

Defining the Future of the Immunity *Ratione Materiae* of State Officials in International Criminal Law

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Abstract

The issue of the immunity ratione materiae of state officials before international criminal courts has been settled by both the International Criminal Court (ICC) and the African Criminal Court (ACC). Accordingly, these criminal courts do not recognise the immunity ratione materiae of state officials despite the official nature of the acts committed. Nevertheless, the issue of the immunity ratione materiae of state officials from foreign criminal jurisdictions remains uncertain, despite the intervention of the International Law Commission (ILC). Consequently, the view that the immunity ratione materiae of state officials covers only official acts performed by state officials does not amount to international crimes is legally justifiable. However, it is inconsistent with the rule of customary international law on the immunity of state officials from foreign criminal jurisdictions, and this view is consistent with the decision of the International Court of Justice (ICJ) in the Arrest Warrant case. This article examines the position of the immunity ratione materiae of state officials from foreign criminal jurisdictions as well as the position before modern international criminal courts. The article maintains that official acts should not be determined by their legality or nature, but by the purpose for which such acts were committed, and the responsibility may be attributed to the state despite their criminal nature. Accordingly, the article argues that the issue of the immunity ratione materiae of state officials and the Draft Article 7 international crimes exceptions could be resolved by a treaty, as was done before the ICC and the ACC, given the fact that this immunity is supported by state practice and is consistent with the customary rules of international law.

Keywords

Draft Article 7 of the ILC; foreign criminal jurisdictions; immunity *ratione materiae*; official acts; state officials

1. Introduction

Immunity *ratione materiae* attaches to official acts that are exercised in accordance with certain state policy by using the apparatus of the state; since the officials who performed such acts acted as instruments of the state, it is the state rather than the official in his or

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her personal capacity that is responsible for such acts.¹ Accordingly, immunity *ratione materiae* or functional immunity usually protects state officials from all official acts performed on behalf of the state.² This functional immunity attaches to all official acts executed by the officials representing the state. Most state officials, including heads of state, are accorded functional immunity since the acts they perform in their official capacity are sovereign acts or *acta jure imperii*.³ This immunity exclusively covers the acts performed in an official capacity on behalf of the state.⁴ The acts performed in this capacity escape foreign scrutiny because they are sovereign acts.⁵

For these reasons, immunity *ratione materiae* will continue to protect the official acts even when the state official is no longer in office.⁶ Functional immunity does not cease but continues to shield both current and former heads of state, as well as other state officials, for acts performed in their official capacity in the interest of the state or the general public while in office.⁷ Again, the rationale here is that the official acts would have been performed on behalf of and in the interest of the state.⁸ That is why even when the state officials are no longer in office, the acts will be regarded as official acts covered by functional immunity.⁹

The basis for the granting of immunity *ratione materiae* was approved in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Blaskic*, where the Appeals Chamber stated as follows:

The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State, and their official action can only be attributed to the State. They cannot be subject to sanctions or penalties for conduct that is not private but undertaken on the behalf of the State. In other words, such State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the state on whose behalf they act: they enjoy so-called functional immunity. This is a well-established rule of customary international law going back in the eighteenth and nineteenth centuries, restated many times since.¹⁰

1 See Pedretti, R 'Immunity of Heads of State and State Officials for International Crimes' (2016) 26(4) *Swiss Review of International and European Law* 758-762.

2 See Dugard, J 'Immunity, Human Rights and International Law Crimes' (2005) *Journal of South African Law* 484.

3 *Ibid.*

4 See Bates, ED 'State Immunity for Torture' (2007) 7 *Human Rights Law Review* 672.

5 Koivu, V 'Head of State Immunity v Individual Criminal Responsibility under International Law' (2001) 12 *Finnish Yearbook of International Law* 312.

6 See Tomonori, M 'The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct' (2001) 29(4) *Denver Journal of International Law & Policy* 281.

7 See Bradley, CA and Goldsmith, JL 'Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation' (2009) 13 *Green Bag 2D* 18.

8 See Mitchell, AD 'Leave Your Hat On – Head of State Immunity and Pinochet' (1999) 25(2) *Monash University Law Review* 30-31.

