In the South African jurisdiction, the position regarding immunity for the Heads of State was addressed in the Bashir case.[232] The facts of the case were that President Omar al Bashir of Sudan visited South African in June 2015 to attend the African Union summit. He was wanted by the International Criminal Court (ICC) that had issued an arrest warrant against him to face charges of genocide, crimes against humanity and war crimes.

The ten charges under the warrant of arrest for Bashir were based on his individual criminal responsibility under article 25(3)(a) of the Rome Statute. They include five counts of crimes against humanity (murder, extermination, forcible transfer, torture and rape); two counts of war crimes (directing attacks on civilians and pillaging); three

[232] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA).

counts of genocide (genocide by killing, genocide by causing serious bodily or mental harm and genocide by causing group destruction).[233]

South Africa, as a signatory to the Rome Statute and having domesticated the Statute, was supposed to arrest Bashir when he arrived in South Africa in 2015 and hand him to the ICC. This did not happen. The failure to arrest Bashir prompted the Southern African Litigation Centre (SALC) to approach the North Gauteng High Court seeking to compel the South African government to honour its domestic and international law commitments with regards to the arrest warrant issued by the ICC.

On 14 June 2015, the High Court issued an interim order to prevent Bashir from leaving South Africa before the matter was finalized. The following day, the Court ordered the South African government to arrest, detain and transfer Bashir to The Hague to face trial for international crimes.

However, the government allowed Bashir to leave the country, ignoring the judgement by the Court. Instead, the South African government appealed the High Court's decision to the Supreme Court of Appeal. The government argued that it was not able to arrest Bashir because he was protected by state immunity accorded to Heads of State.[234]

The judgement by the Supreme Court was a major milestone in clarifying the South African legal jurisprudence on immunity given to Heads of State and their spouses. On 15 March 2016, the Court ruled that the South African government was supposed to arrest Bashir. It was held that the government's decision to let Bashir leave the country was unlawful for it breached its obligations under the South African domestic law that implements the Rome Statute of the ICC. The Court further held that international law immunities, including that for Heads of State, are not applicable to South Africa if a person is wanted for domestic prosecution in South Africa for international crimes of genocide, war crimes and crimes against humanity.[235]

[233] ibid.
[234] *Minister of Justice v SALC* (n.208).
[235] ibid.

Akande considered the judgement comparing it with customary international law and came to the conclusion that customary law rights that have been amended, repealed or replaced by new provisions of treaties relevant to the issue cannot be relied upon.[236] In other words, he concurred that Bashir was not entitled to Heads of State immunity under customary international law since such immunity was removed by treaties on international crimes. Akande concluded that the United Nations Security Council Resolution 1593 that referred the Darfur situation to the ICC and the Genocide Convention removed immunity from arrest for Bashir for all the states who ratified the Rome Statute establishing the ICC.[237] This position means that any international treaty that establishes a new position regarding immunity accorded to the Heads of State and their spouses takes precedent over the position under customary international law.

The main reason behind the Court's judgement was that South Africa's implementation of the Rome Statute of the ICC Act 2002 removed immunity for Heads of State that are wanted by the ICC. According to this Act, South Africa was obliged to arrest Bashir and hand him for prosecution to the ICC. This position was provided for under section 4(2)(a) of the Act, which includes some reference to Heads of State or government.[238]

By and large, the Supreme Court of Appeal of South Africa confirmed that customary international law rule of immunity for Heads of State is still standing. The Court further confirmed the position of the Act that sitting Heads of State enjoy absolute immunity when visiting a foreign country. However, the Court ruled out that the two positions were overridden by the provisions of the Implementation Act of the Rome Statute that sought to bring to justice any person who commits international crimes. Furthermore, the Court found out that the purpose of the Implementation Act excludes immunity as a reason to stop any person from being tried for international crimes by the ICC. In that regard, immunity for Heads of State and their spouses was lifted specifically for

[236] Dapo Akande, 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States?' (Blog of the European Journal of International Law, 29 March 2016) <https://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/> accessed 04 August 2022.

[237] ibid.

[238] Diplomatic Immunities and Privileges Act 2001 (SA).

those charged by the ICC for committing international crimes such as genocide, war crimes and crimes against humanity.

This position was confirmed in 2017 when the matter was brought before the ICC itself in the case[239] between the Prosecutor and Bashir. The Pre-Trial 2 of the ICC delivered its verdict on 6 July 2017 on South Africa's failure to comply with the Court's request under Article 87(7) of the Rome Statute to arrest and hand over Bashir to The Hague. Under Article 87(7), member states are obliged to cooperate with the Court.

In its judgement, the ICC Court held that there was no exclusion of immunity for serving Heads of State even under customary international law if such person is wanted for international crimes. The basis for this decision was Article 27(2) of the Rome Statute that compels states parties to cooperate with the ICC. The Article stipulates that states parties that ratified the Rome Statute have accepted that immunity under official capacity or international law is irrelevant and members should therefore cooperate with the ICC as they are duty-bound to arrest and hand over a person when requested by the ICC.[240]

The ICC addressed the issue of sovereignty in two parts. The first part pertains to the main reason why the Court was established. It was created specifically to bring justice to war criminals as it seeks to prosecute those charged with international crimes such as genocide, crimes against humanity and war crimes. Hence, to include sovereign immunity as the basis upon which Heads of State can evade justice was to defeat the same reason why the ICC was established. Furthermore, by ratifying the Rome Statute, members willingly agree to lift their immunities for the general good.

The second basis of the ICC judgement related to the United Nations Security Council (UNSC)'s extension of its institutional mandate. The UNSC was established to preserve international peace and security and all those who joined it agree to limit part of their sovereignty as they agree to carry out the decisions of the UNSC in terms of the UN Charter.[241] In fact, the legal challenges on whether the UNSC has the power to establish a judicial body like the ICTR was resolved in *Prosecutor v.*

[239] *The Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/ 09-302.
[240] Prosecutor v Al-Bashir (n.236).
[241] *The Prosecutor v Joseph Kanyabashi* ICTR case 96-15-T.

*Kanyabashi*.[242] In this case, the defendant argued against limiting the sovereignty of states such as Rwanda since the ICTR was not established by a treaty. The defendant also challenged the powers of the UNSC arguing that it has no power under Chapter VII of the UN Charter to create an international judicial body. These were the two legal questions that the court was supposed to resolve.[243]

The two arguments were dismissed as the trial court held that membership to the UN mean that a member has agreed to limit certain aspects of its sovereignty when that state joined the UN. The court pointed out that the UNSC enjoy wide discretion when dealing with issues to do with the threat to international peace and security. The Court made it clear that there was nothing under the UN Charter that can stop the Security Council from establishing an international tribunal or any organisation to address any threat to international peace and security.

It was therefore found that the question on whether the conflict in Rwanda was a threat to international peace and security falls under the responsibility of the Security Council.[244] The Security Council has all the discretion to decide.

In short, the ICC confirmed that serving Heads of State would ordinarily enjoy immunity under customary international law but under certain circumstances, such immunity falls away. In the Bashir case, for example, there was a special regime since both South Africa and Sudan are signatory to the UN Charter. As members of the UN, a resolution by the UNSC triggers the ICC's jurisdiction, which can further result in Sudan having duties and rights similar to a state party to the Rome Statute. The rationale being that the UNSC has the authority to impose obligations to states in its role of maintaining world peace and security. Moreover, Bashir's immunity as the Head of State did not apply to countries that are state parties to the Rome Statute like South Africa. The state parties are obliged to cooperate with the ICC by arresting and handing over Bashir to the Court. It can therefore be concluded that the ICC was able to address in the affirmative the most important question on whether the UNSC Resolution that found the jurisdiction of the ICC has nullified any potential claims of

[242] ibid.
[243] ibid.
[244] Jamie Williamson, 'An Overview of the International Criminal Jurisdictions Operating in Africa' (International Review of the Red Cross, 1 March 2006) 111 <https://international-review.icrc.org/sites/default/files/irrc_861_6.pdf> accessed 07 August 2022.

immunity by Bashir. It is clear from the judgement that the ICC prefers justice over sovereignty issues that can be used to evade justice.

### 4.4 Reconciling National Laws with Customary International Law

It is clear from the above discussion that the position on state immunity in South Africa recognises the customary international law rule for Heads of State and the spouses provided that they are not wanted for international crimes of genocide, crimes against humanity or war crimes. Furthermore, such customary international law should not contravene any international treaty or Convention.

The broad principle of universal jurisdiction that excludes immunity for Heads of State that was adopted in the Bashir case puts South Africa in the same place with Belgium despite its 2003 amendments. As already noted, Belgian law actually domesticated the 1949 UN principles by refracting the international criminal norm of universal jurisdiction for international crimes into Belgium domestic legal system. The law extended international jurisdiction to Belgian courts to prosecute anyone who commit international crimes such as genocide, war crimes and crimes against humanity. Despite the fact that the law was revised and repealed in August 2003, the country's Criminal Code incorporated some of the repealed provisions of universal jurisdiction. As a result, Belgium's universal jurisdiction is still in place despite being greatly reduced.

