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A PROGRESSIVE INTERPRETATION OF THE DOCTRINE OF SOVEREIGNTY: AN ELIXIR TO THE ENFORCEMENT OF ARTICLE 27 OF THE ROME STATUTE

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ABSTRACT

The final Diplomatic Conference in Rome witnessed sovereign States who sought for a statute that would specifically accommodate their own particular domestic constitutions. They rather ended up creating an international justice system that is sui generis in nature carrying the imprimatur of many legal systems but closely resembling none and yet very involving. Without assurances of express or implied exclusion of potential constitutional issues, the overwhelming majority of States that participated in the Rome Conference consciously voted in favor of the Statute with all its implications. Eventually, this Treaty established the International Criminal Court (ICC) and re-echoed the Nuremberg dogma of individual criminal responsibility under its article 27. The whole of the Rome Statute was entirely an act of sovereignty, but history has clearly shown that article 27 of the Statute, though elegant to sustain responsible governance, yet, for sovereignty, it is a walk in the dark. Hence, criminal accountability of sovereigns for international crimes has consistently remained an uphill

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task, indeed a nightmare in a broad daylight. The question is can sovereignty be made accountable for its crime. This study aims at a progressive interpretation of the doctrine of sovereignty and its immunity clauses as a panacea to the enforcement of Article 27 of the Rome Statue. The objective is to highlight effect of the doctrine of sovereignty on article 27 of the Statute and discuss the need to enhance global responsible sovereignty. The study adopts doctrinal designs using analytical approach with reliance made on Statutes, case law, law reviews and data in web-based sources all subjected to content analysis. The research found that without a progressive interpretation of the doctrine of sovereignty in line with Article 27 of the Rome Statute, enforcement of individual criminal responsibility of sitting sovereigns will remain an uphill task.

Keywords: Sovereignty, progressive interpretation, sovereign immunity, Article 27 of the Rome Statute.

1. INTRODUCTION

The concept of Sovereignty depicts the complete power to govern a country, the supreme dominion or authority to rule a nation. It is the residuum of power which a State possesses within the confines laid down by international law. According to the doctrine of sovereignty, States are subject to no higher laws except laws created by their consent through treaties, customs and general principles as recognized by them. The present challenges encountered by the international criminal court in its effort to arrest the Former Sudanese President- Al Bashir before his dethronement, and to prosecute him for international crimes, bring to the front burner the palpable tension between sovereignty and international justice. The truth is that whereas sovereignty may not be any longer considered an absolute right,[1] the principle of sovereignty still thrives in international law.[2] It presents sovereignty as incompatible with the aspirations of the Rome Statute and that of international criminal law especially in the quest for

[1] Winston P. Nagan, 'Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia'Volume 6 *DukeJournal of Comparative &International Law*(1995) 127, 142.

[2] See also William C. Plouffe, 'Sovereignty in the "New World Order": The Once and Future Position of the United States, A Merlinesque Task of Quasi-Legal Definition'*, vol*4 *TULSA Journal of Comparative &International Law*. (1996) 49, 53.

individual criminal accountability of Sovereigns for international crimes.[3] Consequently, sovereignty and international justice are simultaneously making conflicting demands on the international community. So that while sovereignty is struggling to maintain its traditional aura and vehemently advocates for non-interference, international criminal law, in hot pursuit of international justice maintains the principle of individual accountability irrespective of official rank and status. Due to this struggle, State Parties and signatories to the Statute consistently hide under the doctrine of sovereignty to circumvent honest commitment to combat international crimes or co-operate with the ICC to arrest and prosecute some indicted sitting presidents and to face the demands of responsible sovereignty, probably for fear of becoming the next victim. This conflict in the past, crippled prior attempts to establish an international criminal court. The same tension reared its ugly head during the Diplomatic Rome Conference. Hence, States sought to be assured that the creation of the International Criminal Court (ICC) with such defined jurisdiction will not strip them of their sovereignty. The drafters sought for a compromise between the competing interests and limited the jurisdiction of the proposed Tribunal to crimes which have received unequivocal universal condemnation[4]and equally adopted the principle of complementarity which is a double edged machinery. Thus, while the doctrine serves as a check on the ability of sovereignty to prosecute international crimes, it is also meant to protect sovereignty. Notwithstanding these tensions and struggles, sovereignty in spite of "itself" signed the Rome statute into a binding legal instrument and established the International criminal court. Ironically, the viability of the court will depend on the continuation of individual accountability under international criminal law irrespective of official rank as was in fact first established at Nuremberg. However, from all indications especially the challenges and promises of the ICC Statute in the pursuit of international justice, it is merely academic to argue that sovereignty is no longer alive in

[3] Joel Cavicchia, 'The Prospect for an International Criminal Court in the 1990s', 10 *Dick. Journal of International law* (1992). 223, 223.

[4] *1996 Proceedings,* see also: Caroling Krass, 'Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court',*22 Deny. J. Int'l L. & Pol'y* (1994) 317, 362 at 352 See generally: Patricia A. McKeon: 'An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice', volume 2*Journal of Civil Rights and Economic Development,(*1997)http://scholarship.law.stjohns.edu/jcred/vol12/iss2/8, accessed 23 February 2023.549.

international law and international criminal law since the coming into force of the Rome Statute. To accept such assumptions without reflection will weaken the effort to make the system functional and effective. This research is in four parts. Part I introduced the study and examined the doctrine of Sovereignty, Immunity and Sovereign Immunity. Part II discussed "The Institution of Sovereignty" and the Need to Preserve the Sanctity without Compromise. The study in Part III is on a voyage of progressive interpretation of the doctrine of sovereignty, sovereign immunity and immunity clauses in Line with Article 27 of the Rome Statue for a responsible sovereignty. Part V makes necessary recommendations and concludes the research.

2. SOVEREIGNTY AND IMMUNITY

Immunity flows from the idea of State sovereignty. Under International Law, immunity from jurisdiction is granted to certain persons, namely State sovereigns, their diplomatic and consular representatives, and international organizations. Thus, since States are independent and legally equal, no State may exercise jurisdiction over another State without its consent. It is a limitation imposed by International Law upon the sovereignty of a State. Personal immunity (*immunity ratione personae*) and functional immunity (*immunity ratione materiae)* are two types of international immunity under customary international law by which officials of one State are immune from another State's jurisdiction.

Personal immunity is attached to a category of State officials by virtue of their office such as Heads of State, Heads of Government and all foreign ministers.[5] It is a kind of absolute immunity since they cover all acts of the official, whether done in a public or private capacity, while on an official or private visit, or prior to taking office.[6] The absoluteness of the immunity flows from the functional rationale behind that immunity which is to enable them discharge their official duties effectively on behalf of their

[5] Arthur Watts "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994) 247 Recueil des Cours 13; Case Concerning the Arrest Warrant *of 11 April 2000* (Congo v Belgium)Judgment (2002) ICJ Rep 1, para 51 Judgment of the Court (Arrest Warrant *Case*). Diplomatic agents have personal immunity but only in the State to which they are sent. See Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, arts 29, 31.