9 Pedretti (note 1 above) 18; Nanda, VP 'Human Rights and Sovereign and Individual Immunities (Sovereign Immunity, Act of State, Head of State and Diplomatic Immunity) – Some Reflections' (1999) 5 *ILSA Journal of International & Comparative Law* 478.

10 See *Prosecutor v Blaskic* (Case No IT-95-14), Appeal Chamber, Judgment on the Request of the Republic of Croatia for review of the decisions of Trial Chamber II of 18 July 1997, para [38].

The principal justification for the granting of immunity *ratione materiae* is the principle of dignity and equality of all states.¹¹ The fact that sovereign acts are carried out by state officials acting on behalf of the state in a context in which immunity *ratione materiae* protects official acts rather than the officials rightly suggests that the sovereign acts of state officials are not subject to the jurisdiction of another state.¹² According to Cassese, immunity *ratione materiae* consists of (i) functional immunity that relates to substantive law and is therefore a substantive defence.¹³ This immunity shields state officials from the substantive law of a foreign country or international law in cases where they would otherwise breach such laws. These violations or breaches are not attributed to the official but to their state. This leads to (ii) functional immunity covering the official acts of any *de jure* or *de facto* state official or agent; (iii) the continuation of functional immunity as it does not cease at the end of the release of the official functions of the state official, because both the acts and the official's responsibility are legally imputed to the state; and (iv) the fact that functional immunity is *erga omnes*. Therefore, this immunity is internationally recognised and may be invoked in respect of any state.¹⁴ Finally, immunity *ratione materiae* covers all state officials. Despite the fact that immunity *ratione materiae* covers all official acts performed by state officials, some official acts are inconsistent with international criminal justice. In this regard, unlike in the case of the international criminal courts, the position of immunity *ratione materiae* before foreign criminal jurisdictions is uncertain; some jurisdictions recognise its application while others do not.

Having outlined the rationale for and the nature of immunity *ratione materiae* in Part 1, this article – in Part 2 – will examine the current position of immunity *ratione materiae* in foreign criminal jurisdictions as determined by the works of the International Law Commission (ILC). In this regard, the classic decisions of the Israeli Supreme Court in the *Eichmann* case¹⁵ and the *Arrest Warrant* case¹⁶ will be examined. Part 3 will examine the position of immunity *ratione materiae* before international criminal courts such as the ICC and the ACC, as the future will be determined by these courts. Part 4 will provide some concluding remarks.

11 *Ibid.*

12 Shen, Q 'Methodological Flaws in the ILC's Study on Exceptions to Immunity Ratione Materiae Officials from Foreign Criminal Jurisdiction' (2018) 112 *AJIL Unbound* 10.

13 See Pedretti (note 1 above) 23; *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening) (No 3)* [1999] UKHL 17, [2000] 1 AC 147, 269, as per Lord Millett, holding that functional immunity amounts to subject-matter immunity.

14 See Cassese, A 'When May Senior Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 *European Journal of International Law* 862-864, for the distinction between personal and functional immunities.

15 See Supreme Court of Israel sitting as Court of Criminal Appeal in *The Attorney-General of the Government of Israel v Adolf, the son of Karl Adolf Eichmann*, 36 *International Law Reports* 277 (the *Eichmann* case).

16 See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, *ICJ Reports* 2002, 3 (the *Arrest Warrant* case).

2. The position of immunity *ratione materiae* in foreign criminal jurisdictions

The current position of immunity *ratione materiae* in foreign criminal jurisdictions has been greatly shaped and scrutinised by the works of the ILC. Before examining the ILC reports on this matter, it is necessary to examine the decisions in the *Eichmann* case and the *Arrest Warrant* judgment.