#### 4.4.1 Australia and South Africa

Another comparable example on universal jurisdiction and immunity for the head of state is Australia. A leading case in the area is that of the President of Sri Lanka, Mahinda Rajapaksa who was indicted for war crimes and crimes against humanity in Melbourne Magistrates' Court on 24 October 2011.[245] In this case, an Australian citizen, Arunachalam Jegatheeswaran, who migrated from Sri Lanka to Australia filed charges against Rajapaksa who was in Australia to attend a Commonwealth Heads of Government Meeting (CHOGM). In this private prosecution, Jegatheeswaran alleged that Sri Lankan forces deliberately attacked the civilians and their clearly

[245] Anna Hood and Monique Cormier, 'Prosecuting International Crimes In Australia: The Case Of The Sri Lankan President' [2012] 13 (1) Melbourne Journal of International Law 77 <https://law.unimelb.edu.au/data/assets/pdf_file/0010/1687249/Hood-and-Cormier.pdf> accessed 09 August 2022.

marked infrastructure like hospitals and camps killing many patients in hospital. In Australia, as in many other common law countries and civil law countries, an individual can prosecute any person privately. However, the federal Attorney-General should give the final approval for the case to continue. This happened just after a day when the indictment was filed, the Commonwealth Attorney-General, Robert McClelland, intervened and opposed the case arguing that Rajapaksa could not be prosecuted as he enjoyed Head of State immunity.[246]

The Attorney-General took the decision despite Australia having introduced the International Criminal Court Act in 2002 that amended the Criminal Code Act of 1995.[247] It did not matter to the Attorney-General that the Act had empowered Australia to prosecute any person accused of international crimes such as genocide, crimes against humanity and war crimes. The Act actually made Australia compliant with its international obligations by incorporating international crimes that are recognised by the ICC into Australian law. According to the Act, Australia now had the right and power to prosecute any person accused of international crimes instead of surrendering such persons to the ICC.

This therefore means that the case against Rajapaksa provided the first opportunity for Australia to reconcile its domestic laws with its international law obligations. The second was filed on 16 March 2018 against Aung San Suu Kyi for international crimes against the Rohingya community in Australia who were deported and forcibly removed from their homes in Myanmar. Like in the first case against Rajapaksa, the Attorney-General dismissed the second case with similar arguments that Aung San Suu Kyi enjoy absolute immunity as a serving Minister for Foreign Affairs from criminal proceedings and cannot be arrested or detained.[248] The Attorney- General relied on the Arrest Warrant case and the customary international law to conclude that exceptions to immunity for Heads of State or Ministers of Foreign Affairs are only available to international tribunals or courts like the ICC but are not available to domestic national courts like those of Australia.

[246] ibid 78.
[247] International Criminal Court (Consequential Amendments) Act 2002.
[248] Hood and Cormier 2012 MJIL (n. 242) 79.

The two cases have raised the role of the Attorney-General in the prosecution of international crimes in Australian jurisdiction. As pointed out above, Australia has universal jurisdiction over international crimes and individuals are allowed to start private prosecution. However, section 268.121(1) of the Australian Criminal Code requires that commencement of any proceedings for international crimes cannot start without explicit and written consent from the Attorney-General.[249] Furthermore, section 268.122(1) of the Criminal Code provides that the decision by the Attorney-General to give or deny consent for private prosecution is final and cannot be challenged or appealed against. [250]

In other words, the Attorney-General enjoys unrestrained discretion when deciding to give or deny consent. His or her decision is final and cannot be questioned. There is no criterion for him to be followed when deciding to give or deny consent and he is not obliged to justify his decision. His decision can only be reviewed by the High Court. As a result, the power vested with the Attorney-General under the Criminal Code in deciding the prosecution of international crimes has been criticised as too broad with very little accountability and review mechanisms.[251] This wide discretion has made it possible for the two cases of Mahinda Rajapaksa and Aung San Suu Kyi to be dismissed by the Australian Magistrates Courts before they started.[252] Furthermore, unrestrained authority to determine the continuation of international criminal cases without laid down guidelines provides room for inconsistencies, discrepancies and unpredictability. Above all, unfettered power to decide on prosecution of international crimes in Australia can lead to abuse. Complete power of anything is an unhealthy scenario for checks and balances.

Nevertheless, highlighting the weaknesses involved in the prosecution of international crimes in Australia has never been the main subject of this discussion. Suffice to say that such weaknesses are important to reveal the major differences in the Australian system with the South African legal jurisdiction where such wide discretion is not offered to anyone. The courts have to make the determination on the prosecution of international crimes.

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[249] Criminal Code Act 1995 (Australia).
[250] ibid.
[251] Hood and Cormier 2012 MJIL (n. 242) 78.
[252] ibid 79.

### 4.4.2 China and South Africa

China is another interesting legal jurisprudence whose official position regarding universal jurisdiction is different to that of South Africa.

On universal jurisdiction, China is guided by Article 9 of its Criminal Code, which provides that China's jurisdiction extends to offences stated in international treaties that were concluded or signed by China.[253] It is from such international treaties that China derives its obligation to assume criminal jurisdiction over international crimes.[254] The shortcomings with the legal provision under Article 9 above pertain to the restrictions of the legal factors. One of which is that the Code does not include or state certain international crimes and their penalties. The second is that customary international law cannot be applied in China because of the requirement of the presence of the accused. The accused has to be in Chinese territory for the legal proceedings to commence. Thirdly, universal jurisdiction is rendered useless in China because China recognises inviolability and immunity of those representing their states.

In spite of the legal provisions above, China believes that universal jurisdiction provided under customary international law is for the crime of piracy. With regards to international crimes of genocide, war crimes and crimes against humanity, China is of the view that there are still grey areas or disagreements among states. China believes that universal jurisdiction over international crimes is not pushed to advance justice and fight against impunity but its application is driven by political motives, which causes a lot of misuse of the otherwise noble principle of universal jurisdiction.[255]

China abhors the alleged misuse of universal jurisdiction by some states who exercise extraterritorial jurisdiction that are not in line with international law and are not accepted widely.[256] In other words, China believes that the UN Charter should

[253] Criminal Law of the People's Republic of China 1997.
[254] ibid.
[255] Li Kai, 'Statement by Mr. Li Kai Chinese Delegate At the 74th Session of the UN General Assembly on Agenda Item 84, The Scope and Application of the Principle of Universal Jurisdiction New York, 16 October 2019,' (United Nations, 16 October 2019) 5 <https://www.un.org/en/ga/sixth/74/pdfs/statements/universal_jurisdiction/china_e.pdf> accessed 13 August 2022.
[256] ibid 5.

guide the exercise of universal jurisdiction by its member states. In particular, member states of the UN must abide by its principle of equality, non-interference in internal affairs and immunity. Hence, universal jurisdiction must be observed while balancing it with the need of fighting impunity and promoting stability of international relations. China believes that immunity for Heads of State and their spouses should be separated between the immunity from domestic jurisdiction and those from international jurisdictions. Whereas heads of state or their spouses are immune from Chinese domestic legal jurisdictions, they are not immune from international tribunals that enjoy universal jurisdiction such as the ICC.[257]

This position is completely different from that obtaining in the South African legal jurisdiction, which observes universal jurisdiction.

### 4.4.3 USA and South Africa

The jurisdiction of the United States of America started to embrace the concept of universal jurisdiction to regulate piracy on the high seas in the nineteenth century. The concept was later extended to cover some criminal acts pertaining to terrorism and a number of legislation on terrorism was derived from the concept.[258]

In practice, the US Congress determines the exercise of universal jurisdiction by enacting different legislations governing the concept. One of these is the federal piracy statute, which gives universal jurisdiction to US courts to prosecute and punish anyone who commits crime of piracy as defined by the law of nations.[259]

The leading case is that of US v. Smith[260] that happened in March 1819. The facts of the case are that Thomas Smith and others were part of the armed vessel commissioned by Spain but mutinied and went on to commit plunder and robbery of a Spanish vessel on the high seas. They were tried in the US and Smith was found guilty by jury of piracy. This was an unprecedent case, first to interpret the US criminal law without referring it to international law and first to define piracy. In the case, piracy

[257] ibid 7.
[258] Curtis Bradley, 'Universal Jurisdiction and U.S. Law' [2000] 2001(9) University of Chicago Legal Forum 31 <http://chicagounbound.uchicago.edu/uclf/vol2001/iss1/9> accessed 15 August 2022.
[259] Piracy and Privateering Act 1940 (USA).
[260] *United States v Smith* [1820] (161) 18 US (5 Wheat) 153.

was referred to as a crime against the universal law of society and a pirate was regarded as an enemy to people.[261]

The other laws that give effect to the universal jurisdiction to US courts are the Terrorism Act[262] and the Human Rights Act.[263] According to these Acts, crimes such as hijacking aircraft, taking hostage, sabotaging aircraft and official torture are criminalised in the USA.

Another more relevant piece of legislation that has been used in the US courts as the basis for universal jurisdiction is the Alien Tort Act.[264] The Act has been used to prosecute human rights cases committed outside the jurisdiction of the US courts. The legislation actually provide jurisdiction to the US courts to preside over any civil action by a foreign national against tort in breach of international or US laws. In recent years, beginning in the 1980s, the law has been used as the basis against individuals or organisations that violate international human rights law and environmental crimes.