[6] Arrest Warrant Case, paras 54–55 Judgment of the Court. But note Watts, 73–74: A Head of State may visit another State privately rather than on an official visit. … His position in international law is in such circumstances at best uncertain.

States. Thus, on leaving office, the rationale becomes inapplicable and personal immunity ceases, leaving the former official with recourse solely to immunity *ratione materiae*.[7]

Functional immunity is rather broader in scope. It provides all State officials with immunity from foreign jurisdiction but only in respect of their official acts. It rests on the idea that the official is acting as a mere instrument of the State, and as such, the official action is attributable only to the State, not the individual. As a necessary consequence, the immunity continues even after the official has left office.[8] The rationale behind this functional immunity is that it precludes foreign States from sitting in judgment of the conduct of other States,[9] something that would damage the foreign State's dignity.[10] Such immunity therefore, acts as a procedural bar to the initiation of proceedings against protected persons by foreign jurisdictions. The official's State of nationality may nevertheless waive the immunity.[11] The International Criminal Tribunal for the former Yugoslavia (ICTY),International Criminal Tribunal for Rwanda(ICTR) and International Criminal Court (ICC) Statutes explicitly exclude the availability of functional immunities in cases of international crimes.[12] Only the ICC Statute expressly excludes the availability of personal immunities in cases of international crimes.[13] Indeed, the ICC Statute goes as far as requesting States to remove immunities regarding the perpetration of international crimes by enacting appropriate legislation in their national laws.[14] However, the waiver of immunity is qualified in Article 98(1) of the ICC Statute with respect to non-party States. In practice, the ICTY indicted two sitting Heads of State although the court's jurisdiction was only effectively exercised once they

[7] See also:Regina v Bow Street Magistrate, Ex Parte Pinochet (No 3*)* [2001] 1 AC 147, 202 (HL) Lord BrowneWilkinson,210 Lord Goff [*Pinochet No 3*].

[8]Prosecutor v Tihomir Blaškić(29 October 1997) IT9514, paras 38 and 41 (Appeals Chamber, ICTY).

[9] Hazel Fox, *The Law of State Immunity* (Oxford University Press, New York, 2002) 353–354.

[10]Hugh King, Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute (2006) 4 *NZJPIL* 272.

[11]Advisory Service on International Humanitarian Law, General Principles of Jurisdiction https://www.icrc.org/en/download/file/1070/general-principles-of-criminal-law. Accessed 13 March 2023.

[12](Art. 7(2), ICTY Statute; Art. 6(2), ICTR Statute; Art. 27(1), ICC Statute).

[13](Art. 27(2).

[14](Arts 27 and 88).

had left office. However, the Universality principle[15]is now recognized in international law.

Although rules of sovereign immunity form part of customary International Law, today they are incorporated either in international treaties or in national statutes of certain States.[16] A State may waive its immunity from jurisdiction and consequently submits itself to the jurisdiction of an international or regional court. Traditionally, State representatives are granted immunity from foreign jurisdiction to allow them to effectively exercise their official functions and represent the State in international relations. It is worthy of note that the United Nations enjoy complete immunity from all legal process. Its premises, assets, archives and documents are inviolable.[17] It is exempt from direct taxes and customs duties. The international community since after the World War II has moved increasingly toward the development of a system of international jurisdiction, complementary to that of domestic courts, to try people accused of international crimes. The system is mainly two-fold: on one hand, it relies on the establishment of ad hoc tribunals set up after a conflict; on the other, it runs with the newly created International Criminal Court.

3. SOVEREIGN IMMUNITY `

The doctrine of sovereign immunity is a legal concept derived from English common law which states that a State cannot be litigated in the courts under its jurisdiction by its own nations. Under this doctrine, when a wrong is done, someone else must have done it, since the King can do no wrong. On the other hand, “the King must not, and was not allowed and not entitled to do wrong. It means that the King cannot do a wrong. Also, the

[15] The universality principle, in its broad sense, implies that a State can claim jurisdiction over certain crimes committed by any person anywhere in the world, without any required connection to territory, nationality or special State interest. Before the Second World War, such universal jurisdiction was considered as contrary to International Law by the Common Law countries, except for acts regarded as crimes in all countries, and crimes against the international community as a whole such as piracy and slave trade. However, after the Second World War, universal jurisdiction became universally recognized over certain acts considered as international crimes which are committed against the international community as a whole or in violation of International Law and punishable under it, such as war crimes, crimes against peace and crimes against humanity.

[16] Such as the 1972 European Convention on State Immunity, the 1976 U.S Foreign Sovereign Immunities Act and the 1978 U.K State Immunities Act.

[17] The 1946 General Conventions on the Privileges and Immunities of the United Nations, which sets out the immunities of the United Nations and its personnel.

doctrine of State immunity is justified based on the basis of the equality, independence and dignity of the State. The jurisprudence behind the doctrine of sovereign immunity flows from the fact that since States are independent and equal, they should not be subjected to the jurisdiction of other States unless and until they give their consent.[18] In other words, the concept of State immunity is based on two international law maxims *par in parem non habet imperium*, and par *in parem non habet juris dictionem*. [19] The enjoyment of this privilege is based on reciprocity and comity. It ensures that States are unimpeded in the exercise of their functions.[20] In International Law, "sovereign immunity" refers to the legal rules and principles determining the conditions under which a State may claim exemption from the jurisdiction of another State. It is a creation of customary International Law and derives from the principles of independence and equality of sovereign States. By virtue of this principle one sovereign State cannot be sued before the courts of another sovereign State without its consent. Thus, the question of immunity is at the same time a question of jurisdiction for it is only when the court already has jurisdiction that it will become meaningful to speak of immunity or exemption from it. For this reason, sovereign immunity is also referred to as "jurisdictional immunity" or "immunity from jurisdiction."[21]

The general rule in criminal law is that an indictment lies against all persons who actually commit, or who procure or assist in the commission of an indictable offence, or who knowingly harbour a traitor or assist persons who have committed offence. All persons who aid, abet, counsel or procure the offence are treated as principal offenders.[22] However under waiver of immunity, proceedings brought against a person entitled to immunity are without jurisdiction unless and until there has been a waiver which gives

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[18] A Kaczorowska, *Public International Law*, 4th ed. (London: Routledge, 2010) 362.

[19] These Latin maxims respectively mean that equals have no sovereignty over each other and that a sovereign State cannot exercise jurisdiction over another sovereign State. These are general principles of international law forming the basis of State immunity. Because of these principles a sovereign State cannot exercise jurisdiction over another sovereign state.