2.1 The *Eichmann* case

Adolf Eichmann was a German who served the Nazi regime under Hitler. It has been reported that he was only answerable to Hitler himself.¹⁷ After the defeat of Germany and the Nazi regime, Eichmann escaped to Argentina.¹⁸ He was later captured by Israeli special forces and brought to Jerusalem to stand trial for crimes committed against the Jews by the Nazi regime.¹⁹ He was indicted for 15 charges in total: four crimes against the Jewish people; seven crimes against humanity; one war crime; and three charges of membership of a hostile organisation.²⁰ Twelve of these charges carried the death penalty under the Nazi Collaborators Law enacted by the Israeli Parliament in 1950.²¹ One of the defences Eichmann pleaded was that the crimes against humanity that he had allegedly committed were acts of the German state and that he, as an organ of the state, could not be held personally liable.²² The Israeli Supreme Court rejected Eichmann's defence and maintained that persons who commit international crimes such as crimes against humanity must be personally responsible for such acts and that the act falls completely outside the jurisdiction of the sovereign state that ordered or ratified their commission, therefore the individuals cannot shelter behind the official character of their task.²³ Again, official acts are committed as a mere arm or mouthpiece of a foreign state and are acts of that state rather than acts of the official in their personal capacity.²⁴ In other words, the state official cannot be called to account for these acts in their personal capacity.²⁵ This rule therefore is a substantive defence available to state officials for any of the official acts that they have committed. Mr Eichmann was found guilty on all 15 counts of the indictment,²⁶ and the court, mindful of the fact that there was no punishment to

17 Lasok, D 'The Eichmann Trial' (1962) 11(2) *International and Comparative Law Quarterly* 358.

18 For the legality of the Eichmann trial and his capture in Argentina, see Baade, HW 'The Eichmann Trial: Some Legal Aspects' (1961) 400 *Duke Law Journal* 400-420.

19 *Ibid* 400.

20 Lasok (note 17 above) 356.

21 *Ibid*.

22 See Alebeek, RV 'National Courts, International Crimes and the Functional Immunity of State Officials' (2012) 59 *Netherlands International Law Review* 5, 19.

23 See *Attorney-General of the Government of Israel v Adolf, the son of Karl Adolf Eichmann*, 36 *International Law Reports* 309-310.

24 See Alebeek (note 22 above) 14.

25 For detailed definitions of official acts, see Elphicks, LC 'State Consent and Official Acts: Clearing the Muddied Waters of Immunity Ratione Materiae for International Crimes' (2016) 41(1) *University of Western Australia Law Review* 313-315.

26 See Lasok (note 17 above) 370.

satisfy the crimes he was charged in the indictment and also the fact that the maximum punishment would serve as a deterrent, sentenced Eichmann to death.²⁷

The decision of the Israeli Supreme Court in the *Eichmann* case was greatly influenced by the Nuremberg Trial of 1945.²⁸ The International Military Tribunal (IMT) disregarded the 'act of state' or official act defence, as well as the 'superior orders' rule.²⁹ The Tribunal stated categorically with regard to international crimes that the position of the state official is irrelevant. Accordingly, Article 7 of the 1945 IMT provides as follows:

The official position of the defendants, whether as Head of State or responsible official in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

In the end, Eichmann was held personally responsible for all official acts amounting to international crimes by the Supreme Court of Israel and the defence that these acts were acts of the Nazi state was rejected. Therefore, based on the above judgment, state officials are personally responsible for all official acts that amount to crimes in international criminal law and the defence of immunity *ratione materiae* is inapplicable. The decision in the *Eichmann* case is consistent with the House of Lords' decision in the *Pinochet* case,³⁰ in which it was held that former President General Augusto Pinochet was criminally responsible for the acts of torture which he had committed when he was in office and also that torture is not an official act.³¹ However, these views seem to have been reversed by the ICJ in the *Arrest Warrant* case.

2.2 The *Arrest Warrant* case

This case concerned an arrest warrant issued on 11 April 2000 by an investigating judge in Brussels, Belgium against Mr Abdulaye Yerodia Ndongbasi, an incumbent Minister of Foreign Affairs of the Congo, accused of offences that constituted serious breaches of the Geneva Convention of 1949 and its Protocols, as well as crimes against humanity.³² One of the submissions of the Congo was that by issuing and circulating an international arrest warrant against an incumbent state official, Belgium had violated the rule of customary international law regarding the incumbent Minister's absolute inviolability and immunity from the criminal process, and also the equality of state principle.³³ The ICJ rejected the Belgian contention that, at the time of the hearing, Mr Yerodia was no longer the Minister of Foreign Affairs. Thus, the ICJ noted that the character of the dispute had not

27 *Ibid* 372.