This was confirmed in 2004 by the US Supreme Court, which ruled that the Alien Tort Act gives US courts jurisdiction over claims derived from universally accepted international law norms.[265] Despite the confirmation of the broad provisions of the Alien Tort Act allowing universal jurisdiction against those who violate international human rights norms, the US Supreme Court later placed some limitations to the Act. In Kiobel v. Royal Dutch Petroleum,[266] the US Supreme Court ruled that the Alien Tort Act does not generally apply to torts committed in foreign countries except in cases that are related to territory of the United States and committed with sufficient force. These exceptions provided a window that can be utilised to pursue Alien Tort Act claims related to extraterritorial acts.

As discussed above, there has been some broad and limited use of universal jurisdiction in criminal cases in areas of terrorism and drug trafficking. Universal jurisdiction has mainly been used in civil cases.

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[261] ibid.
[262] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act 2001 (USA).
[263] Civil Rights Act 1964 (USA).
[264] Alien Tort Claims Act 1789 (USA).
[265] *Sosa v Alvarez-Machain* [2004] U.S. LEXIS 4763.
[266] *Kiobel v Royal Dutch Petroleum* [2013] U.S. LEXIS 3159.

Regarding immunity for Heads of State, their families and heads of government in the US, universal jurisdiction should be viewed in two separate ways, the pre-FSIA[267] and the post-FSIA periods. During the pre-FSIA period, the US granted absolute immunity where the courts would grant immunity to the Heads of State on instruction of the State Department regardless of the nature and type of the crime committed. After the introduction of the FSIA, the position changed from absolute to restrictive type of immunity where the federal courts became the sole determinants of immunity, replacing the State Department role. This prevented a situation whereby immunity is determined based on only political considerations.[268] As with South Africa, the courts are the ones to determine immunity that should be extended to the Heads of State and their family members.

However, one of the principles separating the two jurisdictions is that the US courts give more power or absolute power to grant immunity to the executive arm of government. This principle was introduced way back in 1882 by the US Supreme Court in the case of Lee[269]. In this case, it was held that the guiding principle for the courts exercising their jurisdiction or surrendering it when dealing with foreign affairs issues was to follow the decision of the political branch and not to embarrass the political branch by adopting an antagonistic jurisdiction. Hence, it is not the business of the courts to extend or deny immunity that has not been extended or denied by the government of the US.[270] The courts in the US are bound by the recommendations submitted by the executive branch as those recommendations are regarded as conclusive determination by the other arm of government. Thus, once the State Department has filed its suggestion on immunity, the court is compelled to follow the suggestion and surrender its jurisdiction.[271]

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[267] Foreign Sovereign Immunities Act 1976 (USA).
[268] Shobha Varughese George, 'Head-of-State Immunity in the United States Courts: Still Head-of-State Immunity in the United States Courts: Still Confused After All These Years' [1995] 64(3) Fordham Law Review 16 <https://core.ac.uk/download/pdf/144225746.pdf> accessed 16 August 2022.
[269] *United States v Lee* 106 U.S. 1882 (196).
[270] *Republic of Mexico v Hoffman*, 324 U.S. 1945 (30).
[271] Kline v Kaneko, 141 Misc. 2d 1988 (787).

### 4.4.4 UK and South Africa

The United Kingdom (UK) position on universal jurisdiction and immunity is similar in many respects with that of South Africa.

In the UK, universal jurisdiction is provided under the Geneva Conventions Act of 1957 as well as under other legislations against international crimes such as war crimes.[272] The UK has universal jurisdiction over international crimes of torture, hostage taking, terrorism and breaches of the four 1949 Geneva Conventions.

Regarding torture, section 134 of the Criminal Justice Act[273] domesticates the United Nations Convention against Torture.[274] This Act empowers the British courts to try any person who commits torture.

Furthermore, the International Criminal Court Act of 2001[275] provides universal jurisdiction to UK courts for war crimes, genocide and crimes against humanity that are committed anywhere around the world. The purposes of the Act are to:

- Allow UK courts and other authorities to arrest and surrender persons wanted by the ICC;
- Provide for investigations assistance outlined by the Rome Statute;
- Enforce ICC sentences in the UK; and
- Domesticate ICC crimes into the UK law.[276]

These are the international crimes of genocide, crimes against humanity, war crimes and offences against the administration of justice of the ICC.[277] The UK has embraced jurisdiction to try these crimes irrespective of the places where they were committed. These are heinous crimes that are recognised by customary international law and require that the UK complies with its international obligations as provided for in various conventions. This is the same approach with the South African legal jurisdiction.

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[272] Geneva Conventions Act 1957 (UK).
[273] Criminal Justice Act 1988 (UK).
[274] UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.
[275] International Criminal Court Act 2001 (UK).
[276] ibid.
[277] ibid.

It therefore follows that whoever commits these international crimes cannot hide behind immunity to avoid prosecution in the UK jurisdiction. This includes Heads of State and their family members.

However, many offences that are prosecuted under universal jurisdiction must be done with the consent of the Attorney General. In giving consent, the Attorney General is required to act independently of the government. He or she should apply implicitly laid down prosecution principles of supplying enough evidence and making sure that it is in the public interest to prosecute. The Attorney General must also consider the facts of each case and different circumstances when giving or denying consent. Acting independently of government does not mean that the Attorney General should not consult. He or she may consult relevant government departments or officials to give their inputs on issues related to public interest such as international relations and national security. Nevertheless, the final decision to give or deny consent will be that of the Attorney General.

#### 4.4.5 Austria and Universal Jurisdiction

Austrian universal jurisdiction is provided for under section 64 of its Penal Code that stipulates that Austrian courts have jurisdiction over crimes such as abduction, slave trade, human trafficking, organised crime, drug crimes, air-piracy, terrorism, rape and torture.[278] The Austrian courts are competent to try these crimes if its interests are affected or if the accused is in Austria. It will not matter if these crimes were committed outside the country.

Furthermore, section 64(6) of the Penal Code provides that the Austrian courts are also empowered to try those crimes committed outside without consideration of locally applicable law when Austria is mandated by international treaties to prosecute such crimes.[279] Moreover, Austria has domesticated all the international crimes under the Rome Statute of the ICC and is therefore competent to try war crimes, genocide, crimes against humanity and crimes against aggression. This means that Austraian courts have jurisdiction to try these international crimes even if they are committed outside its territory. Section 65 of the Penal Code also allows Austria to try all cases

[278] Penal Code 1966 (Austria).
[279] ibid.

committed outside its borders provided that such crimes are punishable under locally applicable laws and that the offender is in Austria and cannot be extradited.[280]

One of the examples of the cases brought under Austrian courts relying on the principle of universal jurisdiction was the case against Bosnian Serb Dusko Cvjetkovic who was charged for genocide, murder and arson that were allegedly committed in Bosnia and Herzegovina.[281] The Austrian Supreme Court allowed the case to continue using section 65 of the Penal Code as cited above.

### 4.5 Conclusion

As discussed above, it is important to highlight that universal jurisdiction is not applied uniformly but takes different shapes or forms relating to the domestic implementing laws. Already, there are more than 147 countries that implements universal jurisdiction for different international law crimes.

This concept limits immunity extended to Heads of State and their family members especially for international crimes of genocide, war crimes and crimes against humanity. Many countires are increasingly domesticating international conventions such as the Rome Statute establishing the ICC. This grants member states of such treaties some universal jurisdiction as an obligation derived from the need to implement the convention. In the same way Heads of State are now exposed to judicial prosecution by the ICC, the member states of the Rome Statute that established the ICC are obliged to comply with the statute.

[280] ibid.

[281] Ariana Pearlroth, 'Universal Jurisdiction in the European Union: Country Studies' (The Redress Trust, 1 September 2001) 3 <https://documents.law.yale.edu/sites/default/files.pdf> accessed 16 August 2022.

## CHAPTER 5
## CASE LAW ON IMMUNITY

### 5.1 Introduction

This chapter reviews three leading cases on immunity extended to Heads of State and their spouses to see how different jurisdictions apply universal jurisdiction on the subject matter. The Arrest Warrant case has been chosen mainly because it is the leading case decided by the International Criminal Court and is used as a precedent case by most jurisdictions. The two Grace Mugabe cases in Hong Kong and South Africa are interesting in their similarities and difference in their verdicts. They provide a contrasting view on the immunity as interpreted by different countries.

### 5.2 Grace Mugabe Case in Hong Kong

On 15 January 2009, a British photo-journalist based in Hong Kong, Richard Jones, alleged that he was assaulted by the then first lady of Zimbabwe, Grace Mugabe, while he was trying to take photographs of her in Hong Kong. Jones alleged that he was beaten by Grace Mugabe while her bodyguards grabbed him and tried to take his camera. The journalist claimed that he sustained wounds on his face and was treated in a hospital after the incident.

Jones reported the case to the Hong Kong police two days after the incident and after Grace Mugabe and her delegation left the country. The police then brought the case to the Department of Justice in March 2009 to decide whether Grace Mugabe should be prosecuted. If she was supposed to be prosecuted, there were still other important legal questions to be determined.