[20] U O Umozurike, *Introduction to International Law*3rd ed.,(Ibadan: Spectrum Books Limited, 2007) 90.

[21]Xiaodong Yang, sovereign immunity http://www.oxfordbibliographies.com/view/document/obo9780199796953/obo-9780199796953-0018.xml, accessed 13 March 2023.

[22]Archbold Pleading, Evidence and Practice in Criminal Law, 42nded (London: sweet & Maxwell, 1941) 24.

jurisdiction to the court.[23] Consequently, a conviction obtained against a person entitled to immunity will be quashed where there has been no waiver of the said immunity.[24] With respect to sovereign immunity in international law, the sovereign is immune from criminal jurisdiction. When sovereign immunity is claimed, proper course is for the trial judge to cause the appropriate officer of the court to write to the foreign and commonwealth secretary of States to ask for his certificate as to the status of the person claiming immunity. Such certificate is conclusive evidence of the position[25]and no further investigation should be permitted.

A sovereign is a person, body or State vested with independent and supreme authority. He is the ruler of an independent State[26] and not accountable for acts "done by it in the exercise of sovereign authority."[27] Thus it was held that 'the forcible confiscation and retention of 10 civilian aircrafts from Kuwait by Iraq Airways Corporation[28] at the direction of the government, was an activity done in the exercise of "sovereign authority" within the meaning of Sovereignty.'[29]Until recently, sovereignty was regarded as relating to a particular individual in a State and not as an abstract manifestation of the existence and power of the State.[30] The sovereign was a definable person, to whom allegiance was due. This personalization was gradually replaced by the abstract concept of State sovereignty but the basic mystique remained.

Generally speaking, sovereign immunity is the doctrine that the sovereign or State cannot commit a legal wrong and is immune from civil suit or criminal prosecution. Though this is commonly believed to be rooted in English law, it is actually rooted in the inherent nature of power and the ability of those who hold power to shield themselves.[31]With regards to State immunity, there is a distinction between *acta de jure imperii* i.e., acts

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[23] Article 32 in schedule 1 to the Diplomatic Privileges Act 1964,

[24]R v Madon (1961)2 QB 1; 45 CR APP R 80.

[25]Mighell v Sultan of Johore *(1894) 1 QB 153;* Duff Development Co. Ltd v Kelantan Government(1924) AC 797.

[26]A G Bryan, 7th Ed (West Group St. Paul Minn, 1999) 1401.

[27] State Immunity Act 1978 (c33), s 14(2) (a).

[28] A corporation owned by the Republic of Iraq.

[29]Kuwait Airways Corporation v Iraq Airways Corporation, The Times 27 October 1993. See also: D Greenberg, *Stroud's Judicial Dictionary of Words and Phrases*, 7thed ,vol 3 (South Asia: Sweet & Maxwell 2008) 2580.

[30] MU Shaw, *International Law*, 4thed(Cambridge University Press 2002) 492.

[31] The Lactic Law Library, http://www.lectlaw.com/def2/s/03htm , accessed 12 July 2022.

of a public and governmental nature and *acta jure gestionis* i.e. private acts such as commercial transactions.[32]

In England, sovereign immunity was predicated on the concept that the sovereign can do no wrong. However, since the American Revolution, the American rulers came up with another rationale to protect their power. For example, the sovereign is exempt from suit on the practical ground that there can be no legal right against the authority that makes the law on which the right depends.[33] Statutes waiving the sovereign immunity of the United States must be construed strictly in favour of the sovereign. In a constitutional monarch the sovereign is the historical origin of the authority which creates the courts. Thus, the courts had no power to compel the sovereign to be bound by the courts, as they were created by the sovereign for the protection of his or her subjects.

The Spanish monarch for example is personally immune from prosecution for acts committed by government ministers in the Kings name.[34] The person of the King of Spain is inviolable and shall not be held accountable. His acts shall always be countersigned in the manner established in Section 64 of the constitution[35] and without such counter signature they shall not be valid, except as provided under section 65(2). The section simply states that the king freely appoints and dismisses civil and military members of his household.

In Nigeria, section 308 of the Constitution of the Federal Republic of Nigeria, 1999(fourth Alteration)[36] provides immunity from court proceedings for the president and his vice, the governors of States and their deputies. This immunity extends to acts done in their official capacities so that they are not responsible for acts done on behalf of the State. However, it is worthy of note that the immunity does not extend to acts done in abuse of the powers of their office of which they are liable upon the expiration of their tenure.

In Australia, there is no automatic crown immunity. Although the crown may be explicitly or implicitly immune from any particular statute.

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[32]Kuwait Airways corp. v Iraqi Airways *,* (No 2) (1995) 1 Lloyds Rep 25 CA.

[33]McMahon v United States.342 U.S. 25, 27, (1951).

[34]Spanish constitution of 1978, Title II, Section 56, (3).

[35]To be countersigned by the president of the Government and when appropriate by the competent ministers.

[36](hereinafter referred to as the 1999 Constitution).

There is a rebuttable presumption that the crown is not bound by a statute.[37] The crown's immunity may also apply to other parties in certain circumstances.[38]

In Belgium, the Kings person is inviolable; his ministers are accountable.[39] Similarly, Article 13 of the Constitution of Denmark states that the King shall not be answerable for his actions, his person shall be sacrosanct. The ministers shall be responsible for the conduct of the government and their responsibility shall be determined by statute.[40]
In Malaysia, prior to 1993, rulers in their personal capacity were immune from any proceedings brought against them. However, an amendment to the constitution in 1993 made it possible to bring proceedings against the King or any ruler of the component State in the special court.[41]Article 5 of the constitution of Norway makes the Kings personality sacred; he cannot be censured on accused. The responsibility rests with his counsel.[42]

In Sri Lanka, the president has sovereign immunity.[43] Article 7, chapter 5 of the Swedish Instrument of government states that the King may not be prosecuted for his actions, nor may a Regent be prosecuted for his actions as Head of State. This only concerns the King as a private person, since he does not appoint in the government, nor do any public officials act in his name. It does not concern other members of the Royal family, except in such cases as they are exercising the office of Regent when the King is unable to serve. It is disputed among Swedish constitutional lawyers

[37]*Bropho v State of Western Australia* [2005] AUIndig Law Rpr 6; (2005) 9(1) Australian Indigenous Law Reporter 37 http://www.austlii.edu.au/au/journals/AUIndigLawRpr/2005/6.html, accessed 13 March 2023.

[38] See also: *Australian Competition and Consumer Commission v. Baxter Healthcare*. **Pty Limited** [2007] HCA 38, 232 CLR 1; 81 ALJR 1622; 237 ALR 512

[39] Belgian House of Representatives: The Belgian Constitution, Article 88 of the Belgium constitution. https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf, accessed 1 May 2023.