28 See Art 7 of the 1945 IMT Statute at Nuremberg, which was enacted on 8 August 1945 and came into force on 8 August 1945 <<https://www.jus.uio.no/english/services/library/treaties/04/4-06/imt-charter.xml>> accessed 14 March 2021.

29 See Art 8 of the 1945 IMT Statute.

30 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening)* (No 3) [1999] UKHL 17, [2000] 1 AC 147.

31 See Wedgwood, R 'Augusto Pinochet and the International Law' (2000) 46 *McGill Law Journal* 244.

32 See the *Arrest Warrant* case para 13.

33 *Ibid* para 12.

changed, which was the lawfulness of the arrest warrant issued on 11 April 2000 against an incumbent Minister of Foreign Affairs.³⁴

After a careful examination of this matter,³⁵ the ICJ decided that there is no customary international law exception to the rule accorded to immunity from jurisdiction and inviolability to the incumbent Minister of Foreign Affairs, and senior state officials like a head of state, when they are accused of crimes or have committed war crimes or crimes against humanity.³⁶ Furthermore, Cassese notes that the ICJ's decision that foreign ministers and other state officials are only prosecuted, after leaving office, for international crimes committed while in office provided they were performed in a private capacity is inconsistent with international criminal justice regarding state officials of non-state parties to the Rome Statute.³⁷ This means that functional immunity will continue to shield perpetrators of international crimes committed by states that are not party to the Rome Statute.³⁸ However, as was stated in the *Pinochet* case, committing international crimes such as torture, war crimes, genocide and crimes against humanity cannot be regarded as the function of heads of state or senior state officials.³⁹ Therefore, any shields against these crimes are waived when the official is no longer in office.

In sum, the *Arrest Warrant* decision is inconsistent with the *Eichmann* judgment.⁴⁰ In the *Arrest Warrant* case, the decision implies that immunity *ratione materiae* continues to shield the state officials despite the fact that the official acts are inconsistent with international criminal law as long as the state officials are still in office.⁴¹ In other words, the defence of immunity *ratione materiae* is maintained even if the acts committed by the state officials amount to crimes in international law. The current position of the immunity *ratione materiae* of state officials in foreign criminal jurisdictions proposed by the ILC is perhaps different.

2.3 The position of immunity *ratione materiae* of state officials from foreign criminal jurisdictions as determined by the ILC

Since the issue of immunity of state officials before foreign criminal jurisdictions has dominated the international arena, especially after the *Pinochet* and *Arrest Warrant* cases, some foreign jurisdictions do recognise the immunity *ratione materiae* of state officials despite the nature of the international crimes committed, while others still do not recognise such immunity.⁴² The ILC of the United Nations (UN) was mandated to

34 *Ibid* para 40.

35 For example, in para 58 of the *Arrest Warrant* case, the ICJ examined Art 7 of the 1945 IMT Statute, Art 6 of the International Military Tribunal of the East (IMT), Art 7(2) of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Art 6(2) of the International Criminal Tribunal for Rwanda (ICTR) and Art 27 of the Rome Statute.

36 See the *Arrest Warrant* case para 58.

37 See Cassese (note 14 above) 853.

38 *Ibid* 875.

39 See further Alebeek (note 22 above) 55.

40 See *Arrest Warrant* case para 61.

41 *Ibid* para 58.

42 See Rynaert, C 'Functional Immunity of Foreign State officials in Respect of International Crimes before the Hague District Court: A Regressive Interpretation of a Progressive International Law' (2020)

explore and formulate possible solutions to this matter.⁴³ The various Rapporteurs of the ILC worked on this matter and the current Rapporteur, Concepcion Escobar Hernandez, in 2017 adopted Draft Article 7, which deals with six international crimes in terms of which immunity *ratione materiae* will not be applicable.⁴⁴ At its seventy-first session in 2019,⁴⁵ the ILC annexed the Draft Article on the immunity of state officials from foreign criminal jurisdictions provisionally adopted by the Commission, and the Draft Article on the immunity of state officials from foreign criminal jurisdictions to be considered by the Commission.⁴⁶ Accordingly, Draft Article 7 on the immunity of state officials from foreign criminal jurisdictions provides as follows:

Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.⁴⁷

These limitations to immunity *ratione materiae* has been strongly criticised by commentators as having no roots in international law.⁴⁸ Many commentators have questioned whether there is any state practice with regards to the above-mentioned exceptions to the immunity *ratione materiae* of state officials in respect of international crimes before foreign criminal jurisdictions.⁴⁹ Consequently, state officials who commit any of the crimes listed in Draft Article 7 will be personally responsible before foreign criminal jurisdictions. The truth is that an individual or a single state official *simpliciter* may never commit any of the above-mentioned crimes, for example, an airstrike killing civilians or genocide, for his or her own personal interest because these crimes are committed with the assistance or help of the state or the current government using state apparatus. To shift the whole responsibility to individual state officials may not render justice. Moreover, not all the members of the ILC were in support of the Draft Article 7 international crimes exception to the functional immunity of state officials from foreign criminal jurisdictions.

EJIL Talks 2 March 2020 <<https://www.ejiltalk.org/functional-immunity-of-foreign-state-officials-in-respect-of-international-crimes-before-the-hague-district-court-a-regressive-interpretation-of-a-progressive-international-law/>> accessed 30 March 2021.

43 *Ibid.*

44 See Mahmudov, I 'Immunity as a Main Obstacle on the Way of National Prosecution of International Crimes' (2019) 5 *Baku State University Law Review* 84-85.

45 See Concepcion Escobar Hernandez, Special Rapporteur for the Immunity of State Officials from Foreign Criminal Jurisdiction, Seventh Report on the work of the seventy-first session, A/CN.4/729 <<https://legal.un.org/ilc/reports/2019/>> accessed 18 March 2021 (2019 Seventh Report of the ILC).

46 See Seventy-first Session (2019), ILC <<https://legal.un.org/ilc/sessions/71>> accessed 18 March 2021.

47 See Draft Art 7 of the 2019 Seventh Report of the ILC.

48 See Murphy, SD 'Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?' (2018) 112 *AJIL Unbound* 8.

49 See Identification of Customary International Law Text, Instrument, and final Reports by the ILC <https://Legal.un.org/ilc/texts/1_13.shtml> accessed 28 March 2021 (the 2018 ILC Draft Conclusions on Identification of Customary International Law). The conclusion indicates that in order to determine a rule of customary international law, there must be general practice accepted as law *opinio juris*.

Indeed, the majority of the members were supportive of the approach in the fifth report.⁵⁰ Again, the rationale for granting this conduct-based immunity to state officials is based on their functions, hence the term ‘functional immunity’.⁵¹ It is true that not all acts committed by state officials should be attributed to the state which they represent or should be regarded as official acts before foreign criminal jurisdictions.⁵² Even though it is difficult to draw the line as to which acts are official acts and which acts are not,⁵³ the determining criterion should be the purpose for which the acts were committed.⁵⁴ If it can be proven that the acts which the state officials have committed will not benefit the state official and that there is no conflict of interest, the acts should be attributed to the state, irrespective of their legality.⁵⁵ Finally, even though the current Rapporteur, Concepcion Escobar Hernandez, advanced two reasons to justify the Draft Article 7 international crimes exceptions to immunity *ratione materiae*,⁵⁶ Draft Article 7 is a new rule in international law with no legal basis. In other words, it does not reflect existing law but rather reflects the policymaking of the ILC.⁵⁷ Moreover, the state practice in support of this draft article is not widespread and consistent.⁵⁸

Another aspect that the Seventh Report considered was the waiver of immunity. By virtue of Draft Article 11 of the ILC’s Seventh Report, a state may waive the immunity of its officials from foreign criminal jurisdictions.⁵⁹ Accordingly, the waiver of such immunity must be express and clear, and must also mention the officials whose immunity is being waived and the crime which they have committed pertaining to the waiver.⁶⁰ Moreover, such waiver of immunity from foreign criminal jurisdictions shall be communicated through diplomatic channels and may be effected either by a treaty, where both states are parties, or other procedures commonly accepted by both states.⁶¹ Consequently, waiver of immunity is irrevocable, and an express waiver may also be deduced clearly and

50 See Alebeek, RV ‘The International Crimes Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?’ (2018) 112 *AJIL Unbound* 28-29.

51 See Keitner, C ‘Functional Immunity of State Officials Before the International Law Commission: The “Who” and the “What”’ (2015) 17 *QIL, Zoom-Out* 52.