One of the legal dispute that was supposed to be solved was on which jurisdiction was to decide the case, whether the case was to be decided by the Hong Kong government or by the central government of the People's Republic of China. The second question was whether Grace Mugabe, who was on a private visit to Hong Kong and was a first lady when the incident occurred, was entitled to diplomatic immunity.

Regarding the first question, it was decided that the central government of mainland China should handle the issue. This was despite the fact that the alleged assault occurred in Hong Kong. The decision was based on the Special Law of Hong Kong

whose Article 13 stipulates that China shall be responsible for the foreign affairs of Hong Kong.[282] The foreign affairs issues include implementing diplomatic regulations and laws as well as handling diplomatic affairs of Hong Kong. These fall under the responsibilities of the Ministry of Foreign Affairs of the central government of China.

Hong Kong was under the British rule before it was returned to China in 1997. Despite being under China, Hong Kong has a special arrangement to maintain separate political, economic and legal systems from the central government of the mainland China.

However, its Constitution stipulates that China will handle its foreign relations while Hong Kong will only handle issues of external affairs. Article 13 cited above authorises the Hong Kong Special Administrative Region to handle external affairs.[283] Such external affairs include agreements in economic, trade, financial, monetary, shipping, communications, tourism, cultural and sports fields. These fields could be concluded by the Hong Kong Special Administrative Region under the 'One Country, Two Systems' policy using the name "Hong Kong, China."[284]

The distinction between foreign affairs and external relations was the determinant factor to know which government should handle the matter. The matter was therefore supposed to be handled by the Ministry of Foreign Affairs of the central government of China, which is responsible for all foreign affairs matters. In other words, foreign affairs issues are sovereign matters that should be handled by the sovereign government while external affairs are dealt with at the local level by the local government of Hong Kong.

Pertaining to the second question on the entitlement to immunity by Grace Mugabe, the Department of Justice refused to prosecute the case based on the understanding that she was entitled to diplomatic priviledges and immunities. The Department of Justice relied on the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities, whose Article 22(1)(3) designate Grace Mugabe as 'other visiting foreigners to whom the Chinese Government has granted

[282] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1997.
[283] ibid Article 13.
[284] ibid Article 13.

the privileges and immunities.' Furthermore, the Department of Justice relied on the advice from the Ministry of Foreign Affairs to rule that China generally extends diplomatic privileges and immunities to spouses of foreign Heads of State during their stay in China and Hong Kong. The spouses enjoy such immunities even if the alleged assault was committed during official visit or private visit since there is no such requirement under the regulations. Hence, the Department of Justice declined to prosecute Grace Mugabe and concluded that she was entitled to diplomatic status in Hong Kong that makes her immune from arrest, detention and prosecution.

The decision raised many concerns from several Hong Kong legislators who believed that Grace Mugabe was not entitled to diplomatic immunity since she was not on diplomatic visit but on private visit when the incident occurred. The Department of Justice clarified that it was the Commissioner of the Ministry of Foreign Affairs who advised that the Central People's Government generally extends diplomatic immunity to spouses of Heads of State when they visit China, including Hong Kong.

The Department of Justice further backed its decision by citing the UK and Australia jurisdictions as proof that granting immunity to spouses of Heads of State is in line with international law and practice. In particular, the Department cited section 20(1) of the UK State Immunity Act of 1978 and section 36 of the Australian Foreign States Immunities Act of 1985, which grant immunity to spouses of Heads of State.

There were also questions raised on whether the decision did not undermine the rule of law. Some legislators like Audrey EU, Albert Ho and Margaret Ng felt that the decision to give diplomatic immunity to Grace Mugabe promotes impunity for those granted diplomatic immunity can commit crimes without being brought to justice. In addressing this question, the Department of Justice argued that the rule of law was not undermined since the issue is handled at diplomatic level though Grace Mugabe may not face a criminal charge.

**5.3 Grace Mugabe Case in South Africa**

History has the tendency to repeat itself as Grace Mugabe found herself accused again of committing similar offence of assault in South Africa.

The facts of the matter are, on 13 August 2017, Grace Mugabe was accused of assaulting three women in South Africa. One of the women, Gabriella Engels,

reportedly suffered serious facial and mental injuries from the alleged assault. Engels filled criminal charge of assault with intent to cause grievous harm to her body against Grace Mugabe.

Grace Mugabe left the country two days after the incident and the Embassy of Zimbabwe wrote a note verbale to the Department of International Relations and Cooperation wishing to invoke diplomatic immunity for Grace Mugabe requesting her protection from arrest and prosecution by South African authorities. The Embassy argued that Grace Mugabe was visiting South Africa as part of the advance team of the Zimbabwean official delegation to the SADC Summit that was being hosted by South Africa from 11 to 20 August 2017.

After the note from the Zimbabwean Embassy, the Attorney representing the second applicant, Afriforum, also wrote to the Minister arguing that extending diplomatic immunity to Grace Mugabe would defeat the cause of justice as she was not on official visit to South Africa. The Attorney argued that her visit was for private business and medical reasons. It was argued that it was not true that Grace Mugabe has visited South Africa for the SADC Summit. The Summit was only being used as a scape goat to evade prosecution for her assault charges.

Despite the objections, the Department of International Relations and Cooperation gave diplomatic immunity from criminal prosecution to Grace Mugabe on 19 August 2017. The reason was based on section 7(2) of the DIPA,[285] which empowers the Minister to confer immunities and privileges to a person or organisation in the interest of South Africa. However, the Minister's powers are not arbitrary as she is required to consider all the facts before she can make a determination. In this case, some of the facts considered include the relations between South Africa and Zimbabwe that were likely to be affected with the prosecution of the latter's first lady. The other reason considered was that the Minister felt that prosecuting a first lady of Zimbabwe was going to negatively disrupt the SADC meeting that was underway. Furthermore, the Minister considered legal reasons and come to the conclusion that both international and domestic law grant immunity *rationae personae* to Heads of State, heads of government and Ministers of Foreign Affairs. The Minister then decided that there was derivate immunity for the spouse of the Head of State. According to the

[285] Diplomatic Immunities and Privileges Act 2001 (South Africa).

Minister, customary international law automatically accord immunity to spouses of the Heads of State. However, the Minister's lawyer argued during his oral presentation that the Minister did not rely on domestic South African laws but only recognised the existing customary international law right to immunity that Grace Mugabe enjoyed by virtue of her being the spouse of the Head of State.[286]

This decision was challenged by Engels, AfriForum and the Democratic Alliance at the High Court of South Africa at the Gauteng Provincial Division in Pretoria as the applicants sought to have it declared as unconstitutional and unlawful. It was challenged on the basis that the Minister's decision did not take into consideration of section 232 of the Constitution that states that any customary international law violating the Constitution is invalid.[287]

The Women's Legal Centre Trust (WLC), the Commission for Gender Equality (Commission), and the Freedom under Law (FUL) joined the case as *amicus curiae,* in support of the relief sought by the applicants but relying on different reasons. The WLC and the Commission wanted the Minister's decision declared unconstitutional on the basis that the decision neither promotes gender equality nor promotes the development of its attainment. FUL agrees with the applicants that the Minister's decision violates section 232 of the Constitution.[288]

What come out from the submissions by all the parties is that the court has to resolve whether Grace Mugabe as a wife of a Head of State enjoy immunity for allegedly assaulting Engels. If this was not the case, the Court also has to determine whether or not the Minister's decision to grant immunity to Grace Mugabe was constitutional and lawful.

After considering all the submissions by all the parties, the High Court annulled the Minister's decision and held that Grace Mugabe is not immune from the jurisdiction of South African courts and that the Minister's decision to grant her immunity was unconstitutional and unlawful.[289] The court reviewed legal precedents by other jurisdictions and rejected the Minister's decision on the basis that there was no

[286] *Democratic Alliance v Minister of International Relations and Co-Operation And Others* 2018 (2) SACR 654 (GP).
[287] Constitution of the Republic of South Africa 1996.
[288] *DA v Minister of International Relations* (n. 282).
[289] *DA v Minister of International Relations* (n. 282).

customary international law rule that gives automatic immunity for spouses or other family members of a Head of State. The court argued that such a rule does not apply in South Africa because of the constitutional provision under section 232[290] that does not recognise any customary international law breaching domestic laws of South Africa.

The court further pointed out that even if the customary international law rule on immunity existed, it is inapplicable to South Africa because of section 6(a) of FSIA[291] that removes immunity extended to Heads of State when they commit international crimes. This means that Heads of State are not immune in cases involving death or injury of any person in South Africa. Hence, former President Robert Mugabe himself was not immune had he been the one being accused for assaulting Engels. As a result, the court reasoned that Grace Mugabe could not claim derivative immunity from being the wife of President Mugabe who did not enjoy such immunity in South Africa.[292]

The judge also dismissed the US case law that the Minister relied upon to make her decision. The Minister elaborated that the US courts give extensive or absolute deference to the executive to determine immunity for the Heads of State or their spouses. The US courts surrender their jurisdiction to allow the executive to decide as it sees it fit if the individual deserves immunity. The judge dismissed this approach on the basis that it does not reflect a rule in customary international law. Instead, it reflected US' domestic choices that were made purely for their foreign relations reasons.[293] The judge pointed out that the scenario was different in South Africa where the executive (the Minister) is allowed to grant immunity subject to the provision of the Constitution and national legislation. Furthermore, the South African courts need not to surrender the jurisdiction to the executive branch of government.[294]

It has been pointed out that the legal position that serving Heads of State do not enjoy immunity for certain crimes in South Africa will present problems for its diplomatic

[290] Constitution SA (n. 254).
[291] Foreign States Immunities Act 1981 (South Africa).
[292] *DA v Minister of International Relations* (n. 282).
[293] *DA v Minister of International Relations* (n. 282).
[294] ibid.

relations with other countries. How the decision will be enforced without massive backlash from other countries is a critical question.