[40] ICL Document Status; Denmark Constitution; https://www.constituteproject.org/constitution/Denmark_1953.pdf?lang=en accessed 13 March 2023.

[41]Malaysian Act 1963. See also: Federal Constitution of Malaysia 1963 as amended http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=44034&p_country=MYS&p_count=199 accessed 13 March 2023.

[42]DLOVDATA: The Constitution of the kingdom of Norway:http://www.icla.up.ac.za/images/un/use-of-force/western-europe others/Norway/Constitution%20Norway%201814.pdf accessed 13 March 2023.

[43] IDEA; The Scope and the Content of the Sri Lankan Constitution: Perspectives of Opinion Leaders: https://www.constituteproject.org/constitution/Sri_Lanka_2019.pdf?lang=en.Accessed 13 March 2023.

whether the article also implies that the king is immune against lawsuits in civil cases, which do not involve prosecution.

The Crown Proceeding Act of 1947 drastically altered the position for the United Kingdom and made the government generally liable, with limited exceptions, in tort and contract. Even before then it was possible to claim against the crown with the Attorney General's fiat. Alternatively, Crown servants could be sued in place of the crown, and the crown as a matter of course paid any sums due. Also Mandamus and prohibition were always available against ministers because they derive from the royal prerogative.[44] However as of 2011 lawsuit against the sovereign in his or her personal and private capacity remained inadmissible in British law. The State Immunity Act 1978 regulates the extent to which foreign States are subject to the jurisdiction of British Courts.[45]

In the United States, the Federal Government has sovereign immunity and may not be sued unless it has waived its immunity or consented to suit. The United States has waived sovereign immunity to a limited extent, mainly through the Federal Tort Claims Act, which waives the immunity if a tortuous act of a federal employee causes damage.[46] The Tucker Act, also waives the immunity over claims arising out of contracts to which the federal government is a party.[47] In *Hans v. Louisiana*[48] the supreme court of the United States held that the eleventh Amendment re-affirms that States possess sovereign immunity and are therefore generally immune from being sued in federal court without their consent. In later cases, the Supreme Court considerably strengthened State sovereign immunity. For example, in *Blatchford v. Native village of Noatak*[49] the court explained that the Eleventh Amendment stands not so much for what it says, but for the presupposition of the constitutional structure which it confirms: that the States entered the federal system with their sovereignty

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[44]House of Common: Political and Constitutional Reform Committee; The UK Constitution: https://www.legislation.gov.uk/ukpga/Geo6/10-11/44/contents accessed 1 May 2023.

[45]*Ibid*.

[46]Federal Tort Claims Act II - US Department of Justice, https://www.justice.gov/sites/default/files/usao/legacy/2011/02/03/usab5901.pdf accessed 22 November 2019.
Tucker Act of 1887, Legal information institute https://www.law.cornell.edu/wex/tucker_act,accessed 1 May 2023.

[48]134 U S 1 (1890). https://supreme.justia.com/cases/federal/us/134/1/, accessed 19 April 2019.

[49] (89-1782), 501 U.S. 775 (1991) https://www.law.cornell.edu/supct/html/89-1782.ZS.html, accessed 17 March 2023.

intact; that the judicial authority in Article III is limited by this sovereignty and that a State will therefore not be subject to suit in federal court unless it has consented to the suit, either expressly or in the plan of the convention.

In International Law, sovereign immunity is available to countries in International Court but if they are acting more as a contracting body,[50] the sovereign immunity may not be available to them. Also, under International Law, and subject to some conditions, countries are immune from legal proceedings in another State. This is a principle of law which stems from Customary International Law.[51]However, in recent times and with the development of international criminal law, State immunity is undergoing some challenges and metamorphoses. This is because State immunity seems to shield Heads of States and other high-ranking officials from being held accountable for gross human right violations.[52] Thus, the removal of immunity with regard to criminal responsibility for perpetrator of international crimes culminated in the establishment of the International Criminal Court. Hence, The Rome Statute categorically states:

> Immunities or special procedural rules which may attach to the official capacity of a person whether under national or international law shall not bar the court from exercising its jurisdiction over such person.[53]

It has been argued that the increasing attention and sensitivity of human rights violations, crimes against humanity and humanitarian law abuses raise issues of individual criminal responsibility in the community of sovereign States.[54] Furthermore, there is an acknowledgment by the comity of nations that certain rules such as the prohibition of crimes of torture and others[55] are of *jus cogens* character and therefore should prevail over any other rules including the rules of State immunity. Finally, international law jurists maintain that the concept of State immunity is

[50]e.g. making agreements in regards to extracting oil and selling it.

[51] P Malanczuk, et al, *Akehurst's Modern introduction to International Law* 7thed (Routledge 1997) 118.

[52]A Kaczorowska ,*supra,* 19.

[53] The International Criminal Court Statute, Article 27 (2).

[54]R Thaukur, *The United Nations: Peace and Security*, (Cambridge University Press 2008) 116.

[55] Like genocide, crimes against humanity, war crimes and aggression. See: A Kaczorowska, *supra,* 19.

incompatible with basic human rights such as the right to a remedy, the right to adequate protection and the right of access to a court.[56]

3.1 **The "Institution of Sovereignty" and the Need to Preserve the Sanctity without Compromise**

The "Institution of Sovereignty" is a recognized and respected institution in international law. Hence, it is surrounded with immunities, Personal and functional with clauses that mystify the very nature of sovereignty. However, the Rome Statute which regulates international crimes[57], in its quest for international justice has dared the shield of sovereignty and in its article 27 provides for Irrelevance of Official Capacity for international crimes. Thus, Article 27 of the Statute states:

> i. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> ii. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The challenging question is, whether sovereignty in the face of its immunities be made subject to the International Criminal Court, be made accountable for international crimes and to what extent? The answer is in the affirmative according to the provisions of the Rome Statute. It is trite that in a system where the rule of law operates, the law is supreme since no one is above the law irrespective of rank, class and title. The crimes enumerated in the Rome statute nevertheless reflect a combination of treaty law, customary law and human rights law.[58]Treaties are formal

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[56]R Thaukur, *supra*.

[57]Articles 5,6,7, and 8 of the Rome Statute.

[58]*See,e.g.,* A/Res/46/242 (Bosnia); A/Res/46/133 (El Salvador); AfRes/46/134 (Iraq); A/Res/46/132(Burma).

agreements between states, while customary law is derived from state practice and international legal norms. Both Treaties and customary law depend on state consent, which is a manifestation of the principle of sovereignty. Human rights law is a hybrid between treaties and customary international law, derived from contemporary, core human values. Of course, Human rights laws vary considerably from state to state and bind parties without consent. It is an essential feature of international law. The UN General Assembly routinely adopts resolutions concerning human rights. To this extent, there must be a shift in emphasis to bring a balance between the sovereign rights of States and the authority of the larger international community[59] in justice issues.