52 See Gaeta, P ‘Ratione Immunity Materiae of Former Heads of State and International Crimes: The Hissene Habre Case’ (2003) 1(1) *JICJ* 190.

53 *Ibid.*

54 Akande, D and Shah, S ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2011) 21(4) *European Journal of International Law* 832, noting that whether or not acts of state officials are regarded as official acts does not depend on the legality of those acts, whether in international or domestic law, but on the purpose and means through which the official committed the acts.

55 *Ibid.*

56 The Rapporteur justified the application of the draft article on two grounds as follows: (i) there is a discernible trend or an international custom towards limiting the functional immunity or marking the contours of such exceptions; (ii) the draft article must be shaped to fit an international legal order whose unity and systematic nature cannot be ignored and therefore there is a systematic recognition of international crimes as an exception to immunity.

57 See Murphy (note 48 above) 7-8.

58 *Ibid.*

59 See 2019 Seventh Report of the ILC Draft Art 11(1).

60 *Ibid* Draft Art 11(2).

61 *Ibid* Draft Art 11(3).

unequivocally from an international treaty to which both the forum state and the state which the state official represents are parties.⁶² Finally, immunity of state officials from foreign criminal jurisdictions will be determined by the courts of the forum state that are competent to exercise jurisdiction.⁶³ Given that there is inconsistency in the application of the immunity *ratione materiae* of state officials from foreign criminal jurisdictions, on the one hand, and disagreement between the members of the ILC in the acceptance of the draft articles dealing with the international crimes exception of immunity *ratione materiae* of state officials from foreign criminal jurisdictions, on the other, a possible treaty resolution may be used to determine the international crime limitations of functional immunity from foreign criminal jurisdictions. However, the position of immunity *ratione materiae* before international criminal courts is different. Its application is determined by the statute creating the international criminal court.

3. The position of immunity *ratione materiae* before international criminal courts

The future of the immunity *ratione materiae* of state officials before international criminal courts has mainly been shaped and determined by the Rome Statute creating the ICC,⁶⁴ and the 2014 Malabo Protocol creating the ACC.⁶⁵ In the *Arrest Warrant* case, the ICJ indicated that the functional immunity of state officials before international courts will be determined by the statute creating the court as follows:

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for former Yugoslavia, and the International Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 2, paragraph 2, the '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.'⁶⁶

In this regard, I will examine the position of immunity *ratione materiae* before the ICC as well as the position before the ACC.

62 A good example of such treaty where both states may be parties that expressly waive the immunities of their officials is the Rome Statute.

63 See generally Draft Art 9 of the 2019 Seventh Report of the ILC.

64 Rome Statute of the International Criminal Court, circulated as document A/CONF.183/9 of 17 July 1998 and came into force on 1 July 2002 (Rome Statute) <<https://www.icc-int/resource-library>> accessed 21 March 2021.

65 See *Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights of the African Union* <<https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>> accessed 21 March 2021 (the 2014 Malabo Protocol).

66 The *Arrest Warrant* case para 61.

3.1 The position of immunity *ratione materiae* before the Rome Statute

The Rome Statute, which came into force on 1 July 2002, does not recognise either immunity *ratione materiae* or immunity *ratione personae* of state officials within its jurisdiction.⁶⁷ Accordingly, Article 27 of the Rome Statute provides as follows:

1. 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.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁶⁸

Article 27 of the Rome Statute waives both the functional immunity and the personal immunity of all state officials within the jurisdiction of the ICC.⁶⁹ Consequently, given the fact that the Rome Statute was created by contracting state parties through a treaty, the functional immunity or immunity *ratione materiae* as well as the personal immunity or immunity *ratione personae* of state officials whose states are parties to the Rome Statute have been waived.⁷⁰ While Article 27(1) of the Rome Statute reinforces criminal responsibility and waives functional immunity of all state officials whose states are parties to the ICC, Article 27(2) also waives personal immunity and all remaining protections, including procedural rules and hurdles attached to the official capacity in respect of crimes before the ICC.⁷¹ Therefore, immunities as a bar to the exercise of jurisdiction are completely eliminated by the treaty creating the ICC in accordance with Article 27 of the Rome Statute. This waiver applies to both high-ranking and subordinate state officials within the jurisdiction of the ICC.⁷² In other words, while Article 27(1) of the Rome Statute eliminates the official capacity and official acts of the state officials as a substantive defence to criminal responsibility within the jurisdiction of the ICC, Article 27(2) of

67 Aghem, HE 'The ICC or the ACC: Defining the Future of the Immunities of African State Officials' (2020) 6 *African Journal of International Criminal Justice* 53.