There is always a need to balance the two extreme positions of striping immunity for Heads of State and their spouses who are accused of committing international crimes and the need to punish those who commit such crimes.

The lack of a solution in this matter is said to have led to the application by South Africa to withdraw from the Rome Statute that establishes the ICC in 2016. The South Africa government argued that it has been conflicted by the Rome Statute and its domestic Act implementing it, which compels South Africa to arrest all persons wanted by the ICC including those who enjoy diplomatic immunity. This has been viewed as a requirement that is in conflict with South Africa's obligation to other states, which undermines its goal of pacific settlement of disputes. In short, the decision to withdraw from the ICC was informed by the need to honour customary international law that grants diplomatic immunity to Heads of State to promote dialogue in resolving conflicts peacefully.

**5.4 The Arrest Warrant Case**

One of the leading cases on immunity extended to Heads of State is the Arrest Warrant case[295] that was decided by the International Criminal Court.

The facts of this matter are that on 11 April 2000 a Belgium court issued an arrest warrant that was distributed to all states against the acting Minister of Foreign Affairs of the Democratic Republic of Congo (DRC), Mr. Abdoulaye Yerodia Ndombasi. The order by the Belgian court sought the arrest and subsequent extradition of Mr Ndombasi to Belgium to answer charges of war crimes and crimes against humanity.

On 17 October 2000, the DRC applied to International Criminal Court to compel Belgium to cancel the arrest warrant. The DRC argued that Belgium has violated customary international law rule on immunity stating that serving Ministers of Foreign Affairs are inviolable and immune from criminal processes. The DRC demanded that

[295] *Democratic Republic of Congo v Belgium* [2002] (ICJ Rep75) ICGJ22 ICJ.

Belgium should be asked to cancel its arrest warrant and pay reparation for the moral damage it caused to the DRC.[296]

In its opposing papers, Belgium contends that the case was now moot because Mr Ndombasi was no longer the Minister for Foreign Affairs. Another argument raised by Belgium was that the DRC Minister was not entitled to immunity since he was accused of international crimes. Belgium argued that it had universal jurisdiction to try war crimes and crimes against humanity. In support of this argument, Belgium relied on the Pinochet case that was decided by the UK's House of Lords and the Qaddafi case that was decided by the French court. Belgium also objected to the jurisdiction of the International Court of Justice to preside over the case.

The following questions were therefore before the court:

- Whether Belgium violated customary international law on inviolability and absolute immunity from criminal prosecution for serving Minister of Foreign Affairs by issuing arrest warrant.
- Whether Belgium should cancel its arrest warrant and pay reparations for issuing the arrest warrant.
- Whether Belgium violated the principle of sovereign equality when it exercises universal jurisdiction.

In its decision, the Court dismissed the argument by Belgium that the Congolese Minister for Foreign Affairs had no immunity since he was accused of international crimes. The Court contends that the issuance of arrest warrant was against Belgium's international commitments to the DRC to respect and not to infringe Mr Ndombasi's immunity and inviolability accorded to him under customary international law. This was after the Court found out that there was an international law principle according immunity and inviolability to Heads of State and governments, Ministers of Foreign Affairs, Diplomatic and Consular agents.[297]

Another critical finding by the Court was that the serving minister like Mr Ndombasi had immunity for both actions on official duty and for private actions performed during his tenure. During his tenure, he cannot be prosecuted even for those actions he

[296] *Arrest Warrant Case* (n.258).
[297] *Arrest Warrant Case* (n.258).

performed before his appointment. The Court actually dismissed Belgium's position and held that the incumbent Minister enjoys absolute immunity even if he is accused of international crimes. The Court maintains that there was no other way in customary international law to the principle of absolute immunity that is extended to serving Minister of Foreign Affairs.[298]

Pertaining to the ICC's jurisdiction to preside over the case, the court ruled that jurisdiction is determined at the beginning of instituting proceedings. In this regard, it was clear that there was a legal dispute over the arrest warrant when DRC instituted proceedings to have the warrant cancelled. The objection by Belgium that the court lost its jurisdiction because there was no longer a legal dispute was therefore dismissed.[299]

With regards to international jurisdiction of Belgium, the Court ruled that such provisions by international treaties and conventions do not lift absolute immunity extended to serving Ministers of Foreign Affairs.[300] The incumbent Minister remains immune despite international conventions creating domestic jurisdiction.

However, the Court ruled that such immunity does not mean that the Minister was totally exempted from prosecution. The immunity only stops prosecution for a specific period but does not completely exonerate the accused. It was established that the incumbent Minister for Foreign Affairs can still be prosecuted either in his own country, in a foreign court if his country waives his immunity, when he is no longer the Minister or can be prosecuted during his term of office by an international body like the ICC.

As a result, Belgium was asked to cancel its arrest warrant issued against the DRC Minister of Foreign Affairs. By a big majority, the Court concurred with contention by the DRC that the Minister was immune even for international crimes. The court considered different treaties relied on by the parties and concluded that they do not spell out the immunities accorded to Ministers of Foreign Affairs. Instead, the court relied on customary international law and came to the conclusion that such law grants immunities to the Ministers of Foreign Affairs for the functions and not for personal

[298] ibid.
[299] ibid.
[300] ibid.

benefit.[301] The court then decides that because of the nature of their functions, the Ministers of Foreign Affairs are entitled to full immunity and inviolability during the period they are serving their countries. The idea of such immunity is to enable the Minister to perform his duties without any hindrance or any possible threat of being arrested. The court further reasoned that absolute immunity is accorded to the Ministers because it is difficult to distinguish between private actions from official actions.[302]

This landmark ruling has been criticised for deviating from the imerging international consensus that immunity for Heads of State or Ministers of Foreign Affairs ought to be lifted for international crimes such as genocide, war crimes and crimes against humanity. These crimes are considered as most heinous by most countries in the international community and they believe that there ought to be an exception to immunity when it comes to these crimes. In that regard, it will follow that the issuance of arrest warrant by Belgium did not actually violate international law as many countries such as those reviewed in chapter four consider it a standard practice.[303]

Despite the criticisms, the judgement should be viewed as a positive development in international law. The call for a balance between current global trends for the need to punish those who commit international crimes versus the principle of immunity and inviolability of state officials should not be the basis for sacrificing immunity. The judgement clarified many grey areas regarding immunity extended to Ministers of Foreign Affairs and heads of state. Immunity accorded them while still serving does not mean impunity since they can still be tried when they leave office or by the ICC.

However, the ICC and other international bodies that are capable to adjudicate and enforce their rulings should be empowered to be able to discharge their duties impartially, professionally and neutrally. This will build confidence and trust so that developing countries do not think that they are the only ones being targeted. It is

[301] *Arrest Warrant Case* (n.258).
[302] ibid.
[303] Myint Zan, 'Democratic Republic of Congo v Belgium: Arrest Warrant of 11 April 2000; Crimes against Humanity: Immunity versus Impunity' [2009] 7(1) Journal of South Pacific Law 2 <http://www.paclii.org/journals/fJSPL/vol07no1/4.shtml> accessed 3 September 2022.

therefore recommended that universal jurisdiction be extended to international bodies like the ICC and not individual states.

### 5.5 Conclusion

It was shown that China generally grants diplomatic immunity to visiting Heads of State and their spouses. It does not matter whether the Head of State or the spouse commit the offence during an official or private visit. Furthermore, the immunity in China is extended even for international crimes such as assault. It was also indicated that the Chinese Department of Justice follow the advice of the Ministry of Foreign Affairs on immunity extended to Heads of State and their spouses. It was also shown that the position is different in the South African legal jurisdiction. In South Africa, Heads of State and their spouses are only immune if such immunity is derived from customary international law that does not contravene the South African Constitution and other domestic laws. Immunity is also excluded for international crimes such as genocide, war crimes and crimes against humanity. Also important is that the Heads of State or their spouses should be visiting South Africa on official business. On the international front, it was illustrated that the ICC held a contrary view to that of South Africa. According to the ICC judgement on the Arrest Warrant case, customary international law grants absolute immunity and inviolability to Ministers of Foreign Affairs or Heads of State during their term of office to allow them to carry out their duties. They are immune for all their actions on official duty or on private business. They can only be prosecuted after they left office or their government agreed to lift their immunity or by the international body such as the ICC, which had jurisdictions over such matters.

# CHAPTER 6
# FINDINGS AND RECOMMENDATIONS

## 6.1 Summary of Findings

This section summarises the findings from Chapter 2 to Chapter 5, which were addressing the research questions in Chapter 1.