The regular enforcement of criminal law has always required coercion, and the authority to deploy coercive powers internationally remains firmly in the hand of States. These States make their decisions on the basis of national interests and often times they bear no necessary relationship to the needs of international justice. Enforcement decisions take place in a legalized context in which there is often times great pressure to vindicate the rule of law. Taken to a logical extreme, routine enforcement of international criminal law would call for a qualitatively different approach to the deployment of coercive power to maintain international peace and security. However, such deployment no doubt remains a pre-eminently politicized area of international law. It seems that the best remaining hope for the entrenchment of international criminal law as a regular feature of the international system is the development of a deeply rooted culture of accountability by States.[60] Hence, the ICC aims at and indeed should be understood as aiming at contributing to the emergence of such a culture. May be the Court is yet to achieve this aim.

The concept of Sovereignty and its ramification in international law is very much alive and actively affects the application of international criminal law. This study finds that the case of Al Bashir and the non-cooperation of some individual States to bring some of the indicted sitting sovereigns into ICC's custody reflect the strength of the principles of sovereignty and non-intervention. Such attitude suggests that the principle

[59] Daniel B. Pickard, 'Comment on the Security Council Resolution 808: A Step Toward a Permanent International Criminal Court for the Prosecution of International Crimes and Human Rights Violations', *25 Golden Gate University Law. Review*.(1995) 435, 439.

[60] In this case, they are States where sovereigns/presidents and/or nationals are indicted for violating international criminal law.

of sovereignty which protects the very "institution of Sovereignty" and the person occupying that sit is weighty. Obviously, the principle of non-intervention which stems from the doctrine of sovereignty is clashing directly with the need for international justice and the protection of human right. Thus, the call for an overhaul of the UN Charter.

Understandably, sovereign inviolability is not necessarily about the person who is occupying the seat at the time but about the "institution of sovereignty" itself. Therefore, in order to make individual criminal accountability under Article 27 of the Rome Statute practicable, the statute must come up with a legal and necessary strategy of responding to sovereign lawlessness and impunity which falls under international crime an which is grossly crippling the entire globe. Such strategy has to be directed towards preserving the "institution of Sovereignty" itself, the entire legal order and not necessarily preserving the person of the wrong doer who is occupying the sovereign seat at the material time but perpetrating impunity contrary to the spirit and intendment of international criminal law and what sovereignty stands for. The institution of sovereignty must be separated from the wrong doer who is occupying the seat at any time, perpetrating crimes against humanity under sovereign garb and trampling on human rights. The law can pierce through the sovereign garb to see who is actually responsible and then, hold him accountable for the violation. This is because there is need to avoid and stop the ugly and trending culture of human right abuse and impunity. Consequently, if the rule of law is to be strictly and properly observed by both the domestic and international community, it will be understood that indulging in acts that constitute genocide or crime against humanity violates the sacredness of the very "institution of sovereignty" which is structured to be an epitome of integrity, security and sanctity. Since the "institution of sovereignty" is so structured therefore, prosecuting an offending sovereign for a crime while on seat, contradicts "sovereignty". It ridicules the principle of due process and encourages rascality. To retain the sanctity of sovereignty, the offending sovereign must be impeached to make him step down from office and be available for his prosecution. This is in line with due process of law. The offending sovereign has to be first removed from office by way of impeachment under the domestic laws through which he was elected into

office[61]. His prosecution should be strictly limited to actions which are opposed to his official function and which a sovereign does not undertake in his role as a sovereign.

The line between the official and unofficial acts of a sovereign is always thin in this regard. For instance, the entire powers of government are vested in the President. The sitting President is elected by the whole State, and no one part of the State has or should have the power to undo a decision of the whole State to the extent of removing him from office. His removal has to be done by those who put him in power or by their representative body acting in line with the domestic constitution. Obviously, the Rome Statute is not part of the statutes that brought any sitting president to power. Therefore, following this progressive interpretation, since the ICC is not part of the Sate that elected a president into office, it will be difficult for the ICC to remove him from office without the cooperation of State/domestic body that elected him into office. Although, the sovereign may be a signatory to the Rome treaty, he took that action as a sovereign and on behalf of his country. If he is indicted for an international crime, his sovereign garb has to be extricated from him first by the State parliament by way of impeachment, to enable him face his charges. The "institution of sovereignty" has to be saved from ridicule. That is why his impeachment is necessary. Why the international criminal court is facing a big challenge in arresting indicted sitting presidents apart from the immunity clause is because State parliaments have not made it possible by impeaching indicted presidents upon ICC's indictment. If the doctrine of sovereignty is not progressively interpreted as submitted above and not properly addressed by the international community, the ICC may continue to face this challenge of arresting indicted sitting presidents. Presently, State immunity laws are opposing the interest of Article 27 of the Rome Statute. These State laws are to be viewed reviewed, to facilitate the implementation of Article 27 of the Rome Statute, otherwise enforcement will remain an uphill task. The State immunity laws must be reviewed and

[61] In the case of President Jacob Zuma of South Africa in Johannesburg in December in 2018 his own party, the African National Congress, ordered him to step down because his nine year presidency has been mired in scandals and accusations of widespread corruption in his government. According to the party member, his continued stay will erode the renewed hope and confidence among South Africans. Since party election in December in which Mr Ramaphosa defeated Mr. Zuma's Preferred candidate for the leadership of the ANC. Norimitsu Onishi:www.nytimes.com. accessed 2 December 2021.

re- drafted in such a way that will make Article 27 of the Rome Statute functional. The domestic parliament must also synergize with the ICC in the interest of justice. It needs a combined force of the State concerned, the ruling party, the lawmakers empowered by the domestic constitution to get the indicted sovereign out of office and make him available for ICC's prosecution. This is because, before a sitting president/sovereign is prosecuted for a crime, the ideal practice should be to get him impeached so that he steps down from office since the integrity of the 'institution of sovereignty' is inviolable.

It is submitted that any attempt to arrest and prosecute a sovereign while in office by an independent court would also violate the Constitutional provisions on appointments, election and removal of a sitting president. Sovereignty is "constitutional independence", which can neither be shared nor be divided. The only possible exception to this could be found in the fight for protection of human right and to curb crimes against humanity. While it can be argued that international law is the child of sovereignty,[62] there is also an opinion that sovereignty is a passport for entry into an already constituted international community.[63] It merely sees constitutional independence as a means to lure States into an international society, where their sovereignty can be regulated through treaties and other sets of norms. The ICC seems to have led to a divided or truncated sovereignty for States. This is because, while the ICC acknowledges the constitutional validity of States, it also undermines its sharing in that absolute authority when States are unwilling and unable genuinely to exercise it in prosecuting international crimes. When States Parties are unwilling and unable genuinely to prosecute international crimes that has taken place in their jurisdiction, the ICC steps in to investigate and prosecute. The ICC believes in responsible sovereignty rather than an absolute authority which sovereigns enjoy over their subjects, but fail to exercise sovereignty genuinely to prosecute international crimes. When States are unwilling and unable genuinely to exercise sovereignty to prosecute international crimes in their territories, they will always be subordinate to the ICC because, the latter possesses the treaty powers to

[62]Gow, James, A Revolution in International Affairs? Security Dialogue. September 2000, 31 (3) 297.