68 *Ibid.* See generally Art 27 of the Rome Statute.

69 See Ramsden, M and Yeung, I 'Head of State Immunity and the Rome Statute: A Critique of the PTC's Malawi and DRC Decision' (2016) 16 *International Criminal Law Review* 707-708.

70 See Lee, SE 'Head of State Immunity: The Ongoing Debate and Implications for the Future Development in International Criminal Law' (2018) 24 *Australian International Law Journal* 133.

71 See Webb, P 'Human Rights and the Immunities of State Officials' in De Wet, E and Vidmar, J (eds) *Hierarchy in International Law: The Place of Human Rights* (Oxford Press University, 2012) 8, holding that while Art 27(2) of the ICC is the first express denial of immunity in a constitutive instrument of an international court, Art 98 of the ICC also upholds immunity in certain situations, as indicated earlier.

72 See Akande, D 'International Law Immunities and International Criminal Court' (2004) 98 *American Journal of International Law* 420, noting that state parties to the Rome Statute are compelled to arrest and surrender their own officials to the jurisdiction of the ICC.

the Rome Statute also eliminates all the immunities, including personal and functional immunities belonging to the state officials, whether high-ranking or subordinate, as a defence in the exercise of its jurisdiction.⁷³

In sum, the substantive defence accorded to state officials for all official acts committed before the jurisdiction of the Rome Statute are eliminated for criminal justice. Therefore, immunity *ratione materiae* cannot be invoked within the jurisdiction of the Rome Statute in accordance with Article 27(1).

3.2 The position of immunity *ratione materiae* before the ACC

The 2014 Malabo Protocol, like the Rome Statute, does not recognise the immunity *ratione materiae* of state officials within its jurisdiction in respect of international crimes. In other words, the fact that the act committed is an official act is irrelevant once found to be an international crime. Accordingly, Article 46B of the 2014 Protocol provides as follows:

1. A person who commits an offence under this Statute shall be held individually responsible for the crime.
2. Subject to the provisions of Article 46A*bis* of this Statute, the official position of the accused person shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Article 28A of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinated was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof.

In accordance with Article 46A*bis* of the 2014 Malabo Protocol, dealing with the personal immunity of senior serving AU state officials while in office, the immunity *ratione materiae* of state officials is waived in respect of international crimes before the jurisdiction of the ACC. Former senior state officials can also not rely on the substantive defence of immunity *ratione materiae* for international crimes they committed while in office within the jurisdiction of the ACC.⁷⁴ By virtue of Article 46B(4) of the 2014 Malabo Protocol, the fact that the state officials acted in accordance with an order from the government or a superior will not relieve them of criminal responsibility.⁷⁵ Therefore, the 2014 Malabo Protocol, like the Rome Statute, does not recognise immunity *ratione materiae* of state officials as a substantive defence within its jurisdiction in respect of international crimes

73 See Uriarte, JA 'Al Bashir: Exception to Immunity of Sudanese Head of State and Cooperation with the International Criminal Court' (2016) 68 *Revista Española de Derecho Internacional* 46.

74 By virtue of Art 28A of the 2014 Malabo Protocol, the ACC may entertain 14 international crimes within its jurisdiction and these crimes are: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous waste, illicit exploitation of natural resources, and the crime of aggression.

75 See Art 46B(4) of the 2014 Malabo Protocol.

and *jus cogens*.⁷⁶ However, the ACC recognises the personal immunity of senior serving African state officials and these officials may only be prosecuted as former officials for international crimes committed while in office.⁷⁷

In sum, both the Rome Statute creating the ICC and the Malabo Protocol creating the ACC as modern international criminal courts do not recognise the substantive defence of immunity *ratione materiae* of state officials within their jurisdictions if the state officials are accused of international crimes. Accordingly, modern international criminal courts do not recognise official acts of the state office when such acts amount to international crimes recognised within their jurisdictions, which means that criminal justice prevails. The immunity of state officials from foreign criminal jurisdictions could be as resolved through a treaty like the Rome Statute and the Malabo Protocol.