In Chapter 2, the main purpose was to give a context by embarking on a historical analysis of immunity extended to the spouses of Heads of State. The Chapter therefore reviewed customary international law regarding immunity given to Heads of State and their spouses. It mainly focuses on immunity for Heads of State because the immunity for their spouses is derived from them. The Chapter further discussed immunity of spouses under the human rights discourse. It was found from the analysis that under customary international law, certain high-ranking office bearers such as the Heads of State and government, Ministers of Foreign Affairs and the members of their family enjoy absolute immunity from civil and criminal prosecution in foreign courts. This immunity is only enjoyed during their terms of office to allow them to carry out their duties unhindered by the prospect of being arrested and prosecuted in another country.

It was also found that the principles establishing customary international law is based on the actions of states and what is being discernible from the actions of most western countries and institutions such as the European Union, Canada, United Kingdom and USA is that states are slowly minimising immunity in respect of international crimes and gross human rights abuses. This is buttressed by many international conventions and treaties that are removing immunity for international crimes like genocide, war crimes and crimes against humanity.

In other words, the principle of sovereign equality entails that officials such as incumbent Heads of State are entitled to both personal and functional immunities to protect them from official and private acts and allow them to carry out their duties. The principle of individual criminal responsibility came much later after the Second World War. Its intention is to make sure that immunity should not mean impunity and international crimes should be punished.

Chapter 3 examined the legal positions of Australia, UK, US, Austria, South Africa and China on derivative immunity. This was meant to have a general understanding of what different legal jurisdictions provide in terms of immunity extended to spouses of Heads of State. The chapter also analysed how immunity questions are handled, whether the legislation defers the decision to the courts or the executive is given powers to determine such issues. It was found that these states follow two distinct approaches to the doctrine of state immunity of either absolute or restrictive. The former grants unfettered immunity from jurisdiction in its courts for all actions performed by foreign state. The latter limits immunity in certain circumstances such as international crimes. It was also found that many states are drifting from absolute immunity to restrictive one as the concept of immunity is evolving to meet modern demands for justice. It was revealed that even China that adopts an absolute approach is now considering adopting a restrive approach to safeguard its economic interests.

Chapter 4 looked at the concept of universal jurisdiction and immunity for the Heads of State and their spouses, comparing the legal jurisdiction of South Africa with those of Austria, Australia, UK, US and China. This was done mainly to reconcile these countries' national laws with customary international law on immunity. It was shown that universal jurisdiction is applied differently depending on domestic implementing laws. Its effect is to limit immunity extended to Heads of State and members of their families that are accused of international crimes. It was further shown that Austria, Australia, South Africa, UK, and US have domesticated international conventions such as the Rome Statute that establishes the ICC. Such treaties give member states universal jurisdiction to try and prosecute international crimes addressed by those treaties and conventions. All member states who are signatories to such international treaties and conventions are compelled to implement them.

Chapter 5 provided a practical aspect to the whole discussion by assessing three leading cases on immunity extended to Heads of State and their spouses to see how different legal jurisdictions apply universal jurisdiction on the subject matter. These were the Arrest Warrant case and the two Grace Mugabe cases in Hong Kong and South Africa. It was shown that irrespectictive of the purpose and nature of the visit, China generally grants absolute immunity to visiting Heads of State and their spouses. This is the position even if the Head of State or his spouse is accused of

international crimes. The Chinese position was shown to be the direct opposite of the South African one as the similar case was treated differently in these two jurisdictions. In South Africa, it was revealed that immunity for Heads of State and their spouses is only granted based on customary international law that does not contravene the Constitution of South Africa and other domestic laws. The Heads of State or their spouses have to be in South Africa on official business to qualify for such immunity. It was also shown that South Africa also excludes immunity in case of international crimes.

In the Arrest Warrant case, it was illustrated that the view by the ICC is completely different to that of South Africa. The ICC held that, under customary international law, incumbent Heads of State and Ministers of Foreign Affairs are accorded absolute immunity and inviolability from prosecution by foreign states. They are immune for all their actions either on official duty or on private business. They can only be held accountable after they left office or if their governments agreed to lift their immunity. It was further held that only the international bodies like the ICC have jurisdictions over such matters.

### 6.2 Recommendations

In the problem statement, it was indicated that there is no standard approach in international law dealing with immunity for spouses of Heads of State. This area has remained a legal lacuna in customary international law as both national laws and case laws have approached the issue differently.

This section is making five recommendations to address the challenges highlighted in the Problem Statement as a way of contributing towards the discussion.

#### 6.2.1 Immunity for Spouses of Heads of State

This recommendation is motivated by Chapter 5 particularly the Arrest Warrant case. It is recommended that spouses of the incumbent Heads of State be accorded the same absolute immunity given to their spouses from prosecution by another state as was decided by the ICC in the Arrest Warrant case. The recommendation is not meant to trigger debate on peace versus justice, which is an area for another research. The recommendation is made purely for the respect of sovereign equality among states and ensures that these officials perform their duties without hindrance.

The only exception is to subject them to the universal jurisdiction of international bodies like the ICC if both countries are members to it or if the United Nations has lifted such immunity. The rationale is that signatories to the international treaties or conventions like the Rome Statute agree to have their immunities lifted in certain circumstances such as to international crimes.

### 6.2.2 Deferrence of Immunity to the Executive

The other recommendation informed by chapter 3 is that issues of immunity should be decided by the executive specifically the Ministry of Foreign Affairs which is responsible for managing the country's relations with other countries. The reason is that relations between states is very complex and sensitive but does not mean once a person is accorded immunity there is no justice. Immunity comes with responsibility and there are diplomatic ways that states can use to pursue justice against those who commit international crimes, for example, justice is usually pursued through negotiation and arbitration as discussed under the last section in this chapter. This is another area for further study. Suffice to say that the American and Chinese systems where the courts surrender jurisdiction to the executive to decide on matters of immunity appear to be the better way to manage relations among states and promote international peace. The courts may decide to strip immunity as happened in the Grace Mugabe case in South Africa but implementation of such decision proved very difficult. It was the same in Bashir case where the court decided that South Africa was supposed to arrest him and hand him to the ICC. Implementation of the decision proved very difficult mainly because of the reciprocity principle in foreign affairs. Suing another sovereign can actually trigger grave consequences.

### 6.2.3 Balance Immunity with Impunity

Chapter 2 informed this recommendation. The immunity extended to serving Heads of State and their spouses should not mean impunity. These officials should be prosecuted once they left office. It is recommended that diplomatic channels should be pursued first to promote peace and justice. It is further recommended that universal jurisdiction be given to international bodies like the ICC to try the serving Heads of State and their spouses accused of such crimes. In the event that one of the parties is not a member to the Rome Statute establishing the ICC, the matter should be decided by the United Nations Security Council.

Justice should also be pursued once the official left office and immunity should be lifted for private actions only.

### 6.2.4 Reforming Customary International Law to reflect Human Rights

Chaprter 2 is the foundation of this recommendation as it situates immunity under the human rights discourse. There should be incremental development of immunity to reflect modern day demands of personal responsibity for international crimes. The United Nations should be leading in efforts towards reforming the whole immunity system to make sure that those who abuse the noble idea of immunity are brought to justice so that the offended have an avenue for some redress. The United Nations should buid upon the Nuremberg and Tokyo tribunals that are considered as milestones in the concept of individual responsibility for international crimes. They were the first platforms where high ranking military leaders, politicians and other influential civilians were tried.

The principles established by the Nuremberg trials that every person should be held accountable for his action irrespective of that person's status should be pursued further. Such provisions of the Nurember principles can be said to be representing norms of customary international law. It is recommended that treaties, conventions and other instruments establishing international tribunals should not only be considered important sources of international criminal law and custom but should be considered as the actual international criminal law.

This should be done by empowering the ICC and other international bodies that are capable to adjudicate and enforce their rulings. Professionalism, neutrality and impartiality should guide these bodies so that the developing countries do not think that they are the only ones being targeted. It is therefore recommended that universal jurisdiction be extended to international bodies like the ICC and not individual states.

### 6.2.5 Conciliation and Arbitration

The case law discussed in Chapter 5 motivated this recommendation. Conciliation and arbitration should also be considered before escalation of the dispute to the courts. This brings in the services of a neutral person to resolve the dispute with binding decision. Conciliation and arbitration provide a quicker way to obtain an amicable solution than litigation, which is expensive and sometimes is difficult to

enforce. An arbitrator is selected by both parties to the dispute and is selected based on that person's knowledge on immunity and international law.