[63] George Sorensen, "Sovereignty: Change and Continuity in a Fundamental Institution", 168-182. in Atul Bharadwaj; International Criminal Court and the Question of Sovereignty, Institute for Defence Studies and Analyses; Strategic Analysis, Vol. 27, No 1, Jan-Mar 2003.

force States to comply with its international obligations as it relates to prosecution of international crimes.

4. **THE MISCONCEPTION ABOUT THE PRINCIPLE OF SOVEREIGNTY AND ITS CONFLICT**

The general misconception about the Principle of Sovereignty is the failure to appreciate that the principle of sovereignty protects the sovereign as long as he carries out his official duties/ function in line with the provisions of the relevant constitution and not otherwise. Obviously, genocide and crimes against humanity are not parts of the official duties/functions of any sovereign/government. Thus, where a State is a party to both the Rome Statute and the Genocide Convention, for example, the International Criminal Court would have inherent jurisdiction over the commission of these crimes especially when the relevant State is unwilling genuinely to prosecute those crimes. More so, since the main attribute of sovereignty is to provide security and protection for its citizens, a sovereign who engages in acts of genocide and/or crimes against humanity against his citizens, is a contradiction to the very "institution of sovereignty" and what that institution stands for. He should therefore be stripped of his sovereign garb to face the law or still voluntarily waive his personal immunity having engaged in acts that are universally condemned by the international community[64], and which acts are against customary international law. By extension**,** sovereignty should not be protected at the expense of human right. A Sovereign can waive its immunities expressly or by implication. Hence, the Legal Implications of Ratification of the Rome Statute and other International Treaties.

Ratification defines the international act whereby a State indicates its consent to be bound to a treaty if parties intended to show their consent by such an act. It is the confirmation of an action which was not previously approved and may not have been authorised by a principal who adopts the acts of his/her agent. The negotiations that precede a treaty are often conducted by delegations representing each of the States involved, meeting

[64]*Quinn v Robinson*, 783 F.2d 776, 799 (9th Cir. 1986) It is stating that human rights violations are abuse of sovereignty if carried out under authority of state. See also M. M. Martinez, 'National Sovereignty and International Organizations 66 (1996) ,cited in Patricia A. McKeon, 'An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice', *Journal of Civil Rights and Economic Development*: Vol. 12: (1997) Iss. 2, Article 8.

at a conference or in another setting. Together they agree on the terms that will bind the signatory States. To become a party to a treaty, a State must express its consent to be bound by the treaty which could be done in a variety of ways, including appending signature on the treaty by a proper representative of the State. A Treaty therefore, becomes binding on States upon ratification and deposit of instruments thereof.[65] However, application at municipal level may depend on the constitutional system of a particular State. Each State is left free by international law to make its own constitutional arrangements for the exercise of its treaty-making power. International law only determines the validity of treaties in the international legal system; that is when and how it becomes binding upon a State as regards other State Parties. It also determines the remedies available on the international plane for its breach. However, it is the national legal system that determines the status or force of law which will be given to a treaty[66]within that legal system.

Under modern treaty practice, however, States often express their consent to be bound by a separate act of ratification that is carried out after signature. For bilateral treaties, this ratification is typically manifested by the exchange of instruments of ratification. For multilateral treaties such as the Rome Statute, it is typically manifested by the deposit of an instrument of ratification or accession with a central depository, such as the United Nations. Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory State to continue the treaty-making process. The signature qualifies the signatory State to proceed to ratification, acceptance or approval. It also creates a legal obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.[67] A representative may sign a treaty "ad referendum", i.e., under the condition

[65] J.N Ezeilo, *Women, Law & Human Rights Global and National Perspectives(Abuja: ACENA PUBLISHERS:2011).*

[66] See also: Articles 18, 26 and 27 of the Vienna Convention on the Law of Treaties 1969.

[67]Articles 10 and 18, Vienna Convention on the Law of Treaties 1969. Under Article 18(b), a State that has expressed its consent to be bound by a treaty is „obliged to refrain from acts which would defeat the object and purpose pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

that the signature is confirmed by his State. In this case, the signature becomes definitive once it is confirmed by the responsible organ.[68]

When a treaty is subject to ratification after signature, the signature is referred to as a "simple signature," but a signature that indicates consent to be bound is referred to as a "definitive signature."[69] Even after the expiration of the period for signing, a State may have the ability to join the treaty by submitting an instrument of accession with the treaty depository, if the treaty so permits.[70]In most democracies, the legislature authorizes the government to ratify treaties through standard legislative procedures by passing a bill. In some other countries[71], parliamentary approval is not required as a general matter but is required for certain categories of treaties. As a result, domestic law will in some instances prevent a country from expressing its consent to be bound to a treaty through signature. When this is the case, the executive will typically have the authority to sign the treaty but will be required to wait to ratify it until the completion of required domestic procedures.

Ratification of international treaties is always accomplished by filing instruments of ratification as provided for in the treaty. The legal implication of ratifying a treaty, including the Rome Statute by any State is that by that ratification the State becomes a party to the treaty and becomes legally bound by the instrument guiding the treaty/statute. In the case of the Rome Statute, the treaty becomes binding on the sovereign including its citizens. It implies membership of the State to the Rome treaty. Furthermore, it implies a peremptory submission to the jurisdiction of the ICC should the sovereigns or any of their citizens engage(s) in international crimes within the ICC's Jurisdiction.

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[68]Article 12 (2) (b), Vienna Convention on the Law of Treaties 1969.

[69]*United Nations Treaty Handbook* (2006) 2-3 <http://untreaty.un.org/English/TreatyHandbookEng.pdf>. accessed 3 may 2019. Some treaties provide that States can express their consent to be legally bound solely upon signature. This method is most commonly used in bilateral treaties and rarely used for multilateral treaties. In the latter case, the entry into force provision of the treaty expressly provides that the treaty will enter into force upon signature by a given number of States.

[70] Accession is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. See also: Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969; United Nations Treaty Handbook, *supra,* 2.

[71]Such as France and Germany.