3.3 Determination of *ratione materiae* of state officials from foreign criminal jurisdiction through a treaty

Just like the issue of immunity of state officials before international criminal courts was finally settled by a treaty,⁷⁸ it is also possible to resolve the contentions with regard to Draft Article 7 dealing with the international crimes exception of the immunity *ratione materiae* of state officials from foreign criminal jurisdictions through a treaty. In this regard, states may choose to become a state party through ratification of the treaty, thereby accepting that the international crimes exceptions of functional immunity are applicable to all their respective state officials before foreign criminal jurisdictions.⁷⁹ Accordingly, the draft article and all its limitations will not be applicable to non-state parties. In other words, states that reject the international crimes to the immunity *ratione materiae* of state officials from foreign criminal jurisdictions will not ratify the treaty and therefore crimes such as genocide, crimes against humanity, war crimes, apartheid, torture and enforced disappearances will be regarded as official acts of the state and state officials will not be held responsible. A state official, according to the ILC, is any individual who represents the state or who exercises state functions,⁸⁰ and such officials are covered by immunity *ratione materiae* for all official acts performed and this immunity is a substantive defence before foreign criminal jurisdictions.

4. Concluding remarks

Official acts are always performed in an official capacity and these acts are covered by immunity *ratione materiae*. These official acts are a substantive defence used by state officials if such acts do not amount to crimes. Since immunity *ratione materiae* covers only the official acts of state officials, the view that immunity *ratione materiae* should not be

⁷⁶ See generally Art 27 of the Rome Statute and Art 46B(2) of the 2014 Malabo Protocol.

⁷⁷ Aghem (note 67 above) 57, noting that the immunity *ratione materiae* of former African state officials is recognised only for official acts.

⁷⁸ See the Rome Statute creating the ICC and the Malabo Protocol creating the ACC.

⁷⁹ See Abashidze, A and Shatalova, S 'International Crimes Exceptions to the Immunity of State Officials from Foreign Criminal Jurisdiction: The Russian Perspective on the Work of the International Law Commission' (2017) 64 *Netherland International Law Review* 217.

⁸⁰ See Draft Art 2(e) of the 2019 Seventh Report of the ILC.

applicable if the state officials are accused of international crimes is justifiable. However, some international crimes,⁸¹ which are committed with state apparatus in accordance with the state policies, and where it is proven beyond reasonable doubt that such acts will not benefit the individual state officials but the state, should be considered as official acts.⁸² The reason for such a consideration is that the official act in this regard is determined by its purpose and not by its legality. Accordingly, while the issue of immunity *ratione materiae* and official acts in respect of international crimes appears to be settled before the international criminal courts, with both the ICC and the ACC not recognising the immunity *ratione materiae* of state officials and official acts as a substantive defence before their respective jurisdictions, the situation before foreign criminal jurisdictions has not been settled by the ILC. The customary international law rule lifting the immunity *ratione materiae* of state officials as a substantive defence before foreign criminal jurisdictions is well entrenched because it is supported by state practice and *opinio juris*. Unfortunately, the ILC's Draft Article 7 dealing with international crimes exceptions to the immunity *ratione materiae* of state officials from foreign criminal jurisdictions is inconsistent with this customary rule because there is no state practice for this international crimes' exception. Moreover, given the fact that some states still support the immunity *ratione materiae* of state officials before foreign criminal jurisdictions, a possible solution is to codify Draft Article 7 in statutes and make it applicable through a treaty. In this way, like the Rome Statute and other similar treaties, Draft Article 7 dealing with international crimes exceptions to the immunity *ratione materiae* of state officials from foreign criminal jurisdictions will be applicable only to state officials whose states have ratified the treaty.

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81 An example of such international crimes committed by the state officials is when a state orders an airstrike, and many civilians are killed in the action; such acts should be considered official acts and the responsibility should be attributed to the state rather than to the state officials.

82 *Ibid.*