### 6.3 Concluding Remarks

The research found that there is a legal lacuna on immunity of the spouses of Heads of State or family members. In some cases it has been granted but denied in other similar cases. Case law has not provided guidance since different courts and forums have taken divergent views regarding the matter. The idea is to solve the puzzle faced by legal jurisdictions on how best to balance the noble intentions of diplomatic immunity and the rampant abuse of such immunity. The puzzle is complicated by the principle of reciprocity that is so central to diplomatic relations of states but appears not to be noticed in the legal area. As a result, some jurisdictions have adopted an absolute (unlimited immunity) while others adopted a restrictive (selected) immunity approach. It was found that the concept of immunity has undergone a lot of changes to meet modern demands as many states are drifting away from absolute state immunity adopting a restrictive approach to state immunity. Many states are only granting immunity to Heads of State for official functions excluding international crimes, commercial transactions and other private actions. This again provides problems of implementation because states are sovereign. It is therefore recommended that spouses of the incumbent Heads of State be accorded the same absolute immunity given to their spouses from prosecution by another state as was decided by the ICC in the Arrest Warrant case. The recommendation is made purely for the respect of sovereign equality among states and ensures that these officials perform their duties without hindrance. Furthermore, immunity should be decided by the executive specifically the Ministry of Foreign Affairs which is responsible for managing the country's relations with other countries. This should not mean impunity since officials should be prosecuted once they left office. An incremental development of immunity is also recommended to reflect modern day demands of personal responsibity for international crimes. International bodies such as the United Nations should be leading in efforts to reform the whole immunity system to make sure that those who abuse the noble idea of immunity are brought to justice so that the offended have an avenue for some redress. Alternative dispute resolutions such as conciliation and arbitration should be utilised. By and large, the concept of impunity needs further research so that it is not confused with immunity.

## Bibliography

### 1. Books


**A**

Ahluwalia *Legal Status Privileges and Immunities*

Ahluwalia K, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (Springer 1964).

**D**

Denza *Diplomatic Law*

Denza E, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (2 edn Clarendon Press 1998).

Dugard *International Law*

Dugard J, *International Law: A South African Perspective* (4 edn Juta 2016).

**E**

Elias *Africa Development International Law*

Elias OT, *Africa and the Development of International Law* (Oceana Publications Inc 1972).

**F**

Foakes *Position Heads of State*

Foakes J, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press 2014).

**P**

Patton *Qualitative Research*

Patton QM, *Qualitative Research and Evaluation Methods* (3 edn Sage Publications 2002).

Pedretti *Immunity of Heads of State*

Pedretti R, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff Leiden 2015).

**S**

Shaw *International Law*
Shaw NM, *International Law* (6 edn Cambridge University Press 2008).

Strydom *International Law*

Strydom H (ed), *International Law* (Oxford University Press 2016).

**W**

Wertheimer *Rhetoric of American First Ladies*

Wertheimer MM, *Inventing A Voice: The Rhetoric of American First Ladies of the Twentieth Century* (Rowman & Littlefield Publishers 2004).

## 2. Journals

**A**

Andrews 2004 ASIL

Andrews S, 'U.S. Courts Rule on Absolute Immunity and Inviolability of Foreign Heads of State: The Cases against Robert Mugabe and Jiang Zemin' (2004) 8(27) American Society for International Law <https://www.asil.org/insights/volume/8/issue/27/us-courts-rule-

absolute-immunity-and-inviolability-foreign-heads-state> accessed 26 May 2022.

**B**

Baker 2010 EJIL

Baker R, ‘Customary International Law in the 21st Century: Old Challenges and New Debates’ [2010] 21(1) European Journal of International Law <https://academic.oup.com/ejil/article/21/1/173/363352> accessed 03 July 2022.

Bianchi 1999 EJIL

Bianchi A, ‘Immunity vs Human Rights: The Pinochet Case’ (1999) 10(2) European Journal of International Law <https://watermark.silverchair.com/100237.pdf?token> accessed 01 June 2021.

Bradley 2000 UCLF

Bradley C, ‘Universal Jurisdiction and U.S. Law’ [2000] 2001(9) University of Chicago Legal Forum <http://chicagounbound.uchicago.edu/uclf/vol2001/iss1/9> accessed 15 August 2022.

**D**

Dyani-Mhango 2021 AHRLJ

Dyani-Mhango N, ‘Revisiting Personal Immunities for Incumbent Foreign Heads of State in South Africa in Light of the Grace Mugabe Decision’ [2021] 21(2) African Human Rights Law Journal 1135 <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962021000200021> accessed 10 July 2022.

**G**

Gathii 2012 OHHIL

Gathii TJ, ‘Africa and the History of International Law’ [2012] 48 Oxford Handbook of the History of International Law <http://file:///C:/Users/Preferred%20Customer/Downloads/SSRN-id2029019.pdf> accessed 10 July 2022.

George 1995 FLR

George VS, ‘Head-of-State Immunity in the United States Courts: Still Head-of-State Immunity in the United States Courts: Still Confused After All These Years’ [1995] 64(3) Fordham Law Review <https://core.ac.uk/download/pdf/144225746.pdf> accessed 16 August 2022.

Godwin 2018 CBLJ

Godwin A, ‘State immunity’ [2018] 2(3) China Business Law Journal <https://law.asia/state-immunity/> accessed 09 July 2022.

**H**

Halliday and Carruthers 2007 AJS

Halliday T and Carruthers B, ‘The Recursivity of Law: Global Norm Making and National Law Making in the Globalization of Corporate Insolvency Regimes’ [2007] 112(4) American Journal of Sociology <https://www.jstor.org/stable/10.1086/507855> accessed 20 July 2022.

Hong 2018 FLR

Hong Y, ‘Pedigree Prosecution: Should a Head of State’s Family Members be Entitled to Immunity in Foreign Courts?’ (2018) 86(6) Fordham Law Review

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5531&context=flr> accessed 17 February 2021.

Hood and Cormier 2012 MJIL

Hood A and Cormier M, 'Prosecuting International Crimes In Australia: The Case Of The Sri Lankan President' [2012] 13 (1) Melbourne Journal of International Law, <https://law.unimelb.edu.au/data/assets/pdf_file/0010/1687249/Hood-and-Cormier.pdf> accessed 09 August 2022.

**K**

Kalyango and Winfield 2009 GMJ

Kalyango Y and Winfield B, 'Rhetorical Media Framing of Two First Lady Candidates Across Cultures' (2009) 1(7) Global Media Journal <http://lass.purduecal.edu/cca/gmj/fa09/gmj-fa09-kalyango-winfield.htm> accessed 30 May 2021.

**L**

Loizeau 2015 EJAS

Loizeau PM, 'First Lady But Second Fiddle or the Rise and Rejection of the Political Couple in the White House: 1933-Today' (2015) 10(1) European Journal of American Studies <https://journals.openedition.org/ejas/10525> accessed 06 February 2021.

**M**

Malone 2016 CLR

Malone J, 'Derivative Immunity: The Impact of Campbell-Ewald Co. v. Gomez' [2016] 50(1) Creighton Law Review <https://heinonline.org/HOL/LandingPage?handle> accessed 15 June 2021.

Maluwa 2004 ASIL

Maluwa T, ‘The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?’ [2004] 98 American Society of International Law <https://www.jstor.org/stable/25659924> accessed 10 June 2021.

**R**

Rahman 2017 TCR

Rahman F, ‘Questioning Chinese government’s stand for sovereign immunity’ [2017] 9(1) Transnational Corporations Review <www.tandfonline.com/action/showCitFormats?doi=10.1080%2F19186444.2017.1290923> accessed 09 July 2022.

**S**

Sebastian 2010 GNLR

Sebastian T, ‘Diplomatic Immunity versus Harm to the Individual: An Attempt at Appraisal’ [2010] 3(1) The Gujarat National Law University Law Review <https://ssrn.com/abstract=2053426> accessed 27 January 2021.

Sena 2005 EJIL

Sena DP and Vittor DF, ‘State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case’ (2005) 16(1) European Journal of International Law <https://doi.org/10.1093/ejil/chi104> accessed 1 June 2021.

Smith 1973 JAH

Smith R, ‘Peace and Palaver: International Relations in Pre-Colonial West Africa’ [1973] 14(4) Journal of African History <https://www.jstor.org/stable/180903> accessed 1 June 2021.

Stoll 2011 MPEPIL

Stoll TP, ‘State Immunity’ Max Planck Encyclopedia of Public International Law (2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law> accessed 28 January 2021.

**T**

Troy 2009 AHR

Troy G, ‘First Ladies and the Fourth Estate: Press Framing of Presidential Wives’ (2009) 114(4) The American Historical Review <https://doi.org/10.1086/ahr.114.4.1121> accessed 29 May 2021.

**Z**

Zachary 2012 TBYIL

Zachary D, ‘State Immunity for the Acts of State Officials’ [2012] 82(1) The British Yearbook of International Law <https://doi.org/10.1093/bybil/brs002> accessed 27 January 2021.

Zan 2009 JSPL

Zan M, ‘Democratic Republic of Congo v Belgium: Arrest Warrant of 11 April 2000; Crimes against Humanity: Immunity versus Impunity’ [2009] 7(1) Journal of South Pacific Law <http://www.paclii.org/journals/fJSPL/vol07no1/4.shtml> accessed 3 September 2022.

### 3. Websites and blogs

-- ‘Government of China Legislative Council Panel on Administration of Justice and Legal Services: Supplementary Note on Questions (Legco, 01 January 2020) <https://www.doj.gov.hk/en/legco/pdf/ajls20200622e1.pdf> accessed 23 February 2021.

**A**

Akande 2016 EJIL

Akande D, ‘The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States?’ (Blog of the European Journal of International Law, 29 March 2016) <https://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/> accessed 04 August 2022.