There is a 'transitional provision' or 'opt-out' clause under Article 124 of the Rome Statute. A State may declare for a period of 7 years after the Rome Statute had come into force that it does not accept the jurisdiction of the ICC with respect to crimes referred to in Article 8 on war crimes, if the crime is alleged to have been committed by its nationals or on its territory. With the single exception of this transitional clause, the Rome Statute prohibits reservations to the treaty.[72]When a State ratifies a treaty it does not mean automatic domestication of the treaty unless the domestic legislation says it does. Domestication is another process altogether. Some domestic laws may provide that a treaty to which it's State is a party has no direct application in domestic law in the absence of implementing legislation. Thus, while signing indicates the intention of a State to take steps to express its consent to be bound by a treaty and also creates an obligation in the period between signing and consent to be bound, and to refrain from acts that would defeat the object and purpose of the treaty. Ratification legally binds a State to implement the treaty subject to valid reservations, understandings and declarations.

In Nigerian for example, a treaty becomes enforceable at the domestic level once incorporated into a national legislation. In *Abacha and Others v Fawehinmi*,[73] the Supreme Court of Nigeria was called upon to interpret the status of the African Charter on Human and Peoples Right, which is a treaty incorporated into the national law by statute vis-à-vis the country's municipal laws including the constitution. The Court held *inter alia* "…where a treaty had been incorporated into a national law as provided in section 12 of the Constitution of the Federal Republic of Nigeria 1999(as amended) , it becomes binding and the court were to give it like effect as all other laws enacted by the National Assembly.

The result is that for the ICC prosecutor to begin an investigation in a country, it is necessary for that country to have ratified this treaty. Nearly two-thirds of the UN member States about 123 States are party to the treaty. Among the exceptions are the largest and most powerful States namely US, Russia, China, India, Pakistan, and Saudi Arabia. The only other way for the ICC to reach these countries is if their forces commit international crimes on the territory of a country that is a party to the Rome

[72] Rome Statute, Article 120.
[73] (2002)3 LRC 296 (SC).See also: J N Ezeilo, *supra,* 159.

Treaty. For example, there is evidence that U.S military forces and intelligence personnel committed war crimes on Afghan soil. In 2004 the government in Kabul decided to ratify the treaty. That is precisely why alleged US crimes in Afghanistan should be a focus of the ICC.

5. PROGRESSIVE INTERPRETATION OF SOVEREIGN IMMUNITY AND IMMUNITY CLAUSES IN LINE WITH ARTICLE 27 OF THE ROME STATUTE.

The simplest interpretation to the reactions of most world sovereigns and State Parties to the Rome Statute towards the implementation of Article 27 of the Statute is manifested in withdrawals of membership and massive non-cooperation by States. "Probably for fear of becoming the next victim or global lethargy or lack of courage to face the demands of "responsible sovereignty." Otherwise, enforcement of Article 27 of the Rome Statute by State Parties who ratified and signed the Statute into a binding legal instrument wouldn't be a contentious issue. Unfortunately, since after signing the treaty into law both State Parties and non-State Parties are most uncomfortable with the enforcement of Article 27 of the treaty where relevant. As a result, most States have failed to prosecute their indicted sitting presidents for crimes against humanity in their various States. They have equally failed to corporate with the International Criminal Court in actualizing most of its arrest warrant against some indicted sitting presidents. Before Al Bashir was dethroned, notwithstanding ICC arrest warrants issued against him, both State Parties and non-State Parties to the Rome Statute allowed Al Bashir free movement in and out of their country without arresting him.

Probably, protection of national security information could be an added reason for non-sovereign co-operation with the ICC for prosecution of indicted sitting presidents. This is because States are often reluctant to share national security information with an international tribunal or court. However, the Rome Statute took care of this fear in Articles 54(3)(f), 57 (3) (c), 93(4), 99(5), and 72 of the Rome Statute. Article 54(3)(f) mandates the prosecutor to ensure the confidentiality of information obtained by him that may jeopardize national security. Article 57 (3) (c) obligates the pre-trial Chambers to provide the necessary protection of national security information. Article 93(4) and 99(5) permits States Parties to deny the ICC requests where it concerns its national security. While article 72 of the

Statute allows the State concerned the right to intervene in the proceedings in order to resolve the issue.

It is very obvious that the ICC needs more support to achieve its purpose and increase its legitimacy. The Court cannot act alone; it needs the support of states and international organizations. There is therefore every need for a progressive interpretation of the doctrine of sovereignty, sovereign immunity and immunity clauses in line with Article 27 of the Rome Statute for effectiveness. This will enable the enforcement of criminal accountability of indicted sitting presidents for international crimes. Obviously, interpreting constitutional executive immunity provisions as guaranteeing absolute immunity from domestic prosecutions or International Criminal Court's prosecution for acts that constitute international crime would mean an affront to justice and to the very objectives of any well-meaning constitution. Such interpretation defeats the very essence of immunity. This is because, crimes generally do not constitute official functions of any government whether presidential or Parliamentarian and therefore fall outside the scope of immunity. No constitution works against its interest, therefore, constitutional immunity provisions should not be construed to shield and protect a sovereign in a cesspool of international crimes against the very citizens he is meant to protect.

It is indeed difficult to deny that the influence of sovereignty is weighty on international criminal law. The case of Al Bashir, reflects the strength of the doctrine of sovereignty and the extent to which both sovereignty and international justice are simultaneously making conflicting demands on the international community. Considering Al Bashir's travels round the world while ICC arrest warrants were subsisting, one begins to question the effectiveness of these warrants, particularly against sitting Heads of State, the limitations of international tribunals and the need for global compliance. It is indisputable that, to date, the ICC's arrest warrants have not achieved their objective with respect to the arrest of AlBashir. Notwithstanding the indictments, Bashir made trips to countries that are not parties to the ICC statute, such as Saudi Arabia, Ethiopia and Qatar.[74] It was however his visits to State Parties to the Rome Statute such as Kenya,

[74]https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant.accessed 23 November 2021.

South Africa then, Uganda and Jordan, that raised the most questions. This challenge came more to limelight when Jordan was referred to the UN Security Council by the ICC due to its failure to arrest Al Bashir during a March 2017 trip. Jordan's response was that he was immune from arrest as a sitting head of state.[75] Jordan said it subscribed to the need to punish those responsible for crimes within the court's jurisdiction, but not at the "expense of fundamental rules and principles of international law aimed at securing peaceful relations among States." South Africa was also admonished for similarly failing to arrest him.

The Al Bashir's case goes to the heart of the problem with the ICC. Not less than 123 States have ratified or acceded to the Rome Statute,[76] but the lack of a police force means it is reliant on countries for the implementation of its decisions. How useful then and functional will the ICC be when it cannot arrest those it wants to try for crimes they have allegedly committed? Yet, ICC Statute does not honour official immunity as a defence. Obviously, one of the biggest weaknesses the ICC is facing and which it may continue to face until State parties decide to cooperate, is arresting sitting Heads of State without any progressive interpretation of the doctrine of sovereignty and all the clauses surrounding it.

There is always a very negative impact on the ICC when Indictees are still holding Power in the face of the Rome Statute. There are cases of indicted sitting presidents and their agents who remained in power irrespective of the pendency of their indictments and arrest warrants.[77] They ignored indictments, defied arrest and continuously perpetrated international crimes with impunity while most of their agents remained at large.[78] Such affront continuously challenges and questions the potency of

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[75]*Ibid*.

[76]United Nations Treaty Database entry regarding the Rome Statute of the International Criminal Court.https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en, accessed 23 February, 2023.

[77] We have examples of Al Bashir of Sudan and Muammar Gaddafi.

[78]In The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli ICC-01/11-01/17, the first warrant of arrest was issued on 15 August 2017, The second arrest warrant was issued on 4 July 2018 but Werfalli has not been arrested. The case remains in the Pre-Trial stage, pending the suspect's arrest or voluntary appearance before the Court. The ICC does not try individuals in their absence. Pre-Trial Chamber I considers that there are reasonable grounds to believe that, under article 8(2)(c)(i) and 25(3)(a) and (b) of the Rome Statute, Al-Werfalli is criminally responsible for Murder as a war crime allegedly committed in Libya, in the context of seven incidents against 33 persons in the non-international armed conflict in Libya, from on or before 3 June 2016 until on or about 17 July 2017, Murder as a war crime in the context of an eighth incident which took place on 24

the ICC indictments and arrest warrants on sitting presidents. The question is, are sitting presidents exempted from criminal accountability under the Rome statute? The answer is in the negative. Then since they are not exempted, when does time run for their accountability for international crimes under the Rome statute? Certainly, sovereignty is not a defence to criminal responsibility in international criminal law, therefore, they have no immunity stopping their immediate prosecution upon committal of any international crime. This challenge lives the Court with the picture of an impotent institution with penetrable legislations. The picture makes fun of the whole idea of a permanent international criminal court and what it stands for.

The truth is that the scope of functional immunity and personal immunity is mainly determined by customary international law, in which an exception from functional immunity has developed since the Nuremberg trials. The exception provides that a State official cannot rely on immunity *ratione materiae* when committing international crimes. The ICTY rightly held in *Prosecutor v Kristi*[79]that it may be the case that, between States, such a functional immunity exists against prosecution for those acts, but it would be incorrect to suggest that such immunity exists in international criminal courts. The argument is that the status of immunity *ratione personae* in customary law is not recognized in the relationship between the ICC and its Member States. This is because when becoming a Member State to the ICC, and consenting to its jurisdiction, every Member State waives the immunity *ratione personae* that would otherwise be accorded to its State officials. The intendment of Article 27 is to ensure that the Rome Statute reaches the aim set out in the preamble of putting an end to the impunity of State officials of the Member States. By acceding to the Rome Statute the State consents to Article 27 and the provision stating that immunities shall not bar the court from exercising jurisdiction over their State officials. The waiver extends to relationship between different State Parties. In fact, not giving the waiver effect in the relationship between different State Parties would deprive the Article of all practical meaning. If article 27 would only have effect in the relationship between the individual

January 2018, when Mr. Al-Werfalli allegedly shot dead 10 persons in front of the Bi'at al-Radwan Mosque in Benghazi, Libya. https://www.icc-cpi.int/libya/al-werfalli, accessed 22 February, 23.

[79] ICTY A. Ch., 1 July 2003, para 26

Member State and the ICC, the Article would be practically useless since the ICC then would have to obtain a specific waiver from the Member State of a State official when requesting other Member States to cooperate with the arrest and surrender of that State official. This waiver is very important too in interpreting the intendment of Article 98 of the Statute.

Article 27 of the Statute is also suggestive that the categories of potential perpetrators of international crimes are known to mankind. It will therefore be absurd for the Rome Statute to proscribe certain acts as international crimes and on the other hand exempt both real and potential perpetrators of these crimes from liability on grounds of their official capacity, which official capacity is actually the source of their power for perpetrating such crime.

Furthermore, if it is argued that because of article 34 of the Vienna Convention, *Al Bashir* and other officials of non State Parties to the Rome Statute should not be prosecuted for international crimes by the ICC, it will mean in the case of Rome Statute that perpetrators of international crimes can hide under article 34 of the Vienna Convention to indulge in impunity and escape liability. Certainly, officials of non State Parties who perpetrate international crimes cannot be left to continue with their impunity or be left to go free for perpetrating acts of genocide and crimes against humanity threatening the global peace. This is Nuremberg steering the international community in the face once again. Therefore, the Nuremberg precedence which has been codified in Article 27 of the Rome Statute has to be followed. Obviously, it is not the intendment of article 34 of the Vienna Convention that the enemies of mankind should be left to thrive in criminality threatening the peace of the world simply because they refused to be part of a treaty to make the world peaceful and secure. It is against the spirit of the law to read into any enactment words which are not to be found therein and which will alter its operative effect. This research will decline to do so. Therefore, Article 27 implies sovereign immunity whether as it relates to officials of State Parties or non State Party to the Statute is immaterial to individual criminal responsibility before the ICC as long as international crimes are the question.

6. RECOMMENDATIONS AND CONCLUSION

It may seem that actualizing the arrest and trial of a sitting Head of State is a lot more complicated than perhaps first thought if not an uphill task. The

actual problem is lack of honest commitment of the international community to combat impunity and which is beclouded by an unprogressive interpretation of the doctrine of sovereignty and surrounding immunities. Obviously, non-progressive interpretation of the doctrine of sovereignty and its inherent challenges have the capacity to further stall global enforcement of the Rome Statute and the functionality of the ICC since they present the Statute as a weak legal instrument that is almost ineffective. The Statute has suffered withdrawals and looming threats of withdrawal of membership by State Parties. More so, the massive non cooperative attitudes of both State Parties and non-State Parties including signatories to the Statute, towards the implementation of criminal accountability of sitting presidents, is simply a mirage of negative implications. It implies that at the time of signing the statute into law, State Parties who ratified the treaty, the signatories and indeed the international community did not envision that State Parties will not respect their obligations as provided in the Statute. It negatives the whole idea of a permanent International Criminal Court and what it stands for, more so, when those who promoted the Nuremberg principles and championed the course of a permanent International Criminal Court are most vehemently opposing the same course. The Statute was massively desired, and supported at the Rome conference. Perhaps, some State Parties and signatories took it to be another forum for sovereign politics probably to automatically re-write the immunity rules without a progressive interpretation. No Human rights deserve the best protection. We conclude this article with a call for the overhaul of the United Nations Charter to give recognition for the re-conception of sovereignty to mean Responsibility to Protect (R2P) to diffuse sovereign absolutism to allow for humanitarian intervention to curb impunity by sovereigns.