**F**

Finder 2010 SPCM

Finder S, ‘Lawsuits against foreign countries in the Chinese courts’ (Supreme People’s Court Monitor, 29 March 2020) <https://supremepeoplescourtmonitor.com/2020/03/29/lawsuits-against-foreign-countries-in-the-chinese-courts/> accessed 09 July 2022.

Franklin 2021 DIPLO

Franklin A, ‘Are international immunities of heads of state and government officials undergoing a major change?’ (*Diplo*, 18 July 2021) <https://www.diplomacy.edu/blog/are-international-immunities-of-heads-of-state-and-government-officials-undergoing-a-major-change/> accessed on 30 May 2021.

**K**

Kolodkin 2008 UNILC

Kolodkin AR, ‘Immunity of State Officials from Foreign Criminal Jurisdiction Memorandum by the Secretariat’ (United Nations International Law Commission, 8 August 2008) <https://legal.un.org/ilc/guide/4_2.shtml> accessed 28 January 2021.

**P**

Parliamentary Assembly Council of Europe 2006 LAHR

Parliamentary Assembly Council of Europe's Committee on Legal Affairs and Human Rights, 'Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States', (12 June 2006) <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf> accessed 16 August 2022.

Pearlroth 2001 TRT

Pearlroth A, 'Universal Jurisdiction in the European Union: Country Studies' (*The Redress Trust,* 1 September 2001) <https://documents.law.yale.edu/sites/default/files.pdf> accessed 16 August 2022.

**W**

Williamson 2006 IRC

Williamson J, 'An Overview of the International Criminal Jurisdictions Operating in Africa' (*International Review of the Red Cross*, 1 March 2006) <https://international-review.icrc.org/sites/default/files/irrc_861_6.pdf> accessed 07 August 2022.

**4. Newspapers articles**

-- Grace Mugabe 2014 *BBC News*

-- 'Grace Mugabe: Who is Zimbabwe's former first lady?' *BBC News* (London, *4 December 2014*) <https://www.bbc.com/news/world-africa-30307333> accessed 30 May 2021.

**B**

Brooks 2019 *BuzzFeed*

Brooks CR, ‘A US Diplomat's Wife Who was Involved in a Deadly Car Crash in the UK has Fled the Country’ *BuzzFeed* (New York, 5 October 2019) <https://www.buzzfeednews.com/article/ryancbrooks/us-diplomat-wife-immunity-harry-dunn> accessed 5 February 2021.

**K**

Kemp 2017 *The Conversation*

Kemp G, ‘Grace Mugabe: Why Diplomatic Immunity Isn’t Always An ‘out of Jail’ Ticket’ *The Conversation* (London, 21 August 2017) <https://theconversation.com/grace-mugabe-why-diplomatic-immunity-isnt-always-an-out-of-jail-ticket-82721> accessed 07 February 2021.

**M**

Madani 2020 *Diplomat Magazine*

Madani AIW, ‘Fundamental legacy of The Nuremberg and Tokyo Trials 1945-1948’ *Diplomat Magazine* (Ottawa, 20 January 2020) <www.ifimes.org/en/researches/fundamental-legacy-of-the-nuremberg-and-tokyo-trials-1945-1948/4521> accessed 17 June 2022.

**5. Thesis and dissertations**

**H**

Hossein 2012 DPhil thesis

Hossein MK, ‘Immunity of Heads of State and its effects on the context of International Criminal Law’ (DPhil thesis, Hamburg University 2012).

**K**

Knight 2005 DPhil thesis

Knight LM, ‘From Private to Public Life: Rhetoric of First Ladies in their First Year’ (DPhil thesis, The University of Southern Mississippi 2005).

## 6. Conference Papers

UN Memorandum

-- ‘Immunity of State Officials from Foreign Criminal Jurisdiction Memorandum by the Secretariat’ (United Nations, 2008) <https://www.refworld.org/pdfid/48abd597d.pdf> accessed 28 January 2021.

## L

Li 2019 UNGA Paper

Li K, ‘Statement by Mr. Li Kai Chinese Delegate At the 74th Session of the UN General Assembly on Agenda Item 84, The Scope and Application of the Principle of Universal Jurisdiction New York, 16 October 2019,’ (United Nations, 16 October 2019) <https://www.un.org/en/ga/sixth/74/pdfs/statements/universal_jurisdiction/china_e.pdf> accessed 13 August 2022.

## 7. CASES

### Australia

*Luxembourg v Kingdom of Spain*

*Infrastructure Limited and Energía Solar Luxembourg v Kingdom of Spain* [2013] ICSID 368 *(Case ARB/13/36 Eiser)*.

### Belgium

*Mobutu v Cotoni*

*Mobutu v SA Cotoni* [1988] Civil Court of Brussels 169, [1988] 91 ILR 259.

### France

Gaddafi case

General Prosecutor at the Court of Appeal of Paris, Appeal judgment, Appeal No 00-87215, Decision No 64, (2001) 125 ILR 490, (2001).

**South Africa**

*DA v Minister of International Relations*

*Democratic Alliance v Minister of International Relations and Co-Operation And Others* 2018 (2) SACR 654 (GP).

*Minister of Justice v SALC*

*Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA).

**United Kingdom**

*Pinochet case*

*R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* (No. 3) [2000] 1 AC 147.

**United States of America**

*Kline v Kaneko*

*Kline v Kaneko* [1988] SDNY 87 Civ 6479, [1988] RJW 685 F. Supp. 386.

*Kiobel v Royal Dutch Petroleum*

*Kiobel v Royal Dutch Petroleum* [2013] U.S. LEXIS 3159.

*Kilroy v Windsor*

*Kilroy v Windsor* [1978] Ch 78-291, [1978] U.S. Dist. LEXIS 20419.

*Mexico v Hoffman*

*Republic of Mexico v Hoffman*, 324 U.S. 1945 (30).

*Sosa v Alvarez-Machain*

*Sosa v Alvarez-Machain* [2004] U.S. LEXIS 4763.

*Schooner v McFaddon*

*The Schooner Exchange v. McFaddon* [1812] 11 US (116) 137.

*Tachiona v US*

*Tachiona v United States [2004] 386 F.3d 205, (2004) U.S. App. LEXIS 20879.*

*US v Lee*

*United States v Lee* 106 U.S. 1882 (196).

*US v Smith*

*United States v Smith* [1820] (161) 18 US (5 Wheat) 153.

*Ye v Zemin*

*Wei Ye v Jiang Zemin* [2004] 383 F.3d 620, (2004) U.S. App. LEXIS 18944.

**International Court of Justice**

*Belgium v Senegal*

*Belgium v Senegal* [2012] ICJ GL No 144, ICGJ 437 (ICJ 2012).

*Arrest Warrant case*

*Democratic Republic of Congo v Belgium* [2002] ICJ Rep (75) ICGJ 22.

*Prosecutor v Kanyabashi*

*The Prosecutor v Joseph Kanyabashi* ICTR case 96-15-T.

*Prosecutor v Al-Bashir*

*The Prosecutor v Omar Hassan Ahmad Al-Bashir* [2018] ICC-02/05-01/ 09-302.

*Equatorial Guinea v France*

*Equatorial Guinea v France* [2020] ICJ-06/06-2018 163.

*Germany v Italy*

*Germany v Italy* [2012] ICJ-06/07-2010 143.

*Marcos v Swiss Police*

*Marcos v Fed. Dep't of Police, Tribunal fédéral [TF]* [1989] FSC 155 ILR 6202.

## 8. LEGISLATION

### Austria

Austrian Penal Code

Penal Code of Austria 1966.

**Australia**

Australian Criminal Code

Criminal Code Act No 12 of 1995.

Immunities Australia

Foreign States Immunities Act No 196 of 1985.

International Criminal Court Act

International Criminal Court (Consequential Amendments) Act No 42 of 2002.

**Belgium**

Humanitarian Law Act

Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law (Belgium 1999).

**People's Republic of China (China)**

Criminal Law

Criminal Law of the People's Republic of China 1997.

**South Africa**

Constitution SA

Constitution of the Republic of South Africa Act No 108 of 1996.

Diplomatic Immunities and Privileges Act

Diplomatic Immunities and Privileges Act No 37 of 2001.

States Immunities SA

Foreign States Immunities Act No 87 of 1981.

**United Kingdom**

Criminal Justice Act

Criminal Justice Act 1988.

Geneva Conventions Act

Geneva Conventions Act 1957.

International Criminal Court Act

International Criminal Court Act 2001.

Immunity UK

State Immunity Act 1978.

**United States**

Civil Rights Act 1964.

Civil Rights Act 1964.

Foreign Immunities Act

Foreign Sovereign Immunities Act 1976.

Terrorism Act

Justice against Sponsors of Terrorism Act 2016.

USA Patriot Act

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act 2001.

**INTERNATIONAL INSTRUMENTS**

**Treaties and Conventions**

UNCICJ.

Charter of the United Nations and Statute of the International Court of Justice 1945.

ECSI.

European Convention on State Immunity, European Treaty Series No. 74 of 1972.

UNCIMT.

The United Nations Charter of the International Military Tribunal 1945.

UNPPCG.

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide 1948.

CTCIDTP.

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

ICSPCA.

The International Convention on the Suppression and Punishment of the Crime of Apartheid 1973.

VCDR.

Vienna Convention on Diplomatic Relations 1961.